

DRAFT DELIBERATIVE

**National Organic Program (NOP)
Appeals Case Summary**

Case ID:	APL-015-17
Operator Name:	Kuhlman Farms
Certifier Name:	Organic Certifiers
Prepared By:	Jason Goitia & Valeria Frances reviewed
Date Prepared:	March 14, 2017
Adverse Action Being Appealed:	Combined NONC/Proposed NOPR

Kuhlman Farms, Inc. ("Producer") is appealing a Combined Notice of Noncompliance and Notice of Proposed Revocation ("Combined Notice") issued by Organic Certifiers, Inc. ("Certifier").

Findings of Fact

On October 7, 2010, Certifier began certifying Producer.

During 2016, Producer is in the process of renewing the certification of four (4) existing sites totaling (b) (4) acres where it already has been growing organic blue and pink corn. In addition, Producer is applying for the first time for eight (8) additional sites totaling (b) (4) acres on which Producer had not previously grown organic corn.

On July 21, 2016, Producer submitted a site history affidavit. The affidavit lists eight (8) separate sites (one site listed is "Home"), and attested that they did not have prohibited substances applied for three (3) years prior to the 2016 crop.

On August 16, 2016, an inspector conducted an on-site inspection for certification, and the inspector listed on the Exit Interview sheet that he found no issues.

Between August 25 – 30, 2016, NOP C & E staff received at least 3 complaints by email and phone. Each complaint reported the use of prohibited materials on land already designated as certified organic or being transitioned into organic status by Producer.

- Complainants offered that they have witnessed the use of prohibited materials and can provide photo evidence.
- Complainants said that Producer had brought in fields as organic that he attested as being under his management for the 3 years prior with no use of prohibited materials.
- Complainants indicated that: 1) Producer only controlled for one year; 2) prohibited materials had been applied in the years while it was not under his control; and 3) he is using prohibited materials on his certified organic fields.

On September 6, 2016, NOP C & E staff began investigation by phoning complainants to clarify the details of the complaints, gather testimony, and acquire available written and photo evidence.

On September 7, 2016, NOP C & E Staff requested that Certifier investigate the complaints per Section 205.661 (a). Certifier reported they had received a complaint a few months earlier.

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On September 14, 2016, Certifier notified Producer in an email message that a complaint concerning the operation had been received, and that it would investigate the matter. It would be investigated by Certifier sending an inspector who would conduct an on-site inspection. The complaint concerning the operation alleged the application of prohibited materials and insufficient site history.

On September 28, 2016, inspector met with 5 complainants about their evidence along with a local expert agronomist, toured the problem fields, and gathered additional written and photographic evidence.

On September 29, 2016, inspector returned to tour the same fields with Producer to interview him about details and discrepancies regarding site histories. The inspector also collected samples to test for pesticide residue using protocol to prevent contamination with any other substances and to establish a clear chain of custody. Producer offered him samples that he had already collected of his own fields which inspector accepted.

On September 29, 2016, Certifier emailed Notice of Decision on Certification that included some requests for more information, indicated a need for better descriptions regarding practices on the OSP, and a request for more documentation regarding site history regarding new fields.

On October 3, 2016, (b) (6), (b) (7)(C), a new complainant came forward in person to Certifier as (b) (6), (b) (7)(C). (b) (6), (b) (7)(C) attested that (b) (6), (b) (7)(C) attested that he used materials that would be prohibited in organic production.

On October 20, 2016, the sample test results that OCI received from OMIC USA Inc laboratory showed that soils were contaminated with both Glyphosate and Bifenthrin.

On October 31, 2016, Certifier sent an email to Producer about the test results from a testing lab on the soil samples from the September 29th inspection.

On November 1, 2016, Certifier shared investigation report, analytical results, and draft Combined Notice of Noncompliance and Proposed Revocation with NOP C & E Staff, and requested feedback.

On November 10, 2016, NOP C & E Staff responded to Certifier in concurrence with findings and proposed actions, and queried if investigation was in process regarding the possible involvement of (b) (4).

On November 16, 2016, Certifier issued the Combined Notice of Noncompliance and Revocation with an effective date of January 2, 2017. The Combined Notice gave various reasons for the revocation detailed below that relate to:

1. Prohibited substances found during the inspection after testing them; and
2. The use of sites not eligible for certification.

On December 28, 2016, (b) (6), (b) (7)(C)

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On January 3, 2017, Certifier denied Producer's mediation request. The grounds for the denial are not stated.

On January 3, 2017, NOP C & E staff requested that the USDA Farm Services Agency (FSA) provide their records on the management history of farm sites that Producer had claimed were under his control for 36 months prior to certification in signed affidavits.

On January 17, 2017, NOP C & E requested USDA Science & Technology labs analyze 21 soil samples and found detectible levels of bifenthrin in 5 out of 9 soil samples and atrazine on 3 out of 9 fields. USDA labs does not have a test for glyphosate yet although they are working on that.

