

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

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| In re: |) | |
| S & M Foods S.A.C. |) | |
| |) | Administrator's Decision |
| |) | |
| Lima, Peru |) | APL-79-20 |
| |) | |

This Decision responds to an Appeal (APL-079-20) of a Notice of Noncompliance and Proposed Suspension of National Organic Program (NOP) certification issued to S & M Foods S.A.C. (S & M) of Lima, Peru, by Certification of Environmental Standards GmbH (CERES), 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. S & M is an organic operation initially certified on February 3, 2016 for handling.
2. On July 8, 2020, CERES issued a Notice of Noncompliance and Proposed Suspension.
3. On July 23, 2020, CERES denied S & M’s July 20, 2020 mediation request.
4. On August 21, 2020, S & M filed an Appeal.

DISCUSSION

The USDA organic regulations at 7 CFR §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: ... (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 §205.103, 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; (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. (c) The certified operation must make such records

available for inspection and copying during normal business hours by authorized representatives of the ... the certifying agent.”

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 §205.201, 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, indicating its composition, source, location(s) where it will be used, and documentation of commercial availability, as applicable; (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; and (6) Additional information deemed necessary by the certifying agent to evaluate compliance with the regulations.”

The organic regulations at §205.270, Organic handling requirements, state that, “(c) The handler of an organic handling operation must not use in or on agricultural products intended to

be sold, labeled, or represented as “100 percent organic,” “organic,” or “made with organic (specified ingredients or food group(s)),” ... (1) Practices prohibited under paragraphs (e) and (f) of §205.105.”

The organic regulations at §205.272, Commingling and contact with prohibited substance prevention practice standard, state that, “(a) The handler of an organic handling operation must implement measures necessary to prevent the commingling of organic and nonorganic products and protect organic products from contact with prohibited substances.”

The organic regulations at §205.300, Use of the term, “organic,” state that, “(a) The term, “organic,” may only be used on labels and in labeling of raw or processed agricultural products, including ingredients, that have been produced and handled in accordance with the regulations in this part.”

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...; (c) Permit on-site inspections with complete access to the production or handling operation, including noncertified production and handling areas, structures, and office 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...”

The organic regulations at §205.406, Continuation of certification, state that, “(a) To continue certification, a certified operation must ... submit the following information, as

applicable, to the certifying agent: ... (4) Other information as deemed necessary by the certifying agent to determine compliance with the Act and the regulations in this part.”

CERES issued a Notice of Noncompliance and Proposed Suspension after finding numerous noncompliances at an inspection of S & M, involving separation of organic and non-organic products; a risk of contamination of organic products by prohibited substances; recordkeeping requirements; the refusal to cooperate during the inspection; and notification by a customer that pesticide residue was detected on product received from S & M.

A review of the evidence shows CERES conducted an inspection of S & M on June 24, 2020 at which it found numerous noncompliances. Specifically, CERES found that S & M failed to provide for sufficient separation of organic and non-organic products during reception, processing, and storage. The inspector found S & M was processing organic and conventional quinoa on the same production line; and S & M’s hard-copy records and digital documentation system do not provide for the correct separation of the organic and conventional finished product. The inspector was also not able to successfully conduct a traceability exercise from raw materials through the finished products. S & M took several hours to provide information on the mass balance of organic quinoa and was unable to present information on the mass balance of conventional quinoa for 2019. The inspector found S & M didn’t have a system enabling the summarization of quantities of purchased raw material, amount of processed and stored finished organic product, and amount of organic sales. Further, the inspector found that for conventional sales, S & M receives a verbal report from staff on the quantity of each batch, which is entered into a spreadsheet, but doesn’t maintain documentation. CERES also stated that S & M refused to cooperate during the inspection, denying access to portions of the operation, and did not have requested records available.

CERES also stated in the adverse action notice that the inspector found a container of Galaxy 10, containing alpha-cypermethrin, in close proximity with organic products in processing, storage, and transport areas which creates a risk of contamination of organic products. Specifically, alpha-cypermethrin is a prohibited substance for which the Environmental Protection Agency has set a tolerance level for various agricultural products. S & M stated that although the Galaxy 10 was found in the 'cleaning product warehouse inside the processing plant,' it would ensure that such products would henceforth only be kept in the warehouse of Plant 1 for conventional production only, and no such products would be allowed in Plant 2 which will handle organic production only. The inspector also observed S & M spraying chlorine in the paprika pepper area of the facility, for pesticide disinfection, while organic quinoa is located in the same facility 'around the corner.' While CERES was able to take a photo of the Galaxy 10, and one area of the plant, S & M wouldn't allow the inspector to take photos of the warehouse.

