

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re:	)	
	)	
Invernadero Tolentino SPR de RL	)	<b>Administrator's Decision</b>
	)	
	)	<b>APL-071-24</b>
Celaya, Guanajuato,	)	
Mexico	)	

This Decision responds to an Appeal (APL-071-24) of a Notice of Proposed Suspension under the National Organic Program (NOP) issued to Invernadero Tolentino SPR de RL (Tolentino) of Celaya, Guanajuato, Mexico by USDA accredited certifying agent Oregon Tilth Certified Organic (OTCO). The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act)<sup>1</sup> and the U.S. Department of Agriculture (USDA) organic regulations.<sup>2</sup>

### 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

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

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

believe they are adversely affected by a noncompliance decision of a certifying agent may appeal 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 September 10, 2015, Tolentino was certified for crops by OTCO.
2. On December 6, 2022, OTCO issued a Notice of Noncompliance and Proposed Suspension to Tolentino based on finding at the recent inspection that Tolentino failed to take sufficient measures to prevent the contamination of organic crops by conventional crops and inputs applied to conventional crops.
3. On January 3, 2023, after OTCO granted mediation, Tolentino and OTCO entered into a Settlement Agreement, whereby Tolentino agreed to take numerous corrective actions to prevent the contamination of organic product.
4. On February 29, 2024, OTCO conducted an inspection of Tolentino, at which it found that organic product had been placed in a conventional greenhouse where conventional inputs were applied to the organic product.
5. On May 1, 2024, OTCO issued a Notice of Noncompliance based on the inspection findings.
6. On May 17, 2024, OTCO issued a Notice of Proposed Suspension after not receiving a complete or sufficient response to the noncompliance notice and finding that Tolentino placed organic product in a conventional greenhouse, where it was sprayed with conventional prohibited inputs, and in doing so, breached the prior OTCO Settlement Agreement.

7. On July 9, 2024, OTCO denied Tolentino's mediation request stating that it had violated its own Organic System Plan, breached the prior settlement agreement, and sold conventional product as organic.

8. On July 20, 2024, Tolentino filed an Appeal.

### **REGULATORY CITATIONS**

The USDA organic regulations at 7 C.F.R. §205.100, What has to be certified, previously stated that, “(a) Except for operations exempt or excluded in §205.101, each production or handling operation or specified portion of a production or handling operation that produces or handles crops, livestock, livestock product or other agricultural products that are intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s))” must be certified according to the provisions of subpart E of this part and must meet all other applicable requirements of this part ... (c) Any operation that: ... (2) Makes a false statement under the Act to the Secretary, a governing State official, or an accredited certifying agent shall be subject to the provisions of section 1001 of title 18, United States Code.”

The organic regulations at §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 §205.201, Organic production and handling system plan, state that, “(a) The producer or handler of a production or handling operation ... 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; ... (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 §205.400, 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;

(b) Establish, implement, and update annually an organic production or handling system plan ...

(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; and (2) Change in a certified operation or any portion of a certified operation that may affects its compliance with the Act and the regulations in this part.”

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: (1) An updated organic production or handling system plan which includes: (i) A summary statement, supported by documentation, detailing any deviations from, changes to, modifications to, or other amendments made to the previous year’s organic system plan during the previous year ... (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 citations as set forth directly above reflect language in place before the regulatory changes, as the noncompliances cited by OTCO occurred prior to March 19, 2024. However, the above cited sections were not revised on March 19, 2024, except for 7 C.F.R. §205.406(a)(1) which was slightly reworded to rearrange information required of operations.

## **DISCUSSION**

Tolentino was certified organic for crops by OTCO on September 10, 2015. Tolentino produces seedlings/transplants of numerous varieties of several organic products. These seedlings include broccoli, cucumber, eggplant, kale, watermelon, and zucchini. Tolentino also

has a conventional crop operation and has numerous greenhouses, divided between organic and conventional production. On December 6, 2022, OTCO issued a Notice of Noncompliance and Proposed Suspension citing to numerous noncompliances found at two inspections. Specifically, regarding the August 2022 annual inspection, OTCO stated that Tolentino didn't adequately mark/identify the organic and the conventional product trays, using green markers for both, just different shades of green; and also washed and stored the sanitized trays used for organic and conventional products together. Further, the inspector observed black plastic trays and Styrofoam trays used for conventional product being used to produce organic seedlings.

