UNITED STATES OF AMERICA DEPARTMENT OF AGRICULTURE

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PUBLIC HEARING

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IN THE MATTER OF:

:

NATIONAL LEAFY GREEN : Docket No.

VEGETABLES HANDLED IN : AO-FE-09-0138

THE UNITED STATES; : AMS-FV-09-0029

HEARING ON PROPOSED
MARKETING AGREEMENT

NO. 970

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Wednesday, September 23, 2009

Hyatt Regency Hotel Monterey Grand Ballroom 1 Old Golf Course Road

Monterey, CA

The above-entitled matter came on for hearing, pursuant to notice, at 8:00 a.m.

BEFORE:

Marc R. Hillson Chief Administrative Judge APPEARANCES:

ON BEHALF OF THE USDA:

SHARLENE DESKINS, Esq., Office of General

Counsel, Marketing Division
ANTOINETTE M. CARTER, Technical Assistant to
the Chief, AMS

MELISSA SCHMAEDICK, Senior Marketing Specialist, AMS

KATHLEEN A. STALEY, Food Safety Officer, AMS, Fruit & Vegetable Programs

ANTHONY J. SOUZA, Federal Program Manager, AMS SUZANNE DASH, Agricultural Economist, AMS MICHAEL DURANDO, Chief, AMS RAYNE PEGG, Administrator, AMS

ON BEHALF OF THE PROPONENTS:

JASON RESNICK, Western Growers ROBERT WILKINSON, Western Growers

SCOTT HORSFALL, California Leafy Green Handler

Marketing Agreement

HENRY GICLAS, Western Growers

ON BEHALF OF THE NATIONAL ORGANIC COALITION:

CHARLES ENGLISH, National Organic Coalition

C-O-N-T-E-N-T-S

WITNESS	DIRECT	CROSS	REDIRECT
Scott Horsfall	538	550	627
Paul Simonds	636	643	
Steve Etka	648	665	
Bill Stevens	779	783/786	
Patty Lovera	790	808/823	
Garth Kahl	848	859	
J. Baumgartner	883	904	
Claudia Reid	921	931	
E. Odabashian	937	954	
Paul Shimek	969	981	
Paul Hardison	1012	1017	
Lisa Bunin	1023	1036	

E-X-H-I-B-I-T-S

NO	DESCRIPTION	MARK	RECD
15	Scott Horsfall testimony	538	550
16 17 18	Paul Simonds' booklet Steve Etka testimony 3 Documents Extending date of the Monterey Hearing (each is marked Exhibit 18 separately)		646 663 744
19	Tom Willey Testimony	744	752
22 23 24	Dale Coke testimony Bill Stevens testimony Patty Lovera testimony Survey Garth Kahl testimony First handout provided by Garth Kahl	782 803 807	766 782 803 807 858
24B	Second handout provided by Garth Kahl (Fish and Game report)	850	858
25 .	Jo Ann Baumgartner testimony	888	903
25A	Report referred to by Jo Ann	884	903
	Baumgartner		
26	Claudia Reid testimony	920	935
27	Elisa Odabashian testimony	950	950
28	Steve Shimek slideshow	971	981
29	Allen Hardison testimony	1012	1023
30	Lisa Bunin testimony	1035	1035

- 1 P-R-O-C-E-E-D-I-N-G-S
- 2 (8:05 a.m.)
- JUDGE HILLSON: Okay, let's go on
- 4 the record.
- 5 Good morning. It's September 23rd,
- 6 and we're in Monterey, California for the
- 7 second day of hearing on the Leafy Green
- 8 Vegetables Handled in the United States,
- 9 Docket No. AO-FFE-09-0138 AMS-FV-09-0029 FV-
- 10 09-970-1.
- Just a reminder to put your cell
- 12 phones on vibrate or turn them off. I'm Mark
- 13 Hillson, and I'm the chief judge of the USDA,
- 14 and we're here to take testimony of anyone who
- 15 wants to testify who has an interest in this
- 16 subject. I'd also remind people once again
- 17 that anyone who testifies is subject to cross-
- 18 examination, and basically any interested
- 19 person can ask questions of a witness if they
- 20 so desire.
- 21 I'm going to continue my practice
- 22 unless I hear a good reason to do otherwise,

- 1 is that after the proponent's witness
- 2 testifies, I'll ask the government panel to
- 3 ask their questions, and then I'll turn it
- 4 over to any of the nongovernmental
- 5 representatives in the audience, and when the
- 6 opponents present their case, which will start
- 7 sometime today, I'll once again let the
- 8 government panel go first, and then I'll let
- 9 the opponents ask any questions that they
- 10 have.
- I understand through various
- 12 conversations that we have a number of people
- 13 we need to accommodate who want to testify
- 14 today. So it looks like we're going to go
- 15 with at least the next couple of proponent
- 16 witnesses first, and then I might I will
- 17 likely turn it over to Mr. English to put on
- 18 some or part of the proponents' case to
- 19 accommodate the witnesses who need to testify
- 20 today.
- 21 Any preliminary matters other than
- 22 what I just said?

- Okay, Mr. Resnick, you may call
- 2 your next witness.
- 3 MR. RESNICK: Thank you, Your
- 4 Honor. The proponent group calls Scott
- 5 Horsfall.
- 6 JUDGE HILLSON: Okay. And I'm
- 7 marking the document that I was just handed as
- 8 Exhibit 15.
- 9 (Whereupon the aforementioned
- 10 document was marked for
- identification as Exhibit No. 15)
- 12 Whereupon,
- 13 SCOTT HORSFALL
- 14 Was called as a witness by counsel for the
- 15 proponents group and, after having been first
- 16 duly sworn, was examined and testified as
- 17 follows.
- JUDGE HILLSON: Okay, can you
- 19 please state your name and spell it for the
- 20 record?
- 21 MR. HORSFALL: My name is Edward
- 22 Scott Horsfall, E-d-w-a-r-d S-c-o-t-t H-o-r-s-

- 1 f-a-1-1.
- JUDGE HILLSON: Okay, and you
- 3 have a statement you wish to read, correct?
- 4 MR. HORSFALL: I do.
- 5 JUDGE HILLSON: All right, you may
- 6 proceed.
- 7 MR. HORSFALL: Thank you, Your
- 8 Honor.
- 9 My name is Scott Horsfall. I am
- 10 the chief executive officer of the California
- 11 Leafy Green Products Handler Marketing
- 12 Agreement, commonly called the LGMA. The LGMA
- is a mechanism very verifying through
- 14 mandatory government audits that handlers and
- 15 growers are following accepted food safety
- 16 practices in the production and harvest of
- 17 lettuce, spinach and other leafy green
- 18 products. We are an instrumentality of the
- 19 State of California, and operate with
- 20 oversight from the California Department of
- 21 Food and Agriculture.
- 22 Although the leafy greens industry

- 1 has always prioritized food safety, in the
- 2 aftermath of the 2006 outbreak farmers,
- 3 shippers and processors recognized that more
- 4 effort was needed to protect public health.
- 5 The question was how to do it.
- 6 Several potential solutions were
- 7 discussed, including regulatory and
- 8 legislative options both at the state and
- 9 federal levels. These discussions were broad,
- 10 and included parties from both inside and
- 11 outside the industry. As discussions
- 12 progressed, it was clear that the leafy greens
- industry was determined to address the issue
- in a responsible manner, and to do it in a way
- 15 that would rebuild confidence among consumers,
- 16 buyers, and regulators.
- 17 In the end the decision was made
- 18 to create the California Leafy Greens Handler
- 19 Marketing Agreement, now usually referred to
- 20 as the LGMA. The marketing agreement gave the
- 21 farmers, shippers and processors of leafy
- 22 greens a vehicle to protect public health that

- 1 could be in place in time for the next year's
- 2 season. This marketing agreement also
- 3 provided the industry with the flexibility to
- 4 quickly change and amend the program based on
- 5 sound science and new breakthroughs in food
- 6 safety research.
- 7 This flexibility is one of the key
- 8 benefits of the LGMA structure.
- 9 The LGMA is focused on preventing
- 10 the introduction of pathogens in leafy greens
- 11 fields and farms, and we applaud the Obama
- 12 administration and the President's food safety
- 13 working group for their focus on prevention in
- 14 their approaching to improving food safety
- 15 systems in the United States.
- We were happy to hear Vice
- 17 President Biden and Health and Human Services
- 18 Secretary Sibelius describe prevention as Job
- 19 No. 1 at their food safety press conference on
- 20 July 7th of this year.
- 21 I'm going to submit part of
- 22 Section 970 for the record, and take this

- 1 opportunity to walk through several sections.
- 2 I will pick up where Mr. Giclas left off
- 3 yesterday, and following on the example of my
- 4 colleague from Western Growers, I will refrain
- 5 from reading each of these sections into the
- 6 record as they are already there. I will
- 7 elaborate on a few of the sections, and then
- 8 we'll be happy to answer questions if there
- 9 are any.
- 10 I'm going to cover Sections 970.55
- 11 through 970.98 of the proposed National Leafy
- 12 Greens Marketing Agreement.
- The first section covers expenses
- 14 and assessments. And in a nutshell the
- 15 assessment level is capped at five cents for
- 16 a 24-pound carton equivalent. The assessment
- 17 levels described here reflect the existing
- 18 standards in California. It should be noted
- 19 that the initial California assessment level
- 20 was two cents per 24-count carton equivalent,
- 21 and we lowered that to a penny and a half per
- 22 carton equivalent after the second year.

- 1 Efficiencies in implementing the
- 2 program led to the reduction in assessments.
- 3 The proponents are confident based on
- 4 experiences in California and Arizona, that
- 5 the actual costs of the proposed National
- 6 Leafy Greens Marketing Agreement will be far
- 7 less than the five cents per carton equivalent
- 8 cap that is put into this proposal.
- 9 MR. HORSFALL: If I may, Your
- 10 Honor, Roger Wilkinson on behalf of Western
- 11 Growers. Just to make the record clear, Mr.
- 12 Horsfall, your comments were about 970.56?
- MR. HORSFALL: Correct.
- 14 MR. HORSFALL: I don't believe
- 15 that got in there.
- MR. HORSFALL: Okay, thank you.
- 17 Section 970.58 on contributions,
- 18 the proponents believe the assessments will be
- 19 sufficient to fund the proposed National Leafy
- 20 Greens Marketing Agreement, including
- 21 administrative and other costs. However
- 22 should industry members or other entities want

- 1 to contribute voluntarily to the research and
- 2 promotion efforts of the organization, this
- 3 section makes such contributions possible.
- 4 Under duties and responsibilities
- 5 of signatories I want to talk a little bit
- 6 about 970.66, verification audits. This
- 7 section describes in fairly broad terms the
- 8 types of verification audits that would be
- 9 available through the National Leafy Greens
- 10 Marketing Agreements, including GAP or Good
- 11 Agricultural Practices audits, GHP, good
- 12 handling practices, or GMP, or good
- 13 manufacturing practices audits.
- 14 This section outlines the audit
- 15 requirements of the proposed National Leafy
- 16 Greens Marketing Agreement. The proponents
- 17 believe that such audits should be carried out
- 18 by government bodies, specifically the United
- 19 States Department of Agriculture for GAP
- 20 audits, and the USDA or the U.S. Food and Drug
- 21 Administration for GMP audits or GHP audits.
- 22 The committee will work with USDA

- 1 to determine audit schedules, but the
- 2 intention is for all signatory members and the
- 3 growers to handle product from all handlers on
- 4 a regular basis. These programs operate under
- 5 the auspices of the USDA's audit programs.
- 6 And in California and Arizona, we have worked
- 7 very closely with USDA to set up those audit
- 8 schedules and requirements.
- 9 There are requirements as part of
- 10 that program that would apply to the national
- 11 basis as well, and that is a collaborative
- 12 effort.
- 13 Section 970.67 on audit metrics,
- 14 this is a fairly broad description of the
- 15 types of practices that will be included in
- 16 each of these audit areas. All of the audits
- 17 specified in this section will be based on
- 18 specific, verifiable and science-based metrics
- 19 developed by the technical review board and
- 20 approved by the committee and the secretary.
- 21 While the specifics of any audit metrics will
- 22 be determined once the committee has been

- 1 formed, this section specifies that said
- 2 metrics will be science based, that they will
- 3 be in compliance with FDA guidance and/or
- 4 regulations; will be verifiable via audit; and
- 5 will be updated regularly as new science
- 6 becomes available.
- 7 Section 970.68 is traceability,
- 8 and I would only state that the requirement
- 9 here is in keeping with the Food Security Act
- 10 requirements on food handlers, in terms of
- 11 being able to trace the product one step back
- 12 and one step forward.
- 13 Section 970.69 covers the official
- 14 certification mark. The certification mark
- 15 would be created and granted as the official
- 16 mark of the National Leafy Greens Marketing
- 17 Agreement. It'd be licensed to signatories
- 18 to use on their paperwork such as bills of
- 19 lading. By using the certification mark in
- 20 this manner, signatories will communicate to
- 21 their customers that the company is in
- 22 compliance with the LGMA's requirements in

- 1 full.
- 2 Skipping ahead to the section
- 3 called research and promotion, 970.75, the
- 4 proponents do not believe the National Leafy
- 5 Greens Marketing Agreement resources should be
- 6 used to fund a consumer advertising campaign
- 7 designed to, quote, sell food safety.
- 8 However the proponents do believe
- 9 that funds should be used to promote
- 10 acceptance of the National Leafy Greens
- 11 Marketing Agreement, its audit program, and
- 12 its food safety program to buyers and others
- in the produce industry, and to communicate
- 14 the meaning of the MLGMA certification mark.
- 15 It is the hope of the proponents that the
- 16 creation of the National Leafy Greens
- 17 Marketing Agreement will smooth the way
- 18 towards acceptance of a common standard for
- 19 food safety practices in the leafy greens
- 20 industry, and outreach and promotion to the
- 21 intended target audience, that is, buyers,
- 22 will be critical to gaining that level of

- 1 acceptance.
- 2 It is also the intention of the
- 3 proponents to allow for market research
- 4 products in order to better understand and
- 5 communicate with key audiences such as buyers.
- The next section is under 970.83,
- 7 compliance. And this program or this section
- 8 spells out the conditions under which a
- 9 signatory could lose his or her certification
- 10 under the program. Compliance with the
- 11 requirements of the National Leafy Greens
- 12 Marketing Agreement results in certifications
- and member in good standing, and gains the
- 14 right to use the certification mark and to
- 15 communicate with customers about their status
- 16 in the program.
- 17 By the same token failure to
- 18 comply must come with consequences, and this
- 19 section spells out the details of the
- 20 compliance program of the National Leafy
- 21 Greens Marketing Agreement.
- 22 Failure to meet these

- 1 requirements, and failure to comply with the
- 2 approved metrics can lead to decertification
- 3 and loss of the right to use the certification
- 4 mark.
- 5 The specific compliance or
- 6 noncompliance section applies primarily to
- 7 marketing product that has not been subject to
- 8 verification audits through the program.
- 9 In the section for miscellaneous
- 10 terms, it covers several legal requirements of
- 11 the program, and some additional definitions
- 12 that I think are pretty self-explanatory. It
- 13 also covers the termination requirements of
- 14 the program that the secretary can undertake
- 15 should that become necessary.
- 16 Withdrawal from the program,
- 17 970.98, signatories can withdraw from the
- 18 program as long as they do so in writing
- 19 before the end of a given fiscal year. The
- 20 requirement is that if you are in the program
- 21 that you do need to stay in through the fiscal
- 22 year because of the need to be able to plan

- 1 from a budget and the administration
- 2 standpoint.
- 3 So that completes my testimony.
- 4 Again, there are sections that I obviously
- 5 refrained from reading into the record as they
- 6 are already in the record, but I'm happy to
- 7 answer questions.
- JUDGE HILLSON: All right, thank
- 9 you for your testimony. And I'm going to
- 10 receive you written testimony and enter it
- 11 into the record as Exhibit No. 15.
- 12 (Whereupon the aforementioned
- document previously marked for
- identification as Exhibit No. 15
- was received into evidence)
- 16 JUDGE HILLSON: And let me ask
- 17 the panel if they have any questions.
- 18 You go ahead, Ms. Schmaedick, you
- 19 may go first.
- 20 CROSS-EXAMINATION BY COUNSEL FOR THE USDA
- MS. SCHMAEDICK: Good morning,
- 22 this is Melissa Schmaedick.

