

2017 JUL 20 AM 11: 23

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

RECEIVED

In re:)	OFPA Docket No. 16-0108
)	
Xochitl, Inc.)	
)	
Respondent.)	Consent Decision and Order

This proceeding was instituted under the Organic Foods Production Act of 1990, as amended, 7 U.S.C. §§ 6501-6522 (OFPA), alleging that the Respondent, Xochitl, Inc., willfully violated the National Organic Program Regulations issued thereunder, 7 C.F.R. §§ 205.1-205.699 (NOP Regulations). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.138).

The Respondent admits the jurisdictional allegations as set forth herein and specifically admits that the Secretary has jurisdiction in this matter, neither admits nor denies the remaining allegations of the complaint, waives oral hearing and further procedure, and consents and agrees, for the purpose of settling this proceeding, and for such purposes only, to the entry of this decision.

The Complainant agrees to the entry of this decision.

Conclusions

1. Xochitl, Inc., is a corporation, hereinafter referred to as Respondent, whose mailing address is 6020 Colwell Blvd, Irving, Texas 75039.
2. Between November 4, 2009, and October 17, 2014, the Respondent was engaged in business as a certified organic operation, as defined in the OFPA, certified pursuant to an organic certificate issued by Quality Assurance International (QAI), a certifying agent accredited by the United States Department of Agriculture.
3. On March 27, 2014, QAI conducted an unannounced inspection of the Respondent's operation and found that the Respondent had used nonorganic cottonseed oil in the production of corn chips sold as organic. Additionally, QAI found that the Respondent did not list in its organic systems plan (OSP) products to be sold as organic in Canada per the terms of the US/Canada Equivalence Arrangement, incorrectly displayed the USDA organic seal on its product labels, and failed to notify QAI of changes to its operations that would affect compliance.
4. On April 7, 2014, QAI issued a Combined Notice of Noncompliance and Proposed Revocation to the Respondent for the alleged violations found on March 27, 2014.
5. On April 28, 2014, the Respondent submitted a response to the April 7, 2014 Combined Notice of Noncompliance and Proposed Revocation to QAI, admitting to the use of nonorganic cottonseed oil in its products sold as organic and providing records concerning its operations.
6. On May 13, 2014, QAI issued a second Combined Notice of Noncompliance and

Proposed Revocation to the Respondent, corrected to clarify that the only possible response to the Combined Notice of Noncompliance and Proposed Revocation were acceptance of the proposed revocation, appeal, or request for mediation.

7. On June 3, 2014, the Respondent filed a timely appeal of the May 13, 2014, Combined Notice of Noncompliance and Proposed Revocation with the AMS Administrator.

8. On August 4, 2014, QAI issued a Notice of Proposed Suspension to the Respondent for not adequately responding to QAI in regard to the noncompliance cited in the April 7, 2014, Combined Notice of Noncompliance and Proposed Revocation.

9. On September 4, 2014, the Respondent filed a timely appeal of the August 4, 2014, Notice of Proposed Suspension with the AMS Administrator.

10. On October 16, 2014, the Respondent signed a settlement agreement under which the Respondent agreed to withdraw its appeals and waive further procedures; to pay a civil penalty of \$31,315; and to have its organic certification suspended as of the date of the settlement execution. The settlement agreement stated that the agreed-upon suspension would continue until the Respondent could demonstrate correction of cited noncompliance and complete the certification reinstatement process; and, after and within one year of any reinstatement of organic certification, to pay for an unannounced inspection by QAI. The AMS Administrator agreed not to issue a formal Decision charging the Respondent with alleged violations of the NOP Regulations.

11. On October 28, 2014, QAI sent the Respondent a Notice of Suspension, formally notifying the Respondent of the suspension of its organic certification pursuant to the executed settlement agreement.

