



July 28, 2011

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

RE: Docket No. AO-FV-09-0138; AMS-FV-09-0029; FV09-970-1; "Proposed National Marketing Agreement Regulating Leafy Green Vegetables; Recommended Decision and Opportunity to File Written Exceptions to Proposed Marketing Agreement No. 970"

To Whom It May Concern:

I offer these comments on behalf of Food & Water Watch, a national nonprofit consumer advocacy organization. During the fall of 2009, Food & Water Watch, as well as many other consumer, organic farming, natural food retailer, environmental, and other groups spent a great deal of time and expense participating in the field hearings held by the Agricultural Marketing Service (AMS) regarding the proposed National Leafy Greens Marketing Agreement (NLGMA). These groups attended the hearings to oppose the proposed NLGMA, pointing out that the agreement fails to meet the basic requirements of the Agricultural Marketing Agreement Act (AMAA), the statute that authorizes the establishment of marketing orders and agreements. In addition to this fundamental concern, opponents believe that addressing food safety standards through a marketing agreement is inappropriate, that the proposed marketing agreement is unnecessary in light of new food safety authority held by the Food and Drug Administration (FDA), and that the marketing agreement could have a negative impact on small, independent and organic producers of leafy greens as well as a negative impact on the environment.

While the recommended decision does include some minor adjustments to the governance structure and other aspects of the proposed agreement, it still fails to address the overall concerns we have about using a marketing agreement for food safety purposes and the other potential negative impacts of such an agreement.

Food Safety is not a Marketing Issue

Marketing agreements are intended to help an industry solve problems faced in marketing their products. Marketing agreements for produce have been designed on the premise that participating in the agreement offers an advantage in the marketplace. And marketing efforts often try to distinguish between brands on the basis of different product

characteristics.

While the industry may view decreasing consumer confidence in the safety of leafy greens as a marketing problem, consumers are less likely to view the safety of the food they buy as something that should be dealt with through marketing claims – or that should vary between brands.

Whether or not a product has been grown and processed in a way that minimizes the chance that it contains pathogens that could cause illness is not a quality attribute. It is a critical issue that rises above other characteristics like size, variety, or appearance. The issue of whether minimum safety practices were followed is not something that should be subject to efforts to distinguish between competing brands. It is unfair to ask consumers to determine which products were produced with which food safety standards – and it is unacceptable to make the penalty for buying the wrong brand an increased risk of illness. Safe food is something that all consumers deserve, no matter what brand they buy.

Section 970.69(b) of the proposed agreement does clarify that the official NLGMA certification mark “may not be used on consumer packages,” and that this change was made in response to concerns raised by opponents. However, the change stops short of prohibiting the use of the mark in advertising and promotional materials for NLGMA signatories or sellers of NLGMA-certified products. The failure to prohibit the use of the mark in such marketing efforts still allows food safety programs to be put in a marketing arena.

AMS Is Not a Food Safety Agency

Simply put, we believe that the Agricultural Marketing Service is the wrong government agency to deal with the safety of leafy greens. The expertise of AMS is in economics and marketing, not food safety. As the Administrator of AMS, Rayne Pegg, stated before a House Oversight and Government Reform subcommittee in 2009, “AMS is not a food safety agency.” Her statement reiterates the position taken by her predecessor, Lloyd Day, who said the same thing to a House Agriculture subcommittee in 2007.

AMS’ role in administering a marketing agreement is not the same as that of the FDA, the agency with jurisdiction over the safety of produce, when dealing with a regulation. Serving as an auditor, the role AMS would play under the proposed agreement, does not offer the public the same oversight and protection as the development and enforcement of a regulation.

The proposed NLGMA does not follow the established conventions for creation of federal regulation. The lack of transparency and accountability to the public in the NLGMA process leaves citizens and the consuming public without the same level of information and input that they would have in a traditional regulatory process. For example, the NLGMA will allow public comment only after standards have been developed by an industry-dominated board.

Congress has considered changes to USDA's authority that would give it more responsibility for safety of foods other than meat and poultry, but has not ultimately passed any legislation that would give the agency the authority to take on development of food safety standards through marketing agreements. Therefore, with this proposal for a marketing agreement for the safety of leafy greens, the agency is merely serving as a venue for the leafy greens industry to develop its own standards. But as many witnesses at the hearings expressed, standards that will affect consumers and many small players in the industry should not be determined by the most powerful players in the industry.

