



# National Organic Coalition

## Executive Summary

### **Issues Raised in January 2010 Brief Filed in Opposition to the Proposed National Leafy Greens Marketing Agreement**

In 2009, several large associations for the leafy greens industry proposed that USDA's Agricultural Marketing Service establish a National Leafy Greens Marketing Agreement (NLGMA) for the entire nation, modeled on existing agreements in California and Arizona. USDA is considering this proposal based on the record established by a series of formal hearings held around the country in the fall of 2009.

Organizations representing leafy greens producers, consumers, environmental organizations and cooperative food retailers turned out to these hearings to voice their concerns about this proposal. In spite of the intimidating setting and overwhelming amount of time required for individuals to participate in the hearing process, the number of witnesses willing to participate demonstrates the depth and breadth of opposition to the proposal. Opponents pointed out that the proposed NLGMA fails in many regards 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. We believe that the proposed NLGMA is primarily focused on marketing an image of food safety, to restore consumer confidence in the aftermath of the 2006 *E. coli* outbreak in spinach and other subsequent outbreaks. But from a public policy and food safety science standpoint, food safety must be viewed through a different lens than marketing.

Our objections to the proposed NLGMA were described in detail in a final brief submitted to AMS on January 27, 2010. Below is a summary of some of the arguments raised in that document.

#### Statutory Intent

The Agricultural Marketing Agreement Act of 1937 is designed to protect producers and consumers, not handlers. The Declared Policy of the Act is quite clearly to provide for an orderly flow of commerce "in the interests of producers and consumers." Handlers and processors are not mentioned in the law because they are not the protected class. And yet they are the ones seeking the marketing agreement, which is opposed by many producers, especially smaller and more specialized producers, and consumers.

There is nothing in the language of the AMAA, the case law or AMAA's legislative history that supports the kind of marketing agreement proposed to the Secretary. The proposed NLGMA would not only fail to establish and maintain orderly marketing conditions, the purpose of the

AMAA, but would instead create confusion by establishing a system of standards for leafy greens that will compete with guidances being developed by the Food and Drug Administration and standards that could be required by pending legislation.

#### Food Safety is Not a Marketing Issue

Marketing agreements are designed to manage the sale of products with measurable attributes and communicate differences between products in the marketplace by making claims about attributes such as size, variety, and appearance. Because food safety, which is described in the proposed NLGMA as process-based, is not a measurable “quality” trait, food safety does not fit into the framework of a marketing agreement.

Food safety should not differ between growers or brands on the basis of whether or not they participate in a program such as the NLGMA. Consumers regard food safety as something that is pre-competitive, that is, something that is a baseline requirement for all products, not something to be used to gain an advantage in the marketplace. Choosing the “wrong” brand should not result in an increased risk of illness.

#### The NLGMA is an Inadequate Venue for Regulating Food Safety

Congress has considered changes to USDA’s authority, but has not ultimately passed any legislation that would give the agency the authority to take on the development of food safety standards through marketing agreements. Therefore, 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.

Because of the marketing mission of USDA’s Agricultural Marketing Service, the agency’s staff is made up of economists and marketing specialists, not food safety scientists. And various AMS administrators have testified to Congress that “AMS is not a food safety agency.” Therefore, we believe that the mission of AMS makes it impossible for the agency to fulfill a food safety role.

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 proposed LGMA will allow public comment only after the standards have been developed by industry.

The structure of the governance for the proposed NLGMA is flawed, with too much power given to handlers, while producers and consumers are not adequately represented. The governing power under the proposed NLGMA is with the Administrative Committee. Under the proposed structure of that Committee, handlers dominate the membership and therefore the votes. Under this structure, handlers can always outvote the other members of the Committee, including growers. Committee representation for producers is token, and there is no explicit representation at all for organic producers/handlers or for consumers. There is also very little food safety expertise in the proposed committee structure. There is an enormous amount of distrust among small-to-medium, diversified and organic growers that this process will serve them well.

### The Proposed NLGMA is Duplicative

The proposed NLGMA is duplicative of other government programs on food safety, including commodity specific guidance currently being created by the Food and Drug Administration (FDA) as well as potential regulation for produce required by pending food safety legislation. In addition to existing and potential government regulation of leafy greens, the LGMA will also be duplicative of existing industry requirements, including audit and metric programs required by buyers.

The LGMA will create different standards for leafy greens growers, in contrast to the single science-based food safety standard applied broadly to farm operations that many producers advocate. Failure to achieve this whole farm approach will drive “audit fatigue” for diversified growers who grow more than just leafy greens. Witnesses at many hearings expressed their frustration with the already long list of inspections and standards they contend with, including standards developed by FDA, USDA, ISO 65, Canada, Primus Labs, AIB, organic certification, and assorted private buyer requirements.

Even with its authority to create marketing agreements and orders, USDA lacks the authority to prohibit so-called “supermetrics,” requirements set by retailers and other buyers, and there is nothing in NLGMA that would prevent companies from requiring growers to follow metrics that exceed or differ in some way from LGMA metrics. Some retailers could use their requirement of supermetrics as a marketing strategy and claim that their product is better because it exceeds USDA standards. This proposal would not simplify the regulatory landscape for growers – it would complicate it.

