

UNITED STATES DEPARTMENT OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE  
BEFORE THE ADMINISTRATOR

In re:	)	
Fusión Organic S.P.R.	)	<b>Administrator's Decision</b>
de R.L. de C.V	)	<b>APL-020-16</b>
Jalisco, Mexico	)	

This Decision responds to an appeal (APL-020-16) of a Notice of Proposed Suspension of National Organic Program certification issued to Fusión Organic S.P.R. de R.L. de C.V. (Fusión Organic), doing business as Fusión Organic of Jalisco, Mexico, by Certificadora Mexicana de Productos y Procesos Ecológicos SC (Certimex). The operation has been deemed not in compliance with the Organic Foods Production Act of 1990 (Act) (U.S.C. 6501 - 6522) and the U.S. Department of Agriculture (USDA) organic regulations (7 C.F.R. Part 205).

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

## FINDINGS OF FACT

1. Certimex is an accredited certifying agent under the USDA organic regulations; Fusión Organic has been a certified organic crop operation since September 9, 2011.
2. On May 5, 2016, Certimex conducted an unannounced inspection of Fusión Organic and collected cucumber leaf samples for pesticide residue analysis.
3. The analysis, reported on May 9, 2016, detected a prohibited substance, acetamiprid at levels exceeding five percent of the Environmental Protection Agency's (EPA) tolerance for this commodity.
4. On May 25, 2016, Certimex issued a Notice of Noncompliance to Fusión Organic informing that the product could not be labeled or sold as organic pending further investigation of the cause of the residues.
5. On June 9, 2016, Certimex conducted a follow up inspection to investigate the source of acetamiprid contamination. According to the inspection report, Fusión Organic explained that flood water in July 2015, which came from an upslope area where nonorganic crops were grown, caused the contamination. The inspector collected cucumber leaf samples from areas within and outside the area which Fusión Organic reported had flooded. The laboratory analysis indicated acetamiprid residues at 0.010 ppm in both sets of samples.
6. On June 21, 2016, Certimex issued a combined Notice of Noncompliance and Proposed Suspension to Fusión Organic. The notice stated that the levels of acetamiprid initially detected suggest that the contamination was likely due to direct application rather than flood waters.
7. On June 22, 2016, Fusión Organic submitted a letter to Certimex reiterating that the acetamiprid residues on the cucumber leaves resulted from the flooding. Fusión Organic

provided photo and video evidence of the flooding and explained that acetamiprid metabolites are persistent in soil and water.

8. On June 26, 2016, Certimex issued a Notice of Proposed Suspension to Fusión Orgánico citing the presence of residues of a prohibited substance on organic cucumber plants due to the direct application of acetamiprid.
9. On July 1, 2016, Certimex issued a letter rejecting Fusión Orgánico's request for mediation.
10. On July 8, 2016, AMS received Fusión Orgánico's timely appeal. The appeal denied any direct or intentional application of prohibited substances.

### **DISCUSSION**

Certimex proposed to suspend Fusión Orgánico's organic certification. The effect of this suspension would prohibit all sale, labeling or representation of Fusión Orgánico's products as organic. Certimex proposed to suspend the certification because a prohibited substance, acetamiprid, was detected on organic cucumber crops. The residue levels exceeded 5 percent of the EPA tolerance for this crop. Certimex asserted that this was a direct application and willful violation of the USDA organic regulations. This was based on: (1) Rapid decline in residue levels of acetamiprid within a 38-day interval between sample collections. Certimex concluded that the levels of acetamiprid initially detected were too high to result from flooding that occurred 253 days prior to the sample collection. (2) Fusión Orgánico revised its description of the extent of the flooding to include a larger area after further residue testing showed trace levels of acetamiprid in production areas that were not reported to have flooded.

In its appeal, Fusión Orgánico argued the acetamiprid residues were due to flooding and were not a direct application. The appeal included: prior laboratory analyses (March 2015,

December 2013) which showed no residues of prohibited substances; a letter from a research professor explaining how the flooding was the likely cause of the acetamiprid residue findings; a letter from the neighbor who farms adjacent lands testifying to the use of acetamiprid on his sorghum crop; maps showing the neighboring farmland with respect to Fusión Organics greenhouses; videos/photos of the July 2015 flooding in and outside of the Fusión Organics greenhouses; and a log of substances applied to the cucumber crop in 2015 and 2016.

Fusión Organic provided supporting statements from experts about the behavior of acetamiprid in soil, a letter from the neighboring adjacent farm testifying to the use of acetamiprid on a sorghum crop, photo and video footage of the July 2015 flooding and prior clean residue testing results. Fusion Organic stated that it has implemented corrective measures to prevent future flooding.

### **CONCLUSION**

The record in this case indicates that acetamiprid, a prohibited substance, was present in the Fusión Organic crop production area. Fusion Organic's claim that the acetamiprid residue from flooding is not supported by the evidence. 1) Flooding occurred 253 days prior to sample collection and acetamiprid residue would have mostly dissipated in this time period. 2) Acetamiprid residues were detected on cucumber leaves. These leaves were not present 253 days prior to when the sample was collected and flooding occurred. 3) The levels of acetamiprid residues detected on the cucumber plants exceeded five percent of the EPA tolerance; therefore, these crops must not be sold, labeled, or represented as organically produced. The evidence indicates that acetamiprid was applied to the cucumbers.

Section 205.671 of the USDA organic regulations states that organic products which exceed five percent of the EPA tolerance for the specific residue must not be sold, labeled, or

represented as organically produced. In addition, the USDA organic regulations require that organic products must be produced without the use of prohibited substances (§ 205.105); and, land for organic production must have no prohibited substances applied for three years preceding the harvest of the organic crop (§ 205.202(b)).

The presence of flood water from nonorganic farms, demonstrates that Fusión Organic did not have adequate buffer areas to prevent contact with prohibited substances. Therefore, the operation is not in full compliance with § 205.202(c), which requires distinct, defined boundaries and buffer zones such as runoff diversions to prevent the unintended application of a prohibited substance to the crop or contact with a prohibited substance applied to adjoining land that is not under organic management.

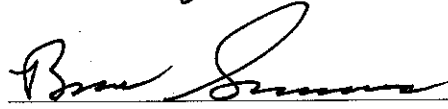
### **DECISION**

The appeal is denied and the Fusión Organic operation is to be suspended.

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

If Fusión Organic waives the hearing, the Agricultural Marketing Service will direct Certimex to issue a Notice of Suspension of the operation. Land areas on which prohibited substances were detected will be suspended for three years from the date of the inspection when the prohibited substance was detected, May 5, 2016. Fusion Organic may request reinstatement of certification at any time for the remaining production areas. A request for reinstatement must include results from pesticide residue testing to verify compliance.

Done at Washington, D.C., on this 17<sup>th</sup>  
day of August, 2017.



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Bruce Summers  
Acting Administrator  
Agricultural Marketing Service