

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
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)
Agricola EBM S.A. de C.V.) **Administrator's Decision**
) **APL-051-22**
)
Baja California, Mexico)
)

This Decision responds to an Appeal (APL-051-22) of a Notice of Noncompliance and Proposed Revocation under the National Organic Program (NOP) issued to Agricola EBM S.A. de C.V. (EBM) of Baja California, Mexico by SCS Global Services (SCS), 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 such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680

¹ 7 U.S.C. 6501-6522

² 7 C.F.R. Part 205

Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

FINDINGS OF FACT

1. On January 14, 2020, EBM became certified for crops.
2. On February 25, 2022, SCS issued a Notice of Noncompliance to EBM.
3. On March 24, 2022, SCS issued a Notice of Noncompliance to EBM.
4. On April 14, 2022, SCS issued a Notice of Noncompliance and Proposed Revocation to EBM.
5. On April 21, 2022, SCS denied EBM’s request for mediation.
6. On May 16, 2022, EBM filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 C.F.R. §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: ... (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 ...” The organic regulations at §205.203, Soil fertility and crop nutrient management practice standard, state that, “(e) The producer must

not use: (1) Any fertilizer or composted plant and animal material that contains a synthetic substance not included on the National List of synthetic substances allowed for use in organic crop production ...”

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 ... must include: ... (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 ... (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

EBM was certified organic for crops, specifically brussel sprouts, peas, and green beans, on January 14, 2020 by SCS. On February 14, 2022, SCS conducted a renewal inspection of EBM and took a sample of brussel sprouts in (b) (4) A (b) (4) [REDACTED] in which it grows organic brussel sprouts. The SIASA (Servicio Integral a la Agroindustria S.A. de C.V.) lab report of February 22, 2022 revealed the

presence of Chlorpyrifos-ethyl at 0.105 mg/kg and Imidacloprid at 0.934 mg/kg in the (b) (4) sample.

The Environmental Protection Agency (EPA) tolerance level for Chlorpyrifos-ethyl in brussel sprouts at that time was 1.0 mg/kg. Therefore, the 5% allowed level in organic brussel sprouts was 0.05 mg/kg. The EPA revoked the tolerance level for this substance on February 28, 2022, barring all use in agricultural crops. The EPA tolerance level for Imidacloprid in brussel sprouts is 3.5 mg/kg and therefore, the allowed 5% level in organic brussel sprouts is 0.175 mg/kg. The levels of these 2 prohibited substances in organic brussel sprouts sampled from EBM's (b) (4) significantly exceed the allowed 5% level. However, EBM's input list didn't contain any prohibited substances.

Therefore, on February 25, 2022, SCS issued a Notice of Noncompliance to EBM detailing the laboratory findings, stating that the brussel sprouts from (b) (4) couldn't be represented or sold as organic, and stating that EBM must submit a written rebuttal or correction action for the noncompliance, along with supporting documentation. SCS instructed EBM to provide an assessment of the affected product including lot numbers and quantities, report on the disposition of the contaminated product, investigate the origin of the contamination, and describe the procedures for preventing contamination in the future.

EBM replied to SCS on March 8, 2022, stating that prohibited substances including Chlorpyrifos-ethyl and Azoxystrobin had been applied to (b) (4) due to input application staff not being supervised. EBM also stated that on March 7, 2022, it had conducted training of staff, specifically, "A training to the personnel that is dedicated to foliar applications and irrigators was made, emphasizing the lists of authorized products, and the identification of toxicity bands and OMRI registers in the label." EBM stated that it renewed the contract of the engineer who is to

oversee the application of inputs, and it conducted sampling and testing of brussel sprouts from (b) (4) on March 1, 2022, and only found Chlorpyrifos-ethyl at 0.03 mg/kg. However, this finding doesn't negate SCS's original findings.

Further, subsequent findings established the application of prohibited substances at all (b) (4) locations. Specifically, on March 10, 2022, SCS conducted an unannounced inspection of EBM's (b) (4) and took samples of the organic brussel sprouts in all (b) (4) locations, collecting leaves at 5 different points within each (b) (4). At the inspection, EBM stated that the prior contamination of (b) (4) was the result of staff from the conventional plots applying inputs without the consent of the organic manager.

The March 17, 2022 SIASA lab reports from the analyses of the samples from the organic brussel sprouts in (b) (4), revealed the presence of 9 different prohibited substances, with most substances found at levels exceeding 5% of the EPA tolerance level allowed in organic brussel sprouts. The results of the SIASA lab reports were charted with the EPA tolerance levels and the 5% allowance for organic crops and show that each of the (b) (4) samples had various prohibited substances, with some of the substances found at levels that were multiple times the allowed levels. These include Chlorantraniliprole at 54.102 mg/kg on (b) (4) 1; at 44.47 mg/kg on (b) (4) and at 58.337 mg/kg on (b) (4)

Therefore, on March 24, 2022, SCS issued a second Notice of Noncompliance, detailing the laboratory findings of the samples from (b) (4); stating that the brussel sprouts from the (b) (4) couldn't be represented or sold as organic; and again asking EBM to provide a written rebuttal or corrective actions in regard to the findings. EBM wrote SCS on March 29, 2022, stating that it has (b) (4) of meshed organic brussel sprouts, and investigated the findings of contamination in (b) (4). EBM acknowledged that the substances found on the

samples aren't allowed in organic crop production, and stated it would sell the brussel sprouts as conventional. EBM didn't mention (b) (4) even though prohibited substances had been found on those samples from February 14, 2022 and March 10, 2022. On April 4, 2022, EBM wrote SCS stating that "ignorance of some workers and the lack of supervision" caused the contamination of (b) (4). EBM stated that it decided to sell the brussel sprouts as conventional which explains the contamination of the crop. EBM wrote SCS on April 6, 2022, stating the brussel sprouts will be sold in the conventional market. SCS stated to NOP that EBM never mentioned converting the brussel sprout (b) (4) to conventional until sampling at the unannounced inspection revealed prohibited substances.

