



THE CENTER FOR FOOD SAFETY

28 July 2011

Hearing Clerk,
United States Department of Agriculture,
Room 1031-S,
1400 Independence Ave., SW.,
Washington, DC 20250-9200, Fax

Submitted via email to: Antoinette.Carter@ams.usda.gov, Melissa.Schmaedick@ams.usda.gov

Re: Docket No. AO-FV-09-0138; AMS-FV-09-0029; FV09-970-1

Comments on Proposed National Leafy Green Marketing Agreement

I am submitting these comments on behalf of the Center for Food Safety (CFS). CFS is a non-profit, environmental and consumer advocacy organization that works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. Our constituency is comprised 200,000 members, nationwide, who actively engage in public policy debates on organic agriculture, sustainable food production technologies, and food safety. They also support organic agriculture with their food dollars by consuming organic food from farmers' markets and grocery stores, as shareholders in Community Supported Agriculture (CSA) farms, by growing their own food, and by promoting organic food purchases in schools and other local institutions.

Summary

CFS opposes the establishment of a National Leafy Green Marketing Agreement (NLGMA) as a means to address growing food safety concerns in the U.S. While we wholeheartedly support the creation of better guidance and training to promote food safety and more stringent oversight and regulation for food production, processing, and handling, we are deeply concerned about potential negative impacts of the NLGMA on the environment, organic agriculture and small and medium-sized farmers. Preventing food borne illness is a national imperative; however, actions taken to prevent such illnesses should not occur at the expense of diverse cropping systems, wildlife, habitats, biodiversity conservation, and/or clean waterways.

We believe that the NLGMA does not adequately address these concerns and that its implementation would adversely impact farm diversity and farming communities across the country. The public has the right to know how their food is grown and that right is much more likely to be preserved through an open, federal rulemaking process than by an industry-driven agreement that lacks transparency and a public participation process.

Food Safety Must Not Be Regulated by the Agricultural Marketing Service

The marketing arm of USDA is not an appropriate institutional home within government for developing and enforcing food safety standards. As stated on the home page of USDA's Agricultural Marketing Service (AMS) website, AMS's role is to "administer programs that facilitate the efficient, fair marketing of U.S. agricultural products, including food, fiber, and specialty crops."¹ Nowhere on the AMS website is food safety mentioned as a part of its mission or mandate. Moreover, since AMS staff are economic and marketing specialists rather than food safety experts they are not equipped to take on the task of food safety regulation.

Since food safety is a public health issue and not a marketing issue, we believe that the responsibility for regulation and oversight of food safety rests with the U.S. Food and Drug Administration (FDA) in coordination with the U.S. Department of Agriculture (USDA). Our position is consistent with Congress' recent passage of the Food Safety Modernization Act,² which gives FDA a greater ability and statutory authority to safeguard our nation's food system. FDA is currently in the process of finalizing its Guidance for Industry on the safety of leafy greens and the dual proposals from FDA and USDA would likely result in overlap, conflict and confusion.³ While the Center continues to urge FDA to take mandatory and immediate action, we feel that USDA's competing action would undercut FDA's food safety expertise. As such, we believe that the passage of the NLGMA would be duplicative by establishing yet another set of standards that places an additional and unfair burden on leafy green vegetable producers.

NLGMA Exceeds the Authority of the Agricultural Marketing Agreement Act

The proposed NLGMA extends well beyond the scope of the Agricultural Marketing Agreement Act of 1937 (AMAA), the law authorizes AMS to create marketing orders in the first place. According to the AMAA, its intent is to "establish and maintain such orderly marketing conditions for agriculture commodities in interstate commerce," and to create price parity and stability in the marketplace. The AMAA authorizes the creation of policies to regulate market prices and to facilitate the sale of U.S. farm products, but it does not authorize the adoption of agreements and metrics to address food safety matters. Adoption of the NLGMA as proposed violates the AMAA by putting the AMS in the position of exceeding its statutory and legal authority. Even though the public has repeatedly raised this concern in hearings held across

¹ USDA Agricultural Marketing Service. <http://www.ams.usda.gov/AMSV1.0/>. Web. 26 July 2011.

² Food Safety Modernization Act (FSMA). Web. <http://www.gpo.gov/fdsys/pkg/PLAW-111publ353/pdf/PLAW-111publ353.pdf>.

³ U.S. Food and Drug Administration (July 2009) "Guidance for Industry: Guide to Minimize Microbial Food Safety Hazards of Leafy Greens; Draft Guidance."

the country, and even though USDA has acknowledged these concerns in the proposed rules, the agency has still skirted its responsibility for directly responding to this charge. USDA's failure to prove and defend the AMAA's statutory authority undermines the legitimacy and validity of the NLGMA.

