



2009

**National Leafy Greens Marketing Agreement Hearing, Oct. 22, 2010, Charlotte, NC
Testimony of Roland McReynolds, Executive Director, Carolina Farm Stewardship
Association**

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Your honor and USDA staff, my name is Roland McReynolds and I am the Executive Director of the Carolina Farm Stewardship Association, CFSA. Thank you for conducting this hearing here today and for the opportunity to present testimony on the proposal to establish a National Leafy Greens Marketing Agreement.

CFSA is a member-based organization with a mission to support local and organic agriculture in the Carolinas by educating, inspiring and organizing farmers, consumers and businesses. Our farmer membership includes large-scale organic operations of 1,000 acres or more and beginning farmers intensively cultivating a single acre; they are predominantly family farms and market gardeners that use sustainable and organic production practices to produce a variety of fruit, vegetable, livestock and dairy foods, and the vast majority run small operations with annual revenues less than \$250,000. Because of the generally prevailing climate conditions in the Carolinas, the leafy greens can be successfully grown throughout the year, and therefore many small farmers are able to rely on leafy greens as an income source during those seasons. We have over 1,200 members in North and South Carolina, and we estimate approximately one quarter of them produce leafy greens at some point during the year. Almost all of them market at least some of their products locally, through direct market sales, restaurants, local grocery retailers, institutions and local handlers and distributors.

Small scale, diversified and organic farmers are committed to providing safe, healthy products to their customers, and they take that responsibility very seriously. Every grower wants to constantly improve their practices for preventing pathogen contamination. The best way to achieve that goal, across all markets, all farm sizes, all climates and growing conditions, is to provide growers with the best scientific information available on pathogen controls, so they can adapt that knowledge to the conditions on their specific farms to create effective, risk-based, scale appropriate approaches to avoid pathogen contamination in their crops. During the comment period in late 2007 on the Announced Notice of Proposed Rulemaking regarding the NLGMA, CFSA submitted extensive comments, and argued for the need to avoid a national system for the governance of pathogen control. Unfortunately, our concerns were largely ignored by the proponents.

CFSA believes that, for a number of reasons which I will now outline or which have already be entered into the record for this hearing, the proposal that is the subject of this hearing is fatally flawed and inappropriate for adoption by USDA. We strongly encourage the Secretary to reject this proposed agreement, and we do not believe that any modifications to this proposed agreement can salvage it.

1. The Agricultural Marketing Agreement Act of 1937 precludes AMS from adopting food safety rules like the NLGMA.

- The intent of the AMAA is to provide a mechanism for growers to organize and protect themselves from the market power of handlers. The proposed LGMA is an agreement by, of, and for handlers that will dictate terms of production and sale to farmers without providing any assurance of the salability of affected producers' products. The

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Agricultural Marketing Service (AMS), by adopting the NLGMA, would be using its authority in violation of the statutory intent and to the detriment of growers.

- AMS, in the words of its Administrator, Rayne Pegg, “is not a food safety agency.” Marketing agreements and orders are for the purpose of verifying, as the AMS website states, “measurable attributes” of agricultural products. Establishing a process for food safety protocols is not the same as measuring an attribute on an end product. The activities of the Administrative Committee under the proposed agreement are not for the purpose of measuring attributes but of dictating processes for production, processing and handling. As Charles Hall of the proponent group member Georgia Fruit & Vegetable Growers Association stated in the NLGMA proponents’ webinar on Aug 19, 2009, the “primary goal of the marketing agreement is to continue our commitment to food safety ... This marketing agreement allows for the development of production and handling best practices that will be endorsed by the signatories.”
- Authority for ensuring produce safety is exclusively the jurisdiction of the Food and Drug Administration. Indeed, managing pathogen controls through a marketing agreement is an inappropriate way to provide assurance to the consumer as to the safety of a food item. The AMS mission is to “facilitate the strategic marketing of agricultural products,” not protect public health. By this marketing agreement AMS would be attempting to achieve through regulations what it could not do under statute.
- Because a food safety process is not a measurable attribute, the NLGMA does not achieve AMS’s goals for marketing agreements, which are to decrease market chaos, promote consumer choice, and control supply. The agreement would increase market chaos by establishing a competing standard for existing and pending private and federal produce safety standards; it would confuse consumers by treating pathogen control systems as an product attribute that varies between brands; and would inappropriately conflate food safety standards with supply controls, as food safety should remain constant, and not be subject to change according to fluctuations in supply and demand.
- Therefore, were AMS to adopt the NLGMA, any handlers signing on would not benefit from the exemption from antitrust liability that would be conveyed by their acceptance of a lawful marketing agreement. Thus the NLGMA could result in market disruptions through civil and criminal legal actions against those parties.