Based on the above, SCS issued a Notice of Noncompliance and Proposed Revocation of certification on April 14, 2022. SCS stated that its review showed that EBM deliberately applied multiple prohibited substances, even after stating that the application of prohibited substances which led to sample results from (b) (4) taken February 14, 2022, was accidental and due to lack of staff supervision. Further, SCS stated that EBM had submitted corrective actions on March 8, 2022, and allegedly conducted training of staff on March 7, 2022. However, despite this, SCS found even higher levels of prohibited substances on samples taken March 10, 2022 at an unannounced inspection. SCS contends that the extremely high levels of some of the prohibited substances shows that the substances were recently applied, even subsequent to EBM's alleged training of its staff and submission of corrective actions. SCS denied EBM's mediation request, stating that "mediation would not be the appropriate course of action due to the nature of the violation." It is noted that the finding of prohibited substances, especially the number of substances and widespread use in this case, isn't correctable.

EBM filed an Appeal stating that it will not market the brussel sprouts from (b) (4) as organic and will remove the (b) (4) of brussel sprouts from its organic production. EBM presented corrective actions including the hiring of qualified personnel, specifically an agronomist to manage its phytosanitary products; separating machinery between organic and conventional production; reviewing its coding system to avoid mixing organic and conventional crops; and reviewing and restructuring its 'work system' to avoid this situation in the future. EBM states that its organic peas and green beans are not affected by, nor close to, the brussel sprout (b) (4) and therefore, should retain certification.

CONCLUSION

Evidence substantiates that EBM willfully violated the organic regulations at 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. §205.202, Land requirements; and 7 C.F.R. §205.400, General requirements for certification. A brussel sprout sample from EBM's (b) (4) taken on February 14, 2022 revealed the presence of prohibited substances, which EBM, addressing the finding on March 8, 2022, blamed on unsupervised staff, and stated that it had conducted training of its staff on March 7, 2022 regarding prohibited substances, and presented corrective actions to SCS. However, 2 days later, SCS conducted an unannounced inspection and samples from (b) (4) of brussel sprouts revealed numerous prohibited substances on every sample, the majority exceeding the 5% of the EPA tolerance level for organic brussel sprouts, and several exceeding the 5% numerous times over. Chlorantraniliprole was found at levels exceeding 250 times the allowed 5% level for organic brussel sprouts.

Such high levels of prohibited substances points to the intentional application of said substances and can't be explained by cross contamination from the conventional land, which isn't close to the organic land. Further, it appears the prohibited substances were applied subsequent to the February 10, 2022 inspection and sampling from (b) (4) which resulted in the February 25, 2022 Notice of Noncompliance. This constitutes a willful violation of the organic regulations and contrary to EBM's corrective actions submitted to SCS and EBM's own input list which didn't include any of the substances. Further, it was only after the March 10, 2022 samples revealed high levels of various prohibited substances, resulting in SCS issuing a 2nd Notice of Noncompliance, that EBM mentioned converting (b) (4) of brussel sprouts to conventional production.

As the application of prohibited substances isn't correctable, and SCS had reason to believe that EBM willfully violated the organic regulations, the issuance of a Notice of Noncompliance and Proposed Revocation was proper pursuant to the organic regulations at 7 C.F.R. §205.662. The use of prohibited materials is a serious violation of the USDA organic standards, and it is essential that organic staff be aware of the regulatory requirements and effectively implement them. Further, any regulatory violations need to be resolved with corrective actions that are effective in their implementation over time. By issuing two noncompliances, SCS provided ample opportunities for EBM to improve its organic control system. Despite this, while EBM stated that it conducted staff training to address its violations, the training didn't result in a correction of the noncompliance. Rather, a subsequent inspection found even higher levels of prohibited substances, resulting in the issuance of a second Notice of Noncompliance.

Effective and timely correction of noncompliances is an important part of maintaining organic certification. EBM was given the opportunity to take adequate corrective measures, but failed to do so. Therefore, due to the severity of the noncompliance and the willful violation of the regulations, EBM may not remain certified and its crop certification should be revoked in its entirety, including not only the brussel sprouts, but also the organic crops of green beans and peas.

DECISION

EBM's May 16, 2022 Appeal of the April 14, 2022 Notice of Noncompliance and Proposed Revocation is denied. EBM's crop certification is to be revoked in its entirety. Pursuant to the organic regulations at 7 C.F.R. §205.662(f), EBM is ineligible to receive certification for 5 years following the date of such revocation. Additionally, if EBM is found to knowingly sell or label its crops as organic, it shall be subject to a civil penalty of not more than the amount specified in 7 C.F.R. §3.91(b)(1) per violation, which is currently set at \$20,130.

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

Done at Washington, D.C., on this 5th
day of September, 2022.

BRUCE SUMMERS

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Bruce Summers
Administrator
Agricultural Marketing Service