- 1 So Mr. Horsfall, are you prepared
- 2 to answer questions on each of the specific
- 3 sections that you have included in your
- 4 testimony and referred to as being entered
- 5 into the notice?
- 6 MR. HORSFALL: Yes, I am.
- 7 MS. SCHMAEDICK: I'd like to
- 8 start with just a general discussion of the
- 9 proposed structure of the program that you are
- 10 including in your proposal. You've mentioned
- 11 a couple of things. You've mentioned
- 12 verification audits. You've referred to GHP
- 13 and GM metrics and the development of those
- 14 metrics.
- 15 Can you explain to me just in a
- 16 very general term how first of all does this
- 17 proposal include specific regulation, or are
- 18 you proposing general authorities? And then
- 19 secondly, could you explain the process by
- 20 which the proponent group envisions specifics
- 21 of this program to be developed?
- 22 MR. HORSFALL: When you say this

- 1 program, are you talking about you started
- 2 out talking about audit metrics.
- 3 MS. SCHMAEDICK: The proposal in
- 4 general.
- 5 MR. HORSFALL: Okay, the proposal
- 6 creates a framework for creating the National
- 7 Leafy Greens Marketing Agreement as an
- 8 organization. It creates certain specific
- 9 authorities for developing for instance audit
- 10 metrics in each of those areas. It creates
- 11 the subcommittee's technical review board as
- 12 it were that are given the specific
- 13 responsibility for developing those metrics,
- 14 which would then be brought back to the full
- 15 committee for the approval and recommendation
- 16 of the secretary.
- 17 So it's the organization itself
- 18 created through this marketing agreement
- 19 proposal is the mechanism for doing it.
- 20 MS. SCHMAEDICK: So the way that
- 21 the proposal currently stands, does it include
- 22 regulation, specific regulation?

- 1 MR. HORSFALL: It does not
- 2 include specific regulation in terms of those
- 3 audit metrics.
- 4 MS. SCHMAEDICK: And the process
- 5 that is described in the proposal, begins with
- 6 the roll of a technical review board, it
- 7 offers advice to the administrative committee;
- 8 is that correct?
- 9 MR. HORSFALL: That is correct.
- 10 MS. SCHMAEDICK: And then the
- 11 administrative committee, how would they go
- 12 about requesting that their proposed
- 13 recommendations actually become regulation?
- 14 MR. HORSFALL: The administrative
- 15 committee has the authority under this
- 16 proposal to review and then adopt the
- 17 regulatory that's not quite the right word -
- 18 the audit specifics or the metric specifics,
- 19 or whatever language we're going to use. The
- 20 committee had the authority to adopt that
- 21 language on behalf of marketing agreement.
- 22 There is a requirement as we discussed

- 1 yesterday for that decision to be made with a
- 2 supermajority vote of the board of the
- 3 committee.
- 4 MS. SCHMAEDICK: I'd like to read
- 5 the language that's been proposed, 970.67,
- 6 audit metrics. It says: audit metrics shall
- 7 be recommended by the committee to USDA for
- 8 approval. Can you explain to me what that
- 9 means?
- 10 MR. HORSFALL: Well, I believe
- 11 that in any marketing agreement the ultimate
- 12 authority resides with the secretary of
- 13 agriculture, that the audit metrics that would
- 14 be brought before the committee would be
- 15 approved for final presentation to the
- 16 secretary of agriculture, which is essentially
- 17 the final step in the process for adoption. MS.
- 18 SCHMAEDICK: Are you aware of whether or not
- 19 there is an option for public comment in that
- 20 process?
- 21 MR. HORSFALL: I'm aware that all
- 22 of these steps take place in public meetings,

- 1 and all the public meetings include the
- 2 opportunity for public comment. I'm not sure
- 3 whether there is a formal public comment
- 4 period. Others in our group may be more
- 5 familiar with that. It's certainly the intent
- of the proponents that all this be subject to
- 7 public commenting.
- 8 MS. SCHMAEDICK: So I just want
- 9 to clarify if I'm understanding you correctly,
- 10 the administrative committee works
- 11 cooperatively with a technical review board to
- 12 develop recommendations that are then
- 13 submitted to the secretary of the Department
- of Agriculture for approval; is that correct?
- MR. HORSFALL: That is my
- 16 understanding of the process.
- 17 MS. SCHMAEDICK: Okay, and that
- 18 it is a public process that involves an
- 19 opportunity for input; is that correct?
- MR. HORSFALL: Absolutely.
- MS. SCHMAEDICK: Thank you.
- 22 Based on your experience with the

- 1 California program, can you say whether or not
- 2 in your opinion that program has been
- 3 beneficial to your industry?
- 4 MR. HORSFALL: I yes, I believe
- 5 the program has been beneficial to the
- 6 industry. I base that on a number of
- 7 different factors, primarily on feedback that
- 8 we get directly from our members. We
- 9 certainly believe that the program has been
- 10 beneficial from the standpoint that it has
- 11 brought a sense of commonality to the
- 12 practices of food safety in the industry. We
- 13 all recognize that there are issues still to
- 14 be dealt with out there; that's been well
- 15 covered yesterday, and I'm sure we'll hear
- 16 more about it today.
- 17 But I think that the other thing
- 18 that we heard, again it's anecdotal, but we do
- 19 hear from our industry, is that the culture of
- 20 the industry has changed over the last two
- 21 years. There is certainly a greater
- 22 acceptance of the need to be focused on food

- 1 safety and to implement programs like this in
- 2 the field. So from that standpoint, and also
- 3 from the standpoint of everybody recognizes
- 4 that an event like what happened two years
- 5 ago, three years ago now, that type of an
- 6 outbreak has a significant impact on the
- 7 entire industry, not just in California, but
- 8 it can certainly impact everybody.
- 9 So the recognition that by
- 10 bringing everybody up to a common standard you
- 11 are minimizing the risk of that happening
- 12 again I think the industry sees that as a
- 13 benefit.
- 14 MS. SCHMAEDICK: Have you done
- 15 any analysis within your industry that would
- 16 substantiate in a quantitative form that there
- 17 has been a benefit as a result of this
- 18 program?
- 19 MR. HORSFALL: No, we really
- 20 haven't to this point. We have I think as
- 21 Mr. Richards presented yesterday, I mean
- 22 finding a cost-benefit equation for a program

- 1 like this which is essentially based on
- 2 avoiding or minimizing risk is a difficult
- 3 thing to do. It's not necessarily something
- 4 that is going to pay off on the bottom line,
- 5 and I think people recognize that.
- I think it's too soon to try to do
- 7 quantitative measures of outbreaks or
- 8 illnesses or things like that. I think that
- 9 those will develop over time. Obviously we
- 10 are pleased that there hasn't been a repeat of
- 11 the kind of outbreak we had three years ago.
- 12 But I don't point to that as a metric.
- MS. SCHMAEDICK: Have you has
- 14 your group or your organization looked at the
- 15 consumer response to your program?
- 16 MR. HORSFALL: We have. We did a
- 17 consumer survey when we were a year into the
- 18 program. And it was really designed to
- 19 measure the consumer response to the type of
- 20 program that we put together. So it was not
- 21 so much, we don't expect consumers to be aware
- 22 of the LGMA, because we are not promoting the

- 1 LGMA to consumers. But we did want to test
- 2 the structure that was put together. So we
- 3 talked about things like the mandatory
- 4 government audits, the fact that buyers inform
- 5 governments and sign off on the program to
- 6 help enforce it, by only buying from certified
- 7 members. And the fact that essentially most
- 8 of the industry was on board, and reaching
- 9 that same level of practices.
- 10 So the results of that survey
- 11 were positive. I think we expected them to
- 12 be. But I think that the most encouraging
- 13 part was that we started that survey by asking
- 14 consumers their confidence level in lettuce
- 15 and leafy greens, and then we explained the
- 16 program, and then we asked that same program
- 17 again. And we did see a very substantial
- 18 increase in that number. The confidence level
- 19 rose by some 70 percent or something like
- 20 that; I don't have those numbers here, from
- 21 the beginning of the survey. Now, this was
- 22 within a year after the original outbreak.

- 1 It was still somewhat type of mind for people.
- 2 So when we initially asked people their
- 3 confidence level, it wasn't particularly high.
- 4 But again what we wanted to do was
- 5 verify that we were putting a program in
- 6 place, and practices in place, with the
- 7 elements in place, that would help raise
- 8 confidence for consumers.
- 9 MS. SCHMAEDICK: So do you have a
- 10 copy of that study available?
- 11 MR. HORSFALL: I do. Absolutely.
- 12 It's on our website. It's available. MS.
- 13 SCHMAEDICK: But you haven't brought it
- 14 today?
- MR. HORSFALL: I don't have it
- 16 here today, no, I do not. I will be happy to
- 17 get a copy.
- 18 MS. SCHMAEDICK: I believe it
- 19 would be helpful to have that available.
- 20 MR. HORSFALL: We can submit a
- 21 copy of it.
- 22 MS. SCHMAEDICK: Your the state

- 1 program, what type of participation do you
- 2 see?
- MR. HORSFALL: Well, we see very
- 4 strong participation among the handlers in the
- 5 state. In fact when the program was created,
- 6 there was an initial list of handlers that was
- 7 assembled through data at the California
- 8 Department of Food & Agriculture, and I think
- 9 there were 79 or 80 names on that. We
- 10 immediately had over 100 people sign up. So
- 11 we had more handlers sign up than we knew
- 12 existed in the state of California. So and
- 13 we've maintained we've dropped we had 120
- 14 companies the first year. We are now I think
- 15 at 106, because either we a number of
- 16 companies have gone out of business in that
- 17 time, or have merged or consolidated into
- 18 other businesses.
- 19 But we have overwhelming support
- 20 from the handler community in the State of
- 21 California. We estimate that well over 90
- 22 percent of the production is covered by our

- 1 members.
- 2 MS. SCHMAEDICK: Among those
- 3 members are there businesses that qualify as
- 4 large business entities as well as small
- 5 business entities under the SBA definition?
- 6 MR. HORSFALL: There are very few
- 7 if any that would qualify as small businesses;
- 8 that's the \$7 million level is it not for
- 9 handlers?
- 10 MS. SCHMAEDICK: For handlers,
- 11 yes.
- MR. HORSFALL: Very few handlers
- 13 would fall in that category, but I do think we
- 14 have a few.
- MS. SCHMAEDICK: Is there a
- 16 definition of large and small business that
- 17 might be more descriptive of your industry?
- 18 MR. HORSFALL: I don't know of
- 19 one. I mean we don't look at the membership
- 20 that way. We simply treat them all the same.
- 21 It's something we could look at and maybe come
- 22 back with an idea on that.

- 1 MS. SCHMAEDICK: Among your
- 2 membership has there been outreach and
- 3 discussion about this proposal for a national
- 4 program?
- 5 MR. HORSFALL: Yes.
- 6 MS. SCHMAEDICK: Can you describe
- 7 to me the types of activities that have been
- 8 done to do that outreach?
- 9 MR. HORSFALL: Well, we've done -
- 10 we have been involved with the other proponent
- 11 groups now for well over a year the idea of a
- 12 national program and the development of this
- 13 draft. In that time we have discussed it at
- 14 several of our board meetings. We've done
- 15 several mailings to the industry. We
- 16 participated in a WebEx seminar that was put
- on awhile back to which growers and handlers
- 18 across the country were invited. And we have
- 19 facilitated the distribution of information,
- 20 the draft of the website information, that was
- 21 created, to our industry. And we have
- 22 essentially just tried to make sure everybody

- 1 was aware, and had the opportunity to comment
- 2 on what was being developed.
- I think later testimony this
- 4 morning, you will get a fairly comprehensive
- 5 report on the outreach that has been done.
- 6 MS. SCHMAEDICK: So that will be
- 7 actually discussed further? Real quickly
- 8 though --
- 9 MR. HORSFALL: And if I may,
- 10 sorry, on that point as well, I think three
- 11 times in the last year and a half both Joe
- 12 Pezzini, our chairman of the board, and I,
- 13 have made presentations to a group called the
- 14 Leafy Greens Council which is based on the
- 15 Midwest that represents the leafy green
- 16 industry across the country; and specifically
- 17 the last couple of times focusing on this
- 18 effort as well. So we have also helped with
- 19 the outreach across the country.
- 20 MS. SCHMAEDICK: All right, so I
- 21 will save my questions for outreach for the
- 22 person designated to speak to that issue.