On January 17, 2017, FSA provided numerous signed documents, field histories, and maps showing that Producer was not in control of a large number of fields (as many as 150 fields from 15 farm sites) 36 months prior to certification.

On January 31, Producer appealed Certifier Combined Notice. Counsel for Producer, Richard D. Siegel, challenged the Combined Notice primarily on procedural grounds.

On February 4, 2017, NOP acknowledged appeal.

Certifier Summary

Certifier sent Combined Notice as required by Sections 205.405(a) and Section 205.662 Code of Federal Regulations ("CFR"). Upon receipt of a request to investigate complaints received by the NOP regarding the application of prohibited materials and insufficient site history, Certifier conducted an Investigation and Unannounced Inspection.

During the Investigation and Unannounced Inspection, the inspector received documented evidence confirming both currently certified sites and sites requested for certification are not currently eligible for certification. Certifier found that items previously attested by Producer in its site history affidavit were untrue. Specifically, the inspector found that the Producer did not have control of the sites in question for thirty-six (36) months, despite the Producer providing leases and site history affidavits covering ten (10) years. While Producer continued to maintain during the inspection investigating the complaint that the site history affidavits are true, Certifier has reason to believe that statements made in the site history affidavits are false.

Additionally, samples taken during the Unannounced Inspection revealed positive residues for Bifenthrin and Glyphosate. Half-lives of the substances indicate application of the substances on the organic fields in the last thirty-six (36) months. The application of prohibited substances are in direct violation of: 1) Section 205.105(a) which prohibits synthetics that are not on the National List at 205.601, and 2) 205.202 (b) of the CFR that requires that land be free of prohibited materials for 36 months.

The Combined Notice also cites Section 205.406(c) of CFR that requires a certifying agent send a written notice of noncompliance to the operation and 205.662 (c) that proposed revocations provide the reasons, the effective date, and the impact of the revocation along with the right to request to mediate and to appeal the revocation. In addition, the certifier cites 202.662 (d) indicating a finding of a willful violation. Certifier refers to NOP Instruction 4002 to support its finding of five (5) years of a prohibition to apply for organic certification following revocation.

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Appellant Summary

Through a letter from its attorney, Richard D. Siegel, Producer alleges that the inspector conducting the inspection failed to conduct an exit interview required by Section 205.403(d) of CFR. Additionally, Certifier failed to provide a copy of the inspection report, as required by Section 205.403(e)(2) of CFR.

The Combined Notice said, for the first time, that the complaints being investigated were complaints made initially to NOP. Producer would like the Combined Notice rescinded. The charges under Sections 205.662(a)(1) and (2) omit facts that underlie the serious charges that could render the Producer ineligible for certification for five (5) years.

The facts contained in the Combined Notice were unspecific and didn't identify which of the sites involve the allegedly false statements. For example, test results do not show application of prohibited substances. Application is just one way prohibited substances can get on a field, which may have gotten there by drift or accidental spraying from neighboring conventional farms. Producer's records fail to show how application happened. Sections 205.662(a)(1) and (2) both require noncompliances with enough specificity and enough supporting facts to allow the operator to respond. The Combined Notice failed to meet the fundamental due process requirements, so it should be rescinded.

Section 205.403(d) of CFR requires an exit interview when the inspection ends, which never happened. Section 205.403(e)(2) requires the operator to receive a copy of the inspection report shortly after the inspection, but Producer has not received the report as of the date of the letter from Producer, which is dated January 31, 2017.

Producer gives four grounds to rescind the Combined Notice:

1. Combined Notice was not a proper notice of noncompliance;
2. Certifier erred in treating the alleged noncompliances as if they could not be corrected;
3. Certifier's investigation has had several irregularities, including depriving Producer of a copy of the inspection report and other significant papers; and
4. Combined Notice said inspection held on September 29 was "unannounced" when in fact it had been scheduled in advance.

Compliance & Enforcement (NOP C & E) Summary

As stated in Findings of Fact, NOP C & E Staff requested that Certifier investigate complaints about the Producer per Section 205.661 (a) in early September 2016. NOP C & E had received multiple complaints by email and phone. Complainants provided details and offered that they had written and photographic evidence.

In mid-November 2016, C & E concurred with the Certifier's findings and proposed actions after reviewing the Certifier's investigation report, the OMIC USA Inc laboratory results showing that soils were contaminated with both Glyphosate and Bifenthrin, and the Certifier's draft Combined Notice of Noncompliance and Proposed Revocation.

In early January 2017, NOP C & E Staff requested that FSA provide records to confirm the land management history of all of the fields in question. Within a couple of weeks, FSA provided numerous signed documents, field histories, and maps showing that the Producer was not in control of a large number of fields (as many as 150 parcels from 15 farm sites) 36 months prior to certification. The fields

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were under the control of many different operators, not just (b) (6), (b) (7)(C), the complainant who came forward willing to share (b) (6), (b) (7)(C) identify and documents publicly.