### The Proposed NLGMA is Based on a Failed Model

It is difficult to see the NLGMA proposal as anything but the progeny of the CALGMA experience. Not only does NLGMA borrow the same name as its California counterpart, but the list of proponents is very similar as well. In addition, the governance structure of the proposed NLGMA continues to place the power in the hands of conventional handlers of leafy green vegetables and nothing in the proposal for the NLGMA differs significantly from the California and Arizona programs. A serious concern for consumers is the fact that several recalls of leafy greens produced under the California and Arizona LGMA took place after the agreement was in effect. And many witnesses explained at the Monterey portion of the hearing that the California agreement has failed to curb the use of private supermetrics. But perhaps the most notable impact of the state agreements has been the growing controversy over the environmental damage triggered by changes in production in the leafy greens industry to comply with food safety programs. 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

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 and the marketing efforts of the NLGMA. Further, 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 100 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.

In addition, organic producers are prohibited under USDA organic standards from using synthetic fertilizers on their farms, and rely on composted animal manure, compost and/or nitrogen-fixing crops to provide part of the nutrient balance needed by their crops. Many witnesses raised concerns that the CALGMA bias against the use of animal manure on farm fields would be replicated in the NLGMA metrics as well, ignoring the strict standards with which organic producers must already comply regarding use of animal manure and compost on their fields. Other sustainable practices employed on many small farms like biodiversity, crop rotation, organic pest control may be threatened by the demands of the NLGMA.

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, 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.

### Environmental Impacts

Witnesses at every hearing location provided testimony on concerns about potential negative impacts 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 the removal wildlife habitat and other conservation measures. 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 negatively impacted environmental quality.

A grower survey by the Resource Conservation District of Monterey County began to quantify the environmental harm of the CALGMA with a grower survey that 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, 7 percent had removed water bodies, and 40 percent had removed wildlife.

### Misplaced Focus

Part of the analysis of food safety risk should also be recognition that scale and type of operation play an important role in creating risk. Testimony was presented throughout the NLGMA hearing process that farms that grow leafy greens to be co-mingled, washed, and processed with produce from other farms to be sold as fresh-cut or “ready-to-eat” product stored in sealed bags in multiple states pose much greater food safety risk than those producing whole-head or bunched product, or salad mixes that are not comingled and shipped long distances in sealed packages. The proposed NLGMA fails to distinguish between different risk pathways for different types of leafy green products.

Microbial pathogen contamination in produce is a valid concern, but it is not the only food safety concern for produce. Yet, the proposed NLGMA and the California and Arizona agreements upon which it is based, focus exclusively on food safety risks posed by pathogens, and ignore other threats to human health that can be posed by leafy greens production. This incomplete scope means that the NLGMA misses the opportunity to address legitimate threats to public health and incorrectly puts producers who minimize those non-pathogen threats at a disadvantage. Some of the food safety impacts the NLGMA model fails to address include uses of agrochemicals, non-therapeutic antibiotics in livestock production, and water pollution from concentrated animal feeding operations (CAFOs). CAFOs generate massive amounts of animal waste and high percentage of the animals in CAFOs harbor and shed *E. coli* O157:H7 and other pathogens. The proposed NLGMA does nothing to address the contamination emanating from these other pathways and focuses solely on practices on individual farms.

### Impact on Local Food Systems

Signatory handlers to the proposed NLGMA would pledge to source product only from growers following the NLGMA prescribed farming practices. For the growers selling to these handlers, the metrics are not at all voluntary. While growers who want to avoid the NLGMA could turn to options such as direct marketing, it is certainly not appropriate to relegate organic, sustainable, and smaller-scale farms to direct marketing channels alone.

If the type of market control demonstrated through the CALGMA example is replicated on a national scale, the supply of “alternative” sources of product will be greatly reduced and efforts to create alternative supply chains and re-establish regional food systems greatly impeded. This would undermine the growing trends and complexity of alternative marketing chains, such as those being promoted by USDA itself through the “Know Your Farmer, Know Your Food” campaign.

### Necessary Reviews Not Completed

The proposed NLGMA is not, in economic reality, voluntary for growers. The agreement will regulate the actions and behaviors of handlers and producers. Thus, a final Regulatory Flexibility Act (RFA) analysis should be required as required in 5 U.S.C. § 605. Especially since the AMAA is designed to protect the interests of producers, ignoring the differential impacts on small- and medium-sized producers would be a significant error by the agency.

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

The proposed National Leafy Greens Marketing Agreement is an inappropriate way to address produce safety. Not only does the proposal wrongly attempt to fit the square peg of public health into the round hole of marketing and promotion, it also attempts to establish a governance and scientific structure that assures a continuation of the large scale, monocultural model of agriculture that we believe greatly contributes to the very food safety concerns at hand. The member organizations of the National Organic Coalition are acutely concerned about produce safety and are engaged in the ongoing practical and scientific debates about the sources of and solutions to the problem. But we unanimously and wholeheartedly agree that the NLGMA is the wrong vehicle to address this critical public health concern.

**For more information, contact:**

**Steve Etko, Legislative Director**  
**703-519-7772**  
**steveetka@gmail.com**