The proposed marketing agreement would be a poor substitute for a regulation developed in a transparent public process by an agency with expertise on food safety, such as FDA.

Conflict with Other Food Safety Regulations

The FDA Food Safety Modernization Act (FSMA) was enacted on January 4, 2011, after the completion of the NLGMA hearing process and post-hearing briefing deadlines. The FSMA requires FDA to write produce food safety regulations, which FDA is in the process of doing and had even begun before the law was enacted. Draft produce safety guidances published by FDA to date have demonstrated a clear focus on leafy green vegetables as one of the priority foods to be addressed by the FDA regulations.

Even though the FSMA had not yet been enacted during the NLGMA hearing process, Congress was in the process of debating the legislation and FDA had already begun work on produce food safety regulations. Therefore, the NLGMA hearing record includes a great deal of testimony from NLGMA opponents about the potential duplication and conflict caused by having both USDA and FDA writing food safety standards for leafy green vegetables. The fact that the FSMA is now law only heightens those concerns.

The FSMA requires FDA to consult with USDA to provide input into FDA's rulemaking process. For example, FSMA requires FDA to consult with USDA's National Organic Program to ensure that food safety standards do not conflict with or duplicate organic certification standards. However, nowhere in the FSMA is there any suggestion that USDA should be writing its own food safety regulations independent of the FDA process. Nor is there any recognition in the NLGMA recommended decision that the NLGMA Administrative Board should consult with the National Organic Program to avoid conflict or duplication with USDA's organic standards, even though Congress has been very clear about the need for FDA to avoid such duplication or conflict.

The preamble to the NLGMA recommended decision discusses the relationship between FDA and USDA food safety standards. However, the discussion does not make clear how the NLGMA leafy green metrics would relate to the FDA leafy green food safety standards, or why two separate regulatory processes are necessary.

When FDA establishes food safety regulations, as is required by the FSMA, those regulations will be the law of the land. Yet, the analysis of the NLGMA recommended decision makes no reference at all to the FSMA or its authority over produce food safety

regulations. We are left to wonder why, if FDA is writing produce food safety regulations, as required by the FSMA, why would USDA establish a separate process to do the same thing? And what is the purpose of establishing a completely separate NLGMA audit metric development process if the FDA will be establishing produce safety regulations that would cover leafy green vegetables?

If the intent of this recommendation is to provide a process for the leafy green vegetable industry to adopt its own unique food safety standards that it believes to be more workable than whatever FDA prescribes, we strongly urge the department to reconsider, as this would be an improper attempt to escape FDA regulation.

Finally, we urge the Department to consider the extensive requirements in the FSMA with regard to organic farms and smaller farms that direct market their produce to local consumers. In addition to requiring FDA to consult with the National Organic Program and to consider impacts on various types and scales of farms, the FSMA contains several exemptions for small, direct market operations. These policies were the result of extensive debate and are considered a vital part of the law by many producer groups and local food advocates. The NLGMA proposal contains no such considerations, which is one more reason that it is an inferior process for dealing with the safety of leafy greens.

Compliance with the Agricultural Marketing Agreement Act

In the recommended decision, the department lists five main “material issues” that were raised at the hearings, but failed to address the issue of whether or not the Agency has the statutory authority to promulgate a marketing agreement to establish food safety metrics for produce. Other than a mention of the opponents’ concern about statutory authority, there is no effort by the department to address the statutory authority question at all. In fact, the statute governing federal marketing agreements, the AMAA, is not mentioned once in the recommended decision or its explanatory preamble. Failure to address this central challenge to the NLGMA is significant flaw in the Recommended Decision.

The intent of the Agricultural Marketing Agreement Act (AMAA) is to provide a mechanism for growers to organize and protect themselves from the market power of handlers. But the recommended NLGMA is an agreement by, of, and for handlers that will dictate the terms of production to farmers.

The proponents of the NLGMA are large handlers, and they are proposing the marketing agreement over the very real objection of many producers. And since a marketing agreement, rather than a marketing order, is proposed, the producers will never get to vote on this handler-sponsored marketing agreement as would be required with a marketing order. While the proponents of the NLGMA describe the agreement as voluntary, numerous witnesses at the hearings described that the practical effect of a handler requirement will be to force producers to comply with this so-called voluntary marketing agreement.

