

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re: )  
Haciban S.A. ) **Administrator's Decision**  
El Oro, Ecuador ) **APL-067-19**  
)

This Decision responds to an appeal (APL-067-19) of a Notice of Noncompliance and Proposed Suspension of National Organic Program certification issued to Haciban S.A. (Haciban) of El Oro, Ecuador, by Control Union Peru SAC (Control Union). 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 such decision to the USDA Agricultural Marketing Service (AMS) pursuant to § 205.680

---

<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. On July 26, 2017, Haciban became certified for crops, specifically bananas.
2. On December 4, 2017, Control Union conducted an inspection of Haciban's two farms, the Colon 1 Farm and the Mercedes Farm, and collected banana fruit samples from both. The resulting December 14, 2017 laboratory report found a prohibited substance on the banana fruit samples from both farms. The prohibited substance was Z-Cypermethrin, for which there is no EPA tolerance in/on bananas.
3. On May 11, 2018, Control Union issued a Notice of Proposed Suspension to Haciban, stating that Haciban has been unable to determine the source of contamination detected in the previous inspection. Control Union noted that Haciban had presented a letter, purporting to be from [REDACTED], Haciban's aerial fumigation company, stating that only allowed substances were used on the Colon 1 and Mercedes farms. However, [REDACTED] stated they did not issue that letter.
4. On May 16, 2018, Haciban requested mediation, alleging irregularities in the Control Union audit. No details on this allegation were provided. Haciban further stated that it obtained the letter in question from [REDACTED], who presented himself as a supplier of [REDACTED]. Haciban also stated that its analysis of banana fruit had shown no prohibited substances in a laboratory report of August 30, 2017.

5. On June 12, 2018, Control Union conducted another inspection and sampled banana fruit and banana leaves from both of Haciban's farms. The subsequent June 27, 2018 laboratory report showed numerous prohibited substances on the leaves from both farms.
6. On August 9, 2018, Control Union issued a Notice of Proposed Suspension to Haciban, citing to the second detection of prohibited substances found on banana leaf samples collected during the June 12, 2018 inspection and sampling.
7. On August 14, 2018, Haciban completed an Incident Report stating that the contamination of the banana leaves on its farms could be due to ineffective cleaning by [REDACTED] of mixing systems and the supply plane, as [REDACTED] also conducts aerial fumigation for conventional farms. Haciban also suggested that the contamination could be due to aerial and ground spraying at a neighbor's conventional farm. Haciban noted planned corrective actions to be taken: changing its aerial services to [REDACTED] and expanding the buffer zones on the two farms.
8. On August 31, 2018, Haciban requested mediation, proposing an agreement whereby Control Union would take fruit samplings two or three times per year and would conduct two additional inspections per year, to corroborate Haciban's fulfillment of corrective measures.
9. On September 3, 2018, Control Union accepted Haciban's mediation request, and set forth conditions for mediation, specifically that Haciban would commence a 3-year transition period and both farms must successfully undergo a conversion to obtain organic certification, during which time Haciban may not sell, label, represent any product from the two farms as organic. Control Union would also conduct two audits per year, during which time banana leaf samplings would be collected.

10. On September 5, 2018, Haciban stated it would not accept the terms of mediation and would instead appeal the Notice of Proposed Suspension to the USDA.
11. On September 18, 2018, Haciban's Appeal to the August 9, 2018 Notice of Proposed Suspension, was received by NOP.
12. On March 20, 2019, at the direction of NOP, Control Union rescinded the May 11, 2018 and August 9, 2018 Notices of Proposed Suspension because it hadn't issued notices of noncompliance prior to issuing the proposed suspension notices, nor was the August 9, 2018 notice a combined notice of noncompliance and proposed suspension. Control Union was instructed to follow proper procedures in issuing adverse action notices.
13. On March 22, 2019, NOP dismissed the September 18, 2018 Appeal of Haciban as the Notices of Proposed Suspension had been rescinded.
14. On April 3, 2019, Control Union issued a Combined Notice of Noncompliance and Proposed Suspension citing to the June 27, 2018 laboratory findings of prohibited substances found on banana leaf samples collected from both Haciban farms during the June 12, 2018 inspection and sampling.
15. On July 16, 2019, after having accepted Haciban's request for mediation, Control Union issued a Mediation Failure letter stating that Haciban didn't agree to the terms of the proposed mediation agreement.
16. On August 24, 2019, Haciban filed an Appeal to the April 3, 2019 Combined Notice of Noncompliance and Proposed Suspension which was accepted.
17. On October 4, 2019, Control Union issued a Notice of Noncompliance based on finding prohibited substances on banana leaf samples collected from both Haciban farms during a September 12, 2019 inspection.