- I do have some questions about
- 2 the way that the proposed program would work,
- 3 and the idea of assessments, how those
- 4 assessments would be collected, and the cost
- 5 of audit verification. If I understand this
- 6 proposal correctly, it encompasses the entire
- 7 chain within the industry beginning at
- 8 production all the way through handling and
- 9 possibly processing. And audit verifications
- 10 would be required at each of those levels.
- 11 Obviously there will be expenses attached to
- 12 each of those audits.
- 13 Can you explain to me the
- 14 proponents' intentions or vision of how that
- 15 system would work?
- 16 MR. HORSFALL: Yes. The
- intention is for the first handler to pay an
- 18 assessment, based on the volume of product
- 19 handled by the company. And that initial
- 20 assessment would be the basic operating fund
- 21 for the organization, and would pay for the
- 22 on-farm GAP audit verification program. So a

- 1 first handler would pay based on the
- 2 assessment rate that is set by the committee
- 3 against all products shipped and put into
- 4 commerce. And that's the first base level of
- 5 the program.
- 6 We did not feel it was fair to ask
- 7 those first handlers to also pay for audit
- 8 verification costs for secondary handlers,
- 9 processors or others further down the chain.
- 10 So rather than apply another assessment and
- 11 double dip on the same assessment that had
- 12 been paid, the second level would be subject
- 13 to actual audit costs incurred to do the
- 14 verification audits required for those steps.
- 15 So there would be two sources of
- 16 funding, the assessment would fund the
- 17 marketing agreements basic operations, and the
- 18 GAP audit verification program. Further
- 19 audits down the distribution channel would be
- 20 funded on a fee basis.
- 21 MS. SCHMAEDICK: So the cost of
- 22 the audit itself during the GAP audit, would

- 1 that be paid by the producer of by the
- 2 handler?
- 3 MR. HORSFALL: That would be paid
- 4 from the assessments levied upon handlers.
- 5 MS. SCHMAEDICK: Okay, and how
- 6 does the proponent group envision well, let
- 7 me read a part of the proposed language and
- 8 ask you to explain it.
- 9 Under 970.56 assessments,
- 10 paragraph A, it says each handler shall pay to
- 11 the committee such handler's pro rata share of
- 12 the committee's expenses. That pro rata
- 13 share, can you explain to me what that means?
- MR. HORSFALL: Well, my
- 15 understanding of that is just simply you work
- 16 backwards from you create a budget according
- 17 to what the program is projected to cost. And
- 18 then you create an assessment level based on
- 19 projected shipments that will get you to each
- 20 handler paying his or her pro rata share.
- 21 So it's maybe inartfully worded
- 22 here. We may be able to improve this . But

- 1 by definition if you are paying an assessment
- 2 based on a volume that you ship, then at the
- 3 end of the year you pay your pro rata share of
- 4 the costs.
- 5 MS. SCHMAEDICK: So is it correct
- 6 to say that smaller handlers, smaller
- 7 businesses, because they are handling a
- 8 smaller volume, their pro rata share would be
- 9 smaller than a larger handler by comparison?
- 10 MR. HORSFALL: Oh, absolutely,
- 11 yes.
- 12 MS. SCHMAEDICK: The actual
- 13 payment of inspection fees, how would that be
- 14 handled? Would each handler pay the
- 15 inspectors? Or would it go through the
- 16 administrative committee? Or how would that
- 17 work?
- 18 MR. HORSFALL: For the GAP audits
- 19 it would go through the administrative
- 20 committee. That would be an arrangement
- 21 between the committee and the Department of
- 22 Agriculture's inspection services.

- 1 MS. SCHMAEDICK: Okay, so again,
- 2 just if I understand correctly, you have a
- 3 pool of assessments that are collected based
- 4 on volume. The inspection service works
- 5 directly with the administrative committee to
- 6 coordinate its services. And the
- 7 administrative committee pays for the audit
- 8 fees out of the assessments that are
- 9 collected.
- 10 MR. HORSFALL: That is correct.
- 11 MS. SCHMAEDICK: Okay. Is this a
- 12 concept that has been widely discussed among
- 13 the members of the California leafy green
- 14 agreement?
- 15 MR. HORSFALL: I don't know that
- 16 it's been widely discussed beyond us assuring
- 17 or not assuring, but explaining that
- 18 essentially the program for the national
- 19 program mirrors what we do in California
- 20 already. It's a system they are already
- 21 familiar with. So it hasn't required
- 22 discussion per se because it's familiar.

- 1 MS. SCHMAEDICK: And is there
- 2 general acceptance among your handler members
- 3 to take on that expense of the GAP audits?
- 4 MR. HORSFALL: Again it's -
- 5 mirrors the system that is already in place in
- 6 California. So yes.
- 7 MS. SCHMAEDICK: At this point
- 8 I'd like to pass the questioning on to my
- 9 colleagues.
- 10 JUDGE HILLSON: Anyone on the
- 11 panel have questions?
- MS. STALEY: Yes.
- 13 Good morning, Kathleen Staley. If
- 14 we could go to Section 970.83 and compliance.
- 15 What are the penalties if someone does not
- 16 comply with the requirements of this program?
- 17 MR. HORSFALL: Loss of
- 18 certification as a member in compliance, and
- 19 that information becomes part of the public
- 20 record. Which in turn has significant sales
- 21 implications for the company. So the bottom
- 22 line of the program really is that

- 1 noncompliance will lead to the loss of sales,
- 2 and hit in the marketplace.
- 3 MS. STALEY: You've talked about
- 4 the fact that this program helps to build
- 5 consumer confidence. As a consumer how would
- 6 I have that information available to me when
- 7 I go into the grocery store and I'm looking to
- 8 buy a leafy green product?
- 9 MR. HORSFALL: I believe that the
- 10 consumer confidence is built by a decline in
- 11 the number of instances related to food safety
- in our products. So this program and programs
- 13 like this are designed to deal with the
- 14 problems, lower the risks so that we don't
- 15 have outbreaks and we don't have incidents,
- 16 and then as an industry we continue to
- 17 produce, distribute and promote a healthy,
- 18 safe product.
- 19 It is not the intent of the
- 20 proponents to sell food safety, to say our
- 21 product is safer than somebody else's product.
- 22 That's not seen as productive. So at this

- 1 point in time we don't anticipate a
- 2 communication effort to the consumer directly
- 3 about the program.
- 4 MS. SCHMAEDICK: Can you walk us
- 5 through the verification audits which are an
- 6 important part of the compliance. So I'm a
- 7 grower. The USDA auditor comes out and does
- 8 the initial audit. Is there anything else
- 9 involved in the audit program?
- 10 MR. HORSFALL: Well, an audit
- 11 begins with a compliance and paperwork audit
- 12 of the handler, the handler member, to make
- 13 sure that that handler has a written
- 14 compliance program; that that handler supplied
- 15 and updated grower list; that the trace back
- 16 requirements are being met; and that they have
- 17 a written plan that explains exactly how they
- 18 are going to meet whatever the requirements
- 19 are that are adopted by this board in terms of
- 20 food safety practices.
- 21 Then the secondary part of the
- 22 audit is in the field where, again, there is

- 1 further paperwork and documentation checks of
- 2 all the various known risk areas that have
- 3 been addressed in the metrics. There are
- 4 observational parts of that audit in terms of
- 5 worker behavior and hygiene; environmental
- 6 assessments. And that collectively makes up
- 7 a verification or a GAP audit. And those
- 8 audits are randomly done throughout the
- 9 marketing season.
- 10 The program will also require
- 11 unannounced audits, so that a very similar
- 12 audit but with no advanced notice whatsoever.
- 13 And they will go directly out to the fields
- 14 and do the field observation part of the
- 15 audit.
- 16 MS. SCHMAEDICK: If an auditor is
- 17 doing either the initial audit or the
- 18 unannounced audit and they find an area where
- 19 there is a problem, how is that handled?
- 20 MR. HORSFALL: In most cases most
- 21 audits find some type of finding or
- 22 observation. An audit report is created, and

- 1 sent back to the marketing agreement. Their
- 2 compliance arm. I guess I'm talking pretty
- 3 much from the standpoint of how things are
- 4 done right now in California and Arizona, and
- 5 I think to a certain degree, we need to leave
- 6 flexibility open to the committee to develop
- 7 their compliance program. There may be
- 8 requirements at the national level that I'm
- 9 not aware of.
- 10 But essentially the audit reports
- 11 details anything that that auditor has seen or
- 12 observed, that either is questionable or is
- 13 not in compliance with the food safety
- 14 practices that are accepted or adopted by the
- 15 board; and then the company is given an
- 16 opportunity to correct those findings,
- 17 depending on how serious they are. It can be
- 18 a very short term correction, or they may
- 19 give them longer to verify that that
- 20 correction has been done. And as long as the
- 21 member completes that corrective action and
- 22 that is verified upon a re-audit, then they

- 1 remain in good standing. If the auditor comes
- 2 across a situation that the auditor deems to
- 3 be a serious immediate health concern, then
- 4 the auditor is obligated to call the FDA or
- 5 the local health authority and bring them onto
- 6 the scene because at least in our California
- 7 situation the FDA has more authority than does
- 8 CDFA or USDA in terms of an immediate problem
- 9 that might need to be taken care of.
- MS. STALEY: Thank you.
- 11 MR. SOUZA: Thank you. Tony
- 12 Souza. Good morning, Mr. Horsfall.
- I have a question regarding the
- 14 audit matrix, Section 970.67, paragraph C. In
- 15 that paragraph it states critical limits for
- 16 process controls for each of the quality
- 17 factors identified in the audit matrix shall
- 18 be prescribed by USDA in consultation with FDA
- 19 or other federal or state regulatory bodies.
- 20 What is it that the proponent
- 21 group is asking for in that paragraph? Is
- 22 that something that would be covered more by

- 1 the technical review panel?
- 2 MR. HORSFALL: Yes. That is
- 3 talking about how the specific metrics for HP
- 4 and GMP audits will be developed by the
- 5 technical review board. I think we talked
- 6 about this, or Mr. Giclas did yesterday at
- 7 some length, in terms of the FDA guidance that
- 8 exists in that area being kind of the
- 9 foundation of those metrics as they are
- 10 developed, which I think is what that
- 11 specifically is referring to there. But as
- 12 for GAP audits, we would expect specific
- 13 verifiable auditable standards to be put in
- 14 place.
- 15 MR. SOUZA: So is it the intent
- 16 of the proponent group to have that document
- 17 reviewed by USDA to ensure that the critical
- 18 limits spelled out in that document are
- 19 auditable?
- 20 MR. HORSFALL: Absolutely. As is
- 21 again the case currently in California and
- 22 Arizona, the process of determining what is

- 1 auditable particularly as it relates to a
- 2 specific set of auditable standards, is a
- 3 collaborative one that involves the regulatory
- 4 agencies.
- 5 MR. SOUZA: A follow up: Ms.
- 6 Staley had asked you to describe the audit
- 7 process. Are you familiar with the number of
- 8 auditors that it takes to provide audit
- 9 service for the program that you have
- 10 currently in California?
- 11 MR. HORSFALL: Yes, we have a
- 12 team of it's ranged anywhere from six to 10
- 13 auditors. Right now I think we have a team of
- 14 five or six auditors that is doing all of our
- 15 GAP audits. They also cover the Arizona
- 16 program during the winter months, and that
- 17 seems to be a pretty good number to meet the
- 18 required number of audits that we have on the
- 19 program.
- 20 MR. SOUZA: So currently you have
- 21 106 signatories, and they are able to audit
- 22 those under the frequency that you described

- 1 earlier?
- 2 MR. HORSFALL: Yes.
- 3 MR. SOUZA: You also mentioned
- 4 that they do crossover currently and audit in
- 5 Arizona?
- 6 MR. HORSFALL: That is correct.
- 7 MR. SOUZA: Under the Arizona
- 8 leafy green marketing?
- 9 MR. HORSFALL: Yes.
- 10 MR. SOUZA: No further questions.
- 11 Thank you.
- JUDGE HILLSON: Anyone else? Go
- 13 ahead, Ms. Dash.
- 14 MS. DASH: This is Anne Dash. I
- 15 have a question about the spinach recall that
- 16 was announced last week. Could you describe
- 17 how the contaminated product was discovered?
- 18 And is this an example where the California
- 19 agreement should get credit for keeping bad
- 20 product off the market, or something fall
- 21 through the cracks and we should blame you?
- MR. HORSFALL: I will admit I

- 1 don't know all the details of that. It was a
- 2 private company's situation obviously. My
- 3 understanding is that a random test of spinach
- 4 in the marketplace that was conducted under I
- 5 believe it was a USDA program called the
- 6 Microbiological Database Program, MDP, is that
- 7 it, found a single bunch of spinach or a box
- 8 of spinach that upon the random test tested
- 9 positive for salmonella. There were no
- 10 illnesses reported. It was on a precautionary
- 11 basis that the company did a recall of I think
- 12 it was 1,700 boxes that were part of that
- 13 particular lot.
- No, I mean I think it's a sign
- 15 that overall there are food safety systems in
- 16 place that are working. We have always said
- 17 that our goal is to reduce risk to the lowest
- 18 level possible, but there will always be some
- 19 risk. And luckily in this case it was caught
- 20 through one of those other programs. And
- 21 luckily nobody got sick.
- 22 But it's not unusual. There have

- 1 been several recalls of different products
- 2 over the last year that have been caught by
- 3 that kind of random marketplace sampling and
- 4 testing.
- 5 MS. SCHMAEDICK: Melissa
- 6 Schmaedick. You just mentioned that the
- 7 recall was for bunched spinach; is that
- 8 correct? So the type of quality concerns that
- 9 the proposed program intends to address, would
- 10 you say that those concerns are relevant for
- 11 bunched product as well as fresh cut packaged
- 12 as well as product that comes in basically any
- 13 form?
- MR. HORSFALL: Yes, we
- 15 fundamentally believe that food safety is a
- 16 shared responsibility of the entire leafy
- 17 greens industry. And that it's not specific
- 18 to any particular segment of that industry, as
- 19 we have seen there can be problems that arise
- 20 with any type of product going to the
- 21 marketplace. And we need to lower that risk
- 22 with all product.

- 1 MS. SCHMAEDICK: Thank you.
- JUDGE HILLSON: Go ahead, Ms.
- 3 Carter.
- 4 MS. CARTER: Antoinette Carter
- 5 with USDA. Just a couple of questions. As
- 6 the chief executive officer of the California
- 7 leafy green products handling marketing
- 8 agreement, have you discussed at all what the
- 9 proposed program is if implemented would
- 10 have on the current California marketing
- 11 agreement? Or could have?
- MR. HORSFALL: Yes, we've
- 13 discussed it. Again we fundamentally believe
- 14 that a single national leafy greens marketing
- 15 agreement should make programs like ours
- 16 obsolete. So ideally there would be a single
- 17 program with a single standard that the entire
- industry would be part of, and the state
- 19 programs well, I can't speak for Arizona,
- 20 but I think the understanding would be that
- 21 the California program would eventually shut
- down.

- 1 MS. CARTER: So just to follow up
- 2 on your response, is it the intent of the
- 3 proponent group that this proposed national
- 4 program replace existing state programs?
- 5 MR. HORSFALL: I think the intent
- 6 of the proponent group is to create a National
- 7 Leafy Greens Marketing Agreement. I don't
- 8 think the proponent group as a whole has
- 9 addressed the consideration of what then
- 10 happens to our program or the Arizona program.
- 11 I am just speaking on behalf of the California
- 12 program, discussions with our industry, we
- 13 don't want nobody wants a situation where
- 14 people have to pay twice for shipping the same
- 15 product to do the same thing. We are trying to
- 16 get rid of duplicative audits, so certainly we
- 17 wouldn't' want to have all of our members
- 18 subject to a California LGMA audit and a
- 19 national LGMA audit. It only makes sense to
- 20 have a single program.
- But how we get there we haven't
- 22 talked in any detail about that yet.