In addition, C & E requested USDA labs analyze 21 soil samples collected by Certifier and confirmed detectible levels of Bifenthrin in 5 out of 9 soil samples. They also detected Atrazine on 3 out of 9 fields. USDA labs does not yet have a test for Glyphosate. They are working on that.

NOP Appeals Analysis of Case

Strengths of this Case: Evidence

- (b) (5) [Redacted]
- (b) (5), (b) (6), (b) (7)(C) [Redacted]
- (b) (5) [Redacted]
- (b) (5) [Redacted]
- (b) (5) [Redacted]
- (b) (5) [Redacted]

(b) (5) [Redacted]

(b) (5)

Questions/Weaknesses/Risks of this Case:

- (b) (5)
- (b) (5)
- (b) (5)

⁴ From NOP Instruction 2602: at the end of the inspection, the inspector conducts an exit interview with an authorized representative of the operation. During the exit interview, the inspector communicates any potential noncompliances observed, and requests any additional information that may be missing from the OSP. If significant information is missing, the inspector should note this in the inspection report and discuss this as a concern during the exit interview.

⁵ **§205.662 Noncompliance procedure for certified operations.**

(a) *Notification.* When an inspection, review, or investigation of a certified operation by a certifying agent or a State organic program's governing State official reveals any noncompliance with the Act or regulations in this part, a written notification of noncompliance shall be sent to the certified operation. Such notification shall provide:

- (1) A description of each noncompliance;
- (2) The facts upon which the notification of noncompliance is based; and
- (3) The date by which the certified operation must rebut or correct each noncompliance and submit supporting documentation of each such correction when correction is possible.



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Settlement Agreement

THIS SETTLEMENT AGREEMENT is entered into by the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS), and Kuhlman Farms, Inc.

USDA, AMS and Kuhlman Farms have decided to compromise and settle the issues among them related to alleged violations of the Organic Foods Production Act of 1990 (7 U.S.C. §§ 6501 et seq.) (OFPA) and the USDA organic regulations (7 CFR Section 205).

Accordingly, the parties agree to the following:

1. The Secretary of Agriculture has jurisdiction in this matter.
2. USDA, AMS agrees not to issue a formal Administrator's Decision charging Kuhlman Farms with alleged violations of the OFPA and the USDA organic regulations for any actions disclosed by the investigation which gave rise to this agreement.
3. Kuhlman Farms admits to the following:
 - A. Organic Certifiers issued on November 16, 2016, a Combined Notice of Noncompliance and Proposed Revocation to Kuhlman Farms in Gothenburg, Nebraska. Kuhlman Farms was given the opportunity to appeal the Notice, and this Settlement addresses this Notice.
 - B. Kuhlman Farms has been given the opportunity to consult with legal counsel regarding this Settlement, is executing this agreement of its own free will, and understands and accepts the terms of this Settlement.
 - C. No alteration or variation of the terms of this Settlement shall be valid unless made in writing and signed by both parties.
 - D. Kuhlman Farms withdraws its appeal and waives further appeal rights in this matter. Failure to comply with the settlement agreement shall automatically void paragraph 2 above. If Kuhlman Farms breaks the settlement terms, USDA, AMS may thereafter pursue an administrative hearing process.
4. Kuhlman Farms agrees to the following actions:



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- A. Kuhlman Farms agrees to a partial suspension of its organic certification. The following specific fields are to be suspended from organic certification: (b) (4), (b) (4), (b) (4) and (b) (4). Reinstatement of these fields may be requested at any time. Kuhlman Farms is prohibited from selling, labeling, or representing any product from these fields as "organic" while they are suspended.
- B. Request(s) for reinstatement for any fields, including (b) (4), (b) (4), (b) (4) and (b) (4) must be supported by a certifying agent for AMS to consider the request. The request for reinstatement must also include an inspection report from the certifying agent and the results of residue testing for each field, where samples are collected and submitted by the certifying agent. Kuhlman Farms is responsible for the costs of the inspection and residue testing.
- C. If reinstatement is granted, Kuhlman Farms agrees to one unannounced inspection, at its own expense, for each year for two years following reinstatement. These unannounced inspections will be conducted separately from, and in addition to, the operation's regular annual inspection as required by the USDA organic regulations.
- D. The fields (b) (4), (b) (4) and (b) (4) are not currently certified. The certification of these fields will be determined by the certifying agent, pending the results of an on-site inspection that includes residue testing conducted by a certifying agent. Kuhlman Farms is responsible for the costs of the inspection and residue testing. If the fields are denied certification, Kuhlman Farms may submit a separate appeal of the Denial of Certification.

This agreement will become effective upon the appellant's signature below.

(b) (6)

Chad Kuhlman
Kuhlman Farms, Inc.

Date: 4-20-18

Guif Tuelor For [redacted]
RS
Dr. Ruihong Guo
Acting Deputy Administrator, National Organic Program
USDA, AMS

Date: 4.23.18