

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0196



In re:

MICHAEL TIERNEY, doing business as  
BIRCHWOOD FARMS,

Respondent.

Appearances:

Buren Kidd, Jr., Esq. and Frank Martin, Esq., for Complainant

Michael S. Tierney, pro se, for Respondent<sup>1</sup>.

Before:

Janice K. Bullard, Administrative Law Judge

**DECISION AND ORDER**

This matter is before me pursuant to a complaint filed by the Administrator, Agricultural Marketing Service, (“AMS”), United States Department of Agriculture (“USDA”; “Complainant”) against Michael Tierney, d/b/a Birchwood Farms (“Respondent”), alleging violations of the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501-6522 (“OFPA”; “the Act”) and the National Organic Program Regulations set forth at 7 C.F.R. §§ 205.1 – 205.699 (“NOP Regulations”).

This Decision and Order<sup>2</sup> is based upon the pleadings and arguments of the parties, and the photographic, documentary and testamentary evidence. The record is closed and the matter is ripe for adjudication.

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<sup>1</sup> Mr. Tierney’s father, Michael Tierney, aided the defense.

## I. ISSUES

1. Whether Respondent willfully violated OFPA and the NOP Regulations by selling, labeling, and representing livestock products that were not from livestock under continuous organic management from the last third of gestation as organic;
2. Whether Respondent violated the Act and NOP Regulations by failing to update his organic system plan;
3. Whether Respondent violated the Act and NOP Regulations by using the term “organic” on labels of raw or processed agricultural products that were not produced or handled in compliance with NOP Regulations;
4. Whether Respondent provided livestock with feed and substances prohibited under the NOP Regulations; and
5. Whether sanctions should be issued against Respondent, and if so, the nature of those sanctions.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### 1. Procedural History

On March 21, 2013, Complainant filed a complaint against the Respondent with the Hearing Clerk for the Office of Administrative Law Judges for USDA (“OALJ”). On April 1, 2013, Respondent filed an Answer. The parties exchanged evidence and filed witness and evidence lists pursuant to my Order, and I set a hearing date. The hearing was continued due to the government shutdown in October, 2013, and eventually was held on April 8, 2014, by personal appearance of the parties and representatives in Washington, D.C. Complainant was represented by Buren Kidd, Esq. and Frank Martin, Esq. Respondent Michael Tierney represented himself.

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<sup>2</sup> Complainant’s evidence shall be denoted as “CX-#”; Respondent’s evidence shall be denoted as “RX-#”; and references to the transcript of the hearing shall be designated “Tr. at [page number]”. Evidence that I add to the record sua sponte shall be denoted as “ALJX-#”.

I admitted to the record Complainant's list of exhibits as ALJX-1. I admitted Complainant's exhibits, identified as CX-1 through CX-33. I admitted Respondent's exhibits identified as RX-1 and RX-2. I held the record open for the receipt of the transcript of the hearing and written closing argument. Both parties filed post-hearing briefs and proposed findings of fact and conclusions of law on July 1, 2014. Respondent included with closing argument documents which had already been admitted to the record.

The record is now closed and the matter is ripe for adjudication<sup>3</sup>.

## 2. Statutory and Regulatory Authority

The Act allows persons to seek and obtain organic certification from certifying agents accredited by the Secretary of USDA to certify crops, livestock, wild crops, products, and handling operations as compliant with the National Organic Standards set forth at 7 C.F.R. part 205. Regulations were issued to implement the Act and ensure consumers that livestock products labeled as "organic" meet the standards promulgated under the Act.

The Act and NOP Regulations require certified organic producers and sellers to submit organic system plans to their certifying agents, and 7 C.F.R. § 205.201(a) requires operators to update organic system plans to reflect changes or additions. Operators are required to keep records regarding the production and handling of products represented as organic (7 C.F.R. § 205.103), and to label products in a manner compliant with the Act and 7 C.F.R. § 205.300(a). The NOP Regulations also include standards for the manner in which livestock intended to be marketed as organic are raised and fed (7 C.F.R. § 205.237(a)).

The NOP Regulations require that "[l]ivestock products that are to be sold, labeled, or represented as organic must be from livestock under continuous organic management from the

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<sup>3</sup> It must be noted that the transcript of the hearing proceedings has many errors, including the pagination. Throughout this D&O, I used the page numbers on which testimony is recorded, and not the numbers identified by the court reporter in the index. I found no error so egregious as to affect the substance of any testimony.

last third of gestation or hatching.” 7 C.F.R. § 205.236(a). Further, “[I]ivestock used as breeder stock may be brought from a nonorganic operation onto an organic operation at any time, provided that if such livestock are gestating and the offspring are to be raised as organic livestock, the breeder stock must be brought onto the facility no later than the last third of gestation”. 7 C.F.R. § 205.236(a)(3).

Non-compliance procedures are set forth in the NOP Regulations at 7 C.F.R. § 205.662. The Act authorizes the imposition of civil penalties of not more than \$10,000.00 for the misuse of an organic label. 7 U.S.C. § 6519. In addition, the Act provides that the Secretary may find operators who violate the purposes of the organic certification period ineligible for a period of five years from the date of violation. 7 U.S.C. 6519 (c)(1)(C). The amount of the civil penalty shall be based on the severity of the violation. William Richardson, 66 Agric. Dec. 69 (June 13, 2007).

