

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Finca Solo) **Administrator’s Decision**
Guayas, Ecuador) **APL-32-20**

This Decision responds to an appeal (APL-032-20) of a Notice of Noncompliance and Proposed Suspension of National Organic Program (NOP) certification issued to Finca Solo (Solo) of Guayas, Ecuador by Quality Certification Services (QCS), an 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 March 7, 2016, Solo was certified organic for crops, specifically bananas, by QCS.
2. On October 7, 2019, QCS issued a Notice of Noncompliance and Proposed Suspension.
3. On January 24, 2020, QCS issued a Notice of Unsuccessful Mediation regarding Solo's October 24, 2019 request for mediation.
4. On February 24, 2020, Solo filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 CFR §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: ... (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...” The specific synthetic substances on the National List which are allowed for use in organic crop production are identified at §205.601.

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 ... 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 production or handling system plan must include: (1) A description of practices and procedures to be performed and maintained...; (2) A list of each substance to be used as a production or handling input...(3) A description of the monitoring practices and procedures to be performed and maintained...(4) A description of the recordkeeping system implemented to comply with the requirements...(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...”

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, “(a) The producer must select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion. (b) The producer must manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials. (c) The producer must manage plant and animal materials to maintain or improve soil organic matter... (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 §205.205, Crop rotation practice standard, state that, “The producer must implement a crop rotation including but not limited to sod, cover crops, green manure crops, and catch crops that provide the following functions that are applicable to the operation: (a) Maintain or improve soil organic matter content...”

The organic regulations at §205.400, General requirements for certification, state that, “(a) 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 of this part; (b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent... (c) Permit on-site inspections with complete access to the production or handling operation, including noncertified production and handling areas, structures, and offices by the certifying agent... (d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the ...certifying agent access to such records during normal business hours for review and copying to determine compliance with the Act and the 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 organic regulations at §205.401, Application for certification, state that, “A person seeking certification of a production or handling operation under this subpart must submit an application for certification to a certifying agent. The application must include the following

information: (a) An organic production or handling system plan...(b) The name of the person completing the application...and, when the applicant is a corporation, the name...of the person authorized to act on the applicant's behalf..”

Certifier QCS states that the May 29, 2019 inspection revealed numerous noncompliances in Solo's operation, including the use of prohibited substances on its banana crops, missing and inadequate records, ineffective soil management practices, and not allowing the inspector access to the accounting system records.

Appellant Solo states that it is attempting to recover physical and digital records lost during a flood of the offices; and questions the time between the sampling of bananas and banana leaves, and the laboratory results. Solo further contends that errors could have occurred due to 5 different farms being inspected in a short time frame.

A review of the evidence shows that QCS noted several noncompliances constituting violations of several provisions of the organic regulations. QCS found the buffer zones around Solo's organic banana crops were unclear and its maps also do not identify the uses of adjacent land and buffer zones pursuant to 7 CFR §205.202. These regulations require distinct, defined boundaries and buffer zones to prevent the unintended application of a prohibited substance or contact with a prohibited substance. QCS was asked about the buffer zone noncompliance and if it existed at the time of Solo's initial certification. QCS stated that the buffer zone noncompliance was not for an inadequacy in the size of the proposed buffer zones, but rather for the operation's failure to properly manage the buffer zones.

Specifically, QCS stated that banana bunches are covered in plastic bags to protect them during the maturation process while on the tree and different colors are used to distinguish between organic and conventional production. However, the inspector found conventional

colored covers in the organic buffer zones. Also, corbertinas, a type of tie around the top of covers used only in conventional production, were also found in the buffer zones. While QCS didn't provide this detail in the adverse action notice, it does state "plot in the northern area (a mixture of colored covers was evident) ..."

While Solo's maps didn't identify the uses of adjacent lands, Solo's Organic System Plan (OSP) of February 20, 2019 lists the adjacent land plots by name, their acreage, and their production as conventional bananas. Further, while the inspector noted that Solo hadn't taken adequate measures to prevent the commingling of organic and conventional crops and contamination from conventional neighbors based on the above observations, it is not uncommon for commodities grown in buffer zones to be designated as conventional commodities in case of contamination from neighboring conventional production.

However, the inspector also found that the operation engaged in mixed production, with livestock whose pastures were fertilized with prohibited inputs including ammonium nitrates, and there were no practices in place to avoid possible contamination of the organic crops. Solo's OSP identified bananas as its only organic product. Solo didn't identify its organic operation as including livestock. This mixed production and failure to disclose it to QCS created a high risk of contamination of the organic crop, as did the finding that prohibited inputs were used for weed control on the property's roads, which also weren't identified in Solo's Organic Grower Plan as required per 7 CFR §205.401.

