UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

BEFORE THE ADMINISTRATOR

In re:	)	
Superior Cannabis Company	)	**Administrator's Decision**
	)	**APL-084-24**
Austin, Minnesota	)	

This Decision responds to an Appeal (APL-084-24) of a Notice of Noncompliance and Proposed Suspension under the National Organic Program (NOP) issued to Superior Cannabis Company (Superior) of Austin, Minnesota by Midwest Organic Services Association (MOSA), a USDA accredited certifying agent. 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. On February 23, 2022, MOSA certified Superior for crops.

2. On May 7, 2024, MOSA issued a Notice of Noncompliance and Proposed Suspension of Superior's Field 420a, citing the application of prohibited substances.

3. On August 9, 2024, MOSA issued a Notice of Mediation Failure, after having accepted Superior's mediation request but mediation being unsuccessful.

4. On September 6, 2024, Superior filed an Appeal.

REGULATORY CITATIONS

The USDA organic regulations at 7 C.F.R. §205.102, Use of the term, "organic," state that, "Any agricultural product that is sold, labeled, or represented as "100 percent organic," "organic," or "made with organic (specified ingredients or food group(s))" must be: (a) Produced in accordance with the requirements specified in §205.101 or §§205.202 through 205.207 … and all other applicable requirements of this part 205."

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 §205.202, 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; and (c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management."

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 …"

The regulations at §205.406, Continuation of certification, states, that "(a) To continue certification, a certified operation must annually pay the certification fees and submit the following information, as applicable, to the certifying agent: … (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part."

On March 19, 2024, a significant update to the organic regulations was implemented. However, the above cited provisions were not revised by those regulatory changes.

DISCUSSION

Superior was certified organic for crops, specifically hemp for human consumption, on February 23, 2022 by MOSA, though the certification includes packaging. Superior's operation has 2 fields totaling a little under [redacted] acres. On September 21, 2023, Superior self-reported to MOSA that Field 420a, the larger of the fields with (b) (4) acres, was accidentally contaminated with prohibited substances by drift from a neighboring conventional operation which had sprayed the substances on July 1, 2023. MOSA issued a Notice of Noncompliance and Proposed Suspension to Superior on May 7, 2024, specifically stating that Superior had reported the "application of prohibited inputs to your property by others." MOSA stated that it disagreed with Superior's contention that the organic regulations don't require the removal of contaminated certified land from certification when the contamination is the result of drift, instead of intentional application by the certified operation itself. MOSA proposed the suspension of Field 420a from certification.

MOSA accepted Superior's June 14, 2024 mediation request, but subsequently issued a Notice of Failed Mediation on August 9, 2024 after the parties were unable to reach a settlement. AMS finds that MOSA's issuance of the combined Notice of Noncompliance and Proposed Suspension was warranted and hence, allowable under the organic regulations at 7 C.F.R. §205.662(c) which provide for the issuance of a combined notice when correction of the noncompliance is not correctable. As stated above, Superior reported that its Field 420a was contaminated with a prohibited substance.

On September 6, 2024, Superior filed an Appeal, stating that a neighboring conventional operation had sprayed herbicide on their soybean crops during a period of high winds, despite the input having restrictions on its use when winds exceeded 10 m.p.h. The neighboring operation

also violated height and border restrictions, resulting in overspraying onto Superior's Field 420a; Superior stated it has taken legal action against the neighboring operation. Superior also stated that soil samples were taken on July 20, 2023, with testing revealing the presence of Glufosinate at below the limits of quantification (LOQ) on both samples; trace amounts of 2-4-D on both samples; and the residue of Metolachlor on both samples at 0.0210 mg/kg and 0.0160, respectively. The July 24, 2023 laboratory reports were submitted to support the appeal. However, Superior argued that these herbicides are known to deteriorate over time. Superior also states that it destroyed the hemp crop in Field 420a.