The stated purpose of the AMAA is to establish and maintain orderly marketing conditions and protect the interest of the consumer. The proposed NLGMA would not only fail to

establish and maintain orderly marketing conditions, but would instead create confusion by establishing a system of standards for leafy greens that will compete with regulations being developed by the Food and Drug Administration as a result of the FDA Food Safety Modernization Act. Adding the proposed NLGMA to the mix will only further confuse the industry, not alleviate confusion and the marketing chaos that ensues from multiple, competing standards that all claim to be the best way to foster safe production practices.

A Flawed Model

The NLGMA is explicitly based on the California Leafy Greens Marketing Agreement (CALGMA). After several years in operation, the CALGMA offers valuable insight into the impacts of a marketing agreement focused on food safety and much cause for concern. The California agreement's focus on growing conditions, with less attention paid to processing, has led to dramatic changes in the way some farms are operating. Many of the witnesses who testified at the 2009 hearings offered detailed examples of these changes and the impact the agreement has had on water quality protection efforts, wildlife habitat, and other methods encouraged or required by organic certification. And initial research has shown some disturbing trends – the majority of Central Coast growers surveyed in spring 2007 reported that they had adopted at least one measure to discourage or eliminate wildlife, ranging from removing vegetation to poison baiting. In 2009, researchers reported that the pressure to comply with food safety programs, both the LGMA and other programs, could be having a chilling effect on participation in federal conservation programs such as the Environmental Quality Incentives Program. After decades of effort to improve agriculture's impact on the environment, and in light of the requirement that certified organic producers work to minimize their environmental impact and protect biodiversity, it is disheartening to see that food safety metrics under this agreement, and in private supermetrics that continue to be widely used in California, in such direct conflict with conservation and environmental goals.

It is also important to note that the requirements often cited as being in conflict with environmental and conservation goals – such as removal of vegetation from buffer zones, a focus on encroachment by all animals including those that may not pose a risk of pathogen transmission, and discouragement of natural soil amendments – could in fact be the wrong approach to food safety. Conservation practices not only protect land and water quality and wildlife habitat, they could also improve food safety by utilizing vegetative buffers that filter pathogens like E. coli and hedgerows that filter dust and airborne contaminants, and building healthy soils that make it harder for pathogenic bacteria to take hold.

The controversy over the California agreement among small, diversified, and some organic growers is also troubling. Consumers are responding as never before to efforts to rebuild local and regional food systems, connect farms and institutions, and promote less industrialized models of food production. It is exactly these farms that are leading the way in this effort that have objected to the California agreement. So it is vital that these operations be able to comply with and flourish under any new type of food safety program.

Finally, from a consumer perspective, the fact that several recalls of leafy greens produced

under the California LGMA offers a reason to pause and consider if the agreement is providing real protection to consumers. It again begs the question of the California agreement's weaker emphasis on processing and the potentially riskier types of products like ready to eat bagged products.

The marketing agreement model established in California and Arizona has not achieved the goals set for these programs and should not be expanded to cover the entire nation by the proposed NLGMA.

Impact on Small Growers and Organic Producers

Although the recommendation includes some changes in structure from the original proposal for the NLGMA, these changes are insufficient to address the concerns we have about the potential for the NLGMA process to be controlled by the largest handlers and processors in the leafy green industry, to the detriment of small and organic leafy greens producers.

The consolidated nature of the leafy greens industry creates the potential for the proposed NLGMA to have unequal impact on different sectors of the industry. The leafy greens industry is highly consolidated, with the majority of the volume produced by a small number of large firms. But it is not homogenous – a large number of small-to-medium sized firms produce the rest of the volume and these firms are very different from the largest players in the industry in the way they grow, harvest, package and market their products. Proponents of the NLGMA repeatedly tried to deal with concerns about the potential impact of the proposed NLGMA on small and medium farms by assuring them that they would not have to participate in the agreement if they did not want to. But the proposed NLGMA is not really voluntary for growers if a large percentage of buyers and handlers sign on to the agreement under pressure from their competitors. If producers choose not to participate in the NLGMA because it is not workable for their operations, they could lose important school and institutional markets for their produce, an important and growing marketing option for smaller farms.

Adding another layer of auditing and recordkeeping through the proposed NLGMA will have a more severe impact on small farmers. The burdens of complying with commodity-specific food safety metrics are much higher for a farmer growing 40 crops on 10 acres than for a grower producing 4 crops on 500 acres. This concern about impacts on small farms has been borne out by a survey of leafy green growers in California during 2008 and 2009. The survey found that the per-acre costs of implementing the CALGMA metrics were higher for small-and-medium-sized farms than for larger farms. This finding related to the significant economies of scale enjoyed by larger operations and their related ability to absorb costs over their large volumes, such as those of hiring designated food safety professionals for their operations.