3. Summary of the Evidence

**A. Documentary and Photographic Evidence**

CX-1 through CX-33

RX-1 and RX-2

**B. Summary of Testamentary Evidence**

Respondent Michael Tierney, d/b/a Birchwood Farms, became involved in the NOP in 2004, and was subject to inspections under the Act and the NOP Regulations. Tr. at 63; 29. Brian Magaro has been an independent inspector for the organic food industry since 2009 and is a member of the International Organic Inspectors Association. Tr. at 29-30. Since 1993, he has attended approximately twenty-five separate training sessions in all categories of the organic food industry. Tr. at 30. He inspects businesses with organic certification to confirm that their practices comply with the NOP Regulations. Tr. at 30-31. The scope of Mr. Magaro’s

inspections is determined by the organic system plan for an operator, and he relies on the information that the producer provides as the basis for organic certification. Tr. at 79-80.

Mr. Magaro inspected Respondent's operation at least four times, including an inspection conducted on September 22, 2009. Tr. at 31. He used an Initial Review Report generated by Respondent's certifying agent, Pennsylvania Certified Organic ("PCO") to document the findings of his inspection, which was based on those elements identified by Respondent's application for organic certification. Tr. at 32; CX-14. Mr. Magaro prepared an inspection report that documented deficiencies with Respondent's operation. Tr. at 33-34; CX-14.

Mr. Magaro found that Respondent did not have adequate records to demonstrate that dairy cattle were fed properly. Tr. at 35. The inspector observed that a non-organic feed ingredient was being used. Id. He found barley flakes that included the ingredient of propionic acid, and which were not labeled GMO free, and he submitted a sample of their label to PCO. Tr. at 88. The inspector concluded that the barley was not certified organic but did not address the presence of propionic acid in his report. Tr. at 90. Mr. Magaro admitted that in an emergency like a natural disaster, an organic operation could use non-organic feed, but the NOP Regulations otherwise do not allow the intentional purchase and use of nonorganic feed. Tr. at 91-92.

Mr. Tierney explained that 100 pounds of the barley was fed to 35 cattle over a two day period, which amounts to roughly 3.5 pounds per animal. Tr. at 318. Respondent had run out of feed and they "needed something to hold [the cattle] over" while they waited for their shipment of grain. Tr. at 319. Mr. Tierney observed that propionic acid is found in ruminants, and he therefore believed that he was compliant so long as the feed was non-GMO [genetically modified organism].

Mr. Magaro also concluded that Respondent's records were insufficient to allow him to determine the quantity of milk that was being produced and processed. Tr. at 35-36. Mr. Magaro

expected to see a list of all ingredients used in every step of the production of a product, including waste product quantities, in order to assure that the process met NOP standards. Tr. at 95. The inspector did not identify a particular dairy product that was deficient, but faulted the recordkeeping itself. Id.

He also cited Respondent for labeling meat from “feeder pigs” as organic, where the pigs had been brought to the farm when young, fed organic feed, and then slaughtered at a facility that was not certified as organic. Tr. at 36-38. Mr. Tierney defended his decision to identify his pigs as organic by maintaining that Respondent could not comply with the regulation without buying a pregnant animal or an infant animal and raising it organically. Tr. at 321.

On September 22, 2009, Mr. Magaro also conducted an inspection of Respondent’s processing operation. Tr. at 38-39. He recorded information regarding Respondent’s practices regarding processing on a Handler Inspection Checklist, noting that Respondent failed to keep adequate records regarding products that had been processed. Tr. at 39-41; CX-14. The inspector shared his findings with Respondent and his father, Michael P. Tierney. Tr. at 42-43; 45. Respondent maintained that they were compliant, and had bought certified organic beef from “Simply Grazing” and from a farm called “Natural Acres”. Tr. at 287.

Mr. Magaro could not recall if he had inspected Respondent’s operation in 2008. Tr. at 48. He recalled discussing the location of organic slaughterhouses with Mr. Michael P. Tierney, but denied recommending that Respondent use a non-certified slaughterhouse to produce meat that would be identified as organic. Tr. at 49-51. Mr. Magaro admitted telling Respondent that he did not know of a local organic slaughterhouse for them to use, but he testified that he would not make such recommendations to producers. Tr. at 52.

Mr. Tierney testified that he did not know of the location of a nearby organic butcher shop, and that Mr. Magaro believed that there was one in Vermont. Tr. at 287. Respondent

“thought [it] was unreasonable to drive ten hours one way, back and then four [sic] times. Id. He recalled Mr. Magaro advising that he would not have a problem with Respondent hauling animals born from certified organic mothers and raised on organic grass to the butcher shop they were familiar with. Tr. at 289. Respondent brought the organic beef to be processed first thing in the morning, when “everything is completely sterile”. Tr. at 312. Mr. Magaro did not recall a conversation in which he condoned Respondent bringing animals to a non-certified slaughterhouse first thing in the morning. Tr. at 53. Mr. Magaro stated, “[i]n the 31 years I’ve been doing this, never has that been allowed”. Tr. at 93.