At a subsequent October 2022 unannounced inspection, the inspector observed conventional production occurring in greenhouses which were dedicated to organic production. Per Tolentino's Organic System Plan (OSP), the greenhouses are either dedicated organic or dedicated conventional. Also, the inspector saw trays of transplants in two greenhouses which weren't labeled as organic or conventional, and there was no contamination prevention measures in place. Again, the inspector observed organic and conventional transplant trays stacked together. Further, numerous inputs prohibited in organic production were found to be used in the conventional production, without sufficient measures/barriers to prevent contamination of the organic crops. OTCO also stated the inspector observed the use of Bactiva (Trichoderma) on organic seedlings, when the input hadn't been approved for use on organic crops; and Tolentino didn't record the use. Lastly, OTCO found that the seed search for non-organic seeds of broccoli and celery wasn't available, which was also a reoccurring noncompliance.

AMS finds that OTCO's issuance of a combined Notice of Noncompliance and Proposed Suspension on December 6, 2022 was warranted, as the cited noncompliances represent a deviation from Tolentino's own OSP in addition to the organic regulations, and the cited

commingling of organic and conventional crops and equipment, having already occurred, wasn't correctable. Tolentino didn't appeal the December 6, 2022 combined notice.

After OTCO granted Tolentino's mediation request, the parties entered into a Settlement Agreement on January 3, 2023, whereby Tolentino agreed to take corrective action to ensure that its organic and conventional crops were kept separate and prevent the contamination of the organic crops by conventional products and inputs. Tolentino agreed to obtain approval for all inputs prior to use; maintain an input application log; submit a map of areas encompassing its organic and conventional operations; provide information to clients on the organic management of the organic transplants; and update its OSP to describe how Tolentino will monitor its actions to prevent contamination of the organic crops. Tolentino also agreed to provide training to its staff on the organic regulations and document the training.

On February 29, 2024, OTCO conducted an unannounced inspection of Tolentino; Tolentino had agreed to this in the prior Settlement Agreement. At the inspection, OTCO found that Tolentino's continued to have noncompliances regarding keeping organic and conventional production separate, clearly identifying organic from conventional products, and taking measures to prevent contamination of the organic products by the conventional product. The inspector also noted that Tolentino failed to comply with its own OSP, failed to implement agreed upon corrective actions; and didn't have seed search documentation available. Of particular note, OTCO stated it found that a group of 11 trays of organic watermelon/Sandia variety (b) (4) seedlings, identified as Lot 24204, had been placed in Greenhouse 52B, which was being used for conventional production, despite being identified as organic on Tolentino's certification. The Inspection Report specifically states that Greenhouse 52B was being used as a conventional greenhouse at the time. OTCO further stated that Tolentino's OSP provided for the use of

organic greenhouses for conventional production, but if used for conventional production, only conventional crops could be placed therein, and adequate measures were required to prevent contamination of organic crops in neighboring greenhouses.

Further, while in the conventional greenhouse from February 3 – 27, 2024, conventional inputs were applied to the organic watermelon seedlings. Specifically, Tolentino applied Sumi-Alpha, an insecticide, and Revus 250 SC, a fungicide. OTCO submitted the application records showing that on February 18, 2024 and again on February 25, 2024, Revus 250 SC was applied to the trays of product in Greenhouse 52B. On February 18, 2024, Sumi-Alpha was applied to the trays in Greenhouse 52B. Sumi-Alpha, by Sumitomo Chemical Agro Insecticides, contains the highly active synthetic pyrethroid esfenvalerate. Revus 250 SC, by Syngenta, is a fungicide containing mandipropamid. Neither pyrethroid nor mandipropamid have an EPA (Environmental Protection Agency) tolerance level for watermelon seedlings, or any other type of seedlings. Therefore, they are prohibited in organic production.

OTCO issued a Notice of Noncompliance to Tolentino on May 1, 2024, citing to the findings and stating that Tolentino hadn't complied with its own OSP; and the corrective actions which Tolentino was to implement per the prior Settlement Agreement weren't followed. After Tolentino failed to provide a complete or an adequate response to the noncompliance notice, OTCO issued a Notice of Proposed Suspension to Tolentino on May 17, 2024. OTCO reiterated that Tolentino had placed 11 trays of organic watermelon/Sandia variety (b) (4) seedlings, identified as Lot 24204, in a conventional greenhouse, where they stayed from February 3 – 27, 2024, and were sprayed with 2 conventional inputs containing prohibited substances.

