

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:)
Finca San Jose) **Administrator’s Decision**
Guayas, Ecuador) **APL-34-20**
)

This Decision responds to an appeal (APL-034-20) of a Notice of Noncompliance and Proposed Suspension of National Organic Program (NOP) certification issued to Finca San Jose (San Jose) of Guayas, Ecuador by Quality Certification Services (QCS), 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. On March 28, 2016, San Jose was certified organic for crops, specifically bananas, by QCS.
2. On October 7, 2019, QCS issued a Notice of Noncompliance and Proposed Suspension.
3. On January 24, 2020, QCS issued a Notice of Unsuccessful Mediation regarding San Jose’s October 24, 2019 request for mediation.
4. On February 24, 2020, San Jose filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 CFR §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)). (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; ... (4) Be sufficient to demonstrate compliance with the Act and the regulations in this part...”

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 §205.201, 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... An organic production or handling system plan must include: (1) A description of practices and procedures to be performed and maintained...; (2) A list of each substance to be used as a production or handling input...(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...(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...”

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 §205.203, Soil fertility and crop nutrient management practice standard, state that, “(a) The producer must select and implement tillage and cultivation practices that maintain or improve the physical, chemical, and biological condition of soil and minimize soil erosion. (b) The producer must manage crop nutrients and soil fertility through rotations, cover crops, and the application of plant and animal materials. (c) The producer must manage plant and animal materials to maintain or improve soil organic matter... (e) The producer must

not use: (1) Any fertilizer or composted plant and animal material that contains a synthetic substance not included on the National List of synthetic substances allowed for use in organic crop production...”

The organic regulations at §205.205, Crop rotation practice standard, state that, “The producer must implement a crop rotation including but not limited to sod, cover crops, green manure crops, and catch crops that provide the following functions that are applicable to the operation: (a) Maintain or improve soil organic matter content...”

The organic regulations at §205.400, General requirements for certification, state that, “(a) 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... (c) Permit on-site inspections with complete access to the production or handling operation, including noncertified production and handling areas, structures, and offices by the certifying agent... (d) Maintain all records applicable to the organic operation for not less than 5 years beyond their creation and allow authorized representatives of the ...certifying agent access to such records during normal business hours for review and copying to determine compliance with the Act and the 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...”

The organic regulations at §205.401, Application for certification, state that, “A person seeking certification of a production or handling operation under this subpart must submit an application for certification to a certifying agent. The application must include the following

information: (a) An organic production or handling system plan...(b) The name of the person completing the application...and, when the applicant is a corporation, the name...of the person authorized to act on the applicant's behalf..”

Certifier QCS states that the May 28, 2019 inspection revealed numerous noncompliances in San Jose's operation, including the use of prohibited substances on its banana crops, missing and inadequate records, ineffective soil management practices, and not allowing the inspector access to the accounting system records.

Appellant San Jose states that it is attempting to recover physical and digital records lost during a flood of the offices; and questions the time between the sampling of bananas, banana leaves, and banana soil and weeds, and the laboratory results. San Jose further contends that errors could have occurred due to 5 different farms being inspected in a short time frame.

A review of the evidence shows that QCS noted several noncompliances constituting violations of several provisions of the organic regulations. QCS found the buffer zones around Solo's organic banana crops were unclear and its maps also do not identify the uses of adjacent land and buffer zones pursuant to 7 CFR §205.202. These regulations require distinct, defined boundaries and buffer zones to prevent the unintended application of a prohibited substance or contact with a prohibited substance. QCS was asked about the buffer zone noncompliance and if it existed at the time of San Jose's initial certification. QCS stated that the buffer zone noncompliance was not for an inadequacy in the size of the proposed buffer zones, but rather for the failure to properly manage the buffer zones. Specifically, QCS stated that banana bunches are covered in plastic bags to protect them during the maturation process while on the tree and different colors are used to distinguish between organic and conventional production. However, the inspector found conventional colored covers in the organic buffer zones. Also, corbertinas, a

type of tie around the top of covers used only in conventional production, were found in the buffer zones. While QCS didn't provide this detail in the adverse action notice, the inspector noted in the Inspection Report of May 28, 2019 that the buffer zones and safeguard measures to prevent contamination from conventional inputs on adjacent lands weren't adequate.

While San Jose's maps didn't identify the uses of adjacent lands, San Jose's Organic System Plan (OSP) of February 19, 2019 lists the adjacent land plots by name and the crops, though it doesn't state whether those adjacent crops are organic or conventional. Further, it is not uncommon for commodities grown in buffer zones to be designated as conventional commodities in case of contamination from neighboring conventional production.

However, the inspector also found that the operation engaged in mixed production, with conventional production at another location which San Jose hadn't claimed. The Inspection Report notes that San Jose's conventional production was not adequately described in the OSP. In fact, San Jose's OSP states that it is an organic operation only. However, empty bags from ammonium nitrate were seen on San Jose's property and San Jose also acknowledged using the foliar fertilizer Ecosis XXI, for which no application records were maintained. The inspector also noted that San Jose's input applications weren't adequately documented so as to be readily understood and auditable. San Jose also couldn't produce any invoices or purchase records for the post-harvest inputs (b) (4) and other inputs and there were no practices in place to avoid possible contamination of the organic crops. Further, San Jose's OSP didn't list all inputs used as required per 7 CFR §205.401.

