

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE ADMINISTRATOR

In re:) **Administrator's Decision**
Kingsley Brothers, LLC) **APL-012-17**
Miller, Missouri)

This Decision is in response to an appeal (APL-012-17) of a Notice of Proposed Revocation of National Organic Program (NOP) certification issued to Kingsley Brothers, LLC (Kingsley), by the Agricultural Marketing Service (AMS), National Organic Program. The operation was deemed not in compliance with the Organic Foods Production Act of 1990, as amended (7 U.S.C. § 6501 et seq.) (Act)¹ and the U.S. Department of Agriculture (USDA) organic regulations.²

BACKGROUND

The Act authorizes the NOP to investigate potential violations of the USDA organic regulations and to initiate compliance actions when there is reason to believe that a certified operation has violated or is not in compliance with the Act or the regulations. Noncompliance procedures are described in 7 C.F.R. § 205.662. Persons subject to the Act who believe that they are adversely affected by a noncompliance decision may appeal such decision to the AMS Administrator pursuant to 7 C.F.R. § 205.680, Adverse Action Appeals Process – General, and 7 C.F.R. § 205.681, Appeals, of the USDA organic regulations.

¹ 7 U.S.C. 6501-6522

² 7 CFR. Part 205

FINDINGS OF FACT

1. Kingsley Brothers, LLC (Kingsley) is an operation located in Miller, Missouri. Kingsley is certified under the USDA organic regulations for organic crop production by the USDA-accredited certifying agent, EcoCert ICO.
2. On May 10, 2016, the NOP received a complaint alleging that Kingsley was knowingly applying prohibited substances to its organic fields and was purchasing conventional crops from other farmers and selling those crops to suppliers as organic. The USDA Office of the Inspector General (OIG) received a similar complaint on August 10, 2016.
3. On September 1-2, 2016, EcoCert ICO conducted an unannounced inspection of the Kingsley operation, collecting soil and plant tissue samples from the center of six of Kingsley's 27 fields. Test results showed that plant tissue samples from one field contained significant levels of the prohibited substance, zeta-cypermethrin. Samples from three other fields showed traces of the prohibited substance, atrazine. The fields showing positive test results represent approximately 18% of the Kingsley's total organic acreage (more than 2,800 acres of corn, soy, and wheat).
4. On November 23, 2016, the NOP issued a Notice of Proposed Revocation to Kingsley for the willful use of prohibited substances in organic production in violation of the USDA organic regulations at § 205.105.
5. On December 19, 2016, AMS received an appeal from Kingsley, which was accepted as timely.
6. On June 12, 2017, AMS sent Kingsley a proposed settlement agreement to resolve the proposed revocation.

7. On July 21, 2017, Kingsley responded by stating that the operation would not consider AMS' settlement offer.

DISCUSSION

The November 2016 Notice of Proposed Revocation was based on residue testing results that showed the presence of prohibited substances (zeta-cypermethrin and atrazine) on organic crops and soil.³ The positive results corroborate statements in a complaint that was submitted to NOP and OIG. The complaint alleged that airplanes owned by a Kingsley entity, Plane Cents Aviation, LLC, applied prohibited substances to Kingsley organic fields on multiple occasions in July 2015 and between May and August of 2016. During a September 2016 unannounced inspection, EcoCert ICO collected samples for residue testing from areas where prohibited substances were allegedly applied.

Information in the complaint included dates of aerial applications, global positioning system (GPS) coordinates for application locations, and the pesticides that were applied. The pesticides reported in the complaint included zeta-cypermethrin and atrazine products, both of which were detected in the residue tests. The complaint also reported that prohibited substances were applied to the center of Kingsley's fields, avoiding the outer perimeter to hide the visual evidence of spraying. The complainants were knowledgeable about aerial spraying practices in

³ 7 C.F.R. 205.105 provides 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;

7 C.F.R. 205.202(b) provides 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;

Zeta-cypermethrin and atrazine are synthetic substances, and are not excepted from the prohibition on their use by either § 205.601 or § 205.603.

general and Kingsley's spraying practices in particular, and had directly observed Kingsley planes spraying and recognized the odors of specific pesticides.

Kingsley's appeal focused on rebutting the positive residue test results for zeta-cypermethrin and atrazine. In the appeal, Kingsley denies that the detected residues were a result of willful aerial application and provides multiple alternative explanations for the presence of the residues. These include that (a) the residues are a result of an act of sabotage by estranged family members via aerial spraying; (b) the results of the tests (including high levels of zeta-cypermethrin and different results in soil vs. plant tissue tests) are not consistent with aerial spraying; and (c) the test results could be from aerial spray drift or from runoff or contamination of the samples taken by the inspector.

