

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re: )  
Dwight Miller and Son Orchards ) **Administrator's Decision**  
D. Read Miller ) **APL-029-17**  
Malah Miller )

This Decision responds to an appeal (APL-029-17) of a Combined Notice of Noncompliance and Proposed Revocation of National Organic Program certification issued to Dwight Miller and Son Orchards (DMO) of Dummerston, Vermont by Vermont Organic Farmers, LLC (VOF). 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 § 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 such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680

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

<sup>2</sup> 7 C.F.R. Part 205

Adverse Action Appeals Process – General, and § 205.681, Appeals of the USDA organic regulations.

### FINDINGS OF FACT

1. VOF is an accredited certifying agent under the USDA organic regulations. DMO of East Dummerston, Vermont, is certified under USDA organic regulations for crops.
2. On January 18, 2017, VOF conducted routine residue sampling that generated positive test results for substances prohibited in organic production, including Captan, Diphenylamine, Phosmet, Boscalid, and Pyraclostrobin. Phosmet and Pyraclostrobin levels exceeded the established Environmental Protection Agency's (EPA) tolerance:  
Phosmet (EPA tolerance of 10 ppm for apple<sup>3</sup>) tested at 31 ppm  
Pyraclostrobin (EPA tolerance of 1.5 ppm for pears group 11-10<sup>4</sup>) tested at 71 ppm
3. On February 24, 2017, VOF notified the Vermont Agency of Agriculture (VAA) of the Phosmet and Pyraclostrobin test results, as required by §205.670(g). VAA opened a separate investigation.
4. Between February 27 and March 1, 2017, VAA investigators collected 9 samples of DMO fruit: 2 from a retail setting in Vermont and 7 directly from DMO's farm. All samples tested positive for the same prohibited substances identified in the VOF sample, with the addition of Acetamiprid, which is also prohibited. Eight of the samples tested at levels greater than 5% of the EPA tolerance, which is a violation of §205.671.
5. On April 6, 2017, VOF issued a Combined Notice of Noncompliance and Proposed Revocation.

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<sup>3</sup> 40 CFR 180.261, Phosmet; tolerances for residues. Available at [https://www.ecfr.gov/cgi-bin/text-idx?SID=982227dcdee8fe6fd6c312dde988c81a&mc=true&node=se40.26.180\\_1261&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=982227dcdee8fe6fd6c312dde988c81a&mc=true&node=se40.26.180_1261&rgn=div8)

<sup>4</sup> 40 CFR 180.582, Pyraclostrobin; tolerances for residues. Available at [https://www.ecfr.gov/cgi-bin/text-idx?SID=982227dcdee8fe6fd6c312dde988c81a&mc=true&node=se40.26.180\\_1582&rgn=div8](https://www.ecfr.gov/cgi-bin/text-idx?SID=982227dcdee8fe6fd6c312dde988c81a&mc=true&node=se40.26.180_1582&rgn=div8)

6. On May 10, 2017, DMO submitted to AMS its formal appeal of the Combined Notice of Noncompliance and Proposed Revocation.

### DISCUSSION

VOF proposed a revocation of DMO's organic certification which would make the operation and all persons responsibly connected with the operation ineligible to receive certification for a period of 5 years following the date of revocation. The proposal is based on the outcomes of VOF and VAA investigations, each of which include test results that indicate the Appellant's fruit tested positive for substances prohibited in organic production. Additionally, the Certifier and the VAA consider the Appellant's explanation for the presence of these substances to be inconsistent with the levels detected in the samples.

Test results show the levels of prohibited substances to exceed the NOP threshold for exclusion from organic sale, set at 5% of the established EPA tolerance. In addition, some levels exceeded the EPA's tolerances. In the VOF sample, results show Phosmet and Pyraclostrobin are 310% and 4733% above the EPA tolerance, respectively. In the VAA's sample, the levels of prohibited substances exceed the 5% NOP maximum threshold for Acetamiprid, Boscalid, Phosmet and Pyraclostrobin<sup>5</sup>.

During each investigation, the Appellant provided statements to VOF and VAA that suggested either storage conditions or insufficient equipment cleaning may have resulted in unintentional contamination.

In the appeal, D. Read Miller of DMO explained that the operation first commingled organic and non-organic fruit in 2016. He wrote, "the fruit that was organically grown by me was not marked as such" and, "the conventionally grown fruit was not marked as such either." He

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<sup>5</sup> Acetamiprid -maximum NOP threshold of 0.05 ppm; Boscalid -maximum NOP threshold of 0.15 ppm; Phosmet - maximum NOP threshold of 0.5 ppm; Pyraclostrobin -maximum NOP threshold of 0.075 ppm

also provides statements that suggest the noncompliance may have occurred in January 2017, when he was away from the farm.

### CONCLUSION

USDA Organic regulations state “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 synthetic substances and ingredients, except as provided in §205.601 or §205.603” (§205.105(a)). Fruit samples collected by the Appellant’s Certifier and the Vermont Agency of Agriculture confirmed through two separate lab reports the presence of substances prohibited in organic production of fruit marketed as organic. The levels and pesticide residue identified in these analyses indicates that prohibited substances were applied directly to the fruit, and are not the result of unintentional contamination as suggested by the Appellant.

Producers or handlers must also develop an organic system plan that is agreed to by the accredited certifying agent (§205.201). This plan includes “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.” Although the Appellant attests to the storage of non-organic crops in unmarked bins, and to the purchase of used farm equipment, none of this information was included in the Appellant’s 2016 organic system plan, nor were the intentions disclosed to VOF during the 2016 on-site inspection.

In summary, the combination of laboratory results, omissions to the organic system plan, and inconsistency in statements made by the Appellant over the course of two separate investigations, demonstrate willful violation of organic regulations.

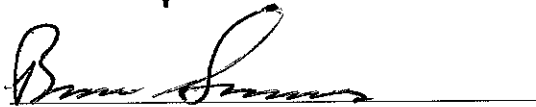
## DECISION

The appeal is denied and VOF's Notice of Noncompliance and Proposed Revocation is upheld. Dwight Miller and Son Orchards, operated by D. Read Miller, is to have its organic certification revoked for a period of 5 years.

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

If Dwight Miller and Son Orchards waives the hearing, the Agricultural Marketing Service will direct VOF to issue a Notice of Revocation. The revocation will be effective for five years from the date of the hearing waiver. After the 5 year-period, the operation may, "...submit a request to the Secretary for reinstatement of its certification. 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 11<sup>th</sup>  
day of September, 2017.



Bruce Summers  
Acting Administrator  
Agricultural Marketing Service