- 1 MS. CARTER: So if the proposed
- 2 program is implemented, and state programs
- 3 continue to operate, should there be some
- 4 consideration for coordination with the
- 5 existing state programs under the national
- 6 program?
- 7 MR. HORSFALL: Yes, I believe
- 8 there should. And there's language that I
- 9 think was part of what Mr. Giclas introduced
- 10 yesterday that allows the national program to
- 11 work through MOUs with existing programs. My
- 12 personal point of view was that that would be
- 13 a short term arrangement at most, ideally, if
- it's going to be up to that committee to
- 15 decide if they didn't want to do it.
- 16 MS. CARTER: Could you explain
- 17 how, if implemented, the implementation of the
- 18 proposed program would work? For example,
- 19 does the proponent group support a phased in
- 20 approach, and why would that be necessary?
- 21 MR. HORSFALL: I'm sorry, could
- 22 you say the first part of your question again?

- 1 MS. CARTER: Could you explain
- 2 how the proposed program if implemented would
- 3 work with regards to audit verification? Does
- 4 the proponent group support a phased in
- 5 process? And if so why would that be
- 6 necessary?
- 7 MR. HORSFALL: Well, I think that
- 8 and again using California as an example,
- 9 which may be instructive there are important
- 10 steps that need to be undertaken before you
- 11 can go in and start auditing. In our case it
- 12 was in a very shortened timeframe because
- 13 there was an intense sense of importance to
- 14 the effort and a need to move quickly. But
- 15 just administratively you've got to form a
- 16 committee and get people appointed out and
- 17 undertake those basic steps of starting a
- 18 program. You've got to create this technical
- 19 review board, and that technical review board
- 20 is going to need some time to develop those
- 21 audit metrics. And so almost by definition
- 22 you are going to have to phase in the program

- 1 in terms of when you actually go out and start
- 2 auditing people in the field or the auditing
- 3 facility. I don't know how to tell you today
- 4 how long that would take, or again, we were
- 5 able to operate fairly quickly in the
- 6 California marketing agreement environment,
- 7 but my assumption is that's a longer process
- 8 on the national level.
- 9 So I think that's just something
- 10 we have to leave that flexibility to the
- 11 committee as it gets formed and moves forward.
- 12 And maybe that's why it's important that we
- 13 have the language that allows us to work in
- 14 some sense with the California and Arizona
- 15 programs, because I don't think we would want
- 16 to stop doing auditing of our industry while
- 17 those steps were underway. So it's difficult
- 18 at this point in time to say how long it would
- 19 take.
- 20 MS. CARTER: I'd like to direct
- 21 your attention to the Section 70,
- 22 administrative review. I believe earlier you

- 1 mentioned that the marketing of product that
- 2 has not undergone a verification audit could
- 3 be subject to denial of the use of the
- 4 certification mark. Are there any other audit
- 5 findings or violations that could subject the
- 6 denial of the use of the certification mark?
- 7 MR. HORSFALL: Well, there I
- 8 will speak from the California perspective,
- 9 which may or may not be the way a national
- 10 program is structured, once they get policies
- 11 established. But yes, there are. There are -
- for instance we require, and this program
- 13 will require, corrective action for even minor
- 14 findings which we get verified on re-audit.
- 15 A member's failure to take corrective action
- 16 can lead to further action such as
- 17 decertification, even if that original finding
- 18 wasn't a very serious finding. So that is one
- 19 example of something that could lead to
- 20 decertification because they would not be in
- 21 compliance with the requirements of the
- 22 program.

- 1 MS. CARTER: Could you also
- 2 explain why does the requester in the proposed
- 3 language need to have a financial interest in
- 4 the program, and why it could not be a public
- 5 citizen?
- 6 MR. HORSFALL: Well, this is
- 7 referring specifically to review of actions
- 8 taken as a result of an audit finding, and
- 9 that's predicated on the idea that it's the
- 10 interested party that's been affected by the
- 11 action taken, and therefore would be the
- 12 interested party that could request
- 13 administrative review.
- MS. CARTER: And does the
- 15 proponent group support USDA establishing the
- 16 level of elevation for administration reviews?
- 17 MR. HORSFALL: I think that that
- 18 is part of the collaborative process that USDA
- 19 would definitely be instrumental in
- 20 developing.
- MS. CARTER: Okay, that's all I
- 22 have. T hank you.

- 1 JUDGE HILLSON: Ms. Deskins.
- 2 MS. DESKINS: Sharlene Deskins,
- 3 USDA Office of General Counsel. I just wanted
- 4 to make sure I understand this correctly.
- 5 Under this language in the agreement the
- 6 intent is for the first handler to pay the
- 7 assessments? Just say it verbally.
- 8 MR. HORSFALL: Yes, oh I'm sorry,
- 9 yes.
- 10 MS. DESKINS: Because there was a
- 11 question yesterday about if secondary handlers
- 12 could sign the agreement. Do you recall that?
- MR. HORSFALL: Yes.
- MS. DESKINS: Okay, in your
- 15 opinion can a second handler sign the
- 16 agreement?
- MR. HORSFALL: Yes.
- 18 MS. DESKINS: Okay, and just for
- 19 the record state what a second handler is?
- MR. HORSFALL: Well, a second
- 21 handler is anybody in that distribution
- 22 process. It could be a handler, it could be

- 1 a processor, who takes control of the product
- 2 for further processing or distribution, who
- 3 might be subject to a good GMP or a GHP audit,
- 4 and their financial or they would then be
- 5 charged on a fee basis for those audits. And
- 6 a good example is, there could be a regional
- 7 processor of leafy green products in the
- 8 Midwest who buys lettuce from a California
- 9 handler who is the first handler. That first
- 10 handler is paid an assessment on that product,
- 11 but the processor may want to be a member of
- 12 the national LGMA and give GHP and GMP audits
- 13 as well.
- 14 So they can join. They are not
- 15 required to pay an assessment, because it has
- 16 already been paid by the first handler. But
- 17 they will be required to pay the costs of the
- 18 verification audit at the processor level.
- 19 MS. DESKINS: Okay, so the intent
- 20 would be for the secondary handler not to pay
- 21 assessments, but they could sign it and get
- 22 the benefits as a signatory of the agreement

- 1 in marketing the product?
- 2 MR. HORSFALL: Yes.
- 3 MS. DESKINS: Okay. The other
- 4 question I had was about the pro rata share of
- 5 the assessments. And I think you kind of
- 6 answered it, but I wanted it on the record.
- 7 So the secondary handlers wouldn't have a pro
- 8 rata share of anything?
- 9 MR. HORSFALL: No, secondary
- 10 handler is only going to pay the fee for the
- 11 audit that that handler incurs.
- MS. DESKINS: In regards to a
- 13 handler, if a handler doesn't pay their pro
- 14 rata fee, what happens to them under this
- 15 agreement?
- 16 MR. HORSFALL: Then that handler
- 17 is subject to when they sign the marketing
- 18 agreement they are obligated to pay their
- 19 assessment. And if they do not do that they
- 20 are subject to action from the department. I
- 21 mean there are collection actions that would
- 22 be undertaken.

- 1 MS. DESKINS: How do you see that
- 2 working?
- 3 MR. HORSFALL: Well, I'll admit I
- 4 don't know exactly how that works at the
- 5 federal level. In our case we have the
- 6 enforcement branch of the Department of Food
- 7 and Agriculture who do our financial audits,
- 8 and if somebody is not paying then we can file
- 9 action against them through the state.
- 10 MS. DESKINS: Okay, and in terms
- 11 of them paying, the handler is expected to pay
- 12 their pro rata share at the beginning of the
- 13 marketing year; is that how it's supposed to
- 14 work?
- 15 MR. HORSFALL: No, it would be on
- 16 an ongoing basis. We bill our members on a
- 17 monthly basis. Because they pay according to
- 18 what they ship, so until they've shipped it
- 19 they don't know what that amount is going to
- 20 be.
- 21 MS. DESKINS: Okay, and in terms
- 22 of compliance, if someone doesn't follow the

- 1 metrics in the agreement, the penalty is they
- 2 lose their standing under the agreement? Just
- 3 explain that to me.
- 4 MR. HORSFALL: The program is
- 5 based on the idea that a member in compliance
- 6 is certified by the marketing agreement as
- 7 being in compliance with the specific
- 8 requirements, those have been audited, and
- 9 that should there be findings that those
- 10 findings have been corrected. That leads to
- 11 certification as we say of a member in good
- 12 standing. Whether that would be the language
- or not, I don't know; but that leads to
- 14 certification.
- 15 That information is public. That
- 16 information is on a website, in the sense that
- 17 these are the companies who are members in
- 18 good standing, and information on any actions
- 19 taken, if somebody has lost that
- 20 certification, is also public.
- 21 And so the loss of certification,
- 22 in our case, you can't ship to Canada if you

- 1 are not a certified member of the leafy greens
- 2 marketing agreement. So if you lose
- 3 certification you are automatically losing
- 4 access to what in most cases is 10 percent of
- 5 your sales roughly. There are many buyers who
- 6 won't buy from you unless you are certified by
- 7 the LGMA as well.
- 8 So the program doesn't have the
- 9 ability to stop anybody from shipping product.
- 10 The biggest club that we have is
- 11 decertification. But again because that is
- 12 public, and because the buying industry is
- 13 pretty closely attuned to any actions that are
- 14 taken, that has real repercussions for
- 15 companies should they fall into that category.
- 16 MS. DESKINS: Okay. I'm just
- 17 trying to see how loss of certification would
- 18 work. Let's say I get audited and they find
- 19 I'm not complying with the agreement. I would
- 20 get notice from the inspection service, or
- 21 from the committee, that I'm not in
- 22 compliance; is that how it would work?

- 1 MR. HORSFALL: Yes. We didn't
- 2 really finish that process. Once the audit is
- 3 completed the audit report goes into the
- 4 compliance arm of the organization.
- 5 Violation levels are assigned if it's
- 6 something that in our language is potentially
- 7 flagrant, then we have a separate process so
- 8 that the handler is afforded due process.
- 9 It's not exactly like this administrative
- 10 review as described here. But there would be
- 11 a process put in place, and if that finding is
- 12 confirmed, then decertification ensures for
- 13 whatever set period of time that process is
- 14 determined. And again, it's different
- 15 depending on the situation.
- MS. DESKINS: Okay, in terms of -
- 17 let's say I'm a signatory handler. I've been
- 18 through some problems. There's an audit.
- 19 They find problems. Does the committee give
- 20 me notice of how many days I have to correct
- 21 it?
- MR. HORSFALL: Yes.

- 1 MS. DESKINS: Okay.
- 2 MR. HORSFALL: And again those
- 3 are policies that will be left to the
- 4 committee to decide. In our case we require
- 5 a corrective action plan within five days of
- 6 notice of a violation. And we do a re-audit,
- 7 depending on how serious we think the
- 8 violation is, either within another three or
- 9 four days, or on the next scheduled audit if
- 10 it's a minor thing. So I assume there would
- 11 be policies like that put in place.
- MS. DESKINS: So the intent is
- 13 that if handlers --
- 14 MR. HORSFALL: The intent of the
- 15 proponents would be to have a similar kind of
- 16 situation.
- 17 MS. DESKINS: Okay, if someone
- 18 has a problem, they get a bad audit, they
- 19 have a certain time period to correct it, and
- 20 then if they don't they lose their
- 21 certification?
- MR. HORSFALL: Correct.

- 1 MS. DESKINS: And just to
- 2 understand how that works, I assume there'd be
- 3 a listing some place of who the signatory
- 4 handlers are. When you lose certification you
- 5 are just taken from that list?
- 6 MR. HORSFALL: In our case, there
- 7 is not only a list of certified handlers, but
- 8 there is also a list of any decertified
- 9 members and for the period of time that they
- 10 are decertified. So it's easily accessible
- 11 information.
- MS. DESKINS: Okay, and just so I
- 13 understand, in terms of the handler in
- 14 marketing it, me losing my certification would
- 15 hurt my ability to market my product to some
- 16 buyers?
- 17 MS. DESKINS: Let me see if I
- 18 have another question for you.
- 19 That's it. Thank you.
- 20 JUDGE HILLSON: Ms. Schmaedick.
- 21 MS. SCHMAEDICK: Melissa
- 22 Schmaedick. I'd like to revisit the

- 1 section on assessments. The definition of
- 2 leafy green vegetables as proposed under the
- 3 agreement encompasses a number of different
- 4 types of vegetables, lettuces and spinach and
- 5 cabbage. So when you are talking about an
- 6 assessment rate, talking about one assessment
- 7 rate, how would that be calculated for all of
- 8 these different types of products, and how
- 9 would you make it equal?
- 10 MR. HORSFALL: This is a very
- 11 difficult issue. It's one that we had our
- 12 group struggle with for a long time. Because
- it's not on a per pound basis, because you do
- 14 have products like cabbage that are extremely
- 15 heavy, that bring a return of something like
- 16 spring mix which is very light.
- 17 The 24-count equivalent is kind of
- 18 a long time standard for much of the leafy
- 19 greens industry. Lettuce has traditionally
- 20 been shipped in a 24-count box. So that is
- 21 the basic unit that was created. What we've
- 22 done in California is to then take to try to

- 1 take that cost back to the field. So the idea
- 2 is that all of these products, regardless of
- 3 what they are end use is, their end weight,
- 4 their end package, that the food safety
- 5 practices that we are implementing in the
- 6 field are essentially the same, what's
- 7 required by the program, and food safety in
- 8 terms of GAP audits is all about what happens
- 9 in the field.
- 10 So formulas were created, starting
- 11 with that 24-count equivalent with each
- 12 product, to determine how to apply that rate
- 13 to get back to a common per acre assessment
- 14 rate, which in our case is roughly \$17 an
- 15 acre, I think, \$15-20, and it's a complicated
- 16 formula, but it all relates back to the 24-
- 17 count equivalent. So that a handler then, even
- 18 if they are shipping something that is not 24
- 19 count, can convert the number to 24-count
- 20 equivalent, and then apply this formula, and
- 21 it comes out to the assessment count that
- 22 relates back to 24-count equivalent.