The inspection also found spots of bare soil with clear evidence of herbicide application, contrary to 7 CFR §205.203 and 7 CFR §205.205, which require soil fertility and crop nutrient management practices as well as crop rotation practices that maintain or improve the physical,

chemical and/or biological condition of the soil, and maintain or improve soil organic matter content. The inspector also observed brown grains in the soil of the banana crops, pointing to the possible presence of fertilizers. However, the inspector couldn't check the different inputs that had been applied to the fields because San Jose's records were incomplete and in disarray. There was also a lack of records, such as sales invoices, that could identify the substances used. Additionally, QCS found that San Jose failed to maintain cleaning-sanitation records for the (b) (4), despite San Jose stating in its OSP that it would maintain equipment cleaning records.

Therefore, QCS collected samples of bananas, banana leaves, and soil and weeds within the banana crop, not in a buffer area, as documented on the Sample Collection Checklist and Chain of Custody document. The Groen Agro Control laboratory report of June 13, 2019 for the bananas shows that no residues were detected, and this was reiterated on the Pest Residue Test Results Notification. However, the testing of the banana leaves revealed the presence of several prohibited substances. Specifically, the June 25, 2019 Groen Agro Control laboratory report and Banana Leaves Pest Residue Test Results Notification show the following substances detected, all of which are prohibited in organic production: Difenoconazol, Epoxiconazol, Fenpropimorph, Propiconozol, Spiroxamine, Tebuconazole, Tridemorph, and Triadimenol. The presence of these substances on the banana leaves is justification for a suspension of San Jose's certification as it substantiates the presence of prohibited substances in the production area.

Samples were also collected of the soil and weeds around the banana plants. The Groen Agro Control laboratory report of June 21, 2019 shows the presence of Paraquat at 1.1 ppm. Paraquat is a prohibited pesticide in organic crop production. The second Groen Agro Control report dated June 20, 2019, for soil and weed samples shows Glifosato, Glufosinato, and AMPA

(Aminomethylphosphonic acid) all at <0.5 ppm. These substances are also prohibited in organic production. Pest Residue Test Results Notification sheets reiterates the findings for the banana soil and weeds.

San Jose didn't contest the finding of the multiple prohibited substances in its Appeal. Rather, San Jose only complained that while the cited samples were taken at the May 28, 2019 inspection, the results were delayed with lab reports dated in June 2019, and QCS didn't issue the Notice of Noncompliance and Proposed Suspension until October 7, 2019, prior to which San Jose continued to export the bananas to the United States and European Union. The time between the inspection and sampling and the lab reports appears reasonable. However, while the lapse between the lab reports and the issuance of the adverse action notice is longer, this is not grounds for negating the laboratory findings of prohibited substances on the banana leaves and banana soil and weeds. Further, San Jose hasn't offered any alternative explanation for how the prohibited substances came to be on the banana leaves and banana soil and weeds, and only suggests that errors could have occurred in the sampling. However, the Inspection Report also shows the inspector found that San Jose's OSP doesn't list all inputs being used or intended for use, and the field and crop production don't appear to be consistent with the use of approved fertilizer inputs. Additionally, the inspector noted that San Jose isn't prepared to immediately notify QCS of the application of any prohibited substance to the fields or crops.

QCS' inspection also found other noncompliances. The inspector couldn't perform a mass balance exercise due to inconsistencies between the numbers for covered and harvested banana clusters. A traceability exercise couldn't be performed for product in week 39 of 2018 as there wasn't any documentation available. There were also insufficient records to audit organic production from conventional production. Further, the inspector wasn't given access to

accounting system records to determine the actual income of the operation and also couldn't determine the destination of fruit produced and sold. San Jose also didn't present Sigatoka evaluation documents for 2018 and week 12 of 2019 to explain the use of phytosanitary products for this leaf-spot disease of banana plants. These failures to maintain records and provide access to the inspector constituted violations of the recordkeeping requirements at 7 CFR §205.103 and the general requirements for certification under 7 CFR §205.400. QCS also noted that San Jose's OSP lists the operation as being (b) (4) hectares, while Ecuador's Ministry of Agriculture, Livestock, Aquaculture and Fisheries lists the farm as (b) (4) hectares.

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 San Jose violated the organic regulations at 7 CFR §205.103; 7 CFR §205.105; 7 CFR §205.201; 7 CFR §205.202; 7 CFR §205.203; 7 CFR §205.205; 7 CFR §205.400; and 7 CFR §205.401. Banana leaf samplings and banana plant soil and surrounding weed samplings collected during the May 28, 2019 inspection of San Jose revealed the presence of numerous prohibited substances. San Jose also failed to engage in soil fertility and management practices that maintain or improve the physical, chemical and/or biological condition of the soil. San Jose's failure to maintain records on inputs also prevented QCS from determining exactly what inputs were used. Although San Jose's noncompliances regarding the maintenance of various records are correctable, the presence of prohibited substances is not.

DECISION

The Appeal is denied, and the Notice of Noncompliance and Proposed Suspension is affirmed. San Jose is to be suspended for 3 years from the date of the last sampling for which prohibited substances were found, namely, May 28, 2019. Barring the interim use of prohibited substances on the land or crops, San Jose will be eligible for organic certification on May 27, 2022. While it is suspended, San Jose may not represent, label, or sell its bananas as organic. Attached to this formal Administrator's Decision denying San Jose's Appeal is a Request for Hearing form. San Jose has thirty (30) days to request an administrative hearing before an Administrative Law Judge. If San Jose waives the hearing, this Administrator's Decision suspending San Jose's certification will become final.

Done at Washington, D.C., on this 21st
day of December, 2020.

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Bruce Summers
Administrator
Agricultural Marketing Service