Mr. Tierney contended that inspectors approved of his method. Tr. at 288-289. Respondent had applied for an organic label from USDA, which provided the labels to the slaughterhouse based on Respondent’s organic certification application. Tr. at 289-290. A USDA meat inspector at the processing plant matched the label with the form and placed the label on the meat. Tr. at 290. Mr. Tierney admitted selling organic animals “under an organic label that was not an organic butcher shop”, stating that he did not understand the regulations. Tr. at 306. Respondent ceased that practice in 2009, and began to use a processor that was located an hour and one half drive from Respondent’s location. Tr. at 313-314.

Mr. Magaro remembered telling Respondent that he was aware of an organic pig operation in North Carolina, but did not agree that he gave advice about purchasing animals for use in the organic program that did not meet the standards required by the NOP for raising organic livestock. Tr. at 54. Mr. Magaro explained that the NOP requires an animal to be raised as organic from the last third of gestation to be certified organic, and may not be purchased as a live animal. Tr. at 55. The offspring of an animal that was raised organic would qualify for organic certification, but the mother would not because that animal would not have met the gestational requirement. Tr. at 57.

The inspector could not recall whether he saw any animals on Respondent's property, but rather, based his conclusion of non-compliance upon his observation that Respondent had meat that was improperly labeled as organic with no organic system plan for meat in place, and therefore, no certification for meat. Tr. at 61. Mr. Magaro testified that Respondent told him that they bought feeder pigs and cattle, fed them organically, and then labeled them as organic. Id. Had the animals been added to Respondent's certificate, Mr. Magaro would have traced them back to their point of sale to determine whether they met the requirements of organic livestock. Tr. at 62.

Mr. Tierney admitted that Respondent sold meat that was not included in their organic system plan. Tr. at 312. He did not think that pigs that were born from animals that were raised organically would not be organic solely because their parents were not from organic stock. Id.

Mr. Magaro was not aware of whether organic producers were given training or advice regarding the NOP, as his expertise was confined to inspecting operations for compliance with the Act and NOP Regulations. Tr. at 63-64. In his experience, an operator would align itself with a certifier and acquire the information needed to meet the standards for organic certification. Tr. at 64. He does not approve methods used by organic operations or the requirements for certification. Tr. at 79. Mr. Magaro advises all operators to maintain records so that NOP standards may be verified, but he does not promote a specific record-keeping method. Tr. at 85-86.

Mr. Magaro described the problem he identified with Respondent's failure to accurately record the tonnage of hay from his pasture that was used as feed, and explained that "a farmer's estimate" of the amount of hay harvested would be acceptable. Tr. at 70-71. Unlike the production of dairy products, Mr. Magaro acknowledged that in a grass fed system where the

majority of the feed was from pasture or grass, the amount of feed would be based on the approximate intake by the animals. Tr. at 95-96.

Mr. Tierney testified that he didn't understand how to satisfy recordkeeping requirements of tracking the food intake of animals who eat grass and who are out on a pasture for "22 hours a day, seven days a week". Tr. at 308-309. He could tell that animals were sufficiently fed by their body conditioning. Tr. at 310. Respondent has since purchased a program to track the grass eaten, but Mr. Tierney testified that "it is not scientific". Tr. at 311.

Amy Talarico has inspected organic operations as an independent organic inspector for eleven years. Tr. at 98. She also manages a certified organic farm operation. Tr. at 97. She holds certificates from the Organic Inspectors' Association in crops, livestock and processing. Tr. at 98. Her inspections are to verify compliance with the National Organic Standards and the operator's organic system plan. Id.

Ms. Talarico inspected Respondent on July 9, 2010, and afterwards met with Mr. Tierney to advise him of deficiencies she had identified and documented in her inspection report. Tr. at 99-101; CX-18. Ms. Talarico found that Respondent's records for milk production were not adequate. Tr. at 102. Because records were not sufficient to track the origin and creation of products, the inspector could not verify compliance with the NOP. Tr. at 104. At the time of the inspection, Ms. Talarico also used a checklist to try to trace products back to sources, and noted that there were no actual production records for products. Tr. at 106-107; CX-19. She observed many lapses in recordkeeping. Tr. at 107.

The inspector found non-organic veal, pork and tomato-basil cheddar cheese were stored in a cooler with signs indicating "USDA organic". Tr. at 103. She recalled that Respondent explained that a new employee erroneously placed the products in the cooler. Tr. at 127. Mr. Tierney admitted that the meat was not organic, and that some of it was sold from a cooler

marked with an organic label. Tr. at 315. However, the meat that Ms. Talarico saw was meant for their dog and would not have been sold. Tr. at 316. It was mistakenly stored by a new employee. Id. Mr. Tierney objected to have been found non-compliant because organic and non-organic products were stored in the same cooler. Tr. at 317. Respondent has since ceased labeling products as organic, and placed clarifying notices on his company's website. Tr. at 318.

