

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Bennett Dairy Inc.)
) **Administrator’s Decision**
)
Kokomo, Mississippi) **APL-061-20**
)

This Decision responds to an Appeal (APL-061-20) of a Notice of Noncompliance and Proposed Suspension of National Organic Program (NOP) certification issued to Bennett Dairy Inc. (Bennett) of Kokomo, Mississippi, by International Certification Services (ICS). The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)¹ and the U.S. Department of Agriculture (USDA) organic regulations.²

BACKGROUND

The Act authorizes the Secretary to accredit agents to certify crop, livestock, wild crop, and/or handling operations to the USDA organic regulations (7 C.F.R. Part 205). Certifying agents also initiate compliance actions to enforce program requirements, as described in section 205.662, Noncompliance procedure for certified operations. Persons subject to the Act who believe they are adversely affected by a noncompliance decision of a certifying agent may appeal

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

such decision to the USDA Agricultural Marketing Service (AMS) pursuant to §205.680 Adverse Action Appeals Process – General, and §205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. Bennett was initially certified organic for crops and livestock by ICS on November 2, 2013.
2. On July 29, 2019, ICS issued a Notice of Noncompliance and Proposed Suspension.
3. On July 30, 2019, Bennett requested mediation, which ICS accepted on August 1, 2019.
4. On May 21, 2020, ICS issued a Notice of Termination of Mediation.
5. On May 22, 2020, Bennett filed an Appeal.
6. On June 2, 2020, ICS issued a Notice of Noncompliance.

DISCUSSION

The USDA organic regulations at 7 C.F.R. 205.103, Recordkeeping by certified operations, state that, “(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)); (b) Such records must: (1) Be adapted to the particular business that the certified operation is conducting; (2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited; ... (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.”

The organic regulations at §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling, state that, “To be sold or labeled as “100 percent

organic,” “organic,” or “made with organic (specified ingredients or food group(s))” the product must be produced and handled without the use of: (a) Synthetic substances and ingredients, except as provided in §205.601 or §205.603; (b) Nonsynthetic substances prohibited in §205.602 or §205.604...”

The organic regulations at §205.201, Organic production and handling system plan, state that, “(a) The producer or handler of a production or handling operation, except as exempt or excluded under §205.101, intending to sell, label, or represent agricultural products as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must develop an organic production or handling system plan that is agreed to by the producer or handler and an accredited certifying agent. An organic system plan must meet the requirements set forth in this section for organic production or handling. An organic production or handling system plan must include: (1) A description of practices and procedures to be performed and maintained, including the frequency with which they will be performed; (2) A list of each substance to be used as a production or handling input, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable; (3) A description of the monitoring practices and procedures to be performed and maintained, including the frequency with which they will be performed, to verify that the plan is effectively implemented; (4) A description of the recordkeeping system implemented to comply with the requirements established in §205.103; (5) A description of the management practices and physical barriers established to prevent commingling of organic and nonorganic products on a split operation and to prevent contact of organic production and handling operations and products with prohibited substances; and (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.”

The organic regulations at §205.202, Land requirements, state that, “Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as “organic,” must: (a) Have been managed in accordance with the provisions of §§205.203 through 205.206; (b) Have had no prohibited substances, as listed in §205.105, applied to it for a period of 3 years immediately preceding harvest of the crop...”

The organic regulations at §205.237, Livestock feed, state that, “(a) The producer of an organic livestock operation must provide livestock with a total feed ration composed of agricultural products, including pasture and forage, that are organically produced and handled by operations certified to the NOP... (b) The producer of an organic operation must not: (1) Use animal drugs, including hormones, to promote growth... (c) During the grazing season, producers shall:... (2) Provide pasture of a sufficient quality and quantity to graze throughout the grazing season and to provide all ruminants under the organic system plan with an average of not less than 30 percent of their dry matter intake from grazing throughout the grazing season... (d) Ruminant livestock producers shall: (1) Describe the total feed ration for each type and class of animal. The description must include: (i) All feed produced on-farm; (ii) All feed purchased from off-farm sources; (iii) The percentage of each feed type, including pasture, in the total ration; and (iv) A list of all feed supplements and additives. (2) Document the amount of each type of feed actually fed to each type and class of animal. (3) Document changes that are made to all rations throughout the year in response to seasonal grazing changes. (4) Provide the method for calculating dry matter demand and dry matter intake.”