- 1 It's very difficult to explain
- 2 without actually putting the numbers up which
- 3 we can bring in if you want to go through that
- 4 in more detail.
- 5 But that is how we've done it in
- 6 California. It is something that we are
- 7 reviewing actually right now, two, 2-1/2 years
- 8 into the program, to make sure those formulas
- 9 are accurate. But that was really the only
- 10 way we could come up with to do it and to do
- 11 it equitably, was to make it equitable on a
- 12 per acre basis, to make it reportable on a per
- 13 carton basis.
- MS. SCHMAEDICK: So has the
- 15 proponent group given some thought as to how
- 16 these complex formulas would be applied at the
- 17 national level within different regions and
- 18 zones?
- 19 MR. HORSFALL: No, I don't
- 20 believe that has been discussed.
- 21 MS. SCHMAEDICK: But you do have
- 22 a system in place under the California

- 1 program?
- 2 MR. HORSFALL: Yes, we do. And
- 3 if I could, I think the key to that will be
- 4 once we collect and maybe we do have some
- 5 more of that information now and lot of it
- 6 really comes down to yield data from different
- 7 parts of the country, and that can all be
- 8 worked into the formula, relatively easy, once
- 9 the basic concept is worked out which we have
- 10 already done.
- 11 MS. SCHMAEDICK: Would it be
- 12 possible at some point for the proponent group
- 13 to provide us an example of how a calculation
- 14 might be done to arrive at that equivalent?
- MR. HORSFALL: Yes. We will
- 16 tackle that before we finish this round of
- 17 hearings.
- 18 MS. SCHMAEDICK: Okay. Just a
- 19 couple of things that we need to get on the
- 20 record here with regard to Sections 970.80 and
- 21 970.81. Section 970.80 is reports and
- 22 recordkeeping, and 970.81 is confidential

- 1 information. Can you explain to me the
- 2 importance of these two sections?
- 3 MR. HORSFALL: Well, the reports
- 4 and recordkeeping, this applies to the
- 5 responsibility of the handler to report
- 6 accurately and completely the volume of
- 7 product shipped, so that appropriate
- 8 assessments can be leveled. So it's quite
- 9 simply the handler when he joins or she joins
- 10 is obligated to completely and accurately and
- 11 thoroughly report any relevant shippers,
- 12 obviously any product covered by the marketing
- 13 agreement, and to pay assessments accordingly.
- 14 And that's all subject then to audit to ensure
- 15 that the appropriate amounts have been paid.
- 16 Confidentiality is common to most
- of these types of programs. That then is very
- 18 sensitive market information, company
- 19 information, and the marketing committee has
- 20 an obligation to keep that information
- 21 confidential in order to protect the rights of
- 22 the members.

- 1 MS. SCHMAEDICK: I'm sorry, what
- 2 type of information would be confidential?
- 3 MR. HORSFALL: The volume
- 4 information, the shipping information, any
- 5 proprietary company information which is
- 6 disclosed to the marketing agreement as a
- 7 result of the requirements of the program is
- 8 confidential information which should be kept
- 9 confidential.
- 10 MS. SCHMAEDICK: And the
- 11 information that might be collected under the
- 12 reports and recordkeeping authority, is that
- 13 information ever used for other administrative
- 14 committee purposes? For example, maybe
- 15 analysis of the marketplace, trends, that sort
- 16 of thing?
- 17 MR. HORSFALL: Yes, I believe it
- 18 would be used for that type of analysis, but
- 19 it would be done in a blinded fashion, so that
- 20 no individual company's information would be
- 21 part of any sort of report or analysis.
- 22 MS. SCHMAEDICK: Would it be fair

- 1 to say that that information would be helpful
- 2 in guiding the administrative committee to
- 3 make informed decisions along the lines of an
- 4 industrywide scope?
- 5 MR. HORSFALL: I think it would
- 6 be essential for those kinds of decisions,
- 7 absolutely.
- 8 MS. SCHMAEDICK: I'm finished
- 9 with questions.
- JUDGE HILLSON: Ms. Staley.
- 11 MS. STALEY: If I could go back
- 12 to something Antoinette Carter talked about,
- 13 the outreach and the phase in period. Could
- 14 you briefly give us a description of how you
- 15 began the implementation of the California
- 16 program, and did you do any outreach and
- 17 education before you implemented that?
- 18 MR. HORSFALL: Well, quite
- 19 frankly, we were under a lot of pressure in
- 20 California to do things quickly. So a lot of
- 21 things happened simultaneously. The marketing
- 22 agreement was debated. Hearings were held

- 1 over the winter and early spring of 2006, and
- 2 I think it was February of 2007 that the
- 3 marketing agreement was actually formed.
- 4 There was concurrently an effort
- 5 underway by a group including academia,
- 6 industry, and food safety experts to develop
- 7 a set of metrics, to develop an audit form.
- 8 There were discussions with USDA and CDFA on
- 9 setting up a memorandum of understanding so we
- 10 could use a government auditor. So all of
- 11 these things were happening at once.
- 12 And then we also during that
- 13 summer, before we started official audits, we
- 14 held a series of outreach workshops through
- 15 the state in each region where you leafy
- 16 greens were grown. So there was outreach. We
- 17 could certainly have done more if we had more
- 18 time, and I think that was extremely important
- 19 in the case of this program.
- 20 But then we also started with a
- 21 three or four month period of what we called
- 22 informational audits. So it was a way not

- 1 only to show growers and handlers what the
- 2 audit was going to be like. It was a way for
- 3 us to do a check on what we had developed so
- 4 far, make sure the systems worked, and we gave
- 5 the industry those two or three months to kind
- 6 of get up to speed on their practices. And
- 7 then it was late July I think of that year,
- 8 that summer, 2007, they actually officially
- 9 started doing audits. So we did all that in
- 10 a fairly compressed, in an ideal world that
- 11 all could have taken a lot more time. But we
- 12 didn't have that option.
- 13 So I would think and I would hope
- 14 that outreach and education on this program
- 15 right from the start will be critical and
- 16 essential to its success.
- MS. STALEY: Thank you.
- 18 I'd also like to talk about and
- 19 I believe Mr. Giclas talked about this
- 20 yesterday -- we focused so far on the good
- 21 agricultural practice part of this program.
- 22 But in the language you talk about good

- 1 manufacturing practice. How is that different
- 2 than the current California program?
- MR. HORSFALL: Well, we don't do
- 4 our program is exclusively focused on good
- 5 agricultural practices. So we do the farm
- 6 level auditing. We don't go that next step in
- 7 the California program, so this would be a
- 8 difference from what we're doing in
- 9 California. It would allow for would
- 10 require for audits, verification audits, to
- 11 take place at the processing level as well.
- Now we do have language in there
- 13 that acknowledges that that is a realm that is
- 14 already under the jurisdiction of the FDA.
- 15 FDA is doing audits there, and so we have
- 16 language or proposed language that would
- 17 recognize FDA audits that are done at that
- 18 level as well. They wouldn't necessarily have
- 19 to be new audits.
- MS. STALEY: Would you be able to
- 21 provide a number of handlers that would be
- 22 involved in the processing that would require

- 1 GMP type audits?
- 2 MR. HORSFALL: Not right here
- 3 today. I think that is something we'd have to
- 4 confer about.
- 5 MS. STALEY: And with the
- 6 California program, going back to the
- 7 corrective action, have if there has been
- 8 a problem noted, observed during the audit,
- 9 has there been any reluctance on the part of
- 10 the handler, the producer, to take those
- 11 corrective actions?
- MR. HORSFALL: Do people argue
- 13 with us sometimes? Yes. Sure, I mean there
- 14 is the audit is very thorough. The audit is
- 15 very depending on who you ask the audit can
- 16 be very picky. There are a lot of things get
- 17 cited that our members don't like having cited
- 18 in a food safety audit. And so we hear about
- 19 those things. But we stand our ground
- 20 basically, and there is nothing that comes up
- in an audit that isn't there because it's
- 22 considered important for food safety. So

- 1 sure, there are disputes.
- 2 MS. STALEY: But ultimately most
- 3 of them take the corrective action?
- 4 MR. HORSFALL: They recognize
- 5 that taking the corrective action is what they
- 6 need to do.
- 7 MS. STALEY: Thank you.
- JUDGE HILLSON: Ms. Schmaedick,
- 9 do you have another question? MS. SCHMAEDICK:
- 10 I do have another question.
- JUDGE HILLSON: Go ahead.
- MS. SCHMAEDICK: This is Melissa
- 13 Schmaedick. So continuing on the subject of
- 14 phasing in this program if it were to be
- implemented, if I'm understanding correctly
- 16 there would be sort of an introductory period
- 17 during which handlers could sign up if they
- 18 want to be a signatory to the agreement?
- 19 MR. HORSFALL: That's correct.
- 20 MS. SCHMAEDICK: What happens if
- 21 over the course of time there are other
- 22 handlers that want to become signatories. Or

- 1 other persons that want to become signatories?
- 2 How do they participate in the program?
- 3 MR. HORSFALL: Well, there is an
- 4 annual period when people can sign up. I'm
- 5 trying to remember, I don't have that section
- 6 in front of it wasn't part of -- MS.
- 7 SCHMAEDICK: I'm referring to 970.97.
- 8 MR. HORSFALL: Okay, I take that
- 9 back, I was confusing that with our program.
- 10 We have a sign up period that handlers have to
- 11 sign up by the start of the fiscal year if
- 12 they want to be in for that year. This
- 13 language would allow any additional handlers
- or parties to sign up at any time by
- 15 registering with the secretary.
- MS. SCHMAEDICK: What about
- 17 Section 970.98, withdraw. How would someone
- 18 who no longer wishes to participate in the
- 19 program remove themselves?
- 20 MR. HORSFALL: Withdrawal is
- 21 possible if you a company can withdraw by
- 22 submitting a request to withdraw prior to the

- 1 end of the fiscal year, at which point they
- 2 would be released from the program, as long as
- 3 they were in compliance with the program at
- 4 the time.
- 5 MS. SCHMAEDICK: Would they have
- 6 to submit a written request? Or how would
- 7 they go about letting the administrative
- 8 committee know?
- 9 MR. HORSFALL: If they file a
- 10 written request then they can be released from
- 11 the program at the end of the fiscal year.
- MS. SCHMAEDICK: I believe your
- 13 statement also included the language under
- 14 970.72, exemptions.
- MR. HORSFALL: Yes.
- 16 MS. SCHMAEDICK: Can you explain
- 17 to me the importance or relevance of this
- 18 particular section?
- 19 MR. HORSFALL: Well, I think I
- 20 skipped over this. I actually meant to
- 21 address this in my earlier statement. I
- 22 apologize for that.

- 1 The proponent group believes that
- 2 since membership in the marketing agreement is
- 3 voluntary, we do not believe that is current
- 4 need to specify any exemptions. Quite frankly
- 5 anybody who doesn't want to be part of the
- 6 program doesn't have to be part of the
- 7 program.
- 8 However in order to provide the
- 9 secretary and the committee flexibility in the
- 10 future we did decide to leave in the language
- 11 allowing for exemptions. So we don't foresee
- 12 or propose any specific exemptions at this
- 13 time, but we did want to leave the committee
- 14 that kind of flexibility, and the secretary
- 15 that kind of flexibility.
- 16 MS. SCHMAEDICK: So it's is it
- 17 your intention or the proponent group's
- 18 intention to exempt handlers from metrics at
- 19 any point?
- MR. HORSFALL: No.
- 21 MS. SCHMAEDICK: Could there be a
- 22 situation in the future where there might be

- 1 a need to exempt a specific type of product,
- 2 or a specific region, to address some
- 3 situation that was unanticipated?
- 4 MR. HORSFALL: That is
- 5 unanticipated, but that's why we left the
- 6 language in there, so there is that
- 7 possibility, that flexibility, for whatever
- 8 circumstances. If the committee and the
- 9 secretary agree that an exemption needs to be
- 10 written, then that possibility does exist. We
- 11 don't have anything in mind.
- MS. SCHMAEDICK: I'd like to ask
- 13 a question about a section of the proposed
- 14 language that was actually brought up
- 15 yesterday, the definition of crop year.
- Does the proponent group
- 17 anticipate ever needing authority to perhaps
- 18 suggest alternative crop years?
- 19 MR. HORSFALL: We haven't
- 20 considered that. I can't think of why we
- 21 would want that language. It's something we
- 22 could talk about. You're suggesting it might

- 1 be advisable to put in language making that
- 2 possible? I'm not supposed to ask the
- 3 questions. No, we haven't talked about that.
- 4 We looked at that crop year, as Mr. Giclas
- 5 said yesterday, it's essential for
- 6 administrative reasons to have a fiscal year
- 7 in place that does mirror the existing crop
- 8 year in California, I believe in Arizona as
- 9 well, and beyond just needing a spot in the
- 10 calendar, it's roughly the point that
- 11 demarcates the northern from the southern
- 12 production regions, but there is really no
- 13 more to it than that.
- 14 MS. SCHMAEDICK: The reason I am
- 15 asking this question is, I'm looking at
- 16 Section 970.95, amendments. It states that
- 17 amendments to this part may be proposed from
- 18 time to time to the committee or any
- 19 interested person affected by its provisions
- 20 including the secretary. My understanding of
- 21 that process is that it would result in
- 22 another hearing, such as the one we are having

- 1 now. What is your understanding of that
- 2 section?
- 3 MR. HORSFALL: I believe there
- 4 are different levels of amendments. I will
- 5 admit to not being an expert on the processes
- 6 involved in the federal marketing agreements.
- 7 But I know that certain types of amendments
- 8 certainly would require hearings.
- 9 MS. SCHMAEDICK: So is it
- 10 important then to have a certain amount of
- 11 flexibility in the proposed language?
- MR. HORSFALL: We have tried to
- 13 build in as much flexibility as is reasonable
- 14 throughout the proposal, so that may be
- 15 something we should consider. MS. SCHMAEDICK:
- 16 Okay, thank you.
- 17 JUDGE HILLSON: Ms. Carter.
- 18 MS. CARTER: Antoinette Carter
- 19 with USDA. Just a few followup questions, Mr.
- 20 Horsfall.
- 21 With regards to Section 56,
- 22 assessments, just to clarify, does the

- 1 authority proposed under this section
- 2 authorize the leveling of assessments that may
- 3 differ by zone or region?
- 4 MR. HORSFALL: We certainly were
- 5 not thinking of it in those terms. I mean we
- 6 were looking at an assessment that is
- 7 equivalent across all the numbers.
- 8 MS. CARTER: And another
- 9 question: does Section 66, which is
- 10 verification, audits, paragraph C, require
- 11 USDA to require all verification audits, to
- 12 conduct all of those, GAPs, GHPs, and GNP
- 13 audits, would require those to be conducted by
- 14 the USDA inspection service?
- 15 MR. HORSFALL: I think that our -
- 16 again, there's language elsewhere that refers
- 17 to it the only exception would be that we do
- 18 want to provide for GHP, GMP audits that may
- 19 be done by FDA to be acceptable to the board.
- 20 And that may be something we'd need to adjust
- 21 in that language.
- MS. CARTER: And just one final

- 1 question. The proposal provides for the
- 2 collection and reporting of information.
- 3 Would it be prudent to include a section that
- 4 specifically states that the forms that are
- 5 being used to collect this information are
- 6 approved by are approved government forms?
- 7 Would that be something that is prudent to
- 8 add?
- 9 MR. HORSFALL: Probably would be,
- 10 yes.
- 11 MS. CARTER: Thank you.
- JUDGE HILLSON: Panel about done?
- 13 Cross-examination from other
- 14 representatives or parties? Mr. English.
- MR. ENGLISH: Charles English for
- 16 the National Organic Coalition.
- Good morning, sir.
- 18 MR. HORSFALL: Good morning.
- 19 MR. ENGLISH: You've been here
- 20 throughout the proceeding, correct?
- MR. HORSFALL: I have.
- 22 MR. ENGLISH: You were here for

- 1 the testimony of I think it was Roger Medina
- 2 from Lakeside Organic Gardens?
- 3 MR. HORSFALL: I was.
- 4 MR. ENGLISH: Has California or
- 5 its program looked at the issue that he raised
- 6 with respect to multiple audits of multiple
- 7 wells? And I mean it more generally then just
- 8 that particular issue, but sort of the issue
- 9 of whether or not at some point in time if
- 10 audits are consistently coming back a certain
- 11 way that one could do something different and
- 12 modify program metrics?
- 13 MR. HORSFALL: Yes, you know
- 14 there is a project underway spearheaded by
- 15 some of the trade associations to collect on
- 16 a confidential basis water test data. We are
- 17 actually quite hopeful that that will lead to
- 18 the point where we can scale back some of the
- 19 water test requirements. We'd like to do that
- 20 very much actually. That's what we're finding
- 21 is for the most part in certain parts of the
- 22 state anyway that those tests are almost

- 1 always within any kind of limit. We'd like to
- 2 get to that point.
- 3 MR. ENGLISH: So in effect
- 4 California recognizes it, and therefore you
- 5 would agree that if this moves forward to a
- 6 marketing agreement at the national level that
- 7 there needs to be flexibility to recognize
- 8 what some might call audit fatigue?
- 9 MR. HORSFALL: I definitely
- 10 believe that whatever gets put in place at the
- 11 national level needs to be flexible, and to
- 12 respond to data, and to respond to new
- 13 science. I don't think anybody should assume
- 14 that what is in place in California is going
- to be what's in place nationally, that will be
- 16 developed later on.
- 17 MR. ENGLISH: I understand. I
- 18 just meant the concept.
- 19 MR. HORSFALL: Conceptually, I
- 20 think we all believe that flexibility, based
- 21 on science, and based on new information, is
- 22 only going to make these standards better.