2. Contrary to proponent claims, the NLGMA will not be voluntary.

- For handlers, if a significant percentage of the leafy greens handlers sign up for the Agreement, it will be very difficult for other handlers to decide not do so as well, due to the market pressure from buyers that will result from that widespread adoption of the agreement. And as approximately 90 percent of the volume of leafy greens in the US is already subject to compliance with the California and Arizona LGMA’s, obviously the sign-ons to the NLGMA from those two states will quickly represent an overwhelming majority of handlers, leaving handlers elsewhere with no actual ability to refuse joining the agreement.
- The metrics required by the Agreement will be mandatory for the growers selling product to those handlers. This will be particularly true in parts of the country where a few handlers dominate the market, and growers have little choice of buyers for their product. As a result, the Agreement becomes a *de facto* marketing order that growers are required to follow. Yet despite the fact that the burden of the Agreement and its metrics would fall heaviest on growers, who would be required to follow the metrics, most of the power for developing and approving the metrics of the Agreement rests with the handlers.
- The NLGMA includes authority for the Administrative Committee to establish a marketing label for products produced in accordance with the agreement, creating a mark that would imply any product that does not have the mark is not safe. This would put growers, handlers and processors that are not in compliance with the NLGMA’s metrics at a competitive disadvantage, further belying the supposed “voluntary” nature of the agreement.
- Once adopted by a large proportion of handlers and processors, the LGMA production, processing and handling standards will essentially become the governing baseline standard for all leafy greens. It will create a *de facto* standard of care that will creep into liability insurance policies and legal proceedings, forcing all

growers to use those production practices prescribed by the agreement, regardless of their lack of applicability to a particular farm, climate, or other lawful USDA programs, such as the AMS National Organic Program, or conservation programs of the Natural Resources Conservation Service.

3. Contrary to proponent claims, the NLGMA will not be reduce the proliferation of private handler and retailer produce safety standards, and so will in fact increase consumer confusion.

- Hank Giclas, representing proponent group member Western Growers, stated in a nationally-broadcast webinar on August 19, 2009, that it's "likely" that there will continue to be supermetrics even if the NLGMA is adopted.
- USDA lacks authority to prohibit supermetrics, and the NLGMA will not change that. There is nothing in the Agreement that would prevent companies from requiring growers to follow metrics that exceed or differ in some way from LGMA metrics. In fact, some retailers or buyers could use their requirement of "supermetrics" as a marketing strategy, by arguing that their product is "better" because it exceeds USDA standards.
- The California LGMA has not limited supermetrics, and in fact those supermetrics have become more draconian for California farmers, particularly small-scale and organic farmers; and those supermetrics lack scientific basis, so the California agreement has in fact increased the proliferation of unscientific, one-size-fits all standards for leafy greens production.
- The NLGMA is being proposed at a time when Congress and the FDA are already in the process of developing legislation and regulations to govern pathogen control in fresh produce from field to fork. In fact, the U.S. Senate is holding hearings today about pending food safety legislation, and comments are due next week for FDA guidances on food safety procedures for leafy greens. Thus growers, as a result of this agreement, could find themselves facing divergent FDA, NLGMA, and multiple private supermetrics in attempting to market their leafy greens. And thus consumers, as a result of this agreement, could find themselves confused with three or more different labels or statements in the marketplace relating to the purported safety of leafy greens. So it's unclear why USDA is moving forward on its own with a potentially conflicting leafy green standard.

4.. The oversight of the LGMA by AMS is not adequate to protect public health.

- AMS is an agency that deals with marketing, not food safety. AMS's expertise is in the areas of marketing and economics, not microbiology. So under the NLGMA, an industry driven board writes the rules under the supervision of an agency with expertise in marketing. This system does not offer consumers assurance that this is a sufficient approach to food safety.
- There is one slot for a "public member" from the production area on Administrative Committee, but no slots for consumers on the Technical Committee that sets the actual metrics. There is an option to name a consumer member to the marketing committee. But putting consumers on marketing committee is not meaningful participation – in that role, there is no discussion of the stringency of standards or usefulness of program, just how to get consumers to accept the LGMA seal.
- Similar private-public systems, such as the California LGMA, have not in fact been demonstrated to be effective in protecting the public from pathogens. Earlier this year a CALGMA signatory recalled 22,000 cases of lettuce that tested positive for Salmonella. The lettuce in question had already been shipped to 29 states.