In addition to the burdens put on small-to-medium scale, diversified producers, organic producers face specific burdens under the proposed NLGMA. Throughout the hearing process, witnesses raised concerns that the metrics established under the CALGMA, and the

interpretation of those metrics by auditors, have resulted in conflicts with national organic standards and imposed heavy and disproportionate burdens on organic producers. For example, in order to become and remain certified as organic, farms must have an organic systems plan that includes measures to promote biodiversity on their farms. Based on the experiences with the California agreement, organic producers, retailers and consumers expressed strong concerns that the metrics developed under the NLGMA would create strong incentives to remove wildlife habitat, in direct conflict with USDA organic standards.

Throughout the NLGMA hearing process, peer-reviewed research was referenced that demonstrates that organic farming systems, which rely on building microbial activity in the soil through the use of non-synthetic chemical farming systems, do in fact provide a significant defense against pathogens in the soil and uptake by the crops grown in that soil. These organic and sustainable systems rely heavily on wildlife habitat, buffer strips, composted and well-managed animal manure, and compost as vital parts of a holistic pest and nutrient management systems. Despite the growing body of science in support of the use of these tools, CALGMA metrics and private supermetrics have targeted these tools as food safety culprits that must be eliminated or avoided.

Finally, we are concerned with the scope of the proposed agreement. There is a real void in what we know about the risk posed by different production and processing methods for leafy greens. It is past time for research to be done to understand these risks. But what we do know is that while no segment of leafy greens production is risk-free, not all leafy greens are the same. We think that the proposal's inclusion of products that are eaten raw as well as those that are normally cooked misses the opportunity to focus on the highest priorities for reducing risk. We are also concerned that the proposed agreement does not have enough emphasis on processing, especially of ready to eat fresh cut products. These products have been involved in many of the recalls and illness outbreaks involving leafy greens and while research is limited, some studies indicate an elevated risk of pathogen contamination in bagged fresh cut products.

Industry Representation in NLGMA Structure

Under the proposed NLGMA, the agency is merely serving as a venue for the leafy greens industry to develop its own standards. Standards that affect consumers and many small players in the industry should not be determined by the most powerful players in the industry. We recognize that the ultimate authority to approve the metrics proposed by the Administrative Board rests with the Secretary. However, from a practical standpoint, it is very unlikely that the Secretary would make changes to metrics developed by the Board, whose members are appointed by the Secretary. Therefore the structure of the Board itself is of paramount importance.

The governance structure for the proposed NLGMA is flawed, with too much power given to handlers, while producers and consumers are not adequately represented. Under the proposed Board structure, handlers dominate the membership and therefore the votes.

We recognize that the recommended decision expands Board membership from the industry recommendation of 23 members to 26 members, reflecting a call from witnesses for greater producer representation on the Board. However, since the industry slots account for 12 of the seats and producers represent 10 seats, the industry is still able to dominate the voting, except in the rare event that 3 of the 4 “at-large” Board members vote with the producer members. The first three at-large Board seats are reserved for a food service industry representative, an importer representative, and a retailer representative, all of which would generally be more aligned with the handling sector than with the producer sector. The fourth at-large seat is reserved for a “public member” representative. However, there is no direction or definition in the recommended decision about the nature of this “public” representative, so it is difficult to know if consumer or other interests would actually be represented by this one member of the board.

In addition, even though a significant percent of leafy green vegetables are marketed as organic, there is no requirement that organic handlers or producers be represented on the Board. Instead, there is only a non-binding recommendation in section 970.40(c)(3) and (c)(4) that certified organic handlers and producers be represented, “to the extent practicable.”

Similarly, there is also only a non-binding recommendation in Section 970.40(c)(2) that “to the extent practicable,” the Board should include “diversified farm producers.” This greatly minimizes the important role of diversified farms in leafy green production. As stated in the explanatory preamble of the recommended decision, 90 percent of the U.S. production of leafy green vegetables are represented by California (75 percent) and Arizona (15 percent), and the production of those states is largely governed under the two existing state LGMA. From the analysis offered in the recommendation, it appears that the main function and benefit (from industry’s perspective) of moving from the California and Arizona agreements toward a National LGMA is to capture the extra 10 percent of U.S. leafy green production that is sourced from the other 48 states. And further, the analysis suggests that the most of this 10 percent is sourced from small and medium sized, diversified farming operations. If this is the case, then surely those producers should have substantial and guaranteed representation on the Board, not merely a vague “to the extent practicable” urging to the Secretary to give these farmers a voice on the Board.

