

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

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| In re: |) | |
| Berry Fruit SpA |) | Administrator's Decision |
| |) | |
| Retiro, Maule, Chile |) | APL-020-21 |
| |) | |

This Decision responds to an Appeal (APL-020-21) of a Notice of Noncompliance and Proposed Suspension of National Organic Program (NOP) certification issued to Berry Fruit SpA (Berry) of Retiro, Maule, Chile, by Kiwa BCS Oko-Garantie GmbH (BCS), 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. Berry was certified organic for crops, specifically blueberries, by BCS on June 26, 2018.
2. On April 3, 2020, BCS issued a Notice of Revision/Certification identifying the noncompliances found at the 2020 inspection. The notice is akin to a Notice of Noncompliance.
3. On February 25, 2021, BCS issued a Notice of Noncompliance and Proposed Suspension.
4. On March 22, 2021, Berry filed an Appeal.

DISCUSSION

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)).” The regulation further states, “(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; (3) Be maintained for not less than 5 years beyond their creation; and (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part.” The 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... 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 ... (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 established in §205.103; (5) A description of the management practices and physical barriers established 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 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 §205.206, Crop pest, weed, and disease management practice standard, state that, “(a) The producer must use management practices to prevent crop pests, weeds, and diseases including but not limited to: (1) Crop rotation and soil and crop nutrient management practices, as provided for in §§205.203 and 205.205; ... (e) When the practices provided for in paragraphs (a) through (d) of this section are insufficient to prevent or control crop pests, weeds, and diseases, a biological or botanical substance or a substance included on the National List of synthetic substances allowed for use in organic crop production may be applied to prevent, suppress, or control pests, weeds, or diseases:

Provided, That, the conditions for using the substance are documented in the organic system plan.”

The organic regulations at §205.303, Packaged products labeled “100 percent organic” or “organic,” state that, “ ... (b) Agricultural products in packages described in §205.301(a) and (b) must: ... (2) On the information panel, below the information identifying the handler or distributor of the product and preceded by the statement, “Certified organic by * * * ,” or similar phrase, identify the name of the certifying agent that certified the handler of the finished product and may display the business address, Internet address, or telephone number of the certifying agent in such label.”

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 of this part; (b) Establish, implement, and update annually an organic production or handling system plan that is submitted to an accredited certifying agent as provided for in §205.200; ...” The organic regulations at §205.406, Continuation of certification, state that a certified operation must ... submit the following information, as applicable, to the certifying agent: (1) An updated organic production or handling system plan ... (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

The organic regulations at §205.601, Synthetic substances allowed for use in organic crop production, state that, “In accordance with restrictions specified in this section, the following synthetic substances may be used in organic crop production: *Provided*, That, use of such substances do not contribute to contamination of crops, soil, or water... (f) As insect management. Pheromones...(i) As plant disease control. ... (2) Coppers, fixed-copper hydroxide,

copper oxide, copper oxychloride, includes products exempted from EPA tolerance, *Provided*, That, copper-based materials must be used in a manner that minimizes accumulation in the soil and shall not be used as herbicides. (3) Copper sulfate – Substances must be used in a manner that minimizes accumulation of copper in the soil....”

Berry is an organic operation certified for crops by BCS, which stated that Berry failed to submit its complaint handling procedures and mark the status – organic or conventional – of neighboring farms on its maps; and used transport labels on which certification information wasn’t properly marked. Further, Berry sold crops as organic when the plots from which the crops were harvested hadn’t completed their transition period; and Berry didn’t monitor the effect of inputs on soil and plants. Berry emailed NOP on March 22, 2021, requesting an appeal, and subsequently submitted documents which Berry alleges resolve the noncompliances.

The evidence substantiates that Berry was certified organic for crops, specifically blueberries, on June 26, 2018; however, the 4 organic plots still needed to complete the transition period before any blueberries from the plots could be represented, labeled, or sold as organic. BCS conducted an annual inspection of Berry on April 3, 2019 and found several noncompliances, including the use of input Feromana - Brand Lure Feromate on the organic crops. The input hadn’t been evaluated or approved by BCS. Berry’s 2019 Organic System Plan (OSP) only shows fertilizers (b) (4) as being approved. Feromana – Brand Lure Feromate is a pheromone used to control *Lobesia botrana* - European grapevine moths or European grape worms and is allowed in organic production but only under certain circumstances as discussed below and which Berry didn’t meet. The 2019 Inspection Report, as well as the OSP Plot List for 2019, show the application of this input on arandos/blueberry crops on October 15, 2018. The 2018/2019 Pesticide Application Registry

specifically states that this input was applied to the El Encino quarters 1, 2, 3, and 4, on October 15, 2018. Berry's operation is composed of those 4 quarters of (b) (4) hectares each for a total area of organic blueberry production of (b) (4) hectares. Therefore, the entire organic operation was affected.