NLGMA Lacks Transparency and Equal Access to Information

The industry-proposed marketing agreement does not allow for adequate transparency and it has much less public accountability than it would otherwise have in a government-developed, directed, and enforced food safety program. For example, the Board itself would be hand-picked by the Secretary of Agriculture, without public disclosure of either the list of Board applicants or the criteria used for choosing members. No explicit public participation provision is proposed to solicit or respond to public input on the topics to be discussed by the Technical Review and Research and Development Committees. Although minutes are required to be taken at all Committee meetings, the draft NLGMA fails to provide for public access to those minutes by posting them on a USDA website or by some other means. This indicates an unfortunate failure on the part of USDA to recognize the value of the breadth of expertise and experience that the wide range of public stakeholders brings to the technical and policy debates on food safety. The closed door process inherent in the proposed NLGMA would leave everyone in the dark about how industry plans to regulate food production practices in the name of "food safety," except for those on the Board. Public comments would only be invited after the industry-driven Board fully developed the NLGMA standards.

NLGMA Consolidates Power in the Hands of the Largest Leafy Green Vegetable Handlers

Large leafy green vegetable handlers stand to benefit most from the implementation of the NLGMA. The move towards industry consolidation is most evident in the proposed structure of the NLGMA, dominated by handlers who would occupy the largest number of seats on the Board. The NLGMA allocates 12 seats to food handlers and only 10 seats to food producers, creating a clear imbalance of power on the Board at the onset. A food importer, a retailer, and a food service representative would also be invited on the Board, fortifying the food industry ranks and bumping up their numbers to a total of 15 members. **No certified organic farmer would be required to be appointed even though organic has been the fastest growing sector in agriculture for the past 20 years.**⁴

While USDA acknowledges repeated public requests for small, diversified, and certified organic farmers and handlers to be appointed to the Board, the agency falls short of mandating their inclusion. Instead, the proposal adds the following caveat: "*to the extent practicable* [emphasis added] Board membership shall include representation of [such]...stakeholder groups."⁵ This

⁴ Constance, Douglas H., and Jin Young Choi. "Overcoming the Barriers to Organic Adoption in the United States: A Look at Pragmatic Conventional Producers in Texas." *Sustainability*, 2010: 2(1):163-188. <http://www.mdpi.com/2071-1050/2/1/163/pdf>. Web. 27 July 2011.

⁵ §970.40 Establishment and Membership. "National Leafy Greens Marketing Agreement Proposed Rules." *Federal Register*. Vol. 76, No. 83, p. 24293.

weak attempt to include diverse stakeholders further decreases public confidence in the USDA's ability to deliver on its promise of increased food safety, as per NLGMA's stated intent.

In sum, the Board structure would limit the diversity of voices heard on the Board, stifle public participation, and serve to further consolidate the market power of the big players in the leafy green vegetable industry. **The voices of small and diverse farmers would remain largely unheard and so would those of the public. Organic farmers would be completely left out of the NLGMA discussions and decision-making, despite being the most dynamic growth sector in U.S. agriculture.**⁶

NLGMA Fails to Learn from the California Leafy Green Marketing Agreement Experience

In what is known as the "salad bowl" of the Central Coast of California, farmers grow over 200 crop varieties, including 82,000 tons of lettuce from Monterey's Salinas Valley alone. This fertile bowl is uniquely situated within the watersheds of the Pajaro River, Salinas River, and Elkhorn Slough which empty into the Monterey Bay Marine Sanctuary, the largest, protected marine area in the U.S. The climate and fertile soil of the Central Coast allows for year round production of a diverse range of crops. Unfortunately, this productive landscape has become increasingly scarred and watersheds threatened as farmers degrade the natural environment in an attempt to comply with California's Leafy Green Products Handler Marketing Agreement (LGPHMA)⁷ requirements.

Widespread efforts to remove wildlife and habitat are taking place even despite the lack of scientific evidence that these actions will achieve the desired results of enhanced food safety.^{8,9,10} In the Salinas Valley, for example, after the 2006 *E. Coli*: 0157: H7 contamination of spinach was made public, one could find piles of dead trees; grasses surrounding farms scraped bare; riparian habitats removed; extensive fences built around property lines, disrupting the movement and feeding of wildlife; ponds bulldozed or sterilized with copper sulfate to kill frogs; and vegetative windbreaks destroyed, all to the detriment of the Salinas Valley Watershed.¹¹

⁶ Constance and Choi. "Overcoming the Barriers to Organic Adoption in the United States," 2010.

⁷ California Leafy Green Products Handler Marketing Agreement.

<http://www.caleafygreens.ca.gov/applications/DocumentLibraryManager/upload/LGMA%20MARKETING%20AGREEMENT.pdf>.

⁸ Stuart, Diana, Carol Shennan, and Martha Brown. "Food Safety versus Environmental Protection on the Central California Coast: Exploring the Science Behind Apparent Conflict," The Center for Agroecology and Sustainable Food Systems, University of California, Santa Cruz, Research Brief #10. 2009.