The inspection also found spots of bare soil with clear evidence of herbicide application, contrary to 7 CFR §§205.203 and 7 CFR 205.205, which require soil fertility and crop nutrient management practices and crop rotation practices that maintain or improve the physical, chemical and/or biological condition of the soil, and maintain or improve soil organic matter

content. The inspector also observed blue, brown, and green grains in the soil of the banana crops, pointing to the possible presence of fertilizers. However, the inspector couldn't check the different inputs that had been applied to the fields, because Solo's records were found to be incomplete and not sufficiently organized to be audited. There was also a lack of records, including sales invoices, that could identify the substances used. Additionally, QCS found that Solo failed to maintain cleaning-sanitation records for the (b) (4) ██████████ ██████████, despite Solo indicating in its OSP that it would maintain equipment cleaning records.

QCS collected bananas and banana leaves samples within the banana crop, not in a buffer area, as documented on the Sample Collection Checklist and Chain of Custody document. The Groen Agro Control laboratory report of June 13, 2019 for the bananas shows that no residues were detected, and this was reiterated on the Pest Residue Test Results Notification. However, the testing of the banana leaves revealed the presence of several prohibited substances. Specifically, the June 26, 2019 Groen Agro Control laboratory report and corresponding Pest Residue Test Results Notification show the following substances detected, all of which are prohibited in organic production: Difenoconazol, Epoxiconazol, Fenpropimorph, Fenpropidin, Fluopyram, Pyrimethanil, Spiroxamine, Tebuconazole, Tridemorph, and Triadimenol. The presence of these substances on the banana leaves is justification for a suspension of Solo's certification, as it substantiates the presence of prohibited substances in the production area.

Solo didn't contest the finding of the multiple prohibited substances in its Appeal. Rather, Solo only complained that while the cited samples were taken at the May 29, 2019 inspection, the results were delayed with lab reports dated in June 2019, and QCS didn't issue the Notice of Noncompliance and Proposed Suspension until October 7, 2019, prior to which Solo continued to export the bananas to the United States and European Union. The time

between the inspection and sampling and the lab report appears reasonable. However, while the lapse between the issuance of the lab report and the issuance of the adverse action notice is longer, this is not grounds for negating the laboratory findings of prohibited substances on the banana leaves. Further, Solo hasn't offered any alternative explanation for how the prohibited substances came to be on the banana leaves, and only suggests that errors could have occurred in the sampling. However, the Inspection Report of May 29, 2019 also shows the inspector found that Solo's OSP doesn't list all inputs being used or intended for use, and input applications submitted by Solo are not adequately documented to be readily understood and auditable.

QCS' inspection also found other noncompliances. There were no fruit harvest or sales records available for weeks 26 to 52 of crop year 2018, and therefore, the inspector couldn't perform a mass balance exercise. Further, the inspector wasn't given access to accounting system records to determine the actual income of the operation and couldn't determine the destination of fruit produced and sold. These failures to maintain records and provide access to the inspector constituted violations of the recordkeeping requirements at 7 CFR §205.103 and the general requirements for certification under 7 CFR §205.400.

QCS also contended there was a violation of the organic regulations at 7 CFR §205.401, because Solo listed a different responsible person in its OSP than requested certification. However, such a change is not a violation of the organic regulations. One of the purposes of the renewal application is to identify changes in the operations, such as responsible contacts.

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, the evidence substantiates that Solo violated the organic regulations at 7 CFR §205.103; 7 CFR §205.105; 7 CFR §205.201; 7 CFR §205.202; 7 CFR §205.203; 7 CFR §205.205; 7 CFR §205.400; and 7 CFR §205.401. Banana leaf samplings collected during the May 29, 2019 inspection of Solo revealed the presence of numerous prohibited substances. Solo also failed to engage in soil fertility and management practices that maintain or improve the physical, chemical and/or biological condition of the soil. Solo's failure to maintain records on inputs also prevented QCS from determining exactly what inputs were used. Although Solo's noncompliances regarding the maintenance of fruit harvest and sales records are correctable, the presence of several prohibited substances are not.

DECISION

The Appeal is denied, and the Notice of Noncompliance and Proposed Suspension is affirmed. Solo is to be suspended for 3 years from the date of the last sampling for which prohibited substances were found, namely, May 29, 2019. Barring the interim use of prohibited substances on the land or crops, Solo will be eligible for organic certification on May 28, 2022. While it is suspended, Solo may not represent, label, or sell its bananas as organic.

Attached to this formal Administrator's Decision denying Solo's Appeal is a Request for Hearing form. Solo has thirty (30) days to request an administrative hearing before an Administrative Law Judge. If Solo waives the hearing, this Administrator's Decision suspending Solo's certification will become final.

Done at Washington, D.C., on this 11th
day of December, 2020.

BRUCE SUMMERS Digitally signed by BRUCE
SUMMERS
Date: 2020.12.10 21:25:02 -05'00'

Bruce Summers
Administrator
Agricultural Marketing Service