18. On December 13, 2019, Control Union issued a Notice of Proposed Suspension citing to the September 12, 2019 inspection of the 2 Haciban farms and sampling and testing of banana leaves from both farms which again found prohibited substances.
19. Haciban didn't file an Appeal to the December 13, 2019 notice and Control Union subsequently issued a Notice of Suspension on January 22, 2020. However, although Haciban has now been suspended, the Notice of Proposed Suspension is being addressed here as the adverse action was issued for the same violation, the finding of prohibited substances, when Control Union conducted 'follow up' inspection, sampling, and testing.

### **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 (specific 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; and (b) Handled in accordance with the requirements specified in §205.101 or §§205.270 through 205.272 and all other applicable requirements of this 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 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 §205.202, 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 §205.671, 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...”

Control Union previously proposed a suspension of Haciban’s organic certification, which would prohibit the sale, labeling, or representation of its products as organic. Control Union detected prohibited substances on banana fruit and banana leaf samplings from Haciban’s two farms on three occasions in the last two years. Laboratory analysis of banana fruit samples collected at the two farms at the December 4, 2017 inspection revealed a prohibited substance on the fruit samples from both farms. Control Union refutes Haciban’s suggestion that the prohibited substance was the result of its aerial fumigation company not properly cleaning equipment used in fumigating both organic and conventional crops. Haciban also suggested that possibly drift from aerial and ground spraying at a neighbor’s conventional farm caused the prohibited substance on its banana fruit.

However, Control Union found that Haciban was unable to determine the actual source of the contamination, and that a letter submitted by Haciban, allegedly from its aerial fumigation company, [REDACTED], was fraudulent. Control Union had contacted APACSA to inquire about the letter and was told that the company hadn’t issued it. Subsequently, an inspection and

sampling of banana fruit and banana leaves at both farms on June 12, 2018 found multiple prohibited substances on the banana leaves of both farms. Control Union previously attempted to mediate with Haciban, which wouldn't accept the conditions of mediation. A second attempt at mediation was made after Control Union issued the Combined Notice of Noncompliance and Proposed Suspension, but Haciban again refused to accept the terms of the proposed mediation agreement. During the pendency of the August 16, 2019 Appeal filed by Haciban, Control Union conducted another inspection of Haciban's 2 farms on September 12, 2019, collecting banana leaf samples from both farms. Laboratory tests of these samples again revealed prohibited substances.

In its Appeal of the April 3, 2019 Combined Notice of Noncompliance and Proposed Suspension, Haciban contends that the prohibited substances on the banana fruit and banana leaves are a result of [REDACTED] not properly cleaning its spraying equipment after doing aerial fumigation over conventional farms. Haciban also suggests that drift from a neighbor's conventional farm may be to blame. Haciban states their sampling and laboratory tests of August 30, 2017 did not reveal any prohibited substances. Haciban previously suggested continued sampling and testing on a regular basis, and also proposed corrective actions of changing its fumigation service and expanding its buffer zones on the two farms. Haciban subsequently changed its aerial fumigation service from [REDACTED] to [REDACTED] and submitted numerous statements and certifications from [REDACTED] regarding [REDACTED]'s inspection, calibration, and cleaning of its equipment. Haciban also re-submitted the maps of the Colon 1 and Mercedes farms, with buffer zones marked.

A review of the evidence shows that sampling and testing of banana fruit and banana leaves from Haciban's two farms have resulted in findings of prohibited substances on three

occasions since Haciban's initial certification on July 26, 2017. The first finding was a result of testing on banana fruit samples collected December 4, 2017 from both farms, only five months after certification. The December 14, 2017 laboratory analysis report from AGQ Labs & Technological Services shows a finding of Z-Cypermethrin at 0.054 ppm on the sample from the Colon 1 farm and Z-Cypermethrin at 0.012 ppm on the sample from the Mercedes farm.

The second finding of prohibited substances occurred after an inspection on June 12, 2018, when additional banana fruit and banana leaves were sampled and subsequently tested. The June 27, 2018 laboratory analysis report from Eurofins shows a finding of Clortalonil at 0.013 mg/kg; Difenconazol at 0.065 mg/kg; Espiroxamina at 0.60 mg/kg; Fenpropidina at 1.9 mg/kg; Flutriafol at 0.022 mg/kg; Isopirazam at 0.14 mg/kg; Pirimetanil at 0.12 mg/kg; Propiconazol at 0.068 mg/kg; Tebuconazol at 0.36 mg/kg; and Triadimenol at 0.31 mg/kg. These substances were found on the banana leaves from the Colon 1 and Mercedes farms from which the samples were mixed.

