

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

BEFORE THE ADMINISTRATOR

In re: )  
K.N. Sreerama )  
APL-009-05 ) **Decision**

This Decision is in response to an appeal (APL-009-05) of a National Organic Program (NOP) proposed suspension of K.N. Sreerama by Organic Certifiers, Inc., for alleged noncompliance with the Organic Foods Production Act of 1990 (Act)<sup>1</sup> and the regulations promulgated thereunder.<sup>2</sup>

**BACKGROUND**

The Act authorizes the Secretary to accredit agents to certify crop, livestock, and handling operations to the National Organic Standards (7 CFR Part 205). Certifying agents also initiate compliance actions to enforce program requirements. Noncompliance procedures are set forth in Section 205.662 of the NOP regulations. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision of a certifying agent may appeal such decision to the Administrator pursuant to Section 205.680 of the NOP regulations.

**FINDINGS OF FACT**

- 1) Organic Certifiers, Inc., Ventura, California, received USDA accreditation on April 29, 2002.
- 2) K.N. Sreerama, Woodland Hills, California, has been certified by Organic Certifiers since September 5, 2002.

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<sup>1</sup> 7 U.S.C. 6501-6522

<sup>2</sup> 7 C.F.R. Part 205

- 3) In 2003, citrus growers in Tulare County, CA were asked to treat their groves with authorized materials to control the Glassy-winged Sharp Shooter (GWSS) insect pest. The two approved pesticides in the GWSS Program were Assail 70 WP and PyGanic 1.4 EC. Only the PyGanic 1.4 EC product is approved for use in certified organic systems. Mr. Sreerama consented to participate with the understanding that the use of PyGanic 1.4 EC would preserve his organic certification status.
- 4) On October 31, 2003, the Treatment Coordinator for Tulare County, CA authorized K.N. Sreerama to make an application of PyGanic 1.4 EC to 285 certified organic acres (45 acres of lemon grove and 240 acres of orange grove).
- 5) On November 26, 2003 Gary Kunkel, Tulare County Agricultural Commissioner/Sealer, issued a letter to K.N. Sreerama informing him that Pesticide Use Reports indicated Assail 70 WP was applied to two locations, Porterville Ranch sites 2-101 and 2-102. The letter continues that this product is not permitted for use in organic production and crops on the property may not be marketed as organic. In addition, the affected land is not eligible for organic certification for three years from the date of the pesticide application.
- 6) The Pesticide Use Reports cited in the Agricultural Commissioner's letter show that Wales Spray Division applied Assail 70 WP on November 13, 2003, to 240 acres of oranges and 45 acres of lemons owned by K.N. Sreerama. An invoice submitted to the Tulare County Agricultural Commissioner confirms the pesticide, crops, site ID and total acres to which the pesticide was applied. Mr. K.N. Sreerama signed and dated this invoice on November 15, 2003.

- 7) On December 4, 2003 Organic Certifiers notified Brian Cox, Tulare County Deputy Agricultural Commissioner/Sealer, that the spraying issue at K.N. Sreerama's Porterville Ranch sites had been satisfactorily resolved. In support of this declaration, Organic Certifiers obtained a written statement from Wales Spray Division of Leffingwell Ag Sales that the contractor sprayed "...PyGanic and not some other substance. It was our error that we listed the sprayed substance as Assail." This statement was signed under penalty of perjury on December 3, 2003, by William Corkins.
- 8) In response, Gary Kunkel, Tulare County Agricultural Commissioner/Sealer notified K.N. Sreerama in writing on December 5, 2003, that in accordance with Organic Certifiers, the issue was resolved. Kunkel, by that letter, concluded that the incorrect report of application of the prohibited pesticide is attributed to clerical error.
- 9) Ray Green, California Organic Program Manager, requested that samples from the areas owned by K.N. Sreerama that were allegedly sprayed with PyGanic be tested. The lemon and orange leaf samples were analyzed at the Center for Analytical Chemistry, California Department of Food and Agriculture, for the presence of either Assail or PyGanic. The results, released on December 31, 2003, show that both samples tested positive for Assail.
- 10) On December 31, 2003, Organic Certifiers issued a Notice of Noncompliance and Proposed Suspension of Certification to K.N. Sreerama for the application of a prohibited substance on or about November 13, 2003 to 240 acres of oranges and 45 acres of lemons, at Porterville Ranch sites 2-101 and 2-102.

