

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re: )  
)  
OSO Sweet Farms LLC ) **Administrator's Decision**  
) **APL-079-22**  
Reidsville, Georgia )  
)

This Decision responds to an Appeal (APL-079-22) of a Notice of Noncompliance and Proposed Suspension under the National Organic Program (NOP) issued to OSO Sweet Farms LLC (OSO) of Reidsville, Georgia by Quality Certification Services (QCS), a USDA accredited certifying agent. 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 believe they are adversely affected by a noncompliance decision of a certifying agent may appeal

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

<sup>2</sup> 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. OSO was certified organic for crops by QCS on April 17, 2018.
2. On July 27, 2022, QCS issued a Notice of Noncompliance and Proposed Suspension to OSO after an unannounced inspection revealed the use of prohibited substances on organic crops.
3. On August 11, 2022, QCS rejected OSO's August 3, 2022 request for mediation.
4. On September 6, 2022, OSO filed an Appeal.
5. On March 23, 2023, OSO and NOP entered into a Settlement Agreement whereby Dutton Field #3 was removed from organic certification with other terms addressing OSO noncompliances.
6. On July 25, 2023, QCS notified NOP that OSO had breached the NOP Settlement Agreement as a prohibited substance was found on organic crops and OSO had failed to identify all used inputs in its Organic System Plan (OSP).
7. On July 26, 2023, NOP issued a Notice of Noncompliance and Request for Corrective Action to OSO to address QCS' allegations.

### **REGULATORY CITATIONS**

The USDA organic regulations at 7 C.F.R. §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)).” Further, the records must, “fully disclose all activities and transactions of the certified operation in sufficient detail as to be readily understood and audited ...”

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 ...” Further, 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; and (c) Have distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.”

The organic regulations at §205.201, Organic production and handling system plan, state that, “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 ... (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; ... (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 ...” Additionally, the organic regulations at §205.406, Continuation of certification, state that, “(a) To continue certification, a certified operation must ... submit the following information ... (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

## **DISCUSSION**

On April 17, 2018, QCS certified OSO for crops. On July 27, 2022, QCS issued a Notice of Noncompliance and Proposed Suspension, because samples of watermelon leaves collected from OSO’s Dutton Field #3 during an unannounced inspection revealed the use of prohibited substances on organic crops. Specifically, laboratory analysis detected Cyazofamid at 2.7 ppm; Fludioxonil at 4.2 ppm; Azoxystrobin at 0.902 ppm; and Tebuconazole at 0.53 ppm. None of these substances have an EPA (Environmental Protection Agency) tolerance level and are not allowed at any level in organic production. QCS also found at the inspection that inputs were used that weren’t disclosed to QCS or seen on OSO’s OSP. As the use of prohibited substances

isn't correctable, QCS was justified in issuing the combined Notice of Noncompliance and Proposed Suspension pursuant to the regulations at §205.662(c).

After QCS rejected OSO's mediation request, OSO filed an Appeal on September 6, 2022, denying the use of a prohibited substance on its organic fields. OSO stated that it has conventional and organic production of watermelon, onions, and cucumbers; and adjoining neighbors produce conventional watermelon. Although OSO acknowledged using the four prohibited substances found on the sampled watermelon leaves in their conventional operation, OSO denied using them on the organic watermelon crop. OSO contended that the residue found on the sample organic watermelon leaf from Dutton Field #3 resulted from a neighbor conducting aerial spraying of its conventional watermelon, or else came from a shared water source which may have been contaminated by runoff from a conventional field. OSO didn't mention drift from their own conventional operation. QCS disputed the drift argument, stating that the sample of watermelon leaf was collected from the interior of Dutton Field #3 and further, there is a large tree buffer zone around Dutton Field #3, and the conventional neighbor is 300 feet away.

OSO acknowledged that Dutton Field #3 was contaminated and stated that the watermelon were sold as conventional; OSO provided several associated invoices showing the sale of the watermelon in early July 2022. OSO also agreed to remove Dutton Field #3 from organic production for 3 years from the date of the positive lab report. Therefore, NOP entered into a Settlement Agreement with OSO on March 23, 2023. The agreement provided for the removal of Dutton Field #3 from organic production, and OSO agreed not to use any prohibited substance on its organic certified crops and to report to its certifier any known unintentional application of such. OSO also agreed to take measures to prevent the contamination of its

organic crops; to identify all planned inputs in its OSP and receive approval from the certifier prior to their use; and to document the use of inputs by input used, area applied to, date of application, and amount used. OSO also agreed it would be subject to two unannounced inspections during the term of the agreement.