Environmental Impact

We believe the USDA is required to prepare an environmental impact statement on the NLGMA. Witnesses at every hearing location provided testimony about concerns about potential negative impact of NLGMA metrics on conservation efforts on farms. These concerns are based in large part on the experiences of farmers required to comply with CALGMA metrics and “supermetrics” imposed by private buyers.

Proponents have argued that CALGMA metrics did not explicitly require wildlife habitat and other conservation measures to be removed. Many witnesses, however, noted that the strong warnings of CALGMA metrics regarding the pathogen dangers of wildlife have been interpreted by auditors to require farmers to remove wildlife habitat and other

conservation measures. The resulting negative environmental impacts in California were raised repeatedly in testimony during the Monterey hearing, including in the neutral testimony provided by the California Environmental Protection Agency and the U.S. Environmental Protection Agency. Witnesses at other hearing sites also made reference to the potential negative environmental impact of a NLGMA. Several environmental and conservation agencies appeared as witnesses at hearings on the proposed NLGMA and expressed concern that any new agreement would not be able to curtail the use of supermetrics and other practices that have impacted environmental quality.

To begin to quantify the environmental harm of the CALGMA, a grower survey by the Resource Conservation District of Monterey County was presented at the Monterey hearing regarding the environmental impact of the CALGMA. The survey showed that 91 percent of the farmers surveyed had previously adopted one or more conservation practices on their farms aimed at improving water quality or wildlife habitat. Of those, 32 percent said that they had removed non-crop vegetation in response to California LGMA or supermetric audits and 40 percent had removed wildlife. Not only is the removal of on-farm conservation measures counterproductive from an environmental standpoint, it is also counterproductive from a food safety standpoint. A growing body of research demonstrates that conservation measures at field edge help filter out pathogens from neighboring property.

Because of the great potential for environmental harm of the proposed NLGMA, a full Environmental Impact Study (EIS) should be conducted. The National Environmental Policy Act (NEPA) requires an environmental impact statement on any “major Federal actions significantly affecting the quality of the human environment.” The NLGMA meets all parts of this requirement, and therefore the USDA must prepare an environmental impact statement before deciding on the proposed NLGMA.

Conclusion

Consumers have been increasingly concerned, and often frustrated, as illness outbreaks and recalls related to produce continue to occur regularly. Many have lost confidence in specific products in the wake of illnesses or recalls and public opinion polling reveals strong support for reform of the food safety system. But this concern about the need for standards for produce safety should not be confused with a willingness to accept food safety programs that are unworkable for some farms or damaging to the environment. Our members and supporters are extremely concerned about the methods used to produce food, the impact food production has on the environment, and the economic viability of small, diversified, and organic farms and regional and local food systems – and they expect any food safety requirements to be developed with these things in mind.

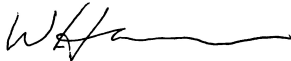
Food & Water Watch believes that the proposed NLGMA does not meet the criteria outlined for the purpose of marketing agreements. It will not eliminate confusion in the marketplace, because it shifts the responsibility for determining if food was produced with good practices to consumers. The agreement does not have any authority to stop the proliferation of supermetrics or other food safety protocols. This growing body of private

standards not only creates pressure on farms to take measures that may run counter to good conservation or wildlife practices, but also puts food safety in the realm of proprietary industry driven processes rather than transparent public standards. The agreement could also serve as a barrier that prevents some producers from entering wholesale or retail markets, effectively trapping them in niche markets and hurting efforts to diversify production and re-establish local and regional food systems.

Consumers are anxious for some movement on produce safety. But that does not mean that this flawed proposal should go forward. Consumers deserve more than a plan that lets the leafy green industry write its own standards, that might be impossible for small or organic producers to achieve, and that introduces yet another marketing claim into an already crowded marketplace. Food safety is too important to be relegated to being a marketing issue and it should not be the subject of a national marketing agreement. Therefore, we are opposed to the National Leafy Green Marketing Agreement and urge the USDA not to proceed with this recommended decision.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Hauter', with a long horizontal flourish extending to the right.

Wenonah Hauter
Executive Director