Superior further argued that while NOP and MOSA contend that the organic regulations addressing the application of prohibited substances and the removal of contaminated land for 3 years from the date of application are relevant whether the application was intentional or accidental, negligent, or incidental from a neighboring farm, the Minnesota Supreme Court has ruled otherwise. Superior cited to *Johnson v. Paynesville Farmers Union Co-op Oil Co.,* 817 NW.2d 693 (Minn. 2012), in which the Minnesota Supreme Court considered a case involving overspray from a neighboring farm onto an organically certified farm. Superior further argued in the Appeal that the United States Supreme Court recently held that the historical authority of federal agencies to interpret and administer their promulgated statutes and regulations under the *Chevron* doctrine no longer applies.

AMS finds the evidence substantiates that Superior violated the organic regulations, as shown by the findings of prohibited substance residue in soil samples taken from Superior's Field 420a and Superior's own self-report that their Field 420a had been subject to overspray and drift from a neighboring operation's spraying of prohibited substance herbicides on the neighbor's conventional soybean crops.

The organic regulations at 7 C.F.R. §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling, do not distinguish between the intentional application of prohibited substances by the certified operation and accidental application by others, or application or exposure by drift from a conventional neighboring operation that sprayed prohibited substances.

The Organic Foods Production Act of 1990 (the Act), at 7 U.S.C. §6511(c)(2), states that, "If, as determined by the Secretary, the applicable governing State official, or the certifying agent, the investigation conducted under paragraph (1) indicates that the residue is – (A) the result of intentional application of a prohibited substance; *or* (emphasis added) (B) present at levels that are greater than unavoidable residual environmental contamination as prescribed by the Secretary or the applicable governing State official in consultation with the appropriate environmental regulatory agencies; such agricultural product shall not be sold or labeled as organically produced under this chapter." Superior argues that the regulations don't distinguish between intentional and accidental application, so the regulations don't apply to drift. However, the Act clearly addresses the matter of environmental contamination, or drift, and provides that organic crops contaminated by such may not be sold or labeled organic. To interpret the regulations at 7 C.F.R. §205.105 and/or 7 C.F.R. §205.202 otherwise would directly conflict with the plain language of the Act.

Further, as stated above, laboratory reports from the testing of soil samples from Superior's Field 420a revealed the residue of Metolachlor on both samples at 0.0210 mg/kg and 0.0160, respectively. There is no EPA (Environmental Protection Agency) tolerance level for Metolachlor in hemp for human consumption; and therefore, it is prohibited at any level in

organic hemp crops. It is also irrelevant that Superior claims to have destroyed the hemp crop in Field 420a, as the laboratory testing revealed that the prohibited substance remains in the soil.

CONCLUSION

AMS finds the evidence substantiates that Superior violated the organic regulations at 7 C.F.R. §205.102, Use of the term, "organic;" 7 C.F.R. §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling; 7 C.F.R. §205.202, Land requirements; 7 C.F.R. §205.400, General requirements for certification; and 7 C.F.R. §205.406, Continuation of certification. AMS finds that prohibited substance residue has been found on two soil samples taken from Superior's organically certified Field 420a. Superior reported to MOSA that Field 420a was contaminated by the overspraying as well as drift from a neighboring conventional operation that sprayed a herbicide containing a prohibited substance. AMS further finds that the organic regulations are applicable despite Superior's contention that the organic regulations aren't applicable when the contamination occurred due to drift or accidental, unintentional, or negligent application by another operation. AMS finds that Superior's Field 420a can't remain certified.

DECISION

Superior's September 6, 2024 Appeal of the May 7, 2024 Notice of Noncompliance and Proposed Suspension is denied. Superior's Field 420a is to be suspended from organic certification and any crops from that field may not be represented as organic for a period of 3 years from the date of application of the prohibited substance. Field 420a is not eligible for

certification until June 30, 2026, which is 3 years after the July 1, 2023 application of the prohibited substance. Superior's Field 421 is unaffected by this decision and remains certified.

Additionally, attached to this formal Administrator's Decision denying Superior's Appeal is a Request for Hearing form. Should it wish to further appeal this decision, Superior has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

Done at Washington, D.C., on this 12th day of February, 2025.

BRUCE SUMMERS Digitally signed by BRUCE SUMMERS Date: 2025.02.12 11:34:03 -05'00'

Bruce Summers
Administrator
Agricultural Marketing Service