- 11) On January 6, 2004, K.N. Sreerama submitted a letter to Randolph Siple of Organic Certifiers requesting mediation. The letter states that the application of Assail was a “tragic error” which transpired during a lapse in oversight when there was no direct supervision of the pesticide application contractor. In support of his plea, K.N. Sreerama includes letters from the Tulare County Agricultural Commissioner and (b)(6) / (b)(7) of Leffingwell Ag Sales. Both parties emphasize Mr. Sreerama’s laudable participation in the GWSS program to curtail the potential pest threat to area grape growers.
- 12) Organic Certifiers rejected Mr. Sreerama’s request for mediation on January 12, 2004.
- 13) Richard Mathews, Associate Deputy Administrator, National Organic Program, received an appeal from K.N. Sreerama on January 20, 2004. As “victims of a mistake and cover up,” Mr. Sreerama pleads that his operation be afforded the same protections as in circumstances when the Government sprays a prohibited substance.
- 14) On October 11, 2004, K.N. Sreerama submitted to the NOP lab analysis results of samples taken on July 22, 2004, from the Porterville Ranch orchards which were sprayed with Assail. The analysis was completed on September 3, 2004, by APT Labs, Wyomissing, PA, and results showed no detectable levels of Assail in leaf tissue and fruit.
- 15) On January 21, 2005, Richard Mathews received correspondence from Robert Hoppe, Esq. of Borton, Petrini & Conron, LLP, the law firm asked to assist Mr. Sreerama in regards to the proposed suspension of his organic certification. Mr.

Hoppe proposes that §205.672, Emergency Pest or Disease Treatment regulations are applicable to this situation so that the participant retains certification and the apparent intent, "...excepts from consequences that would otherwise follow from the application of a prohibited substance..."

16) On February 16, 2005, Mr. Hoppe provided to Richard Mathews a copy of the Environmental Protection Agency's Pesticide Fact Sheet for acetamiprid, the parent compound in the Assail product. The Pesticide Fact Sheet asserts that the compound degrades rapidly in soil, and poses low risk to the environment relative to most other insecticides and minimal risk to non-target plants.

### **DISCUSSION**

K.N. Sreerama requests reconsideration of the decision of the certifying agent to enact a three year suspension on the certified operation at Porterville Ranch Sites 2-101 and 2-102. The application of the prohibited substance, Assail 70 WP, to these areas is unequivocal with evidence to support the nature of the product applied and the time, locations and amount sprayed. This demonstrates a clear violation of §205.202 in that any land from which harvested crops are intended to be sold, labeled, or represented as "organic" must 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. Whether or not the application of a prohibited substance is deliberate or intentional, the organic integrity of the crop is compromised and therefore may not be represented as organic.

The request to apply Emergency Pest or Disease Treatment Programs regulations to K.N. Sreerema's situation is flawed and irrelevant. Whereas Mr.

Sreerama's commendable participation in the GWSS Program was voluntary, Emergency Pest or Disease Treatment Program participation is mandatory and allows operators to retain certification status. However, even while certification remains in effect for a production system under such an Emergency Program, a noncompliant crop may not be sold, marketed or labeled as organic. The nature of this violation involving the application of a prohibited substance would nullify the benefits and privileges of retaining certification.

Despite submission of evidence of no detectable levels of Assail in leaf and fruit tissue, and statements by the Environmental Protection Agency regarding the environmental risks posed by acetamiprid, the required three year period in which land must be free of prohibited substances restricts the application, not the residual activity of the substance.

### **CONCLUSIONS**

The proposal of Organic Certifiers, Inc. to suspend the organic certification for Porterville Ranch sites 2-101 and 2-102 until at least November 13, 2006, due to the application of the prohibited substance Assail is justified by a preponderance of evidence in the record. Although regrettable that an applicator's error has caused this violation, and I make no finding from the record of any willful application by the appellant, such error is not grounds for waiving the regulatory requirements.

**DECISION**

The appeal is denied.

Done at Washington, D.C.

/s/

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Kenneth C. Clayton  
Acting Administrator