NOP requested additional information on the product and BCS submitted the product label for Feromona – Brand Lure Feromate, which shows that 73.5% of the product is E, Z-7, 9 – Dodecadien – 1 – YL – Acetato, and the remaining 26.5% are “other” ingredients which aren't identified. BCS stated that Berry failed to provide any information on these other ingredients and/or if they are compatible with the USDA organic regulations. Further, research shows that while 40 C.F.R. § 180.1126 provides that 10 – Dodecadien – 1 01 (albeit a slightly different strength) is exempt from an EPA (Environmental Protection Agency) tolerance level, said exemption only applies if there is only “inadvertent physical contact with the commodity.” BCS stated, and provided photos showing there was direct contact with the plants, with the dispensers tied to the plants. Further, while the organic regulations at 7 C.F.R. §205.601(f) allow the use of pheromones for insect management, that use can't contribute to contamination of crops, soil, or water. However, as with other inputs, noted in herein, Berry hadn't monitored the use of the product. Therefore, the inspector noted that not only should Berry's transition period not be reduced, but that due to the use of the unapproved input with unknown ingredients, Berry must restart the transition period for the 4 organic plots.

BCS also noted that Berry hadn't monitored the application and accumulation of copper inputs on soil and plants in organic plots. Although the 2019 Inspection Report contained a snapshot of a lab analysis from November 14, 2017, a lab report from 2 years prior doesn't constitute monitoring of the soil, nor demonstrate current monitoring. BCS issued a Notice of

Revision/Certification on April 3, 2019, which is akin to a notice of noncompliance, identifying these noncompliances and also stating that Berry's waybills contained insufficient/incorrect information. BCS also issued a Notice regarding Certification on August 7, 2019, noting these noncompliances and that they must be resolved. This was not the first occurrence of Berry's use of an input without approval. The April 3, 2019 Inspection Report noted that a finding at the December 31, 2018 inspection of the use of an unapproved input had been corrected.

On April 3, 2020, BCS conducted an annual inspection of Berry and noted in the Inspection Report that the inspector verified that Berry had ceased using the Feromana - Brand Lure Feromate on the organic blueberry plots. This was also noted in the report under 'Corrective Measures from the Last Inspection.' The Chart of Inputs – Fertilizers for 2020, within the Inspection Report, and the 2020 OSP noted (b) (4), which didn't include the Feromona – Brand Lure Feromate. However, the 2020 Approved OSP Plot List showed the prior application of Feromona – Brand Lure Feromate on October 15, 2018, and therefore, the inspector noted in the Inspection Report that all 4 organic blueberry plots were still in transition, with the transition ending on October 15, 2021.

The inspector also found that Berry still hadn't corrected the noncompliance from 2019 regarding the failure to monitor the application and accumulation of copper inputs to determine the nutritional status of the soil and plants. Although the organic regulations allow the use of identified synthetic substances, the regulations also require that said substances do not contribute to contamination of crops, soil, or water, and operations must document the conditions and need for such inputs in the OSP. However, the inspector found no evidence of Berry monitoring the application, or need thereof, for such an input. Under the section entitled Corrective Measures

from the Last Inspection, the inspector noted that the corrective measure regarding the measuring of copper accumulation was “0%” complete.

Further, BCS found that Berry’s maps didn’t identify the status of neighboring farms as organic or conventional, as seen on a submitted map. The organic regulations require that certified operations fully disclose all activities and transactions in sufficient detail as to be readily understood and audited. Further, a certified operation’s OSP must include a description of all practices and procedures to be performed and maintained, including monitoring practices and procedures, and describe all inputs to be used.