- 1 MR. ENGLISH: There were some
- 2 questions from the department about consumer
- 3 views, and I know you had a chance to consult.
- 4 Were you from your perspective thinking of
- 5 putting in what's up on the website as sort of
- 6 a two page document, sort of a discussion of
- 7 consumer views? Or were you thinking of being
- 8 broader of what you might submit to the
- 9 department?
- 10 MR. HORSFALL: I'm happy to
- 11 submit the entire that is kind of a white
- 12 paper -- I thought the whole thing was there
- 13 somewhere. But I'm happy to present the
- 14 entire site.
- 15 MR. ENGLISH: Including the
- 16 questions that were asked?
- 17 MR. HORSFALL: Absolutely.
- 18 MR. ENGLISH: Thank you. That's
- 19 all I have.
- 20 JUDGE HILLSON: Does anyone else
- 21 have any other questions? If you could step
- 22 up to the mike, identify yourself.

- 1 MR. HARDISON: Good morning. My
- 2 name is Allen Hardison. I work with Jacob's
- 3 Farm El Cabo.
- 4 A couple of quick questions
- 5 hopefully, Scott. One thing is under what
- 6 is that, under 97.68, traceability, I see no
- 7 requirements necessarily for a GTIN in that.
- 8 MR. HORSFALL: For what?
- 9 MR. HARDISON: GTIN, G-T-I-N, the
- 10 global trade initiative number?
- 11 MR. HORSFALL: Yes, that our
- 12 intent here was simply to put in traceability
- in accordance with the Homeland Security's
- 14 Food Security Act.
- MR. HARDISON: Okay, and then on
- 16 C, just for clarification, documents necessary
- 17 for verification shall be made for two years.
- 18 Does that mean the procedural portion or the
- 19 actual traceback portion? Like I bring in a
- 20 shipment. Do I have to maintain that
- 21 traceback of that shipment for two years, or
- just the procedure how I track the shipment?

- 1 MR. HORSFALL: No, you would be
- 2 required to keep all that documentation.
- 3 MR. HARDISON: Okay.
- 4 MR. HORSFALL: Which again is
- 5 what I think the Food Security Act requires.
- 6 I could be wrong about that, but I think it's
- 7 already part of law.
- 8 MR. HARDISON: Okay. I just
- 9 didn't sound very clear to me, and I couldn't
- 10 remember when I was reading it. Thank you.
- 11 As far as research and promotion,
- 12 I think that was answered, but I guess it
- 13 brings up another question for me. It would
- 14 be interesting to have Dr. Richards from ASU
- 15 answer this.
- 16 But I quess part of my concern or
- 17 questions in regards to this is, if you are
- 18 going to do this, and your funds do not really
- 19 allow for promotion, who is really going to
- 20 understand that we have a leafy greens
- 21 agreement on a federal basis, assuming that
- 22 this goes through? Would it only be our

- 1 clients? Or would this be pushed out to the
- 2 general public? And are there funds in here
- 3 for that? It doesn't appear to be based on
- 4 what you said earlier.
- 5 MR. HORSFALL: Yes. No, the
- 6 consensus of the proponent groups is that this
- 7 is not a program that is about promoting food
- 8 safety or leafy greens directly to the
- 9 consumer. This is a program that is keeping -
- 10 we want to keep our eye on the ball, which is
- 11 implementing practices, and verifying those
- 12 practices, and communicating it, yes, with the
- 13 buyer community. Because the program relies
- 14 so much on the buyers to help with the
- 15 enforcement by only buying from vendors. But
- 16 you are right, there is not an intent there to
- 17 go beyond it.
- 18 MR. HARDISON: Understood. I was
- 19 also kind of curious, because when I looked at
- 20 the per capita consumption, I can see that the
- 21 total if you add up head lettuce and romaine,
- 22 it appears that it's actually increased over

- 1 the last 20 years, the small amount, but the
- 2 per capita has dropped about 10 percent,
- 3 correct?

4

- 5 MR. HORSFALL: Yes, something like
- 6 that. We could have a good debate about
- 7 whether there ought to be leafy green
- 8 promotion efforts going on through some
- 9 entity. But that is not the intent of this.
- MR. HARDISON: Okay. And Ms.
- 11 Carter already asked the questions about phase
- 12 out. It appears you could leave that
- 13 organization quiescent, if you would like to,
- 14 if this were to go through, and if there was
- 15 a phase out.
- MR. HORSFALL: Yes.
- MR. HARDISON: Okay, as far as a
- 18 budget, I was just curious, do you have a
- 19 budget that we could get? There must be some
- 20 kind of budget numbers.
- 21 MR. HORSFALL: Well, it's not a
- 22 budget. We've done a little bit of projection

- 1 in terms of well, if you look at California
- 2 and Arizona, which is 90 percent of the
- 3 production, so we know how much we raise via
- 4 our assessments, and you are going to add on
- 5 another if you have the whole country on
- 6 board, another 10 percent on top of that. So
- 7 at the assessments levels we are at right now,
- 8 if that's what was adopted nationally, we
- 9 would project a budget at around \$5.5 6
- 10 million.
- 11 MR. HARDISON: Okay, that's what I
- 12 had, \$5.5 million. I guess what I'm trying to
- 13 get at is, once you add up all your people
- 14 that theoretically might be in the
- 15 organization, what your cost would be, what
- 16 your audit costs would be, per ranch, how many
- 17 audits were you going to do, what would the
- income and expenses be. And I understand,
- 19 that is not part of this today, but it would
- 20 be nice to see it when it comes out. When
- 21 will that be available, any idea?
- 22 MR. HORSFALL: I don't know. I

- 1 guess we could talk about that.
- 2 Some of that is obviously dependent on how
- 3 many people sign up for the program.
- 4 MR. HARDISON: Okay. Audits on
- 5 the corrective action. I had a couple of
- 6 questions, because they weren't quite clear.
- 7 Would you envision this functioning similar to
- 8 any other audit whereby somebody who is
- 9 audited, and they are going to set up a
- 10 baseline, whether that's 70, 80, 90 percent,
- 11 and then they fall below that because of the
- 12 minor infractions, the minor corrective
- 13 actions, would they be put on a disciplinary
- 14 or administrative hold? Or are you just
- 15 going to say, yes, we are going to allow you
- 16 to get the corrective actions taken care of,
- 17 as long as these are the minor ones?
- 18 MR. HORSFALL: Well, I can't
- 19 speak for what policies this board or
- 20 committee might put in place. In California
- 21 we don't issue a score. So we simply look at
- 22 the deficiencies in the audit, the

- 1 nonconformities in the audit, and we require
- 2 corrective actions within those certain time
- 3 spans. But we don't do a 90 percent, 80
- 4 percent, 75 percent, something like that.
- 5 MR. HARDISON: And if there was
- 6 the immediate failure type of thing, such as
- 7 no hot water for handwashing, or god forbid,
- 8 rat hairs on a production table, would that
- 9 person immediately be put on an administrative
- 10 hold or something like that, or that handler
- 11 so to speak?
- 12 MR. HORSFALL: That will be a
- 13 decision for that board to make?
- MR. HARDISON: For that group?
- 15 Okay.
- 16 How many have you in line with
- 17 what they're asking, have you made an estimate
- 18 of how many people you really think will be
- 19 in the organization assuming this goes
- 20 through, and how many audits total it will
- 21 take?
- MR. HORSFALL: No, I don't have

- 1 that.
- MR. HARDISON: Okay, that handles
- 3 it for me. That's all my questions.
- 4 JUDGE HILLSON: Would you mind
- 5 spelling your last name, just so it's spelled
- 6 right in the record, sir.
- 7 MR. HARDISON: H-a-r-d-i-s-o-n.
- 8 Hardison.
- 9 JUDGE HILLSON: Very good. Thank
- 10 you.
- 11 Any other questions from the
- 12 unrepresented parties or represented by anyone
- 13 other than Mr. English?
- 14 (No response)
- Do you have any redirect?
- 16 REDIRECT EXAMINATION BY COUNSEL FOR THE
- 17 PROPONENTS
- 18 MR. WILKINSON: Robert Wilkinson
- 19 on behalf of Western Growers.
- 20 Mr. Horsfall, during Ms. Deskin's
- 21 questioning, she asked you about sanctions for
- 22 nonpayment of assessments. And I'd like to

- draw your attention to Section 970.83(a)(6).
- 2 This is a section on
- 3 nonconformities, and this subdivision states
- 4 that the committee will develop a policy for
- 5 nonconformities for any other violation of
- 6 this part in essence is what this says.
- 7 MR. HORSFALL: That's right.
- 8 MR. WILKINSON: In your mind
- 9 would that cover failure to pay assessments?
- 10 MR. HORSFALL: Yes, certainly.
- 11 The intent of the answer I gave, maybe I
- 12 didn't state it correctly, is that they have
- 13 the authority to determine what failures to
- 14 comply with the act would lead to
- 15 decertification.
- 16 MR. WILKINSON: Then I want to
- 17 turn your attention to Section 970.81. This
- 18 is confidential information. And would this
- 19 cover such things as supplier lists?
- 20 MR. HORSFALL: Yes, it would.
- 21 Pardon me, yes, supplier lists, shipping
- 22 information, volumes, all those types of

- 1 proprietary information.
- 2 MR. WILKINSON: How about
- 3 customer lists?
- 4 MR. HORSFALL: Customer lists
- 5 absolutely as well.
- 6 MR. WILKINSON: So it generally
- 7 would fall into the category of trade secrets?
- 8 MR. HORSFALL: Absolutely.
- 9 MR. WILKINSON: I'll follow up on
- 10 Mr. Hardison's question.
- 11 I believe California has 106
- 12 signatories, correct?
- MR. HORSFALL: That's correct.
- MR. WILKINSON: And do you know
- 15 how many signatories Arizona has?
- 16 MR. HORSFALL: I don't know for
- 17 sure. I believe it's around 45.
- 18 MR. WILKINSON: It would be
- 19 reasonable to think those folks would sign up
- 20 with the national program, correct?
- 21 MR. HORSFALL: I think it would
- 22 be. I think there is we can pull together

- 1 a pretty good list. And when you talk about
- 2 handlers, you've got obviously the majority of
- 3 them in those two states, the vast majority.
- 4 MR. WILKINSON: Thank you, that's
- 5 all I have.
- 6 JUDGE HILLSON: Any further
- 7 questions? Okay, Mr. Horsfall, you may step
- 8 down. Thank you for testifying.
- 9 (Witness excused)
- 10 JUDGE HILLSON: Before we go into
- 11 our morning break, I just want to restate is
- 12 that one of the goals is to allow everyone who
- 13 wants to testify to be heard. Several people
- 14 have indicated that they needed to testify
- 15 today, and if you are not part of the case
- 16 being presented with by Mr. Resnick or Mr.
- 17 English, if you are here on your own and you
- 18 need to testify today, you need to let me
- 19 know, basically, during the break, which is
- 20 going to be now.
- 21 So we'll come back in about 15
- 22 minutes, five after 10:00.

- 1 (Whereupon, the above-entitled
- 2 matter went off the record at 9:51
- a.m. and resumed at 10:07 a.m.)
- 4 JUDGE HILLSON: Let's go back on
- 5 the record, please. Just as a point of
- 6 information, I had six people who are not
- 7 represented by either Mr. Resnick or Mr.
- 8 English express their wish and their need to
- 9 testify today. I'm just going to read the
- 10 names just to be sure there isn't somebody I
- 11 left out.
- 12 I have Claudia Reid, Elisa
- 13 Odabashian, Bill Stevens, Dale Coke, Tom
- 14 Willey and Steve Shimek, who aren't
- 15 represented by Mr. Resnick or Mr. English.
- 16 So I think the plan is to let Mr.
- 17 Resnick call his next witness, who is one of
- 18 the people who need to testify today anyway.
- 19 Then I was going to let Mr. English begin
- 20 presenting his case, but I have six other
- 21 people to work in. So that's the way it's
- 22 going to be.

- 1 MR. ENGLISH: I understand. And
- 2 as I suggested off the record during the
- 3 break, we are going to maybe have a very, very
- 4 long day. We'll have to see.
- 5 JUDGE HILLSON: It's understood.
- 6 So call your next witness.
- 7 MR. RESNICK: Thank you, Your
- 8 Honor.
- 9 The proponent group calls Paul
- 10 Simonds.
- JUDGE HILLSON: Do you have a
- 12 written statement?
- MR. SIMONDS: Yes, I do, and it's
- 14 provided there.
- 15 JUDGE HILLSON: This?
- 16 MR. SIMONDS: Oh, it's not a
- 17 written statement, excuse me. I won't be
- 18 reading that.
- 19 JUDGE HILLSON: Please.
- 20 (Laughter.)
- 21 MR. SIMONDS: No, not a written
- 22 statement.

- 1 Whereupon,
- 2 PAUL SIMONDS
- 3 Was called as a witness by counsel for the
- 4 proponents, and after having been first duly
- 5 sworn, was examined and testified as follows:
- 6 JUDGE HILLSON: Are you going to
- 7 testify by narrative, or is this going to be
- 8 question and answer?
- 9 MR. SIMONDS: Yes, just by
- 10 narrative briefly, and then question and
- 11 answer.
- 12 JUDGE HILLSON: Go ahead.
- 13 MR. SIMONDS: My name is Paul
- 14 Simonds, S-i-m-o-n-d-s. I am the
- 15 communications manager with Western Growers.
- 16 I began with Western Growers in
- 17 October of 2006, right in the heart of the e.
- 18 coli outbreak tied to spinach. And at that
- 19 time I really kind of began the communications
- 20 effort statewide as it related to food safety
- 21 and the leafy greens marketing agreement here
- 22 in California.