Ms. Talarico also observed that some products that were not on Respondent's plan were labeled with an organic label. Tr. at 128. She prepared an addendum to her report that she submitted to the PCO in order to expand on her concerns about Respondent's operation, specifically, a brochure she collected from Respondent's facility that identified "organic" products that were not certified as organic for Respondent's operation. Tr. at 107-100; CX-20 and CX-21.

Mr. Tierney admitted that Respondent was not certified by PCO to produce or handle meat products at the time of the two inspections at issue. Tr. at 322. He could not understand why Respondent's ice cream wasn't certified until he learned that he had to include it in his organic system plan. Tr. at 325. Respondent had operated for five years, from 2004 until 2009, before realizing that the plan needed to be updated to include products. Tr. at 326. Mr. Tierney's father testified that the brochure had been prepared a long time ago and Respondent has not relied upon it for a long time. Tr. at 347.

Ms. Talarico agreed that Respondent's dairy herd was in good health, despite the lack of records documenting its condition. Tr. at 112-114. She explained that even if Respondent's cows were in the pasture daily, some record should be kept to document that Respondent's management of the herd is compliant with NOP. Tr. at 116-188. She would expect to see feed records, and records of which animals were out in which paddock, and how much and when each animal was eating. Tr. at 120-121. She saw no records documenting anything about the herd's

management, and she could only rely upon her observations and Respondent's responses to her questions. Tr. at 121-123.

Kyla Smith has been the Pennsylvania Certification Program Director for a year and one half, and has worked for that organization since 2010. Tr. at 156-157. She oversees and manages the organic certification process from the receipt of an application to the issuance of an organic certificate. Tr. at 157. Operators submit an organic system plan that is used by inspectors to determine compliance. Tr. at 159-159. Any additions or changes to the plan must be submitted to the certification agent. Tr. at 160. Ms. Smith is responsible for reviewing Respondent's organic certificate records, and was familiar with them, and with reports documenting inspections of Respondent's operation. Tr. at 157-159. Respondent's operating plan was not updated to include meat products or tomato basil cheese. Tr. at 169.

On January 21, 2010, PCO issued a notification of proposed suspension for noncompliance to Respondent. Tr. at 161; CX-14. Inspectors had "found three violation that were deemed to be noncorrectable. . .labeling and selling as "certified organic" meat products that are from nonorganic pigs and beef cattle. . .labeling as "certified organic" meat products that have been processed in a noncertified facility. . . and [using] nonorganic flaked barley containing propionic acid, a prohibited synthetic, to certified organic livestock . . ." Tr. at 161-162. These matters were considered noncorrectable because the products had already been sold, "the organic animals had already been slaughtered in a noncertified facility, and the feed had already been fed to the animals." Tr. at 162-163.

Mr. Tierney replied to the revocation notice and requested mediation in a letter dated January 18, 2010. Tr. at 165; CX-8. In the letter, he asserted that his efforts to locate organic certified pork breeders had been unsuccessful. *Id.* Ms. Smith explained that Respondent could not label and sell pigs as organic if they did not come from organic breed stock, even if the

animals were raised in an organic fashion. Tr. at 165-166. Similarly, animals slaughtered in a non-organic plant cannot be sold as organic. Tr. at 167. PCO would not permit certified operations to sell as organic meat from a nonorganic slaughter house. Id.

On August 9, 2010, PCO sent to Respondent another notice of noncompliance and proposed suspension after a site inspection disclosed continued noncompliance. Tr. at 170-171; CX-24, 24A. Matters that were raised as concerns in an inspection report are often included in certification reports, and sometimes violations of the NOP Regulations are also reported on certification reports, but not on inspection reports. Tr. at 190-191.

Ms. Smith explained that although Respondent's sale of cheese and milk was initially considered a violation, the subsequent request for approval of the products as organic was accompanied by documentation and approved. Tr. at 189. Ms. Smith also explained that the NOP Regulations prohibit the use of synthetic products in livestock production, and that propionic acid is prohibited because it is synthetic. Tr. at 215-216.

Matthew Michael has worked for USDA for twenty-one (21) years and is the Director of the Compliance and Enforcement Division of the NOP. Tr. at 218-219. He testified that there are over 25,000 certified organic operations accredited and certified by 84 NOP agents. Tr. at 220. PCO was accredited by the USDA Agricultural Marketing Service Administrator ("AMS") as an NOP agent. Tr. at 221; CX-1. Mr. Michael testified that AMS has received Respondent's appeals of PCO's determinations of noncompliance and proposed revocation and combined the appeals in one determination issued on June 16, 2011, and denying the appeals. Tr. at 223; CX-27; CX-29. He explained that when an accredited certifier such as PCO proposes an adverse action, the operator has the right to request mediation, and PCO has the authority to grant or deny the request for mediation. Tr. at 256. AMS provides guidance to accredited certifiers, but does not have standardized forms for recordkeeping. Tr. at 257.