⁹ Coke, Dale. "Ready-to-Eat or Not: Examining the Impact of Leafy Green Marketing Agreements," Testimony presented to Domestic Policy Subcommittee on Oversight and Government Reform, U.S. House of Representatives. 29 July 2009.

¹⁰ Lochhead, Carolyn. "Crops, pond destroyed in quest for food safety," *San Francisco Chronicle*. 13 July 2009.

¹¹ "Habitat Destruction." *Wild Farm Alliance*.

http://www.wildfarmalliance.org/Press%20Room/press_room_destruction.htm. Web. 13 July 2009.

A 2007 Survey of Central Coast California growers, conducted by the Resource Conservation District of Monterey County, concluded:

The efforts of agricultural producers on the Central Coast and throughout the state to protect water quality and the environment may be compromised as some food safety guidelines, or interpretation thereof, appear to be in conflict with management practices intended to improve water quality and enhance natural habitat. Growers of fresh produce, particularly leafy greens, are caught in the middle between these competing priorities and in many cases are being put in a position of having to choose between being able to sell their crops or protect the environment.¹²

The survey reported that 21.1% of respondents who grow leafy green vegetables “had actively taken out one or more environmental practices due to food safety concerns.”¹³ Such practices removed or planned for removal include ponds and reservoirs, duck pond habitat, irrigation recovery ponds, grassed waterways, filter/buffer strips, trees, and shrubs.¹⁴

In September 2009, just a week before the Monterey NLGMA hearing, more than 1,700 boxes of spinach were recalled from a Salinas Valley distributor who is a signatory to the California LGPHMA.¹⁵ At that time, the industry response to criticisms that California’s LGPHMA is not working was that recalls will inevitably increase due to “ramped up routine inspections.”¹⁶ Unfortunately, such recalls provide no evidence or public assurance that the source of contamination is being directly addressed and eliminated.

For CFS and its supporters, food safety is not just about eliminating microbial contamination from farms and processing facilities, it is also about looking at the full spectrum of factors that impinge upon delivering safe, nutritious, affordable, fresh food to consumers across the U.S. and abroad. Factors that have been overlooked in California’s LGPHMA include:

- adverse effects on farmworkers, communities, environmental health, and food safety from applying large doses of synthetic toxic pesticides and fertilizers on farms;
- water and air pollution from the excrement of large livestock and poultry operations that overburden the land and contaminate food;
- the removal of beneficial insect and predator habitats that reduce the need for toxic pesticide use on food, in the name of food safety; and

¹² Resource Conservation District of Monterey. “A Grower Survey: Reconciling Food Safety and Environmental Protection,” p.1, Resource Conservation District of Monterey, Salinas, CA. 2007.

¹³ Ibid, p. 6, 2007.

¹⁴ Also see: Beretti, Melanie. “Challenges to Co-Management of Food Safety and Environmental Protection: A Grower Survey,” Resource Conservation District of Monterey, Salinas, CA. July 2009.

¹⁵ Melendez, Claudia. “Spinach recalled after salmonella test,” *Santa Cruz, Sentinel*. Web. http://www.santacruzsentinel.com/localnews/ci_13367245. Web. 18 September 2009.

¹⁶ Resource Conservation District of Monterey, “A Grower Survey,” 2007.

- the non-therapeutic use of antibiotics in livestock raised in confined animal feeding operations (CAFOs) which contribute to widespread antibiotic-resistant pathogens that find their way into our nation's food supply.

All of these factors negatively impinge upon food safety but have been left out of California's LGPHMA, which is purported to be the model for the NLGMA.

Organic Agricultural Practices Enhance Food Safety

Factors that enhance food safety also have been disregarded in California's LGPHMA. For example, planting trees, shrubs, and grasses filter pathogenic dust and pesticides. They also protect against agriculture run-off into waterways. Intercropping on farms attracts beneficial insects and pest predators. The use of green manures builds biologically active soils that fight and degrade pathogens. These types of biodiversity conservation measures, among others, are required on organic farms. In fact, the National Organic Standards Board (NOSB) recently adopted a plan to comprehensively address biodiversity with the full support of the National Organic Program.¹⁷

Organic farmers, by the very nature of how they grow food, reduce food safety hazards because they are prohibited from applying contaminated sewage sludge on farmland, and using toxic, synthetic herbicides and pesticides, as legally mandated by the Organic Foods Production Act (OFPA) of 1990. Organic farmers use compost, rather than synthetic inputs, to build soil fertility and follow strict organic rules for handling, testing, and applying manure-based compost on certified organic land to prevent pathogens such as *E. coli* 0157: H7. Such farmers are also in a better position to quickly identify the potential source of contamination, due to their extensive record keeping in the legally mandated Organic System Plan (OSP). Their systems of production are routinely inspected and certified organic by government-deputized, third party inspectors, who could also become food safety inspectors on organic farms.