- 1 Throughout that time it was the
- 2 focus of Western Growers and then the industry
- 3 at large to pursue a national effort, which
- 4 brings us here today. Over the course of the
- 5 last year we have taken great efforts to work
- 6 with a larger proponent group including United
- 7 Fresh Produce Association, Produce Marketing
- 8 Association, and other members of the
- 9 proponent group, to communicate our efforts to
- 10 the industry at large.
- 11 Contained in the piece of evidence
- 12 that we have submitted is a snapshot of that
- 13 effort. It includes a number of elements
- 14 including the development of a website, which
- 15 was produced to inform the industry about the
- 16 process in the development of the leafy
- 17 greens marketing agreement.
- 18 Also included therein would be the
- 19 specifics of a webinar, which we conducted
- 20 earlier this summer which communicated how the
- 21 leafy greens marketing agreement has come to
- 22 where we are today, and how we have gotten

- 1 here over the course of the last year.
- We had more than 235 people
- 3 participate in that webinar. Contained herein
- 4 also is all of the questions that were
- 5 submitted in that webinar, and how the
- 6 proponent group responded accordingly.
- 7 We've also submitted the
- 8 communications efforts from each association,
- 9 and how each association has communicated
- 10 either the webinar, the website, today's
- 11 hearings, through the various vehicles at
- 12 Western Growers, United, PMA, Florida Fruit
- 13 and Veg, Georgia Association as well.
- 14 So with that I can certainly speak
- 15 to the efforts the industry has taken over the
- 16 course of the last year to communicate with
- 17 the industry. And if there are any questions
- 18 I'd be happy to answer them.
- 19 JUDGE HILLSON: Now this document
- 20 here, you want this in evidence, I take it?
- 21 MR. SIMONDS: Yes, sir.
- JUDGE HILLSON: Okay, so I'm

- 1 going to mark it was Exhibit 16.
- 2 (Whereupon the aforementioned
- 3 document was marked for
- 4 identification as Exhibit No. 16)
- 5 JUDGE HILLSON: I will turn to
- 6 the panel to see if they have any questions of
- 7 this witness. Go ahead, Ms. Schmaedick.
- 8 DIRECT EXAMINATION BY COUNSEL FOR USDA
- 9 MS. SCHMAEDICK: Good morning.
- 10 This is Melissa Schmaedick.
- 11 Can you describe to me the members
- of the proponent group and who they represent?
- 13 MR. SIMONDS: Certainly. The
- 14 members of the proponent group include the
- 15 Arizona Farm Bureau, the California Farm
- 16 Bureau, the California Leafy Greens Marketing
- 17 Agreement, the Georgia Farm Bureau, the
- 18 Georgia Fruit and Vegetable Growers
- 19 Association, the Grower Shipper Association of
- 20 Central California, the Imperial Valley
- 21 Vegetable Growers Association, the Leafy
- 22 Greens Council, the Produce Marketing

- 1 Association, the Texas Vegetable Association,
- 2 United Fresh Produce Association and Western
- 3 Growers.
- 4 MS. SCHMAEDICK: So on this
- 5 proponent group it's fair to say that both
- 6 handlers and growers have been represented?
- 7 MR. SIMONDS: Absolutely.
- 8 MS. SCHMAEDICK: And has there
- 9 been opportunity for their interests, their
- 10 concerns and their opinions to be voiced
- 11 throughout the development of this proposal?
- 12 MR. SIMONDS: Absolutely. The
- 13 webinar was one example of that where they
- 14 have the opportunity to participate and voice
- 15 their concerns, and offer up questions to the
- 16 proponent group. We also have vehicles
- 17 allowing such activity on the website, and
- 18 also each piece of communiqu, from the various
- 19 associations, there is always a, please
- 20 contact us with questions or concerns that are
- 21 tied to the various articles, where the
- 22 National Leafy Green Marketing Agreement is

- 1 addressed.
- 2 MS. SCHMAEDICK: In the process
- 3 of developing the proposal, was the proponent
- 4 group aware of perhaps certain interest groups
- 5 who had concerns about the proposal?
- 6 MR. SIMONDS: Yes. And I
- 7 understand and have participated in a handful
- 8 of different conference calls. But I
- 9 understand that those that had concerns with
- 10 the development of this agreement were
- 11 encouraged to participate in the various
- 12 activities that the proponent group had
- 13 undertaken.
- MS. SCHMAEDICK: And examples of
- 15 that type of outreach is included in this
- 16 binder?
- 17 MR. SIMONDS: I think that those
- 18 were more along the lines of phone calls and
- 19 requests to participate and the webinar
- 20 specifically, and I think that maybe the
- 21 development of the draft, but that would be
- 22 out of my I wouldn't want to speak to that.

- 1 MS. SCHMAEDICK: Are you aware of
- 2 efforts to reach out to different interest
- 3 groups to include them as part of the
- 4 proponent group and part of the drafting
- 5 process?
- 6 MR. SIMONDS: Yes, the development
- 7 of the website was put online probably more
- 8 than a year ago, and anyone and everyone is
- 9 encouraged to participate as a proponent of
- 10 the National Leafy Greens Marketing Agreement,
- 11 and they have the opportunity to participate
- in the process by merely signing up on the
- 13 website, and we have communicated that through
- 14 our vehicles at Western Growers, and I know
- 15 the other associations have done so as well.
- 16 MS. SCHMAEDICK: So if a person
- 17 perhaps did not view themselves as a proponent
- 18 but wanted to be involved in the drafting
- 19 process and the type of information that was
- 20 assessed in developing the proposed language,
- 21 was that opportunity made? Are you aware of
- 22 that?

- 1 MR. SIMONDS: Yes, absolutely.
- 2 And I don't know that anyone has ever said
- 3 that you need to be a proponent to have a
- 4 voice in the process. I believe that the
- 5 website allowed people to voice their concerns
- 6 about the draft proposal throughout, and they
- 7 could weigh in with those suggestions. That
- 8 was really the purpose and the development of
- 9 the website at its core, so people could have
- 10 an opportunity and a forum to voice those
- 11 concerns.
- MS. SCHMAEDICK: And in addition
- 13 to the website, you did mention that there
- 14 were phone calls and perhaps emails or other
- 15 forms of communication that were used to reach
- 16 out to these individuals?
- 17 MR. SIMONDS: That is my
- 18 understanding.
- 19 MS. SCHMAEDICK: But those are
- 20 not necessarily included in this binder?
- MR. SIMONDS: No, they are not.
- MS. SCHMAEDICK: Would it be

- 1 possible to have a sample of some of that
- 2 communication?
- 3 MR. SIMONDS: I'd have to check,
- 4 but if it is available, we'd be happy to
- 5 provide it.
- 6 MS. SCHMAEDICK: Has most in
- 7 terms of your outreach efforts, has it been
- 8 focused in one specific area, or has it
- 9 covered the broad scope of basically the
- 10 country that would it's a national proposal,
- 11 so has your outreach been national in nature
- or has it been more regionally focused?
- 13 MR. SIMONDS: Well, I think as far
- 14 as the proponent group is concerned, the focus
- 15 has been more national. And I think that it
- 16 can be demonstrated by the various interests
- of the proponent group. They represent more
- 18 of a national audience, if you will.
- 19 Western Growers, our efforts
- 20 locally, that would be more regional. We
- 21 represent growers, shippers and packers in
- 22 California-Arizona. So as we work in concert

- 1 with our partners on the proponent group we do
- 2 reach the entire country.
- 3 MS. SCHMAEDICK: Are you aware of
- 4 efforts that were made to then reach out to
- 5 folks let's say maybe in the state of Ohio?
- 6 MR. SIMONDS: Well, I do know that
- 7 contained in this piece of evidence is an
- 8 article written by a newspaper in Ohio. We -
- 9 I would also say that there are other
- 10 interests in participants in the proponent
- 11 group who have representation in Ohio that
- 12 communicated both the development of the
- 13 website and the webinar and so forth and so
- on. So the answer in short would be yes.
- MS. SCHMAEDICK: Does the
- 16 proponent group anticipate having future
- 17 witnesses speak to outreach efforts at the -
- 18 at future hearing locations?
- 19 MR. SIMONDS: We can certainly
- 20 arrange that.
- 21 MS. SCHMAEDICK: I believe that
- 22 is it for my questions. Thank you.

- 1 JUDGE HILLSON: Any other
- 2 questions from the USDA panel?
- 3 Seeing nothing, any other
- 4 questions, Mr. English?
- 5 MR. ENGLISH: I think I can do
- 6 this without a copy. I don't have one. But
- 7 Mr. Simonds was kind enough early this morning
- 8 to let me leaf through one, no pun intended.
- 9 But if I could just understand by way of
- 10 parameters of voir dire, Your Honor.
- 11 JUDGE HILLSON: Ask away.
- MR. ENGLISH: What this document
- 13 purports to show.
- 14 VOIR DIRE EXAMINATION BY COUNSEL FOR THE
- 15 NATIONAL ORGANIC COALITION
- 16 MR. ENGLISH: This document, as I
- 17 understand it, Mr. Simonds, is designed to
- 18 show that at minimum it's designed to show
- 19 that the proponents made efforts to publicize
- 20 what was being looked at, and to seek comment
- 21 on the marketing agreement, correct?
- MR. SIMONDS: That's correct. And

- 1 I would add that this is very much a snapshot
- of that effort, and certainly not meant to be
- 3 a comprehensive all-inclusive list.
- 4 MR. ENGLISH: I understand. And
- 5 for instance the fact that there is a webinar
- 6 is a fact that is established by this
- 7 document; correct?
- 8 MR. SIMONDS: Yes.
- 9 MR. ENGLISH: And the website -
- 10 and I notice the website has for instance hits
- 11 and a diagram of when the hits were. So that
- 12 would be the kind of fact that the document
- 13 demonstrates that you do go to the truth of
- 14 the assertion for you. You actually are
- 15 saying you did this, you were in charge of
- 16 that, and that happened; correct?
- 17 MR. SIMONDS: Yes.
- 18 MR. ENGLISH: I also noticed -
- 19 for instance you referenced a newspaper
- 20 article from Ohio. I haven't actually seen
- 21 that particular one. I'm not going to look
- 22 for it. But I also just looked at sort of

- 1 other articles and statements. The fact that
- 2 those statements were made are in your
- 3 document, but you are not purporting that a
- 4 statement made by Mr. Jones that shows up in
- 5 a newspaper article is a true statement, that
- 6 actual statement? That's not what this is
- 7 trying to show; is that correct?
- 8 MR. SIMONDS: I would say that
- 9 this document shows that that newspaper
- 10 article was written and published, and what is
- 11 contained herein was published by the
- 12 newspapers.
- MR. ENGLISH: And that a
- 14 statement might have been made, and that's
- 15 what it represents, that a statement was made,
- 16 correct?
- 17 MR. SIMONDS: Certainly.
- 18 MR. ENGLISH: With that
- 19 understanding of what the document is, Your
- 20 Honor, I have no objection to its admission.
- 21 JUDGE HILLSON: Okay, I will
- 22 receive Exhibit 16 into evidence.

- 1 (Whereupon the aforementioned
- 2 document have been previously
- 3 marked Exhibit No. 16 for
- 4 identification was received into
- 5 evidence)
- 6 JUDGE HILLSON: And let me just
- 7 ask if there are any other questions from the
- 8 audience? And is there any redirect?
- 9 MR. WILKINSON: Just really one
- 10 question, Your Honor. Robert Wilkinson for
- 11 Western Growers.
- 12 REDIRECT EXAMINATION
- MR. WILKINSON: Mr. Simonds, if
- 14 you would look at page three of the document,
- 15 I believe it's the table of contents.
- MR. SIMONDS: Yes, sir.
- 17 MR. WILKINSON: Go one more page
- 18 if you would. This is a page with orange and
- 19 yellow. This is the table of contents, and
- 20 describes the materials under each tab,
- 21 correct?
- MR. SIMONDS: Right.

- 1 MR. WILKINSON: Those are the
- 2 materials you referenced in your testimony?
- 3 MR. SIMONDS: Correct.
- 4 MR. WILKINSON: Thank you.
- 5 JUDGE HILLSON: Thank you, you
- 6 may step down.
- 7 (Witness excused)
- 8 JUDGE HILLSON: And I think
- 9 unless I misunderstood the agreement that we
- 10 made during the break that Mr. English is
- 11 going to present some of his witnesses right
- 12 now. And we are going to focus it of course
- on getting out the people who need to get out
- 14 today. Is that correct, Mr. English?
- 15 MR. ENGLISH: That is correct,
- 16 Your Honor. And we would for the first
- 17 witness for the National Organic Coalition
- 18 call Mr. Steve Etka, the coordinator for the
- 19 coalition.
- Whereupon,
- 21 STEVE ETKA
- 22 Was called as a witness by counsel for the

- 1 National Organic Coalition and, after having
- 2 been first duly sworn, was examined and
- 3 testified as follows:
- 4 JUDGE HILLSON: Okay, please
- 5 state your name and spell it for the record.
- 6 MR. ETKA: Steve, S-t-e-v-e last
- 7 name Etka E-t-k-a.
- 8 JUDGE HILLSON: Mr. English, do
- 9 you have any questions? Or do you want him to
- 10 read his statement?
- 11 MR. ENGLISH: No, he can proceed
- 12 on his own, Your Honor.
- 13 JUDGE HILLSON: You may proceed,
- 14 then.
- 15 DIRECT EXAMINATION BY COUNSEL FOR THE NATIONAL
- 16 ORGANIC COALITION
- 17 MR. ETKA: Thank you for the
- 18 opportunity to testify here today. My name
- 19 is Steve Etka. I'm the coordinator of the
- 20 National Organic Coalition, the national
- 21 alliance of organizations working to provide
- 22 a federal policy voice for farmers, ranchers,

- 1 environmentalists, consumers, and progressive
- 2 industry members involved in organic
- 3 agriculture.
- 4 Our members share a concern about
- 5 food safety and a strong belief that a
- 6 diversified, conservation minded farming
- 7 system with abundant wildlife habitat are
- 8 highly compatible with food safety, with safe
- 9 food, and in fact are part of the solution.
- 10 We agree that there is a food
- 11 safety problem in this country. We disagree
- 12 however with the proponents of the National
- 13 Leafy Greens Marketing Agreement about the
- 14 appropriate solutions to the problem.
- To summarize our perspective on
- 16 this matter, our members believe that, one,
- 17 USDA's Agricultural Marketing Service, AMS, is
- 18 a critically important agency when it comes to
- 19 marketing and economic issues, but it is not
- 20 the appropriate agency to be taking the lead
- 21 on development of food safety regulations.
- The majority of AMS staff members

- 1 are economists and marketing specialists, not
- 2 food safety scientists. By its own admission
- 3 AMS is not a food safety agency. In her July
- 4 testimony before the Domestic Policy
- 5 Subcommittee of the House Oversight and
- 6 Government Reform Committee, AMS administrator
- 7 Rayne Pegg stated that, quote, the mission of
- 8 AMS is to facilitate the strategic marketing
- 9 of agricultural products in the domestic and
- 10 international marketplace. ASM is not a food
- 11 safety agency.
- 12 The agency through programs such
- 13 as marketing orders and agreements assists
- 14 handlers and producers in verifying various
- 15 product quality control efforts, unquote.
- 16 Two, food safety regulations where
- 17 necessary should be developed in an open and
- 18 public and transparent process with the lead
- 19 role going to a food safety agency such as FDA
- 20 or in some cases the states, in close
- 21 coordination with USDA.
- With regard to food safety

- 1 standards for organic farms, FDA should
- 2 coordinate closely with the national organic
- 3 program within AMS in developing those
- 4 regulations to ensure that both the
- 5 regulations and their interpretation by
- 6 growers, handlers and buyers do not result in
- 7 unintended conflict with the organic
- 8 standards.
- 9 When verification of food safety
- 10 standards is needed to meet regulations,
- 11 enforcement on organic farms should happen
- 12 through existing structures of organic
- 13 certification and inspection, with
- 14 certification agencies accredited by USDA.
- 15 Four, USDA should sponsor regional
- 16 training and education programs to help small
- 17 processors and handlers as well as small to
- 18 medium scale farmers address food safety
- 19 concerns on their operations, and training
- 20 should also be provided to help food safety
- 21 auditors understand the unique needs and
- 22 attributes of those operations.