Lastly, the inspector found that Berry sold blueberries from the transitional plots discussed above, as organic without meeting the transition period. Berry was to complete a 3-year transition period before crops harvested from the 4 plots could be represented, labeled, or sold as organic. The inspector specifically stated during the 2019 inspection that not only would the transition period not be reduced, but the 4 blueberry plots needed to restart the transition period. The inspector stated that the blueberry plots were in transition until October 15, 2021. However, an Invoice of February 28, 2020 submitted by BCS shows the sale by Berry of blueberries identified as organic to (b) (4); and the Invoice notes the blueberries are certified organic by BCS. A sales document from January 21, 2020, included in the Translated Portions of the 2020 Inspection Report, shows that Berry sold (b) (4) of blueberries as organic. Additionally, the Mass Balance Calculation for March 4, 2019 to March 4, 2020, within the 2020 Inspection Report, shows that (b) (4) of blueberries were harvested and sold as organic. The inspector noted that he had reviewed harvest records, sales invoices, and waybills. As the blueberries were harvested and sold from plots which were still under

transition, the blueberries weren't eligible to be represented, labeled, or sold as organic until October 15, 2021.

Therefore, on April 3, 2020, BCS issued a Notice of Revision/Certification identifying the noncompliances which is akin to a Notice of Noncompliance and stated that a suspension may be proposed if they are not resolved. Subsequently, after Berry failed to resolve the noncompliances, BCS issued a Notice of Noncompliance and Proposed Suspension on February 25, 2021 citing the same noncompliances. It is noted that at the April 3, 2020 inspection, the inspector had checked whether Berry had resolved the corrective actions regarding the noncompliances cited in the April 3, 2019 Inspection Report and Notice of Revision/Certification of the same date listing those noncompliances. BCS subsequently issued a Notice of Noncompliance Resolution on March 4, 2021 stating that the noncompliances regarding the waybills and the failure to monitor the accumulation of copper in the soil had been resolved. Upon questioning by NOP, on March 24, 2021, BCS stated that the noncompliances cited in 2019 were resolved, but those cited in the February 25, 2021 Notice of Noncompliance and Proposed Suspension from the 2020 inspection weren't resolved. However, as seen above, the noncompliance regarding copper accumulation wasn't resolved, was cited as a noncompliance at the 2020 inspection, and was identified as a noncompliance in the February 25, 2021 Notice of Noncompliance and Proposed Suspension.

Berry stated in an email of March 22, 2021 that it was appealing BCS' adverse action notice but didn't elaborate or provide any documentation or information to support its Appeal. The NOP letter of March 24, 2021 acknowledging the Appeal and sent to Berry, told Berry it had 45 days to submit any supporting information or documentation for its Appeal. As no information or documentation was forthcoming from Berry, NOP emailed Berry on May 3, 2021,

asking if Berry was going to submit any support for its Appeal. On May 11, 2021, Berry emailed NOP, submitting a Complaints Handling Procedure in Spanish, a graph map of its property with the status of neighboring farms marked, a corrected shipping label purportedly having information on the status of the product in the proper location, and a March 3, 2020 lab analysis of the nutritional status of the soil. However, the lab report doesn't contain the name of Berry or any other information linking the report to Berry. Berry only submitted the documents without providing any additional information or statement addressing the adverse action. Further, the submission of these documents purporting to address the noncompliances is in effect an acknowledgment of the noncompliances and that these actions hadn't been previously undertaken or maintained. As a certified operation, Berry is to ensure that it complies with the organic regulations and that the organic integrity of its products is maintained. However, not only has Berry failed to take corrective actions for all the noncompliances but has also sold blueberries as organic which were harvested from plots still under transition and not eligible for organic designation. This noncompliance is contrary to ensuring the organic integrity of products identified as organic.

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 Berry violated the organic regulations at 7 C.F.R. §205.103, Recordkeeping by certified operations; 7 C.F.R. §205.201, Organic production and handling system plan; 7 C.F.R. §205.202, Land requirements; 7 C.F.R. §205.206, Crop pest, weed, and disease management practice standard; 7 C.F.R. §205.303, Packaged products labeled "100

percent organic” or “organic;” and 7 C.F.R. §205.601, Synthetic substances allowed for use in organic crop production. Berry has been unable to comply with or maintain compliance with the organic regulations and therefore, can’t remain certified.

DECISION

Berry’s March 22, 2021 Appeal is denied, and the February 25, 2021 Notice of Noncompliance and Proposed Suspension is affirmed. Berry’s certification is to be suspended. However, pursuant to 7 C.F.R. §205.662(f)(1), Berry may apply for reinstatement of its certification at any time. The request for reinstatement must be accompanied by evidence demonstrating correction of the noncompliances and corrective actions taken to comply with and remain in compliance with the Act and the organic regulations. If Berry’s organic certification is reinstated, Berry must fulfill the identified transition period for its plots before representing, labeling, or selling products as organic.

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

Done at Washington, D.C., on this 25th
day of June, 2021.

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SUMMERS
Bruce Summers
Administrator
Agricultural Marketing Service

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