Mr. Michael testified that enforcement of the NOP Regulations assures consumers that organic food meets consistent standards and prevents non-compliant operators from gaining an economic advantage. Tr. at 224-225. Organic operators are able to charge a premium price for their products to recoup the costs of compliance with the NOP standards. Tr. at 225. Mr. Michael considered Respondent's violations to be serious, as they covered four categories of organic products, and he believed that revocation of Respondent's organic certification was warranted. Tr. at 225-226. Mr. Michael explained, "...the actions of the operation were counter to the purposes of the act. Consumers were misled, thus the consumer confidence in the organic seal is eroded. They produced and sold products in violation of the regulations, putting themselves in an unfair advantage with their competitors." Tr. at 228.

Mr. Michael found the recordkeeping violations very serious because an inspector relies upon records to determine compliance, and in order to be certified, an operator must demonstrate the ability to comply with the NOP standards. Tr. at 228-229. He explained that the regulations require that feeding records be kept for ruminants that are maintained and fed from pastures. Tr. at 258. Dairy experts are able to determine how much feed from pasture that a cow eats by using industry recognized calculations. Tr. at 260.

Mr. Tierney stated that some inspectors were thorough, such as Mr. Magaro, but others did not want to go through all of his paperwork. Tr. at 292. Since being given the non-compliance for recordkeeping, Respondent "has spent \$10,000.00 on a recordkeeping system that assigns lot numbers to every single one of our products. We have a parlor system that tracks milk flow and I mean, everything has been upgraded...we keep a daily log." Tr. at 296-298.

Because Respondent is currently suspended from the NOP, Mr. Michael concluded that Mr. Tierney is unable to comply with the regulations. Tr. at 230. A suspension could be overturned if USDA AMS agrees to reinstate an operator, but in this case, Respondent's

suspension was not overturned. Tr. at 233. The number of repeated violations by Respondent convinced Mr. Michael that revocation was warranted, just as he had concluded in cases involving operators who had a similar number and type of violations. Tr. at 253. An operation which has its certification revoked is ineligible to sell or label products represented as organic for five years from the date of revocation, but the Secretary can reduce the term of revocation. Tr. at 253; 261.

The elder Mr. Tierney testified that Mr. Magaro had confirmed with him that you need a certified organic pig to start a certified pig operation. Tr. at 333. Mr. Tierney corroborated his son's testimony that Mr. Magaro had advised that he had no problem with Respondent taking animals in their own trailer to a butcher who would process the animals at the start of the day when everything was clean. Tr. at 334.eci

#### 4. Discussion

##### **A. Respondent's Motion to Dismiss the Complaint**

In his written closing argument, Respondent moved for dismissal of the complaint on procedural and substantive grounds. Respondent first raised the issue of whether the matter was within the statute of limitations. Mr. Tierney has cited no statutory or regulatory authority for his position on this issue. Respondent raises the question of why USDA did not bring the instant complaint against him until five years after the alleged violation.

The administrative appeal process allows certified operators to request mediation of the adverse action or appeal the determination to USDA. After PCO denied Respondent's request for mediation, Respondent appealed the non-compliances to USDA's AMS, which issued a decision on Respondent's appeals on June 16, 2011. CX-19. According to the NOP Regulations, "[i]f the Administrator or State organic program denies an appeal, a formal administrative proceeding will be initiated to deny, suspend, or revoke the certification. Such

proceeding shall be conducted pursuant to the U.S. Department of Agriculture's Uniform Rules of Practice or the State organic program's rules of procedure.” 7 C.F.R. § 205.681(a)(2). The instant complaint was filed by USDA on March 21, 2013.

The regulations do not impose a deadline for the filing of the required complaint. The complaint was filed less than two years after Respondent’s appeals were denied. The Act provides for the imposition of a five year revocation from the date of occurrence of violations of the program, but that does not constitute a statute of limitations. See, 7 U.S.C. § 6519 (c)(1)(C).

Accordingly, Respondent’s factual assertions are not supported, and his claim that the proceeding is barred by a statute of limitations is without merit.

Respondent’s other grounds for dismissal are denied as unsupported, for the reasons discussed below.

**B. Violations**

*Violations of 7 C.F.R. § 205.236(a)*

Respondent admittedly sold, labeled, and represented livestock products as organic where the preponderance of the evidence demonstrates that the livestock were not produced and handled under a continuous organic management plan. Mr. Tierney admitted that he had purchased piglets from breeding stock that was not organic, in direct violation of 7 C.F.R. §205.236(a). Although Respondent raised and fed the pigs in accordance with an organic plan, they were not from a source that met the NOP standards.

I give little weight to the testimony that Respondent was unable to identify an organic source for purchase. Respondent knew what the regulations required, and expressed frustration that his PCO inspector could not identify a source of piglets that met the expectations of the NOP Regulations. It is clear from Respondent’s testimony that the operation could have developed

the proper generational organic sources at its own facility, but instead decided to circumvent the regulations for financial gain.

Similarly, Respondent slaughtered organically raised animals at a non-organic facility. Again, Respondent was frustrated that Mr. Magaro could not recommend a certified butchering facility close to his operation, and Respondent made the decision to use his local non-organic processor. Mr. Tierney testified that the facility Mr. Magaro identified was too far away to use. I give little weight to the assertions by both Mr. Tierney's that Mr. Magaro approved the use of a non-organic slaughter house. Mr. Magaro did not recall such a conversation, and I credit his testimony that he would not condone a scheme that was obviously not compliant with NOP Regulations.