The organic regulations at §205.238, Livestock health care practice standard, state that, “(c) The producer of an organic livestock operation must not: (1) Sell, label, or represent as organic any animal or edible product derived from any animal treated with antibiotics, any

substance that contains a synthetic substance not allowed under §205.603, or any substance that contains a nonsynthetic substance prohibited in §205.604.”

The organic regulations at §205.400, General requirements for certification, state that, “A person seeking to receive or maintain organic certification under the regulations in this part must: (a) Comply with the Act and applicable organic production and handling regulations in this part...” (f) Immediately notify the certifying agent concerning any: (1) Application, including drift, of a prohibited substance to any field, production unit, site, facility, livestock, or product that is part of an operation...”

Certifier ICS issued a Notice of Noncompliance and Proposed Suspension after an unannounced audit by NOP under the Pasture Surveillance Program found noncompliances regarding the use of prohibited substances and recordkeeping.

Appellant Bennett stated in its Appeal that it has removed the affected fields from organic production; it no longer owns the affected livestock; and it is improving its recordkeeping.

Documentation substantiates that on June 11 and 12, 2019, NOP conducted an unannounced audit of Bennett as part of its 2019 Pasture Surveillance Program. The NOP auditor observed the application of the prohibited substance Urea on Field 3 and Field 13, and took a picture of Urea in one of the fields as well as a picture of a quotation from AGRI-AFC to Bennett for “46-00-00 Urea TN.” Although the document is dated June 12, 2019, when the audit occurred, Bennett acknowledged using the product. The NOP auditor also learned that non-organic medicated calf starter feed containing the active ingredient Lasalocid had been fed to 5 calves and took a photo of the Kentwood Coop feed bag and label, as well as the product tag. Lastly, the NOP Auditor found that Bennett wasn’t accurately recording the amount of hay actually fed to the livestock on its dry matter intake (DMI) calculation sheets. While ‘free choice

hay' was provided to the livestock while they were on pasture, Bennett only recorded 0.9 lbs of dry matter as being fed to the livestock. The NOP Auditor took a picture of the DMI calculation sheet for 2019 and round bales of hay on a pasture field. NOP wrote ICS on July 8, 2019 informing it of the NOP Auditor's findings.

ICS then issued a Notice of Noncompliance and Proposed Suspension on July 29, 2019 citing to the noncompliances. Bennett requested mediation on July 30, 2019, which ICS accepted. However, on May 21, 2020, ICS issued a Notice of Termination of Mediation after determining that the willful nature of Bennett's noncompliances resulted in ICS being unable to propose a settlement agreement that would bring Bennett into compliance.

ICS subsequently conducted its annual inspection of Bennett on September 13, 2019, at which ICS noted the same noncompliances regarding keeping accurate feed inventory records and DMI calculation sheets that were found at the NOP unannounced inspection of June 11 and 12, 2019. ICS also stated that there were harvested bales on Fields 3 and 13, to which the urea had been applied. Bennett told ICS the bales would be sold in the conventional market.

Bennett admitted to the noncompliances in its May 22, 2020 Appeal but offered explanations and corrective actions. Bennett stated that it had used Urea on Fields 3 and 13, due to a shortage of chicken litter and needing to fertilize the last 2 planted fields. Bennett stated that the inspector (NOP Auditor) had come on the day of the urea application; however, no livestock was present on the fields and after being told by the NOP Auditor that Fields 3 and 13 must be taken out of organic production for 3 years, Bennett 'closed the fields.' Bennett also stated that the livestock hasn't eaten any crops from the 2 fields and hay baled from the fields has been stored separately from organic feed and not sold as organic.

Bennett acknowledged feeding the cited calf starter to 5 calves which were ill. However, Bennett stated that the 5 calves are no longer part of the operation, with 1 dying, and the other 4 being sold. Bennett later stated it didn't maintain any documentation on the sale of the 4 calves. Bennett states it asked ICS on a few occasions what to do with the 5 calves, and sold the 4 surviving calves after not receiving any direction from ICS. Bennett provided a list of the 5 calves with their identification number, date sold/death date, and age at sale/death; and stated that the calves were not yet in milk production and were not sold as organic. Bennett also acknowledged problems with its DMI recordkeeping but stated that after receiving assistance from ICS believes it is better able to accurately record the livestock's DMI and has corrected the forms in question. ICS confirmed Bennett corrected the DMI calculation sheets from the inspection.

