

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Gem Empacadora)
Tierra Verde S de RL of CV,) **Administrator’s Decision**
Dba Green Earth Produce)
)
Coatepec, Harinas, Mexico) **APL-043-20**
)

This Decision responds to an appeal (APL-043-20) of a Notice of Noncompliance and Proposed Suspension of National Organic Program certification issued to Gem Empacadora Tierra Verde S de RL of CV, dba Green Earth Produce (Tierra) of Coatepec, Harinas, Mexico, by Organic Crops Improvement Association (OCIA). 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

¹ 7 U.S.C. 6501-6522

² 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. Tierra was initially certified organic for crops and handling on October 22, 2018.
2. On February 6, 2020, OCIA issued a Notice of Noncompliance and Proposed Suspension.
3. On February 17, 2020, OCIA issued a Notice of Mediation Rejection to Tierra’s request for mediation.
4. On March 23, 2020, Tierra filed an Appeal.

DISCUSSION

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 (specific ingredients or food group(s))” must be: (a) Produced in accordance with the requirements specified in §205.101 or §§205.202 through 205.207 or §§205.236 through 205.240 and all other applicable requirements of part 205; and (b) Handled in accordance with the requirements specified in §205.101 or §§205.270 through 205.272 and all other applicable requirements of this part 205.”

The organic regulations at §205.103, Recordkeeping by certified operations, state that, “(a) A certified operation must maintain records concerning the production, harvesting, and handling of agricultural products that are or that are intended to be sold, labeled, or represented

as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)); (b) Such records must: (1) Be adapted to the particular business that the certified operation is conducting; (2) Fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited;...(4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.”

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, except as exempt or excluded under §205.101, 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; (3) A description of the monitoring practices and procedures to be performed and maintained,

including the frequency with which they will be performed, to verify that the plan is effectively implemented; (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 §205.202, 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...”

The organic regulations at §205.270, Organic handling requirements, state that, “...(c) The handler of an organic handling operation must not use in or on agricultural products intended to be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic...” or in or on any ingredients labeled as organic: (1) Practices prohibited under paragraphs (e) and (f) of §205.105.”

The organic regulations at §205.272, Commingling and contact with prohibited substance prevention practice standard, state that, “(a) The handler of an organic handling operation must implement measures necessary to prevent the commingling of organic and nonorganic products and protected organic products from contact with prohibited substances.”

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...”

OCIA proposed a suspension of Tierra’s certification, stating that the December 2, 2019 unannounced inspection revealed numerous noncompliances in Tierra’s operation, including the use of a prohibited substance on its crops, handling products for which it isn’t certified, and commingling organic and conventional products.

In its Appeal, Tierra objects to the unannounced inspection; states that it has operating procedures for the receipt of organic products; will establish traceability procedures; obtain organic certificates for all products; and maintain all required records.

Documentation substantiates that OCIA conducted an unannounced inspection of Tierra’s operation on December 2, 2019 and found many noncompliances. The inspector sampled Tierra’s tomato grape crop in Lot GEM 2B, and subsequent testing at Primus Labs revealed the presence of the insecticide Imidacloprid at 0.13 ppm as seen on the laboratory report of December 11, 2019. The Environmental Protection Agency (EPA), which sets limits on the amount of chemicals allowed on an agricultural product, set the tolerance level for Imidacloprid at 1.0 ppm. Five percent of that tolerance is 0.05 ppm. Therefore, the finding of the substance at 0.13 ppm on Tierra’s tomato grape crop sample exceeds the level above which a product must not be sold, labeled or represented as organic.

The inspection report documents that the inspector observed organic and conventional products being received and stored in the same area. However, Tierra’s Crop Production Overview within its Organic System Plan of October 7, 2019, states that Tierra is an organic-

only operation, and its organic certificate only allows for processing of its own organic crops. However, the inspector observed Tierra's staff packing and labeling as organic the saladette tomatoes and brussel sprouts received from an external operation, and Tierra did not produce an organic certificate for the supplier.

OCIA stated that Tierra doesn't have field crops for these 2 commodities; however, Tierra's Annual Summary of Organic Production and Sales of October 7, 2019, and the list of products for which certification was requested, does include saladette tomatoes. However, while the Annual Summary lists the saladette tomatoes as (b) (4), the list of products for which certification is requested lists the acreage as (b) (4). Therefore, while Tierra does have field crops for saladette tomatoes, the acreage is uncertain. Also, brussel sprouts are seen on the List of Products for which Certification was requested and are mentioned on the Crop Post Harvest Handling document of October 7, 2019 but are not on the Annual Summary. Therefore, OCIA erred in stating in the Notice of Noncompliance and Proposed Suspension that Tierra doesn't have field crops for those 2 commodities, though the inspector observed these same commodities obtained from another source being packed. The inspector also observed jalapeño products in greater quantities than Tierra's jalapeño crops could produce. However, while the Annual Summary shows only (b) (4) of jalapeno peppers, OCIA didn't provide any specific information on the quantity of jalapeno observed during the inspection. Therefore, OCIA's contention regarding jalapeno production cannot be substantiated.