5. The NLGMA would inappropriately increase burdens on growers, particularly small-scale, diversified and organic producers.

- Existing industry-developed food safety protocols, such as the California and Arizona leafy greens marketing agreements, are not grounded in sufficient independent science. In fact, scientific evidence suggests that many of their approaches harm food safety outcomes rather than improving them.
- Those state-based agreements broadly target animals and wildlife habitat as a risk. The industry's approach contradicts research showing (1) that only certain animals are likely to carry pathogens. On-going research by the California Department of Fish and Game, based on two years of data from fecal samples, has shown that contrary to prior assumptions, wildlife are not a significant source of E. coli; (2) that practices in use on

diversified, conservation-oriented farms, including vegetation planted between fields and around waterways, benefit food safety by slowing the movement of pathogenic organisms in water and dust; and (3) that the incorporation of well-managed animal manure and other natural fertilizers into soil can suppress the presence of pathogenic organisms in soil. The state-based LGMA's punish small growers disproportionately by wildlife control and remediation measures, such as unscientific standards for exclusion of product from harvest in instances where wildlife incursion is identified, and requirements for investments in substantial exclusion methods, that are likely to have a higher cost per acre for smaller farms.

- Those state-based protocols employ a “one-size-fits-all” approach that does not consider different types and levels of risk present in different products or production systems. In fact, any food safety protocols for leafy greens should recognize that the greatest risk is in **processed products**. Analysis by the Community Alliance for Family Farms shows that 99 percent of all fresh produce contamination incidents between 1996 and 2006 came from non-farm sources, namely processing and handling facilities. According to FDA spokesperson Stephanie Kisnek, since 2002, all 14 confirmed incidents of *E. coli* O157:H7 outbreaks in leafy greens have been in product shipped in sealed plastic bags. While risks are present on farms of all sizes, the scale does matter: the consolidation of food production and processing into the hands of fewer and larger operations, and the national and global supply chains that bring much of our food from farms to consumers, have increased the chance that a single contamination incident could sicken a large number of people. The NLGMA inappropriately, and without scientific basis, pushes the cost of pathogen control risks on the farmer, instead of the processors and handlers where it belongs.
- Those state-based protocols, upon which the NLGMA is modeled, directly contradict science-based standards for the use of raw manure in organic farming systems, and consequently drive farmers’ costs up by forcing them to use other, higher-cost, soil amendments.
- NLGMA metrics are likely to discriminate against diversified farming operations that grow a wide variety of leafy greens and other produce. For example, many small leafy greens growers intensively manage acreage with a diversity of crops and crop rotations, including livestock. The experience from the state-based LGMA's is that they reduce the grower’s ability to use those intensive rotation practices due to multiple record-keeping burdens for each crop, fertility management issues (inability to use raw manure for any crop on the farm), buffering requirements, etc., resulting in income lost due to loss of a market for another crop or product.
- NLGMA metrics are likely to discriminate against small acreage farms. Existing state-based LGMA's establish unscientific buffering requirements for compost piles and adjacent livestock operations of 400 feet, potentially resulting in significant loss of available acreage in the case of farms under 50 acres.
- NLGMA metrics are likely to discriminate against farms incorporating conservation practices encouraged by the Natural Resources Conservation Service and other soil and water conservation programs. Unscientific standards in existing state-based LGMA's have reduced participation in conservation programs, and caused expenses for farmers to eliminate conservation practices such as vegetative buffers, as well as degrading soil and water resources.
- According to the statement of Hank Giclas of proponent member group Western Growers at the proponent group webinar of Aug. 19, 2009, farms would “likely” be subject to more than one audit per year, resulting in disproportionately high audit costs that will naturally be passed on to small farms in the form of lower prices from handlers and greater paperwork burdens.
- The NLGMA covers an inappropriately broad range of leafy greens, including crops harvested for sale by the head/whole bunch. Crops for fresh cut bagged processed salads are grown in very high densities and fertility. Crops harvested for whole heads or to be bunched are usually grown at dramatically lower densities. High crop densities and fertility create more succulent plants and a moister microclimate on the bed that can create an environment more suitable for pathogen development. Less dense plantings for head/whole bunch crops provide greater exposure to sun and breezes a more difficult environment for pathogens to colonize.
- The NLGMA would require handlers to establish traceability protocols, and does not establish any protections for small growers from inappropriate, costly traceability mechanisms. According to the statements of Charles Hall of proponent member group Georgia Fruit and Vegetable Growers Assoc. and Robert Gunther of

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proponent member group United Fresh at the proponent group webinar of Aug. 19, 2009, the traceability protocols under the agreement will be aligned with the industry Produce Traceability Initiative, a program developed by and for large-scale producers, handlers and processors, which mandates use of very expensive bar coding equipment and paperwork burdens beyond the capacity of small scale producers.