Additionally, even if Respondent had fully complied with the requirements for organic breed stock and slaughtering at a certified facility, Respondent would nevertheless remain non-compliant with the NOP Regulations because the operation was not certified by PCO to produce or handle livestock for organic meat production. This lapse represents much more than lax recordkeeping. The onus of knowing and meeting the expectations of the program fall on those who stand to benefit from it. The Act requires participants in the NOP to submit their organic plan, and outlines the substance of the plan. 7 U.S.C. § 6513. The NOP Regulations provide specific instruction to operators regarding the plan.

Accordingly, I find that Respondent sold, labeled and represented livestock products as organic that were not from livestock under continuous organic management from the last third of gestation in violation of 7 C.F.R. § 205.236(a). Respondent produced meat at a non-organic slaughterhouse in violation of 7 C.F.R. § 205.236(a). Respondent was not certified to produce or handle livestock for organic meat production.

#### *Violations of Labeling Standards*

Respondent labeled and sold cheese and meat products as “organic”, and advertised those products as organic in his brochure and on his website. At both inspections germane to this adjudication, the inspectors found non-certified meat that was labeled organic, and that was stored in coolers marked with the USDA organic logo. Dairy products were labeled organic that were not certified as part of Respondent’s plan. Respondent admitted that he used the term organic on labels for products that were not certified as organic. Respondent provided organic labels for meat slaughtered at a non-organic plant. There is no contrary evidence.

I give little weight to the explanations offered by Respondent. Although I credit that meat not meant for sale was mistakenly stored, and that products considered organic by other manufacturers were stored with non-organic products, the use of the brochure and the identification of non-certified products in Respondent’s advertising, at its store, and on its website, undermines Respondent’s contentions that the mislabeling was inadvertent. Mr. Tierney provided organic labels for use by a non-organic slaughter house. Respondent voluntarily participated in the organic program for economic gain. Respondent admitted that organic products are sold at a premium price. I credit Mr. Michael’s testimony that consumer confidence in the program rests heavily upon the buyer’s ability to rely on representations of organic production, and that the USDA organic label is a hallmark of the program.

The evidence supports finding that Respondent violated 7 C.F.R. § 205.300(a).

#### *Violations of Organic Feed Regulations*

Respondent admittedly provided livestock with a product that included a substance that was listed in the NOP Regulations as a prohibited synthetic substance. I give no probative weight to the testimony that propionic acid naturally occurs, or that the amount given to the animals was small. The barley that the animals were fed contained the substance, and the regulation allows no exceptions. Despite Mr. Magaro’s testimony that non-organic feed might

be used in a disaster, the regulations do not provide that exception. The Act specifically provides certain exceptions, but none apply to the instant circumstances. See, 7 U.S.C. §§ 6505(c) and (d) and 6506 (b). Even if it was determined that a natural disaster merited an exception to the feeding requirements for livestock, Mr. Tierney's explanation that his animals were fed the suspect barley "to tide them over" while waiting for his regular feed delivery hardly represents a disaster situation. That Respondent fell short of necessary feed reflects poor management.

The uncontroverted evidence establishes that Respondent violated 7 C.F.R. § 205.237(a).

#### *Failure to Update Organic System Plan*

Respondent failed to update his organic system plan to include additional dairy products and meat. Although Mr. Tierney posited that Respondent was unaware that the plan could and should be amended to reflect products that Respondent produced or sold as organic, he nevertheless admitted that Respondent was advised to do so when he first sought organic certification. The record supports finding that Respondent failed to update his organic system plan in violation of 7 C.F.R. § 205.201(a).

#### *Recordkeeping Violations*

I accord substantial weight to Mr. Michael's testimony regarding the significance of recordkeeping to demonstrate compliance with the NOP Regulations. Compliance inspections are infrequent, the ratio of inspectors to facilities is small, and the program relies heavily on voluntary compliance of participating certified operators. Respondent's recordkeeping was considered inadequate to show how much food his pasture fed animals ate when turned out. Mr. Tierney seemed to believe that he did not need to keep records of cows that spent most of their lives out in pasture, eating at will, and seemed to believe that the apparent health of the cows proved that they were sufficiently fed. However, the record makes clear that Respondent was

advised that records of the whereabouts of each cow at any time must be recorded, and an approximation of their intake could be made to satisfy the requirements of the NOP Regulations.

Other recordkeeping deficiencies were noted by inspectors, and Respondent has apparently realized the importance of maintaining records, considering his purchase of an expensive recordkeeping system tailored to NOP participants. I find no support for Respondent's claim that the record fails to establish "what acceptable record keeping is". The NOP Regulations set forth specific requirements for records that must be maintained, and I accord weight to the testimony of two PCO inspectors who discussed recordkeeping deficiencies with Respondent after their inspections.

The evidence on this issue is not contradicted, and I find that Complainant's allegations of violations of 7 C.F.R. § 205.103 are sustained.

