

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Agricola y Comercializadora) **Administrator's Decision**
Dos Hermanos Spa)
Santiago, Chile) **APL-044-19**
)
)

This Decision responds to an appeal (APL-044-19) of a Notice of Noncompliance and Proposed Suspension of National Organic Program certification issued to Agricola y Comercializadora dos Hermanos Spa (Agricola) of Santiago, Chile by the Certification of Environmental Standards GmbH (CERES). 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 25, 2019, CERES issued a Notice of Noncompliance and Proposed Suspension citing to Agricola’s use of prohibited substances.
2. On April 1, 2019, Agricola submitted an Appeal with a supplement submitted on May 9, 2019.

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 (specified 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...”

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 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 §205.601, 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.” The section specifically lists the allowed synthetic substances. Synthetic substances not listed are prohibited in organic crop production.

The organic regulations at §205.671, Exclusion from organic sale, state that, “When residue testing detects prohibited substances at levels that are greater than 5 percent of the Environmental Protection Agency’s tolerance for the specific residue detected or unavoidable residual environmental contamination, the agricultural product must not be sold, labeled, or represented as organically produced.”

CERES issued a Notice of Noncompliance and Proposed Suspension on March 25, 2019, proposing a suspension of Agricola’s entire operation after two unannounced inspections resulted in finding prohibited substances on samples collected at the inspections. On December 6, 2018, CERES conducted an unannounced inspection and collected lemon leaf samples from Agricola’s (b) (4). The January 18, 2019 laboratory results revealed the residue of Carbendazim at 0.033 mg/kg; Carbendazim/Benomyl at 0.033 mg/kg and Paclobutrazol at 0.013 mg/kg on the lemon leaf samples.

On February 27, 2019, CERES conducted another unannounced inspection and collected avocado leaf and fruit samples from (b) (4) a sample of water was collected from a

sprayer which Agricola uses on its crops. The March 15, 2019 laboratory results revealed the residue of Boscalid at 0.012 mg/kg and Paclobutrazol at 0.89 mg/kg on the avocado leaves and fruit. The March 20, 2019 lab report of the testing of the sprayer water revealed the presence of Carbendazim/Benomyl at 19 µg/l (micrograms per liter); Myclobutanil at 4.5 µg/l; Iprodione at 1.3 µg/l; Triadimefon at 1.0 µg/l; Diazinon at 0.14 µg/l; Flusilazole at 0.19 µg/l; Kresoxim-methyl at 0.03 µg/l and Paclobutrazol at 0.22 µg/l.

CERES stated that these various prohibited substances are typically used in citrus and fruit trees as fungicides, and that the high concentrations of all the substances points to direct use and application. Therefore, CERES issued the Notice of Noncompliance and Proposed Suspension for Agricola's entire operation, including the lemon and avocado crops.

In its Appeal, Agricola denies the use of prohibited substances on its lemon and avocado crops. Agricola states it collected its own samples of lemon leaves, which it submitted for analysis. The samples collected from the border of the property show higher levels of the specific prohibited substances than samples collected from the interior of the lemon crop. Agricola contends this proves that the contamination is due to drift and not its direct application of the Carbendazim, Carbendazim/Benomyl, and Paclobutrazol found in CERES' lab results. Regarding the avocado leaves and fruit, Agricola states it submitted samples for analysis; however, Agricola acknowledges that its lab results show levels of Boscalid and Paclobutrazol which are similar to the levels found in the lab reports submitted by CERES. Agricola agrees that the avocado crop should be removed from certification. Agricola states that its sampling and testing of the sprayer water didn't detect any residue, which differs from CERES' testing, which found multiple prohibited substances.

Agricola was initially certified organic for crops and handling on May 19, 2017. CERES' surprise inspections of Agricola's operation and analysis of lemon leaves collected at the December 6, 2018 inspection and analysis of avocado leaves and fruit, and water from a crop sprayer collected at the February 27, 2019 inspection show the presence of numerous synthetic prohibited substances. In its appeal, Agricola attempted to refute and/or explain the results of the laboratory analysis of samples CERES took at the two inspections.