Consumers who buy organic food expect that it is grown in a manner that conserves biodiversity and enhances the natural ecology within which it is grown, in accordance with the National Organic Program (NOP). Research has shown that organic consumers deliberately choose to use their food dollars to support organic agricultural systems and the health and environmental benefits they provide.^{18, 19} Measures that negatively impact the natural environment, as seen since the implementation of California's LGPHMA, are incompatible with organic farming, particularly with respect to biodiversity conservation. They are also incompatible with the values of the organic food consuming public. The fact the NLGMA would

¹⁷ National Organic Standards Board Joint Crops & Compliance, Accreditation, and Certification Committee, "Implementation of Biodiversity Conservation in Organic Agriculture System." 2009. Web. <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5075826&acct=nosb>.

¹⁸ "When it pays to buy organic." Consumer Reports. February 2006. Web. http://www.consumersunion.org/pub/core_food_safety/003130.html.

¹⁹ 2009 U.S. Families' Organic Attitudes & Beliefs Study. *OTA and Kiwi*. June 2009. Web. <http://www.ota.com/pics/documents/2009OTA-KiwiExecutiveSummary.pdf>.

not require the appointment of a single organic farmer to its Board demonstrates a clear lack of understanding about the role organic plays in feeding healthy, fresh foods to communities across the nation and supplying organic businesses, worldwide. Such a slight also serves to alienate an important and growing agriculture sector and the markets that support it.

Small and Medium-sized Farmers Contribute to Food Safety

Critical social factors are integral to delivering a nutritious and sustainable food supply to consumers across the country and they must be carefully considered in discussions about how to improve our nation's food safety. In particular, the important role small and medium-sized farmers play in delivering fresh and healthy food to their communities as well as their contribution to the local economy must be added to the discussion. As such, the creation of a flexible food safety programs is needed, rather than a one-size-fits-all approach which discriminates against these vital contributors to our food supply and economy. Small and medium-sized growers that do not co-mingle their produce with other growers and that sell non-bagged, leafy greens present less risk to the food eating public than larger growers that mix and bag their leafy greens.^{20, 21} As we have seen is the case with recalls of leafy greens, the large majority of illnesses and deaths from eating leafy greens comes from large handlers that mix products from many different growers and bag them for shipping to stores across the country.^{22, 23} The contribution that small and medium-sized farmers make to maintaining food safety in the leafy greens industry is not acknowledged or accounted for by the drafters of California's LGPHMA. As an intended model for the NGLMA, these same biases are likely to be reproduced in the national agreement, particularly if it is drafted by some of the same authors who drafted California's agreement and who are also big, national industry players.

NLGMA Is Not the Food Safety Solution

In conclusion, CFS believes that food safety is not just about eliminating microbial contamination from farms and processing facilities. It is also about looking at the full spectrum of factors that impinge upon delivering safe, healthy food to consumers across the U.S. and abroad. It is about the ability of our nation's farmers to meet the caloric and nutritional needs of every person in the U.S., and being able to support themselves and their families in doing so. It is also about sustaining and enhancing the economy of communities where food is grown. And, it is about safeguarding farmworker health, the natural environment and its inhabitants, and the ethical treatment of wildlife and farm animals.

²⁰ Runsten, David and Elly Hopper. "Testimony at hearing on the proposed national leafy green marketing agreement, Monterey, California," 2009. Web.

<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5079853>.

²¹ "Of Mice and Men," *Terrain Magazine*. Berkeley: Ecology Center. 2 September 2009.

<http://ecologycenter.org/terrain/issues/spring-2009/of-mice-and-men/>.

²² Starmer, Elanor & Marie Kulick. "Bridging the GAPs, Strategies to Improve Produce Safety, Preserve Farm Diversity and Strengthen Local Food Systems." Food & Water Watch and Institute for Agriculture and Trade Policy, 2009.

²³ Coke, Dale. "Ready-to-Eat or Not," 29 July 2009.

CFS does not believe that these values and practices that underpin a safe food system can be preserved with the introduction of a NLGMA that is driven by large-scale green leafy vegetable handlers. We certainly cannot support a marketing agreement that deliberately seeks to shut-out diverse stakeholders and consolidate power and markets within the leafy green vegetable industry. We believe that our nation's food safety interests are best served through the creation of an integrated, transparent, food safety program with strict government oversight, funding for education, training, and enforcement, and with flexibility for implementation that allows diverse and organic farms of all sizes and configurations to thrive across the country. FDA should be the lead agency for the development of food safety standards on farms, where needed, in close coordination with USDA. And, USDA should be responsible for the implementation and enforcement of those farm standards, with NOP oversight of organic production systems.

Respectfully submitted,

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