

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Finca Esmeraldas) **Administrator’s Decision**
Guayas, Ecuador) **APL-33-20**

This Decision responds to an appeal (APL-033-20) of a Notice of Noncompliance and Proposed Suspension of National Organic Program (NOP) certification issued to Finca Esmeraldas (Esmeraldas) 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 12, 2015, Esmeraldas 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 Esmeraldas’s October 24, 2019 request for mediation.
4. On February 24, 2020, Esmeraldas 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 30, 2019 inspection revealed numerous noncompliances in Esmeraldas'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 Esmeraldas 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, banana leaves, and soil and weeds, and the laboratory results. Esmeraldas further contends that errors could have occurred due to 5 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, which requires 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 Esmeraldas' 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 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 found in the buffer zones.

However, while the inspector noted in the May 30, 2019 Inspection Report that Esmeraldas 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 herbicide input GPlus was used but wasn't identified in Appellant's Organic System Plan (OSP) as required per 7 CFR §205.401. The inspector also found empty containers from the pesticide Gramoxone on Esmeraldas' property. Further, 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, that require soil fertility and crop nutrient management practices as well as 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 small balls of different colors on the soil and observed the application of brown pellets suspected to be fertilizer.

The inspector couldn't check the different inputs that had been applied to the fields due Esmeraldas' records being incomplete and in disarray, as well as the lack of records, such as sales invoices, that could identify the substances used. While Esmeraldas' maps didn't identify the uses of adjacent lands, Esmeraldas' OSP of February 19, 2019 lists the adjacent land plots by name, their acreage, and their production as conventional bananas.

Therefore, QCS collected samples of bananas, banana leaves, and soil and weeds 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 12, 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 Banana Leaves Pest Residue Test Results Notification show the following substances detected, all of which are prohibited in organic production: Atrazine, Difenconazol, Epoxiconazol, Fenpropimorph, Fenpropidin, Fluopyram, Propiconazol, Pyrimethanil, Spiroxamine, Tebuconazole, Tridemorph, and Triadimenol. The presence of these substances on the banana leaves is justification for a suspension of Esmeraldas' certification as it substantiates the presence of prohibited substances.

A sample was also taken of the soil and weeds around the banana plants where the inspector observed evidence of herbicide use, and the Groen Agro Control laboratory report of June 21, 2019 shows that Paraquat at 3.8 ppm was detected. Paraquat is a prohibited pesticide in organic crop production and is the active ingredient in Gramoxone, for which the inspector found empty containers on the property. This supports the intentional application of a prohibited substance. The Pest Residue Test Results Notification reiterates the findings for the banana soil and weeds.

Esmeraldas in its Appeal didn't contest the finding of the multiple prohibited substances. Rather, Esmeraldas only complained that while the cited samples were taken at the May 30, 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 Esmeraldas 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 was longer, this is not grounds for negating the laboratory findings of prohibited substances on the banana leaves and banana soil and weeds. Further, Esmeraldas hasn't offered any alternative explanation for how the prohibited substances came to be on the banana leaves and banana soil and weeds, and only suggests that errors could have occurred in the sampling. Further, the inspector also found that Esmeraldas' OSP of May 19, 2019 doesn't list all inputs being used or intended for use, and the Inspection Report of May 30, 2019 notes that input applications submitted by Esmeraldas are not adequately documented to be readily understood and auditable. The inspector also found that Esmeraldas' crops don't appear consistent with the non-use of prohibited pesticides, weed, and disease control substances.

QCS' inspection also found other noncompliances regarding recordkeeping. The Inspection Report of May 30, 2019 notes that Esmeraldas' records don't fully disclose all activities and transactions in sufficient detail to be readily understood and audited, and also weren't maintained for at least 5 years beyond their creation as required in the organic regulations. Also, 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. This failure to provide access to the inspector also constituted a violation of the recordkeeping requirements at 7 CFR §205.103 and the general requirements for certification under 7 CFR §205.400.

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 Esmeraldas 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. Specifically, banana leaf samplings and banana plant soil and surrounding weed samplings, all collected on May 30, 2019 from Esmeraldas' banana crops revealed the presence of numerous prohibited substances. The findings, specifically of Paraquat residues in soil samples and empty containers of Gramoxone which has Paraquat as its active ingredient, demonstrates the intentional application of a prohibited substance. Esmeraldas also failed to engage in soil fertility and management practices that maintain or improve the physical, chemical and/or biological condition of the soil and bare spots of ground. Esmeraldas' failure to maintain records on inputs also prevented QCS from determining exactly what inputs were used. Although Esmeraldas' noncompliances regarding the maintenance of records are correctable, the presence of prohibited substances and evidence of their intentional application are not.

DECISION

The Appeal is denied, and the Notice of Noncompliance and Proposed Suspension is affirmed. Esmeraldas is to be suspended for 3 years from the date of the last sampling for which prohibited substances were found, namely, May 30, 2019. Barring the interim use of prohibited substances on the land or crops, Esmeraldas will be eligible for organic certification on May 29, 2022. Esmeraldas may request a reinstatement of organic certification on or after that date. While it is suspended, Esmeraldas may not represent, label, or sell its bananas as organic.

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

before an Administrative Law Judge. If Esmeraldas waives the hearing, this Administrator's Decision suspending Esmeraldas' certification will become final.

Done at Washington, D.C., on this 14th
day of December, 2020.

BRUCE SUMMERS

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Bruce Summers
Administrator
Agricultural Marketing Service