Agricola submitted a laboratory report of February 25, 2019 showing that sampled lemon leaves had residue for Carbendazim at 0.071 mg/kg; Carbendazim/Benomyl at 0.071 mg/kg; and Paclobutrazol at 0.016 mg/kg. These levels are slightly higher than those seen in CERES' lab reports from the lemon leaf samples collected at the December 6, 2018 inspection, but Agricola states the lemon leaf samples noted in this report were collected from the border of their property. Agricola states it also took lemon leaf samples from the center of its property and submitted a second laboratory report of February 25, 2019 which showed levels of Carbendazim at <0.01; Carbendazim/Benomyl was undetected; and Paclobutrazol at <0.01. Additionally, Agricola submitted a lab report on lemon leaf samples collected on April 4, 2019, almost 4 months after CERES' inspection and sampling. The May 3, 2019 report states no pesticides were detected on the sampled lemon leaves. Agricola contends these results prove that the substances were not directly applied but are due to drift from a neighbor. Agricola also argues that the finding of these prohibited substances in higher levels along the lemon crop border doesn't mean the entire field is contaminated. However, Agricola also states that the substances are not approved for use in Chile and that its neighboring farms do not use the pesticides found on the lemon leaf sample, which contradicts Agricola's claim that the substances came to be on

the lemon leaves due to drift. Further, even if Chile prohibits the use of the substances, that doesn't prove that they weren't used in Chile.

Additionally, even if Agricola's February 2019 lemon leaf samples had lower levels of the prohibited substances than the leaves sampled by CERES at the December 6, 2018 inspection, and the April 2019 samples showed no pesticides, the findings don't negate CERES' lab reports/analysis of samples from the earlier inspection. As CERES contends, new samples collected 10 weeks later, and for the April 2019 sample, almost 4 months later, have no determinative value since any substances applied to or found on the lemon leaves from earlier would have degraded over time resulting in lower levels in subsequent samples.

To support this point, CERES cited The University of Hertfordshire which maintains a Pesticide Properties Database from the International Union of Pure and Applied Chemistry. The database states that Carbendazim has a half-life in vegetative material of 2.2 – 32 days, while Paclobutrazol has a half-life of 4.4 – 6 days, which would explain subsequent lower levels if the substances weren't reapplied to the lemon crop. (A half-life is the time it takes for a concentration of a substance to fall by half its initial value.) Additionally, CERES' refusal to take new lemon leaf samples at the February 27, 2019 inspection is irrelevant, because regardless of the results from taking new samples, the prior findings of prohibited substances remains. Lastly, it is noted that CERES stated it had provided information to Agricola on the requirements and procedures for counter sample analysis; however, CERES couldn't confirm if Agricola followed the procedures for its sampling and testing.

Regarding the avocado leaves and fruit, Agricola states that CERES took extra samples at the February 27, 2019 inspection which it left with Agricola, and which it submitted separately for testing. However, Agricola acknowledges that the lab results for samples of avocado leaves

it submitted show levels of Boscalid and Paclobutrazol which are similar to the levels found in lab reports submitted by CERES. Agricola's lab reports do not include the fruit. Specifically, CERES submitted a lab report of March 15, 2019 which shows the residue of Boscalid 0.012 mg/kg and Paclobutrazol at 0.89 mg/kg on avocado fruit and leaves sampled at the February 27, 2019 inspection. Agricola's lab reports of March 6, 2019 show Boscalid at 0.01 mg/kg from 1 sample of avocado leaves, and Boscalid at .011 mg/kg and Paclobutrazol at 0.455 mg/kg from the other sample of avocado leaves.

Agricola attempts to explain the prohibited substance residues found on the avocado leaves and fruit, stating it discovered that the same tractor that had just applied Paclobutrazol to the conventional Gem avocados was used by mistake to apply Purespray Green Oil to the organic avocados even though there is separate tractor used exclusively for the organic crops. The conventional tractor had also previously been used to apply Boscalid to conventional crops. It is noted that CERES states it was not aware that Agricola had conventional avocados as they were not declared in Agricola's organic plan. However, CERES contends that the level of Boscalid on the avocado leaf and fruit samples is too high to be attributed to the use of a tractor used for the conventional crops with Boscalid residue remaining on the tractor. Regardless, Agricola states the avocado crop was contaminated and agrees the avocado crop should be removed from its certification.

Lastly, CERES' testing of the sprayer water sampled at the February 27, 2019 inspection revealed, in the March 20, 2019 report, the presence of Carbendazim/Benomyl at 19 µg/I; Myclobutanil at 4.5 µg/I; Iprodione at 1.3 µg/I; Triadimefon at 1.0 µg/I; Diazinon at 0.14 µg/I; Flusilazole at 0.19 µg/I; Kresoxim-methyl at 0.03 µg/I and Paclobutrazol at 0.22 µg/I, all of which are prohibited synthetic substances. It is understandable to find the

Carbendazim/Benomyl and Paclobutrazol in the water sample, since those substances were also found on the lemon leaf samples and the sprayer had been used on the lemon crop. CERES also states that the laboratory double-ran the sample and confirmed its initial findings.