The third finding of prohibited substances occurred after an inspection of September 12, 2019, when additional banana leaf samples were collected and tested. The September 25, 2019 laboratory analysis report from Eurofins shows a finding of Chlorothalonil at 0.18 mg/kg; Fenpropidine at 0.11 mg/kg; and Pyrimethanil at 0.013 mg/kg for the mixed sample of leaves from both farms. This third finding occurred after the August 16, 2019 Appeal of the April 3, 2019 Notice of Noncompliance and Proposed Suspension but is addressed here as Control Union had continued to monitor Haciban for use of prohibited substances.

The Environmental Protection Agency (EPA) has established tolerance levels for various chemicals, setting limits on the amount of the chemical allowed on an agricultural product. The substances Clortalonil; Difenconazol; Espiroxamina; Fenpropidina; Isopirazam; Pirimetanil;



Propiconazol; and Tebuconazol do not have established EPA tolerance levels. The substances Z-Cypermethrin and Triadimenol have EPA tolerance levels but not for bananas. Therefore, bananas with residues of any of these substances must not be sold, labeled or represented as organic, and, furthermore, are considered adulterated under the Federal Food, Drug and Cosmetic Act. In this case, the banana crop sampled in December 2017 and which contained Z-Cypermethrin, should not have been sold, labeled or represented as organic. Except for Z-Cypermethrin, residues of the pesticides listed above were found on samples of banana leaves rather than banana fruit. While this does not exclude the edible crop from the organic market on that basis alone, it is evidence of applications of prohibited substances in the organic production area.

Three of the substances - Chlorothalonil, Flutriafol and Pyrimethanil – have an EPA tolerance for bananas and exceeded the allowed 5% threshold for organic products. Specifically, Chlorothalonil has a tolerance in bananas of 0.5 ppm, making the allowed 5% threshold in organic products 0.025. The finding of 0.18 of Chlorothalonil exceeds the allowed threshold. Flutriafol has a tolerance in bananas of 0.30 ppm, making the allowed 5% threshold 0.015. Therefore, the finding of 0.022 exceeds the allowed threshold. Lastly, Pyrimethanil has a tolerance in bananas of 0.10 ppm, making the allowed 5% threshold 0.005. Therefore, the finding of 0.013 exceeds the allowed threshold. Therefore, every substance found in the samples of banana fruit and leaves from Haciban's 2 farms is prohibited per the USDA organic regulations.

Haciban previously suggested that its then-aerial fumigation company, [REDACTED] was to blame for the prohibited substances on Haciban's banana fruit and leaf samples due to inefficient cleaning of plane tanks used in the fumigation since [REDACTED] does aerial fumigation on

conventional and organic farms. Haciban submitted a letter to Control Union purportedly from [REDACTED] which stated that only allowed substances were used in the aerial fumigation of Haciban's Colon 1 and Mercedes farms on November 29 and 30, 2017. However, Control Union contacted [REDACTED] which stated it didn't write the letter and deemed it fraudulent. [REDACTED] provided a written reply to Control Union confirming the letter was fraudulent. Further, [REDACTED] was Haciban's contractor. Hence, Haciban is responsible for the actions or inactions of [REDACTED] and can't justify or excuse the finding of prohibited substances by blaming [REDACTED]. Haciban submitted invoices from [REDACTED] for fumigation services from mid-June and mid-July 2018, along with an Aerial Application Checklist of August 27, 2018. However, these documents post-date the samplings of banana fruit and leaves on December 4, 2017 and June 12, 2018 and resulting findings of prohibited substances and can't negate the laboratory findings. Haciban also submitted laboratory reports from August 30, 2017; however, these are not relevant as they pre-date the first finding of prohibited substances by over 3 months.

Haciban has changed its aerial fumigation service from [REDACTED] to [REDACTED] and submitted numerous statements and certifications from [REDACTED] regarding its inspection, calibration, and cleaning of its equipment. These documents include a Commitment Letter of Aircraft Spray Calibration; a Certificate stating that [REDACTED] will triple wash its containers; and a Certificate of Procedures. All the documents are on [REDACTED]'s letterhead and are dated August 9, 2019. However, while the change in companies and FumiPalma's commitment are "good going forward," they don't negate the prior findings of prohibited substances. Further, subsequent to, and despite, the change in fumigation services, the banana leaf samples collected at the September 12, 2019 inspection again revealed the presence of prohibited substances.