CERES also stated that a customer of S & M located in Sofia, Bulgaria, reported the detection of pesticides on organic red quinoa purchased from S & M, specifically Lot QR0270219-1. The customer emailed CERES on April 1, 2020 reporting that in December 2020, it received red quinoa from S & M which was represented as being organic. However, a sample was taken from the product for analysis and the February 13, 2020 lab report of Galab Laboratories revealed the presence of several pesticides. The customer states it contacted S & M about the finding and S & M stated there had been a production error. CERES wrote S & M on April 3, 2020, informing it of the notification by the customer and the lab findings. CERES instructed S & M that it couldn't sell the red quinoa from Lot QR0270219-1 as organic and CERES wouldn't issue a transaction certificate for product from that Lot. S & M stated in the

Appeal that by November 19, 2020 it would conduct an internal investigation into the finding of the prohibited substance and would update its procedure manual to provide for the sampling and testing of raw materials purchased and the end product from each Lot. However, S & M didn't provide said investigation findings to CERES and didn't respond to NOP's inquiry.

S & M stated in its Appeal that it is working on corrective actions to address the noncompliances and is improving its organic management system. Specifically, S & M submitted a chart of Corrective Actions with its Appeal, addressing each cited noncompliance and proposing corrective actions it planned on implementing by November 19, 2020. S & M stated it would "classify and put in order" its documents regarding organic and conventional products; and would update its database to enable a successful mass balance exercise for the 2019-20 organic and conventional products. S & M stated it would also update its documents to better differentiate between organic and conventional products in its processing area; and would update its procedures manual and use new 'formats' to be able to summarize the quantity of raw materials purchased, quantity of organic and conventional products processed and stored; and amount of sales of organic and conventional products. S & M also stated it would train all staff on procedures and recordkeeping for organic production. Lastly, S & M stated it would apply to a new certifying agent.

S & M has been certified organic since February 3, 2016; as such, it should already be aware of and compliant with the organic regulations, with the records needed to substantiate its compliance. The Corrective Action chart submitted by S & M was an acknowledgement of its lack of compliance, as it set itself a deadline of November 19, 2020 to implement corrective actions that it should have already been following. When NOP asked CERES about S & M's planned actions, CERES replied that it hasn't received anything from S & M to show that any

corrective actions have been implemented. NOP also asked S & M about its promised corrective actions, but S & M didn't respond to NOP. Finally, AMS notes that all operations must comply with the organic regulations; finding a new certifier is not a corrective action.

To assess whether CERES' issuance of a combined Notice of Noncompliance and Suspension was appropriate, AMS also asked CERES about prior findings of noncompliances, demonstrating that S & M was aware of the noncompliances before the Notice. CERES provided a December 27, 2019 chart detailing noncompliances found at the November 26 – 27, 2019 inspection of S & M's operation. CERES had sent this chart to S & M after the inspection and S & M completed the chart with its planned actions which it stated would be taken by December 10, 2019. The noncompliances include the insufficient separation of organic and conventional raw materials during reception, and in processing, and as final products. Traceability documentation was also insufficient; there were incomplete or missing documents; and product labels had missing or incorrect detail. Therefore, S & M's noncompliances cited at the June 24, 2020 inspection were repeat issues from the prior inspection. Further, despite being told of these noncompliances after the 2019 inspection and stating it would take corrective actions, S & M failed to take action to correct the noncompliances.

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 S & M violated the organic regulations, specifically 7 C.F.R. §205.102, Use of the term, "organic;" 7 C.F.R. §205.103, Recordkeeping by certified operations;

7 C.F.R. §205.105, Allowed and prohibited substances, methods, and ingredients in organic production and handling; 7 C.F.R. §205.201, Organic production and handling system plan; 7 C.F.R. §205.270, Organic handling requirements; 7 C.F.R. §205.272, Commingling and contact with prohibited substance prevention practice standard; 7 C.F.R. §205.400, General requirements for certification; and 7 C.F.R. §205.406, Continuation of certification. Specifically, evidence substantiates that S & M failed to sufficiently separate organic and non-organic raw materials and finished products; and in its recordkeeping. S & M failed to maintain and have available records to allow for successful traceability and mass balance exercises during the inspection. S & M's records are missing information needed to determine compliance with the regulations. These noncompliances also constitute a failure to cooperate with CERES during the inspection as S & M was required to provide complete access to its operation. Evidence also substantiates that S & M failed to prevent the risk of contamination of organic products by prohibited substances; and also sold products containing a prohibited substance as organic.

Pursuant to 7 C.F.R. §205.662(c), CERES was justified in issuing a combined Notice of Noncompliance and Proposed Suspension on July 8, 2020, as S & M had been informed subsequent to the November 2019 inspection of various noncompliances, with CERES even supplying a detailed chart on the noncompliances. However, S & M failed to take action to correct these noncompliances, which were found again at the June 2020 inspection. S & M also didn't submit corrective actions which it committed to in its Appeal. These noncompliances show a systemic, operation-wide failure to comply with the organic regulations.

DECISION

The August 21, 2020 Appeal is denied, and the July 8, 2020 Notice of Noncompliance and Proposed Suspension is affirmed. S & M's handling certification is to be suspended. However, pursuant to 7 C.F.R. §205.662(f)(1), S & M may apply for reinstatement of its handling certification after completion of the suspension period. The request for reinstatement must be accompanied by evidence demonstrating correction of the noncompliances found by CERES and corrective actions taken to comply with and remain in compliance with the Act and the organic regulations.

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

Done at Washington, D.C., on this 1st
day of March, 2021.

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SUMMERS
Bruce Summers
Administrator
Agricultural Marketing Service

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