Agricola states that it took a sample of the sprayer water which it sent for testing, and the lab report of March 15, 2019 doesn't reveal any pesticide residue in the sprayer water sample. However, the analysis scope of the laboratory used by Agricola didn't include testing the sprayer water sample for fungicides Carbendazim/Benomyl, Triadimefon, Flusilazole, Iprodione, Kresoxim-methyl, and Paclobutrazol. Therefore, it is expected that the results wouldn't reveal these substances and the results aren't contradictory to the lab report from CERES' sample which revealed numerous prohibited substances.

Agricola also argues that although CERES states that Myclobutanil, Iprodione, and Triadimefon were found in the water sample, those substances were not found on the lemon leaf sample or the avocado leaves and fruit. However, while this is true, it is not known on what crop/area the sprayer had been used immediately prior to CERES taking its water sample. Further, the absence of these substances in the lemon and avocado samples doesn't contradict the possibility that these pesticides were used on prior occasions and degraded under field conditions as opposed to inside a sprayer. The University of Hertfordshire's Pesticide Properties Database shows that Myclobutanil and Triadimefon degrade much faster in soil than in water. Additionally, the sprayer in question is allegedly used only on organic crops and shouldn't have any fungicide residue.

CERES notes that citrus fruits including lemons and avocados are both highly susceptible to diseases caused by fungi, and the substances found on the lemon leaves, avocado leaves and fruit, and in the water sprayer are fungicides. The University of California Agriculture and

Natural Resources Department confirms the susceptibility of lemons and avocados to fungi. CERES also contends that the concentration of the prohibited substances points to direct application by Agricola. Agricola's Organic Management Plan indicates there are problems with fungi in Agricola's operation, specifically the lemon crop. However, while Agricola's desire to control or eradicate the fungi from its crops is understandable, the use of such fungicides/pesticides is prohibited under the organic regulations.

The Environmental Protection Agency (EPA) has established tolerance levels for various pesticide chemicals, setting limits on the amount of the chemical allowed on an agricultural product. It is noted that pursuant to 40 C.F.R. Part 180, the synthetic substances Carbendazim; Carbendazim/Benomyl; Paclobutrazol; Myclobutanil; Iprodione; Triadimefon; Diazinon; Flusilazole; and Kresoxim-methyl do not have established EPA tolerance levels. According to the Federal Food, Drug and Cosmetic Act, imported commodities are considered adulterated unless the EPA has established a tolerance for the pesticide on that commodity and the residues are within the tolerance (21 U.S.C. 346(a)). Therefore, these substances must not be used on agricultural commodities that will enter the U.S. market. However, because the residue was found on the lemon leaves, but the lemon fruit was not sampled, we are not reporting these results to the EPA. The one substance found in the samples that has an EPA tolerance is Boscalid, with a tolerance in or on avocados of 1.5 ppm. For Boscalid, 5% of the EPA tolerance is 0.075 ppm. Therefore, the above-referenced lab reports showing levels of 0.012, 0.011, and 0.01 ppm on avocado leaf and fruit samples are below that threshold. Paclobutrazol was also detected on avocado fruit and leaf samples. There is no EPA tolerance for Paclobutrazol in or on avocados.

Lastly, it is noted that CERES also issued a Notice of Noncompliance and Proposed Suspension to Agricola on the same basis regarding Agricola's compliance with Chile's agriculture standards; and the Chilean Agriculture and Livestock Service (SAG), to which Agricola appealed, supported CERES' decision to downgrade Agricola's operation to conventional.

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. Prohibited synthetic substances have been found on samples from Agricola's lemon crop, avocado crop, and a water sprayer used on the crops. The evidence shows that prohibited substances were applied to the lemon and avocado crops. Regardless of residue levels, the application of such substances is a violation of the organic regulations at 7 C.F.R. 205.102; 7 C.F.R. 205.105(a); and 7 C.F.R. 205.601. Therefore, Agricola's crops may not be represented, labeled, or sold as organic.


DECISION

The appeal is denied and Agricola's organic certification as to crops is to be suspended for 3 years from the date of CERES' last sampling, February 27, 2019. Agricola is also prohibited from representing, labeling, or selling its crops as organic during the 3-year suspension period. Agricola's certification for handling is unaffected.

Attached to this formal Administrator's Decision denying Agricola's appeal is a Request for Hearing form. Agricola has thirty (30) days to request an administrative hearing before an Administrative Law Judge.

If Agricola waives the hearing, the Agricultural Marketing Service will direct CERES to issue a Notice of Suspension for Agricola's crop certification for 3 years. Barring the interim use of any prohibited substance on the crops, Agricola will be eligible for reinstatement of its organic crop certification on February 27, 2022, after the 3-year suspension period has ended. 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 7th
day of October, 2019.



Bruce Summers
Administrator
Agricultural Marketing Service