The inspector also found that Tierra didn't maintain facility or equipment cleaning records, and the facility wasn't clean, with insects and vegetable remains seen on the floor. The raw materials door also wasn't kept closed. The inspector found Tierra's 'flow chart' doesn't show any cleaning practices, though Tierra was also found to be handling conventional products.

There were also insufficient records to conduct an appropriate audit trail and mass balance exercise; and Tierra has continued to use an unreadable OCIA seal on its products. The inspector further noted that Tierra's staff didn't show an understanding of organic regulations, weren't aware of the importance of crop rotation, and although Tierra had conducted training on Good Agricultural Practices, there hasn't been staff training on organic practices.

In its Appeal, Tierra objected to the unannounced inspection stating that it wasn't scheduled. However, that is the nature of an unannounced inspection, which are 'surprise' visits and not scheduled with the operation. Tierra also stated it has submitted the noted documentation to OCIA; has operating procedures for receiving organic products; will maintain all required records; will establish traceability and tracking procedures; and will obtain the organic certificates for all received products. However, Tierra didn't submit any documentation or details on these actions/proposed actions. Further, Tierra's statement that it will take these corrective actions substantiates that they weren't in place at the time of the inspection upon which the Notice of Noncompliance and Proposed Suspension was based. Tierra also failed to provide any possible explanation for the finding of a prohibited substance on its tomato grape crop. It is noted that subsequently on June 19, 2020, Tierra notified OCIA that it is surrendering its organic certification, which was acknowledged by OCIA.

In conclusion, evidence substantiates that a prohibited substance was found to have been applied on Tierra's tomato grape crop. While OCIA's allegation regarding the volume of jalapeno peppers wasn't substantiated, Tierra, in effect, admitted not maintaining the cited records when Tierra stated that it would do so in the future. The collective nature of the noncompliances demonstrates an overall failure to comply, justifying the combined notice of

noncompliance and proposed suspension. Further, Tierra states it is surrendering its certification; though, operations can't avoid adverse actions by surrendering certification.

CONCLUSION

The USDA organic regulations assure consumers that products with the USDA organic seal meet consistent, uniform standards. Key to these standards is that products with the USDA organic seal are produced and handled in accordance with the organic regulations. However, Tierra violated the organic regulations at 7 C.F.R. §205.102; 7 C.F.R. §205.103; 7 C.F.R. §205.105; 7 C.F.R. §205.201; 7 C.F.R. §205.202; 7 C.F.R. §205.270; 7 C.F.R. §205.272; and 7 C.F.R. §205.400. These noncompliances do not allow for continued certification. OCIA's issuance of a combined Notice of Noncompliance and Proposed Suspension was justified because the scope of the noncompliances indicates there has been a noncorrectable, systemic failure of Tierra's overall organic system.

DECISION

The Appeal is denied, and the February 6, 2020 Notice of Noncompliance and Proposed Suspension is affirmed. Tierra's organic certification is to be suspended for 3 years from the date of the last sampling for which prohibited substances were found, namely December 2, 2019. Barring the interim use of prohibited substances on the land or crops, Tierra's operation will be eligible to apply for reinstatement of organic certification on December 1, 2022. In addition, Tierra may not sell, represent, or label its agricultural products as organic.

Attached to this formal Administrator's Decision denying Tierra's Appeal is a Request for Hearing form. Tierra has thirty (30) days to request an administrative hearing before an

Administrative Law Judge. If Tierra waives the hearing, the Agricultural Marketing Service will direct OCIA to issue a Notice of Suspension. After the end of the 3-year suspension on December 1, 2022, Tierra may, pursuant to 7 C.F.R. 205.662(g), submit a request to the Secretary for reinstatement of its certification. The request must be accompanied by evidence demonstrating correction of each noncompliance and corrective actions taken to comply with and remain in compliance with the Act and the regulations in this part.”

Done at Washington, D.C., on this _____
day of _____, 2020

**BRUCE
SUMMERS**

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Bruce Summers
Administrator
Agricultural Marketing Service