6. The structure of the NLGMA is biased in favor of entities that already enjoy market dominance, and so would limit competition.

- In our comments on the original Advanced Notice of Proposed Rulemaking, CFSA opposed any sort of national governing board for the implementation of pathogen control practices in leafy greens production. Rather, we argued for grower-controlled marketing agreements based on region/climate/growing conditions, and on the scale of and market served by farms. We specifically argued that a national board would be inappropriate because the tremendous variation in growing conditions in various climates and regions of the country would make it impossible, and inadvisable, to establish nationally-applicable standards for the production of leafy greens. The proposed NLGMA ignores those essential agricultural realities, and the delineation of zones for representation on the Administrative Committee flies in the face of those realities.
- According to the statement of Hank Giclas of proponent member group Western Growers at the proponent group webinar of Aug. 19, 2009, the zones were established based "on the volume of production," with each zone "anchored by at least one principal area of production as determined by volume." If the marketing agreement were to actually fulfill its stated objective of be designing metrics that are "science-based, scalable, and regionally applicable," the zones would be configured to reflect common regional agricultural characteristics in some manner. For instance, California and Arizona would be in the same zone, Georgia and Wisconsin would be in different zones; Florida and Vermont would be in different zones, and southern Georgia and northern Florida would be in the same zone. But in fact the NLGMA zones reflect no common climate, soil, or method of growing; in fact, they reflect no commonality or contiguity at all.
- There is no requirement of representation for organic handlers, organic farmers or natural foods retailers on the Administrative Committee, despite the double digit annual growth rates in the natural and organic foods market over the last decade.

7. Efforts to influence the development of this agreement by the small-scale, diversified and organic farming communities have been ignored by the proponents, and this situation would likely continue in the administration of the agreement.

- In 2007, the Carolina Farm Stewardship Association submitted comments in response to the advanced notice of proposed rulemaking on the proposed NLGMA, in which we stated grave concerns that a national agreement would be inappropriate given the variations in region, climate, soils, cultural practices, farm scale and market served by the wide variety of farms growing leafy greens across the United States. We suggested regional, scale-appropriate, and risk- and market-based agreements for the purposes of educating growers on best practices in the prevention of pathogen contamination in leafy greens, in conjunction with stricter scrutiny of the entities that have been proven to be the most common sources of widespread pathogen outbreaks in leafy greens (namely processing and packaging for long shelf life), would be the most effective and appropriate means for limiting pathogen contamination in leafy greens. Our suggestions were completely ignored by the proponents in developing the proposed NLGMA. We were never contacted by the proponents about our concerns prior to their June 10, 2009 submission of the proposed NLGMA to AMS, and were only contacted on Oct. 5, 2009 by a representative of the proponents for the purposes of collecting data about food safety costs for small farms.
- The vast majority of the 3,500 comments submitted in response to the ANPR by December 2007 opposed the NLGMA concept, and at least 30 agencies representing small, diversified and organic agriculture interests made comments opposing the agreement or making recommendations for it that were ignored by the proponents. There is no evidence that the proponents made any contact or outreach to those agencies prior to petitioning AMS on June 10, 2009 to adopt the NLGMA.

- In testimony in this hearing in Syracuse, a representative of the proponent Produce Marketing Association indicated the industry position that the NLGMA will more quickly establish pathogen control practices than any FDA regulatory process arising out of pending legislation, and establish more specific standards for leafy greens production than any such FDA process. The representative also stated that “everyone” agrees on the NLGMA. The proponent group’s website includes a projected timeline for the marketing agreement process that provides at most four months for the process of developing recommended audit metrics, an impossibly short period for collecting input from the wide segments of the market that proponents and USDA staff have indicated at this hearing would be involved in the metrics-development process. All these statements by proponents demonstrate the clear expectation of the large-scale handlers that dominate the proponent groups that production metrics will be based on the California LGMA, and will be dictated by those dominant industry players without concessions to the concerns of small, diversified and organic producers, despite the protestations to the contrary during the course of this hearing.

For these various reasons, CFSA urges USDA to reject the proposed NLGMA. Thank you, and I would welcome the opportunity to answer any questions.

Respectfully submitted,



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