On July 25, 2023, QCS reported to NOP that OSO had breached the Settlement Agreement. QCS conducted an unannounced inspection of OSO on June 2, 2023, at which watermelon vines and inedible portions were sampled from the McLeod Field. The laboratory analysis of the watermelon vines revealed the presence of a prohibited substance, Imidacloprid at 0.92 ppm. The finding is shown on a USDA laboratory report of July 24, 2023, from the Gastonia, North Carolina lab. QCS also submitted the Pesticide Residue Test Results Notification, which noted that there is no EPA tolerance level for this substance. The Chain of Custody document shows with photos of the field and the bag containing the sample, and a map showing from where the sample was taken. Further, as noted in the Inspection Report for June 2, 2023 and the Exit Interview, there were no application records for the input Imidacloprid, nor was it listed in OSO's OSP. Further, the inspector found that OSO's 'spray records' showed the use of (b) (4) and (b) (4) on organic fields, though said inputs weren't listed on the OSP.

On July 26, 2023, NOP issued a Notice of Noncompliance and Request for Corrective Action to OSO, asking that it address the QCS allegation of a breach of the Settlement Agreement. On August 24, 2023, OSO provided a response stating that it "does not dispute that Imidacloprid residue was detected in a watermelon vine sample collected at the McLeod (Battle Creek) Field on June 2, 2023," however, OSO disputes that this occurred due to a failure to abide by the Settlement Agreement. Rather, OSO states the contamination resulted from drift by a

landlord's application of Imidacloprid to pecan trees on adjacent land and wasn't discovered until after the watermelons were sold. To support this contention of drift, OSO states they had placed several hives of honeybees in the McLeod Field to pollinate the watermelon crop, and Imidacloprid is fatal to honeybees. Therefore, using Imidacloprid would be counter-productive. Further, the landlord of the adjacent land, when asked by OSO, confirmed that he had sprayed Imidacloprid on the tops of his 60 foot tall pecan trees. OSO also contends that watermelons are classified as part of Crop Group 9 by the EPA and the tolerance level is 0.5 ppm; and therefore, the level found on the watermelon vine is approximately 18% of the EPA tolerance level. Lastly, OSO states it used Imidacloprid to control flies on a cull disposal; however, the area is over 5 miles from the McLeod Field. OSO has reached an agreement with the landlord of the pecan trees not to spray any substances without first notifying OSO.

Regarding the allegation that it used two inputs without prior approval by QCS or listing the inputs in its OSP, OSO denies this allegation. OSO states that while it had a custom of incorporating application records into its OSP after a growing season, without actually listing the inputs in the OSP itself, application records from 2019 show that it used (b) (4) and (b) (4) (b) (4) that crop year. Therefore, QCS was aware that the inputs were used by OSO.

OSO also contested QCS' allegation that it didn't have any input application records available at the June 2, 2023 inspection. OSO states said records were discussed and reviewed during the inspection. OSO provided documentation to support each of its denials and allegations, including a statement from the neighboring landlord; its 2019 Input Application Records, which shows the two questioned inputs and their OMRI certificates; Application Records presented to QCS at the June 2, 2023 inspection; and a statement from an employee

regarding the spraying of Imidacloprid on a cull pile. Further, a September 20, 2023 letter from QCS to OSO shows that the two questioned inputs had been approved by QCS.

QCS reviewed the submissions of OSO responding to the NOP Notice of Noncompliance and Request for Corrective Action and presented its analysis to NOP. First, although watermelons are included in the EPA Crop Group 9 with a tolerance level of 0.5 for Imidacloprid, the residue found on the sampled watermelon vines exceeds the 5% tolerance level for organic watermelon, which OSO has acknowledged. Further, although OSO attributes this finding to drift from an adjacent landlord who sprayed the substance on pecan trees, QCS pointed out that OSO's OSP indicates there is no conventional production adjoining the watermelon fields; that adjoining land is organic; and there is a 50 foot buffer around the watermelon field. Further, QCS identified the location from which the sample was collected which is approximately 70 meters from the closest pecan tree as seen on OSO's field map.

OSO has acknowledged spraying Imidacloprid on a cull disposal area which it states is over 5 miles from the McLeod Field, and the employee who sprayed the substance signed a statement to that effect. However, QCS points to the purchase by OSO of 1 gallon of Imidacloprid in May 2023, which when considering the application directions, is enough to cover OSO's entire organic watermelon crop. Further, this application of Imidacloprid on a cull disposal area isn't documented in OSO's input application records. Nevertheless, AMS doesn't definitively find that it was the OSO-purchased Imidacloprid that was sprayed on the McLeod Field and caused the residue on the sampled watermelon vine, and also notes that OSO has conventional watermelon production, which could explain its presence.