In addition to stating generally that the positive residue test results from Kingsley fields could be a result of sabotage, the first main point in the appeal contends that the concentration of the prohibited substance, zeta-cypermethrin, detected on tissue samples in one field (G) is much higher than would occur from recommended use in aerial application. Likewise, the appeal argues that these residues could not be a result of aerial application because test results found residues only in the plant tissue samples, and not in soil samples. Kingsley also argues that the inspector did not take representative samples but instead took samples from a specifically identified location based on the complaint to the NOP, making it insufficient to prove aerial application and rule out sabotage.

The second key point in Kingsley's appeal addresses the test results from three other fields showing traces of atrazine. The appeal asserts that the results should not be included in the case because the results were below the quantification level of the laboratory and do not conclusively demonstrate noncompliance. The appeal suggests that the detection of atrazine is

more likely due to flawed sampling methodology by the inspector; Kingsley points to what the operation believes is incorrect protocol for packing and shipping the samples to a lab, which could have resulted in contamination. At the same time, the appeal provides an alternative explanation that the traces of atrazine could be a result of runoff or drift from other fields.

AMS finds that these various explanations for the presence of pesticide residues are not plausible. Furthermore, the USDA organic regulations require that all applications of prohibited substances be reported to the operation's certifying agent immediately (§ 205.400(f)). However, the certifier was not notified of any incidents of alleged sabotage by applying prohibited substances to organic fields before the unannounced inspection and the Notice of Proposed Revocation.

AMS also finds that the test results cited in the Notice of Proposed Revocation, showing atrazine at below quantitative levels, indicate the presence of prohibited substances. When residues are not detected, the lab tests results will state "no detection (ND)." The residual levels of atrazine detected on the Kingsley operation are consistent with an application months, or even years, prior to when samples were collected and during the time that the fields were producing organic crops. This is also consistent with information provided by complainants. In addition, field records show that two of the fields that tested positive were planted with corn in 2015, a crop on which atrazine is commonly used.

In response to Kingsley's arguments regarding testing protocol, AMS and the USDA's National Science Laboratories confirm that the sampling procedures used by the inspectors were appropriate and in line with standard procedures for pesticide residue sampling. AMS also notes that the NOP provided the GPS location of the fields for testing to the inspector with instructions

to take samples from an unspecified area in the center of the field specifically to avoid any contamination from runoff or drift.

In addition to rebutting the positive residue test results, Kingsley's appeal states that it has been denied due process and argues that it needs more details about the complaint submitted to the NOP to effectively respond to the proposed revocation of its certification. Kingsley requested this information under a Freedom of Information Act (FOIA) request. AMS released the pesticide residue testing results, but withheld the remainder of the investigative records under FOIA exemption 7 (5 U.S.C. § 552(b)(7)(A)) because this remains an open investigation. The investigative records would be released during the exhibit exchange if Kingsley requests a hearing to appeal this decision. In June 2017, Kingsley filed a complaint against AMS in U.S. District Court arguing that AMS improperly withheld the records. That complaint is still open.

CONCLUSION

The evidence in this case, specifically the residue testing results, demonstrates the application of prohibited substances to organic production areas, in violation of the USDA organic regulations at § 205.105. Kingsley's various explanations for the detection of prohibited substances are not supported by the evidence. Residues of prohibited substances were detected in plant tissue and soils in organic production areas and statements from multiple witnesses that Kingsley was applying prohibited substances via aerial spray over several years corroborate these findings.

The USDA organic regulations are clear regarding the use of prohibited substances on crop land. Any field or farm parcel from which harvested crops are intended to be sold, labeled, or represented as "organic" must not have any prohibited substances applied to it for a period of three years immediately preceding harvest of the crop (7 C.F.R. §§ 205.105 and 205.202(b)).

DECISION

The appeal is denied and the NOP's Notice of Proposed Revocation is upheld. Kingsley's Brothers, LLC's organic certification is to be revoked.

Attached to this formal Administrator's Decision is a Request for Hearing form. Kingsley has thirty (30) days to request an administrative hearing before an Administrative Law Judge. If Kingsley does not request a hearing in that period, this Decision will be implemented and the NOP will revoke Kingsley's organic certification.

In accordance with § 205.662(f)(2) of the USDA organic regulations, "A certified operation or person responsibly connected with an operation whose certification has been revoked will be ineligible to receive certification for a period of 5 years following the date of such revocation."

Done at Washington, D.C., on this 10th
day of April, 2018.



Bruce Summers
Acting Administrator