Subsequent to Bennett's Appeal, ICS issued a Notice of Noncompliance on June 2, 2020, identifying the same feed inventory noncompliance and that the disposition of the 5 calves fed a non-organic calf feed starter wasn't documented. Bennett replied to this notice on July 3, 2020, submitting a Quarterly Feed Inventory for 2019 – 2020 though it only provides information for September 2019, December 2019, and March 2020. Bennett also provided a Harvest Record of Dry Hay and Baleage covering plantings from September 27, 2018 through November 5, 2019, which were harvested from April 22, 2019 through April 22, 2020, with no information beyond that point; and an updated PA-16B: Young Stock Addendum noting the disposition of the 5 calves in question. Bennett states that at the recommendation of the inspector during the September 2019 inspection, it has been keeping quarterly inventory feed records to correspond to the corrected DMI sheets, and has maintained an ongoing log of planting dates, field numbers, crops planted, and harvest dates, with the information transferred to field history sheets.

Bennett reiterated that it hadn't received clear instructions from ICS as to disposing of the 5 calves in question and finally sold 4, with the 5th having died. ICS informed NOP that the noncompliances remained unresolved.

In conclusion, the evidence substantiates that Bennett applied Urea, a prohibited substance, to Fields 3 and 13. The NOP Auditor's observation of the application of the substance without prior notification to ICS points to a willful violation of the organic regulations. Further, evidence substantiates, and Bennett admitted, that the 5 calves in question were fed a calf starter containing a prohibited substance. While Bennett stated that the 5 calves noted at the June 2019 inspection are no longer part of the organic operation, Bennett has been unable to substantiate those claims. s.

Bennett states it now understands how to accurately record the livestock's DMI, and ICS acknowledged that Bennett corrected the DMI calculation sheets from the June 2019 inspection. However, ICS hasn't been able to verify if Bennett has consistently maintained up to date accurate feed inventory records and DMI calculation sheets, and Bennett's July 3, 2020 submission didn't resolve the noncompliances. While recordkeeping noncompliances are correctable, the application of a prohibited substance to crops is not. The organic regulations at 7 C.F.R. 205.662(c) state that when correction of a noncompliance is not possible, the notification of noncompliance and the proposed suspension of certification may be combined in one notification. Therefore, ICS was justified in issuing the combined notice.

CONCLUSION

The USDA organic regulations assure consumers that products with the USDA organic seal meet consistent, uniform standards. Key to these standards is that products with the USDA

organic seal are produced and handled in accordance with the organic regulations. However, Bennett violated the organic regulations at 7 C.F.R. §205.103; 7 C.F.R. §205.105; 7 C.F.R. §205.201; 7 C.F.R. §205.202; 7 C.F.R. §205.237; 7 C.F.R. §205.238; and 7 C.F.R. §205.400. Bennett's continued noncompliances substantiate its inability to consistently comply with the organic regulations. Therefore, Bennett may not remain certified.

DECISION

The Appeal of May 22, 2020 is denied. ICS' July 29, 2019 Notice of Noncompliance and Proposed Suspension of crop and livestock certification is affirmed. Bennett's crop and livestock certification are to be suspended. Although pursuant to 7 C.F.R. §205.662(f)(1), Bennett may apply for reinstatement of its crop and livestock certification at any time, Fields 3 and 13 will be suspended for 3 years from the date of the application of urea, namely June 12, 2019, and will not be eligible for certification until June 11, 2022. Further, any future request for reinstatement must be accompanied by evidence demonstrating correction of each noncompliance. While its certification is suspended, Bennett may not sell, represent, or label its agricultural products as organic.

Attached to this formal Administrator's Decision denying Bennett's Appeal is a Request for Hearing form. Bennett has thirty (30) days to request an administrative hearing before an Administrative Law Judge. If Bennett waives the hearing, the Agricultural Marketing Service will direct ICS to issue a Notice of Suspension.

Done at Washington, D.C., on this 23rd
day of November, 2020

**BRUCE
SUMMERS**

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Bruce Summers
Administrator
Agricultural Marketing Service