However, the fact remains that residue of Imidacloprid was found on the sampled watermelon vine, which OSO acknowledged; the sample was taken from deep within the

McLeod Field; and the level of Imidacloprid found exceeded the 5% allowance for organic production. Further, it is noted that it is irrelevant that the watermelon vine on which Imidacloprid was found is inedible, as the organic regulations at §205.670 provide for the testing of samples to include “soil; water; waste; seeds; plant tissue; and plant, animal, and processed products samples.”

Therefore, AMS finds that OSO has breached the Settlement Agreement at Terms 4A and 4B, as well as 4C since watermelon from the McLeod Field was already sold prior to the discovery of Imidacloprid residue on watermelon vines. OSO agreed in its NOP Settlement Agreement of March 23, 2023 to refrain from using prohibited substances on its organic fields, and to also take measures to prevent the contamination of its organic land/fields/crops by ensuring the maintenance of adequate buffer zones around the organic production areas. However, evidence substantiates that prohibited substance Imidacloprid was found on sampled/tested watermelon vine from the McLeod Field in a level exceeding that allowed for organic watermelon, and which can't be attributed to drift from spraying on neighboring pecan trees.

QCS also alleges that the Settlement Agreement was breached by OSO's failure to list the inputs (b) (4) and (b) (4) in its OSP prior to their use. However, evidence substantiates that OSO previously used these inputs, which is documented on prior application records; and furthermore, are OMRI listed. Further, even if the inputs weren't specifically identified in the OSP, QCS had OSO's prior application records and knew that OSO used the inputs. QCS has since identified them on a list of approved inputs for OSO. Considering all this, while the Settlement Agreement requires OSO to identify all used and planned inputs in its OSP and not to use any inputs on organic crops/fields until approved by QCS, AMS doesn't find

that OSO breached the Settlement Agreement in regard to the use of these two inputs. However, AMS does find that OSO breached the agreement in regard to the application of Imidacloprid to the cull disposal area, which isn't documented in OSO's input application records. QCS also alleges that input application records weren't available at the June 2, 2023 inspection. OSO disputes this allegation, and as the records have since been submitted to NOP, and would be available to QCS, AMS makes no finding on the allegation. However, the recording of input applications other than contemporaneously with the application itself is not compliant with the organic regulations.

In the appeal, OSO also made allegations against QCS, including the forging of the signature of OSO's representative on the Exit Interview from June 2, 2023; and the inability to access its OSP on QCS's web platform. However, viewing different documents signed by OSO's representative, the signature seems to vary from document to document. Further, as stated by QCS, since there is no requirement that an operation's representative sign the Exit Interview, forgery seems pointless. As to accessing QCS's web platform, AMS also isn't making any finding in this regard, but notes that OSO should also retain copies of documents it has submitted to QCS.

The March 23, 2023 Settlement Agreement between NOP and OSO, Term 4K states that, "OSO agrees that the failure to abide by the terms of paragraphs immediately above shall result in USDA, AMS possibly pursuing administrative action against OSO." Clause 3D of the Settlement Agreement states that, "OSO withdraws its appeal and waives further appeal rights in this matter. Failure to comply with the Settlement Agreement shall automatically void paragraph 2 above." Paragraph 2 states, "USDA, AMS agrees not to issue a formal Administrator's Decision charging OSO with alleged violations of the OFPA and the USDA organic regulations

for any actions disclosed by the investigation which gave rise to this agreement.” A closure letter sent to OSO on March 23, 2023 with the executed agreement also stated that, “... failure to abide by the terms of the agreement shall automatically void the Settlement Agreement and USDA, and AMS may pursue an administrative hearing process.” As seen and substantiated above, OSO has breached the March 23, 2023 Settlement Agreement with NOP; and therefore, may not remain certified.

### **CONCLUSION**

Evidence substantiates that OSO has violated the organic regulations at 7 C.F.R. §205.105; 7 C.F.R. §205.201; 7 C.F.R. §205.202; 7 C.F.R. §205.400, and 7 C.F.R. §205.406, as the prohibited substance Imidacloprid was found on sampled watermelon vine from OSO’s organic McLeod Field, which can’t be contributed to drift. Further, OSO failed to document the application of Imidacloprid to a cull disposal area in input application records. These findings also constitute a breach of OSO’s March 23, 2023 Settlement Agreement with NOP. Therefore, the July 27, 2022 Notice of Noncompliance and Proposed Suspension is revived. OSO can’t remain certified at this time.

### **DECISION**

OSO’s September 6, 2022 Appeal of the July 27, 2022 Notice of Noncompliance and Proposed Suspension is denied, and OSO’s certification is suspended. Pursuant to the organic regulations at 7 CFR §205.662(f), OSO may apply for reinstatement at any time with the request for reinstatement being accompanied by evidence demonstrating that OSO can come into and remain in compliance with the organic regulations. However, OSO’s McLeod Field is ineligible