#### *Willfulness*

Mr. Tierney testified that he had asked PCO for direction and guidance with complying with the NOP Regulations and was informed that the onus was on him to comply. Tr. at 291. He stated that "we have operated under this, basically understanding of the regulations only through non-compliances." Tr. at 291-292. Mr. Tierney believes that the allegations of non-compliance arise from a personal dispute between Respondent and PCO, which is the subject of litigation. Tr. at 302-303. He noted that the allegations at issue were five years old, and that Respondent "had a lot more knowledge now than we did back then". Tr. at 321. Respondent also maintains that mistakes were made due to misunderstandings, and that he was overwhelmed when he first sought certification in 2004. Tr. at 357-358. Respondent renewed these arguments in written closing argument, wherein he also alleged that his shortcomings were due to NOP's failure to impose clear guidelines for certifying agents and operators to follow.

I reject Respondent's explanations for his failure to comply with NOP standards.

Respondent's conduct demonstrates a grasp of the program's requirements and novel methods to avoid implementing them. Many of his defenses are little more than excuses for his conduct, and I find little support for his contention that NOP failed to issue guidelines. The Act and the NOP Regulations detail the requirements of the program. Inspectors for PCO described their expectations of Respondent's compliance.

I find that Respondent's attribution of his non-compliance with the Act and NOP Regulations to various factors, such as the failure of PCO to give him guidance; the lack of training from government entities; his misunderstanding of requirements; and plain ignorance of the regulations, reinforces the conclusion that Respondent's violations were willful. Respondent did not seek the advice of a consultant or otherwise strive to learn the NOP standards first hand. Indeed, Respondent purposely devised ways to avoid the rigors of compliance while maintaining ignorance of the NOP Regulations.

Respondent delivered his organic certification and USDA certified organic labels to a non-organic slaughterhouse, where a USDA meat inspector applied the labels, which suggests a disingenuous plan designed to circumvent the NOP Regulations while maintaining the appearance of compliance. The USDA inspector who had labeled Respondent's meat as organic with labels that Respondent provided was not associated with the NOP. Respondent used his certification to get the labels approved, and then delivered them to the non-organic slaughtering facility, fully aware that the plant was not organic. This overt circumvention of the regulations resulted in the labeling of meat produced at a non-organic facility as organic, and lulled consumers to believe that the meat bearing the USDA label was organic.

Additional evidence of Respondent's willful violation of the regulations lies in his requests for advice from his inspection agent about issues that he could not easily resolve, such

as locating organic breeding stock. The request signifies Respondent's awareness of regulatory requirements and his non-compliant solutions to regulatory hurdles represents Respondent's disregard for the regulations.

The evidence demonstrates that when faced with a difficult compliance issue and satisfying his convenience, Respondent chose the easiest path. In the instance of keeping records of food intake by his pasture fed cows, Respondent concluded that the regulation made no sense, and he made no efforts to comply with the NOP Regulations. Similarly, Respondent failed to remove USDA organic symbols from his website for the somewhat implausible reason that it would cost "thousands of dollars" to do so. This violation continued at the time of the hearing, despite Respondent's status of being suspended from participating in the NOP since May of 2013. Tr. at 304; 361.

I decline to give probative weight to the insinuations of bias by PCO against Respondent, arising from litigation between those parties. The scope of my adjudication is confined to whether Respondent violated the Act and the NOP Regulations, and if so, the applicable sanction, if any. Under the circumstances, I find that Respondent's conduct reflects the willful nature of his violations, regardless of the motives of the PCO.

### **C. Sanctions**

Respondent contends that he has already suffered economically because he has not been able to use an organic designation for months, but needs to continue operating in an organic fashion with no ability to recover those costs. Tr. at 355. However, I accord substantial weight to Mr. Michael's testimony about why revocation is an appropriate sanction in the instant matter. Mr. Michael observed that by failing to abide by the NOP Regulations, Respondent gained an unfair advantage over their competition and misled consumers. Mr. Michael concluded that Respondent's actions were counter to the purposes of the Act. He found that the violations were

willful, repeated and in some instances, uncorrectable, which are all conditions that merit revocation. Mr. Michael was additionally influenced by Respondent's current status of suspension, which he found indicated a continual inability to comply with the NOP. He observed that an operator would need to seek reinstatement after the expiration of a suspension, and did not believe Respondent had done so. Tr. at 232. Mr. Michael believed that revocation of Respondent's organic certification was consistent with other revocations for similar violations. Tr. at 253.

Accordingly, I find that the preponderance of the evidence supports the revocation of Respondent's organic certification for a period of five (5) years. I note that the Act also provides for a civil money penalty for mislabeling violations, but I decline to impose that sanction in the absence of a recommendation for civil penalties by AMS. See, 7 U.S.C. § 6519(a).

The Act provides that the revocation or suspension period should begin from the date of occurrence of the violation. 7 U.S.C. § 2121(c)(1)(C). Respondent remains in violation of the Act and NOP regulations, as he continues to use the USDA organic logo on his website. Therefore, the effective date of revocation could begin upon the effective date of this Decision and Order. However, considering Respondent's current suspended status, I find that the effective date of the five year revocation should coincide with the first date that the current suspension was put into effect in May, 2013.