Tolentino didn't dispute the issuance of the proposed suspension notice prior to the 30-day period allowed for response to the noncompliance notice, and instead requested mediation on



May 17, 2024, which OTCO denied on July 9, 2024. OTCO stated in the mediation denial notice that Tolentino's noncompliance was a flagrant violation of their OSP, breached the prior OTCO-Tolentino Settlement Agreement, and demonstrated a repeat of mismanagement of control systems intended to prevent such instances and contamination of organic product. Further, OTCO stated that evidence shows that Tolentino sold the contaminated product as organic. OTCO submitted an Invoice issued by Tolentino to its customer, and which was obtained by OTCO from the customer. The Invoice is dated March 12, 2024, with two line items: the first line shows 11 cantidad (cantidad = quantity) of "Charolas de Sandia Organica" (charolas = trays, of watermelon) at a price of (b) (4) per unit/tray. The second line shows 22 trays of "Charolas de Sandia" at a price of (b) (4) per unit/tray. Further, this Invoice shows that the 11 trays of organic watermelon/Sandia variety (b) (4) seedlings which had been placed in a conventional greenhouse and sprayed with prohibited inputs, were sold as organic.

Tolentino filed an Appeal on July 20, 2024, admitting that 11 trays of organic watermelon/Sandia variety (b) (4) seedlings were placed in a conventional greenhouse, specifically Greenhouse 52B which was being used for conventional production. It further acknowledged that the 11 trays remained in Greenhouse 52B for several weeks and were sprayed with conventional inputs. However, Tolentino states it was a "single instance of a mix-up," and the 11 trays of organic seedlings were placed in the conventional greenhouse because the temperatures outside were unusually low and conventional Greenhouse 52B was heated, and therefore, would ensure "optimal seedling growth." However, the reason for placing the 11 trays of organic seedlings into a conventional greenhouse is irrelevant. Tolentino intentionally placed organic product in a conventional greenhouse where the organic product was sprayed with conventional inputs further contaminating the organic product. Tolentino stated it has identified

the responsible employee, stating that she “did not fully grasp the greenhouse’s organic management plan, despite receiving the necessary training.” Tolentino submitted a training record showing her attendance on February 26, 2024; this was after the 11 trays of organic seedlings had already been placed in the conventional greenhouse on February 3, 2024, and had already been sprayed with conventional prohibited inputs. Tolentino also stated that the employee has been moved to another position and submitted her statement affirming her transfer. However, although Tolentino identified the responsible employee, Tolentino is responsible for the actions of its employees and must provide adequate training to all personnel.

However, in addition to stating the noncompliance was a single incident, Tolentino also alleges that the 11 trays of organic watermelon/Sandia variety (b) (4) seedlings were sold as conventional. Tolentino submitted an Invoice it stated was sent to the customer on March 12, 2024. This is the same Invoice discussed above, which OTCO submitted after receiving it directly from the customer. However, on Tolentino’s submitted copy of the Invoice, the first line item of 11 trays of watermelon/Sandia variety (b) (4) seedlings are not identified as being organic, as was the case with the copy of the Invoice obtained directly from the customer. It appears that Tolentino falsified the document by removing the ‘organic’ designation. It is also noted that although the lot number 24204 doesn’t appear on the Invoice, nor the copy submitted to OTCO by the customer, all other information between the customer copy and the Tolentino copy are identical, except for the ‘organic’ designation of the 11 trays.

Further, Tolentino acknowledged it was Lot 24204 that was cited by OTCO as having been placed in the conventional greenhouse and sprayed with conventional inputs, and Tolentino submitted the same invoice as that submitted by OTCO as including the 11 trays of seedlings from Lot 24204. Lastly, Tolentino submitted with its Appeal an Order form showing that on

March 12, 2024, it sold to the company the 11 trays of watermelon/Sandia variety (b) (4) seedlings known as Lot 24204, and 22 trays of watermelon/Sandia variety (b) (4) seedlings known as Lot 24205. Therefore, Tolentino has confirmed the Invoice discussed herein, with the first line item being 11 trays of watermelon/Sandia variety (b) (4) corresponds to the 11 trays of watermelon/Sandia variety (b) (4) that Tolentino placed in the conventional greenhouse; sprayed with conventional inputs; and sold to the customer.