Haciban also suggested drift from a neighboring conventional farm may be to blame and stated that the neighbors confirmed they use the prohibited substances listed on the laboratory reports of December 14, 2017 and June 27, 2018. Control Union stated that Haciban has been unable to determine the exact source of the contamination which includes prohibited substances Cipermetrina (Cypermethrin); Clortalonil; Difenconazol; Espiroxamina; Fenpropidina; Flutriafol; Isopirazam; Pirimetanil; Propiconazol; Tebuconazol; and Triadimenol. However, Haciban presented the Registry of Application of Phytosanitary Products 2018 for [REDACTED], who Haciban claims is a neighboring farmer. This document shows [REDACTED] grows conventional bananas, and that prohibited substances Clortalonil and Difenconazol were used by [REDACTED] on his crops. However, the authenticity of this document hasn't been established; and the document doesn't account for other prohibited substances found on Haciban's banana fruit and banana leaves. Additionally, the subsequent inspection and sampling of banana leaf samples on September 12, 2019 revealed the presence of additional prohibited substances Chlorothalonil and Pyrimethanil. Further, even if drift from Orrantia's farm could explain the prohibited substances found on Haciban's banana fruit and banana leaves, it doesn't excuse the contamination. Even if one assumes that the contamination was a result of drift from conventional neighbors, it is Haciban's responsibility as an organic operation to have adequate buffer zones to prevent drift contamination. Haciban has re-submitted the maps of the Colon 1 and Mercedes farms, with buffer zones marked and one can see the buffer zone between Haciban's Colon 1 farm and Orrantia's farm. However, again, while an increased buffer zone is advantageous going forward, it doesn't negate the prior findings and prohibited substances were found again on samples collected on September 12, 2019.

Finally, in a prior case, Control Union accepted Haciban's request for mediation, and Haciban proposed additional inspections and samplings of banana fruit and banana leaves. However, Haciban wouldn't accept conditions set by Control Union. Specifically, Haciban would not agree that the two farms must be removed from organic production and go through a three-year transition to obtain organic certification again. After issuing the April 3, 2019 Combined Notice of Noncompliance and Proposed Suspension, Control Union again accepted Haciban's request for mediation. Control Union again offered a mediation agreement whereby Haciban would agree to remove the Colon 1 and Mercedes farms from organic production for 3 years due to the findings of prohibited substances. Further, the agreement would require Haciban to undergo 2 inspections per year; inform Control Union of any changes to its Organic Management Plan; meet the deadlines for responding to any future notices of noncompliance; and not use any prohibited substances on its fields. Haciban again rejected Control Union's terms for an agreement resulting in Control Union issuing the July 16, 2019 Mediation Failure notice. Haciban had proposed that Control Union take samples from the farms multiple times each year, and stated that they hired a new aerial fumigation service, will hire a plant technician, and will extend the buffer zone around the farms. However, Haciban wouldn't agree to the 3-year ban on the farms required under 7 C.F.R. 205.202 when prohibited substances are found. Subsequent testing on banana leaf samples from September 12, 2019 again revealed the presence of prohibited substances.

In conclusion, banana fruit and banana leaf samplings from Haciban's two farms, Colon 1 and Mercedes, have revealed prohibited substances on three occasions within 2 years. The organic regulations at 7 C.F.R. §205.202, specifically require that land from which harvested organic crops are sold, labeled, or represented as organic must not have had prohibited

substances applied to it for a period of 3 years immediately preceding the harvest. Also, the organic regulations at 7 C.F.R. §205.105 state that synthetic substances and ingredients may not be used in organic crop production unless they are allowed per the National List. However, none of the substances detected are an allowed substance per the organic regulations. Further, the prohibited substance, Z-Cypermethrin, found on the banana fruit samples does not have an EPA tolerance for bananas. Therefore, pursuant to the regulations at 7 C.F.R. §205.671, bananas containing residues of Z-Cypermethrin, or any other pesticide for which there is no EPA tolerance, would be adulterated and cannot be sold as organic or conventional. Haciban has not been able to rebut the laboratory findings of prohibited substances. Also, although Haciban has obtained a new aerial fumigation service which has equipment cleaning procedures in place, this doesn't negate the prior findings of prohibited substances. Further, sampling and testing after the change in fumigation services again revealed the presence of prohibited substances.

### **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, Haciban violated the organic regulations at 7 C.F.R. §205.102; 7 C.F.R. §205.105; 7 C.F.R. §205.202; and 7 C.F.R. §205.671. These noncompliances do not allow for continued certification.


## DECISION

The appeal is denied and the suspension of Haciban's organic certification is affirmed. Haciban is not eligible for organic certification for 3 years from the date of the last sampling for which prohibited substances were found on Haciban's two farms, Colon 1 and Mercedes, specifically September 12, 2019. Barring the interim use of prohibited substances on the land or crops, the two farms will be eligible for organic certification on September 11, 2022, when Haciban may apply for reinstatement of its organic certification pursuant to 7 C.F.R. §205.662(f). Until Haciban's certification has been reinstated, it may not sell, label, or represent a product as organic.

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

If Haciban waives the hearing, the Agricultural Marketing Service will direct Control Union to issue a Notice of Suspension. At any time after suspension, Haciban 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." Haciban may work with any certifier to complete a request for reinstatement.

Done at Washington, D.C., on this 10<sup>th</sup>  
day of February, 2020.

  
Bruce Summers  
Administrator  
Agricultural Marketing Service