### III. FINDINGS OF FACT

1. Michael P. Tierney is an individual doing business as Birchwood Farms, whose mailing address is in Newtown, Pennsylvania.
2. At all times material hereto, Respondent was engaged in business as a certified organic crop, livestock and processor operation.

3. Respondent was certified as an organic operation on April 15, 2004, by Pennsylvania Certified Organic (PCO).
4. On April 29, 2002, PCO was accredited by USDA as a certifying agent pursuant to the NOP Regulations.
5. On September 22, 2009, PCO inspected Respondent's facilities and found that Respondent had sold, labeled and represented livestock products as organic, which were not from livestock under continuous organic management within the last third of gestation in violation of the NOP Regulations.
6. The inspection conducted on September 22, 2009, found that Respondent had failed to update his organic system plan to include products.
7. The inspection conducted on September 22, 2009, found that Respondent had used the term "organic" on labels and in labeling raw and processed agricultural products that were not produced or handled in accordance with NOP Regulations.
8. The inspection of September 22, 2009, concluded that Respondent had fed livestock feed that included a substance prohibited by NOP Regulations.
9. The inspection of September 22, 2009, found that Respondent had failed to maintain adequate records concerning the production and handling of agricultural products that were intended to be sold, labeled, or represented as "organic".
10. On January 12, 2010, PCO issued Respondent a Notice of Non-compliance and Notice of Proposed Revocation relating to the violations disclosed by the inspection conducted on September 22, 2009.
11. On January 28, 2010, Respondent replied to the Notices and requested mediation.
12. On February 12, 2010, PCO denied the request for mediation.

13. On February 27, 2010, Respondent filed a timely appeal of the Notices with the AMS Administrator.
14. On May 18, 2010, Respondent applied for and was issued an organic product verification as a producer and handler of: (1) organic crops-pasture; (2) organic livestock-dairy cows and milk; (3) organic yogurt-plain and vanilla (contract only), organic cheese-raw garlic cheddar, raw plain cheddar cheese, and baby Swiss cheese; and (4) 100% organic milk and raw butter (contract only).
15. On July 9, 2010, PCO inspected Respondent's facilities and found that Respondent used the term "organic" on labels and in labeling raw or processed agricultural products that were not produced or handled in accordance with NOP Regulations.
16. The July 9, 2010 inspection disclosed that Respondent failed to maintain records concerning the production and handling of agricultural products that were or that were intended to be sold, labeled, or represented as organic.
17. On July 9, 2010, Respondent was given notice of the non-compliances found at the inspection.
18. On July 12, 2010, Respondent contested the non-compliances.
19. On August 9, 2010, PCO issued a Notice of Non-compliance and Notice of Proposed Revocation to Respondent with respect to the July 9, 2010 violation.
20. On August 19, 2010, Respondent filed a timely appeal of the July 9, 2010 Notices.
21. On June 16, 2011, the AMS Administrator denied both of Respondent's appeals.
22. Subsequently, Respondent was suspended by PCO from participating in the NOP as a certified operator, with a 90 day suspension effective May, 2013.
23. Respondent did not seek reinstatement of its organic certification and the suspension continues to be in effect.

24. At the time of the hearing, Respondent's website continued to bear the USDA organic logo, although Respondent's non-certified status was noted on the website.

#### IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent sold, labeled and represented livestock products as organic that were not from livestock under continuous organic management in willful violation of 7 C.F.R. §205.236(a).
3. Respondent failed to update its organic system plan in willful violation of 7 C.F.R. § 205.201.
4. Respondent used the term "organic" on labels and in labeling raw or processed agricultural products that were not produced or handled in accordance with NOP Regulations, in willful violation of 7 C.F.R. §205.300(a).
5. Respondent fed livestock feed that contained a prohibited substance in willful violation of 7 C.F.R. § 237(a).
6. Respondent failed to maintain adequate records concerning the production and handling of agricultural products that were or were intended to be sold, labeled, or represented as "organic" in willful violation of 7 C.F.R. § 205.103.
7. Revocation of Respondent's certification to participate as an operator in the NOP is appropriate pursuant to 7 C.F.R. §§ 205.662(f)(2) and 205.681(a)(2).

#### **ORDER**

Respondent shall cease and desist from violating the NOP Regulations.

Respondent's organic certification and the organic certification for all responsibly connected persons affiliated with Respondent's operation is revoked for a period of not less than

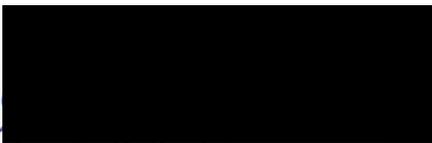
five years; the effective date shall coincide with the first date that Respondent's current suspension from the program was effective in May, 2013.

Pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Initiated by the Secretary, this Decision and Order shall become final and effective without further proceedings 35 days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service. 7 C.F.R. §§1.139 and 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

The Hearing Clerk shall file the attached exhibits as electronic and hard copies with the official record.

So ORDERED this 10th day of October, 2014 at Washington, D.C.

A large black rectangular redaction box covers the signature of the Administrative Law Judge.

Janice K. Bullard  
Administrative Law Judge