12. On or about January 9, 2015, AMS initiated an investigation into allegations that the Respondent was selling agricultural products as organic without certification. AMS found that, between October 17, 2014 and April 6, 2015, the Respondent sold agricultural products as organic in knowing violation of section 205.100(a) of the NOP Regulations (7 C.F.R. § 205.100(a)).

13. On April 15, 2015, the Respondent filed a request for reinstatement with the Secretary of Agriculture through Global Organic Alliance, an accredited certifying agent of the United States Department of Agriculture.

14. On September 24, 2015, the AMS Administrator issued a Decision that cited the Respondent's violations of the NOP Regulations during suspension, denied the Respondent's former appeal of QAI's proposal for revocation, upheld QAI's proposal for revocation for a period of 5 years from the date of suspension, and imposed a civil penalty of \$1,826,000. This civil penalty amount was calculated by multiplying \$11,000, the maximum penalty per violation provided by the OFPA, times 166. At the time of the Decision, AMS had obtained evidence that the Respondent had filled at least 166 unique orders of agricultural products represented as organic since its organic certification had been suspended.

15. On October 22, 2015, the AMS Administrator issued a denial of the Respondent's request for reinstatement citing ongoing violations of the NOP Regulations on the part of the Respondent.

16. On December 23, 2015, AMS obtained evidence that the Respondent had filled at least 168 unique orders of agricultural products represented as organic between October 17, 2014 and October 30, 2015, in addition to the 166 orders known at the time of the September 24, 2015,

AMS Administrator's decision.

The Respondent having admitted the jurisdictional facts only, and the parties having agreed to the entry of this decision, such decision will be entered.

Order

1. Respondent, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the OFPA and the USDA organic Regulations issued thereunder.

2. Respondent's organic certification is suspended for a period of two years. This two-year suspension shall begin upon the effective date of this Order. The suspension period may be reduced from two years to not less than one year if the Respondent can show:

a. it did not sell, label and represent its products as having been organically produced or handled for one year from the effective date of this Order, or between the effective date of this Order and the application for reinstatement of its organic certification, whichever comes later;

b. it is otherwise in compliance with the OFPA and the USDA organic regulations; and

c. it has timely paid all the civil penalty payments required to be made pursuant to paragraph 4 below, prior to being reinstated.


3. Respondent is prohibited from applying for reinstatement for a period of one year after the effective date of this Order.


4. Respondent is assessed a civil penalty of \$1,826,000.00, with \$1,351,000.00 held in abeyance, provided that the Respondent timely pays all the payments required to be made

prior to being reinstated, and does not violate the OFPA and the NOP regulations and standards during the Respondent's period of suspension. In the event the Respondent is reinstated prior to fulfilling all of the required payments in the payment plan noted below, default of the remaining payments will not trigger the payment of the \$1,351,000.00 held in abeyance. The remaining \$475,000.00 shall be paid in monthly installments over a period of six years, with the first installment of \$6,597.38 due upon execution of this Consent Decision. The remaining 71 installments of \$6,597.22 shall be paid every month on the same day of the month as the previous payments until all payments have been made. If Respondent applies for reinstatement pursuant to paragraphs 2 and 3 of this Order, the monthly payments required to be made shall be temporarily suspended effective the date the reinstatement application is received by NOP. The monthly payments required to be made shall resume one month after a decision on the application, and any appeal thereof, is concluded, until the whole of the monthly payments required to be made under paragraph 4 of this Order are satisfied.

The provisions of this order shall become effective upon issuance.

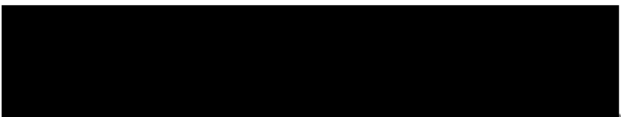
Copies of this decision shall be served upon the parties.


Xochitl, Inc.
Respondent


Buren W. Kidd
Attorney for Complainant

Done at Washington, D.C.

this 20th day of July, 2017


Administrative Law Judge

Channing D. Strother