Tolentino, in addition to stating that it sold the 11 trays of watermelon/Sandia variety (b) (4) seedlings from Lot 24204 as conventional, also offered an explanation for the price difference between Lot 24204 and Lot 24205 of conventional seedlings seen on the Invoice. On the Invoice copies submitted by both Tolentino and the customer, one can see the 11 trays from Lot 24204 were priced at (b) (4) per unit while the 22 trays of conventional seedlings from Lot 24205 were priced at (b) (4) per unit. The price differential corresponds to organic product being pricier, but the term “organic” which appeared on the customer’s copy of the Invoice next to the 11 trays is not noted on Tolentino’s copy. Addressing the inference that Lot 24204 was sold as organic, hence the higher price, Tolentino stated that the 11 trays from Lot 24204 were “charged a different rate because the organic substrate used for this planting has a higher cost.” OTCO couldn’t provide any substantiation for this claim. AMS finds that Tolentino sold the 11 trays of contaminated seedlings as organic despite being aware that they had been held in a conventional greenhouse and sprayed with conventional inputs containing substances prohibited in organic production.

Tolentino stated in its Appeal and an August 2, 2024 letter to NOP that it has new controls in place to prevent any future contamination of organic products, including having ‘organic only’ greenhouses and not placing any organic product in greenhouses 51 – 56;

installing plastic barriers and a 2 meter buffer zone between organic and conventional production areas; maintaining a new log to validate the location of all organic product; and having planting and spreading logs reviewed and verified by a food safety coordinator. These measures are a step in the right direction, but don't negate the violations of Tolentino which aren't correctable. Tolentino already had measures in its OSP which weren't followed.

AMS finds that Tolentino's actions were also a willful and intentional violation of the organic regulations. Tolentino intentionally placed the 11 trays of organic seedlings in a conventional greenhouse without any regard for the organic integrity of the 11 trays, and thereafter sprayed conventional inputs containing prohibited substances on the 11 trays rather than attempt to prevent further contamination of the 11 trays by removing them from the greenhouse when conventional inputs were being sprayed. Tolentino then sold the contaminated 11 trays of watermelon seedlings as organic, knowing they had been in a conventional greenhouse and sprayed with conventional inputs. Further, Tolentino presented to OTCO and NOP an altered/falsified copy of the Invoice it issued when it sold the 11 trays from Lot 24204, with the 'organic' designation removed from the listing of the 11 trays of watermelon/Sandia Variety (b) (4) seedlings, in an attempt to show that the 11 trays were sold as conventional. The copy from the customer shows the 11 trays were sold as organic.

## CONCLUSION

AMS finds the evidence substantiates that Tolentino has violated the organic regulations at 7 C.F.R. §205.100, What has to be certified; 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. §205.201, Organic production and handling system plan; 7

C.F.R. §205.400, General requirements for certification; and 7 C.F.R. §205.406, Continuation of certification. AMS finds that the evidence substantiates that Tolentino violated the organic regulations by intentionally placing 11 trays of organic watermelon/Sandia Variety (b) (4) seedlings from Lot 24204 in a conventional greenhouse; applying conventional inputs containing prohibited substances to the organic seedlings on 3 occasions; and representing and selling the contaminated seedlings as organic. AMS further finds that Tolentino's actions were not only a violation of the organic regulations but also contrary to its OSP; and Tolentino altered/falsified documentation submitted to OTCO and NOP attempting to misrepresent and conceal the fact that Tolentino sold the contaminated seedlings as organic. Therefore, Tolentino can't remain certified.

### **DECISION**

Tolentino's July 20, 2024 Appeal of the May 17, 2024 Notice of Proposed Suspension is denied. Tolentino's certification is to be suspended. However, pursuant to the organic regulations at 7 C.F.R. §205.662(f)(1), Tolentino may apply for reinstatement at any time, with any certifier, upon providing verifiable documentation that it has fully implemented needed corrective measures to clearly separate organic from conventional product in all phases of production; and prevent future contamination of its organic products by prohibited substances.

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

Done at Washington, D.C., on this 3rd  
day of February, 2025.

**BRUCE  
SUMMERS**

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Bruce Summers  
Administrator  
Agricultural Marketing Service