- 1 Five, regulations should target
- 2 the areas of greatest risk, and those risks
- 3 should be scientifically based. Part of the
- 4 analysis of risk should also be recognition
- 5 that scale of operation plays a role in
- 6 determining risk. For example, when there is
- 7 a large scale spinach of lettuce farming
- 8 operation with a centralized washing facility
- 9 commingling product from thousands of acres
- 10 and packing that produce for distribution to
- 11 retail stores in 20 states, the potential for
- 12 widespread contamination and trace back
- 13 difficulties is much higher than there would
- 14 be from a small scale operation cutting fresh
- 15 greens from a 100-acre field, washing it and
- 16 delivering it unbagged to a restaurant,
- 17 farmer's market or natural food cooperative
- 18 later that same day.
- 19 Commonsense would dictate that
- 20 those two types of operations should be
- 21 treated differently when it comes to
- 22 addressing food safety risks.

- 1 For leafy greens we argue that
- 2 large scale operations distributing fresh cut
- 3 or ready to eat greens in sealed bags to
- 4 retail stores in multiple states should be the
- 5 area of greatest scrutiny with regard to food
- 6 safety regulations. `
- 7 Six, food safety regulations
- 8 should recognize the benefits of practices
- 9 used on diversified and organic farms with
- 10 regard to pathogen reduction, including the
- 11 benefits of wildlife habitat such as filter
- 12 strips and vegetative buffer zones to filter
- 13 out pathogens and to encourage beneficial
- 14 insects as a pest control mechanism.
- 15 Many of the concerns that our
- 16 members share about the national LGMA are
- 17 based on concerns that the metrics established
- 18 under the proposed marketing agreement and the
- 19 interpretation of those metrics by handlers -
- 20 or by auditors will be similar to those
- 21 already established under the California LGMA.
- 22 Specifically our members are concerned that

- 1 the metrics developed under the national GMA
- 2 will discriminate against diversified organic
- 3 and/or small scale farming operations by
- 4 creating inflexible one-size-fits-all
- 5 requirements, biased toward large scale
- 6 operations. By penalizing farmers that
- 7 promote wildlife habitat and natural pest and
- 8 pathogen control through conservation
- 9 practices such as vegetative buffer zones and
- 10 filter strips, based on false assumptions of
- 11 pathogen risk from deer, frogs and other
- 12 wildlife, which has been unsupported by
- 13 scientific research.
- 14 Creating barriers to the use of
- 15 basic farming practices required for organic
- 16 certification, such as biodiversity promotion
- 17 measures and organic pest control measures, or
- 18 creating a general bias toward a sterilization
- 19 model of farming, which our members believe is
- 20 ultimately counterproductive from both a food
- 21 safety and an environmental standpoint.
- 22 It would be unfortunate and ironic

- 1 if an agreement intended to enhance food
- 2 safety were to create incentives for farmers
- 3 to move away from sustainable farming systems
- 4 which are designed to reduce toxic loads in
- 5 the water, soil and air, and to instead
- 6 promote the use of large scale monocultural
- 7 farming systems that we believe to be of
- 8 higher risk.
- 9 In keeping with that concern is
- 10 our view that the structure of the proposed
- 11 national LGMA gives majority control to large
- 12 produce handlers with only token power to
- 13 growers, and with no explicit committee
- 14 representation for organic farmers,
- 15 conservationists or consumers.
- 16 In addition the zones established
- 17 to determine administrative committee
- 18 membership are illogical from an agricultural
- 19 or climatic perspective, and seem to be based
- 20 more on ensuring strategic voting power for
- 21 certain states instead of being drawn to
- 22 reflect common growing season or agronomic

- 1 zone characteristics.
- 2 Is leafy green production in
- 3 Wisconsin so similar to that of Alabama that
- 4 the two states should be in zone four
- 5 together? Does it make sense for Vermont and
- 6 Florida to be in the same zone? Both in
- 7 administrative board membership and in zone
- 8 line delineations, the goal would seem to be
- 9 to assure that the power of the proposed for
- 10 the proposed national LGMA rest with large
- 11 scale handlers of a few dominant states.
- The proponents have made a number
- of assertions about the proposal that need to
- 14 be challenged. For example the proponents
- 15 argue that the proposed national LGMA is
- 16 voluntary. From a practical standpoint it is
- 17 not. If 50 percent or more by volume of the
- 18 leafy green handlers sign up for the
- 19 agreement, it will be very difficult for other
- 20 handlers to decline to sign the agreement.
- 21 The National Leafy Greens Marketing Agreement
- 22 standard will essentially become the governing

- 1 baseline standard for handlers.
- 2 In addition the metrics required
- 3 by the agreement will be mandatory for growers
- 4 selling product to those handlers. This will
- 5 be particularly true in parts of the country
- 6 where a few handlers dominate the market, and
- 7 growers have little choice of buyers for their
- 8 product.
- 9 As a result the agreement becomes
- 10 a de facto marketing order that growers are
- 11 required to follow. Yet despite the fact that
- 12 the burden of the agreement and it's metrics
- would fall heaviest on growers who would be
- 14 required to follow the metrics, most of the
- 15 power for developing and approving the metrics
- 16 of the agreement rests with the handler.
- 17 Another assertion that the
- 18 proponents of the national LGMA have made is
- 19 that it would help growers because the LGMA
- 20 metrics would tend to supplant the use of
- 21 additional super metric food safety standards
- 22 by private buyers.

- 1 While it is true that growers are
- 2 suffering under a hodge podge of gap standards
- 3 and super metrics mandated by buyers, there is
- 4 nothing in the proposed national LGMA that
- 5 would prevent companies from requiring growers
- 6 to follow metrics that exceed or differ in
- 7 some way from LGMA metrics.
- 8 In fact some retailers or buyers
- 9 could use their requirement of super metrics
- 10 as a marketing strategy by arguing that their
- 11 product is better because it exceeds USDA
- 12 standards. The national LGMA would merely add
- 13 to the proliferation of food safety auditing
- 14 protocols, super metrics, and certifications
- 15 that result in more time, cost and paperwork
- 16 for growers and will disproportionately
- 17 represent smaller growers.
- 18 While I represent the National
- 19 Organic Coalition, we are working in concert
- 20 with a number of other organizations who share
- 21 our general concerns about this proposed
- 22 marketing agreement. Some of those

- 1 organizations are members of NOC; others are
- 2 not. In that regard we have witnesses from a
- 3 broad spectrum of perspectives who will
- 4 provide testimony about their concerns about
- 5 the proposed LGMA, both with regard to its
- 6 structure and the metrics that would be
- 7 developed under it.
- From the consumer perspective,
- 9 Patty Lovery, Food and Water Watch, and Elisa
- 10 Obadashian of Consumers Union, will be talking
- 11 about the need for a strong federal standard
- 12 for food safety developed by FDA, and their
- 13 concerns about an industry led standard under
- 14 AMS jurisdiction.
- 15 From the family farm and grower
- 16 perspective, Dave Runsten from the Community
- 17 Alliance for Family Farms, and Dale Coke, a
- 18 California leafy greens grower, will talk
- 19 about their experiences with the California
- 20 LGMA, and how its metrics have negatively
- 21 affected family farms, discriminated against
- 22 diversifying farming operations, and reversed

- 1 years of good conservation efforts on farms.
- 2 From the conservation and
- 3 environmental group perspective, Jo Ann
- 4 Baumgartner from Wild Farm Alliance and Lisa
- 5 Bunin of the Center for Food Safety will talk
- 6 about the compatibility of sustainable and
- 7 organic farming systems with food safety
- 8 objectives; how the California LGMA has
- 9 resulted in the destruction of important
- 10 wildlife habitat; and their opposition to the
- 11 expansion of LGMA to the national level.
- 12 From the organic certified
- 13 perspective, Garth Kahl will talk about the
- 14 problems faced by organic farmers who are
- 15 struggling to address the requirements of the
- 16 California LGMA while also trying to continue
- 17 to meet the requirements of the USDA organic
- 18 standards.
- 19 From the faith community
- 20 perspective, Peggy da Silva of the Episcopal
- 21 diocese of California will talk about the
- 22 nutritional needs of low-income citizens and

- 1 how food safety regulations and related costs
- 2 have inappropriately targeted been targeted
- 3 toward fresh leafy greens, driving up the cost
- 4 of those vegetables to citizens who are
- 5 nutritionally at risk instead of targeting the
- 6 regulatory emphasis on high risk, fresh cut,
- 7 and ready to eat leafy greens.
- 8 And from the organic handler and
- 9 wholesale perspective, Josh Hinerfeld of
- 10 Oregon-based Organically Grown, and By Nygrens
- 11 of San Francisco based Veritable Vegetable,
- 12 will talk about the need to have food safety
- 13 standards that embrace the benefits of small
- 14 to medium-scale diversified and organic farms
- 15 and the overall food safety effort, and how
- 16 the proposed national LGMA would be counter
- 17 productive and harmful.
- 18 In conclusion, at a time when
- 19 Congress is debating federal food legislation,
- 20 and FDA is issuing guidance and regulations
- 21 governing produce food safety standards, it's
- 22 hard for our members to understand why AMS

- 1 would be moving forward with an overlapping
- 2 and potentially conflicting food safety
- 3 protocol for leafy greens under the control of
- 4 large scale conventional produce handlers.
- 5 The proliferation of food safety
- 6 protocols and audits is crippling to small to
- 7 medium scale farmers, confusing to consumers,
- 8 and a highly inefficient and ineffective way
- 9 to address food safety concerns.
- 10 One single food safety standard
- 11 should be developed with provisions to target
- 12 regulation toward the highest risk operations
- 13 and activities, and to recognize the unique
- 14 role of small to medium scale diversified and
- 15 organic farming systems in the larger food
- 16 safety arena.
- 17 Thank you.
- 18 JUDGE HILLSON: Any other direct,
- 19 Mr. English?
- 20 MR. ENGLISH: Yes, but first was
- 21 this marked as --
- 22 JUDGE HILLSON: I marked it as

- 1 Exhibit 17.
- 2 MR. ENGLISH: I would move its
- 3 admission.
- 4 JUDGE HILLSON: It's received
- 5 into evidence. It's accepted.
- 6 (Whereupon the aforementioned
- 7 document was marked for
- 8 identification as Exhibit No. 17
- 9 and received into evidence)
- MR. ENGLISH: Mr. Etka, a couple
- 11 of times in your testimony, on pages one and
- 12 two, you referenced interpretation of
- 13 regulations. There's the interpretation of
- 14 regulations on the first page, and there is
- 15 the proposed marketing agreement and the
- 16 interpretation of the metrics by auditors.
- 17 Why did you what did you mean by
- interpretations, and why is that important?
- 19 MR. ETKA: I think there have
- 20 been some comments made that the metrics are
- 21 general, and that where the rubber is really
- 22 meeting the road is where auditors come in and

- 1 how they interpret those metrics. I think
- 2 this has particularly been true in the area of
- 3 wildlife habitat removal. If you look at the
- 4 actual metrics of LGMA, it talks about -- the
- 5 California LGMA -- it talks about the need to
- 6 address the dangers of wildlife, and it talks
- 7 about potential harm from wildlife in terms of
- 8 pathogens. I think there is a paragraph in
- 9 the latest version that I saw that sort of
- 10 gave a little bit of lip service to the fact
- 11 that taking out wildlife habitat is something
- 12 that you should consult with natural resource
- 13 agencies about. But in general I think the
- 14 pressure farms are feeling when they are
- 15 facing audits that determine whether or not
- 16 they can sell their product to buyers is to
- 17 take out that wildlife habitat, and I think
- 18 that we'll have some studies later on from
- 19 future witnesses today and tomorrow that show
- 20 that the majority of farmers who have been
- 21 surveyed have actually ripped out a lot of
- 22 their wildlife habitat in response to those

- 1 metrics.
- 2 So the reality of what is going on
- 3 is really based on how auditors are
- 4 interpreting those metrics, and the result has
- 5 been destruction of wildlife habitat.
- 6 MR. ENGLISH: I have no further
- 7 questions at this time. The witness is
- 8 available for cross-examination.
- 9 JUDGE HILLSON: Okay, I'll turn
- 10 it over to the panel first. Ms. Schmaedick,
- 11 you were on your way to ask a question> Is
- 12 that correct?
- MS. SCHMAEDICK: That's correct.
- 14 CROSS-EXAMINATION BY COUNSEL FOR USDA
- 15 MS. SCHMAEDICK: Melissa
- 16 Schmaedick. Good morning.
- 17 MR. ETKA: Good morning.
- 18 MS. SCHMAEDICK: You had just
- 19 answered a question about the use of the word,
- 20 interpretation. And you spoke about feedback
- 21 that you've heard form your community about
- 22 how interpretation is being made and applied

- 1 during inspections; is that correct?
- 2 MR. ETKA: Yes.
- 3 MS. SCHMAEDICK: Were you talking
- 4 about the California program?
- 5 MR. ETKA: Yes.
- 6 MS. SCHMAEDICK: California Leafy
- 7 Greens Marketing Agreement?
- 8 MR. ETKA: Yes.
- 9 MS. SCHMAEDICK: So you weren't
- 10 necessarily talking about the national the
- 11 proposed National Leafy Greens Marketing
- 12 Agreement?
- 13 MR. ETKA: I'm extrapolating from
- 14 the concerns we have heard both anecdotally
- and from surveys about what has happened under
- 16 the metrics of the California LGMA, and
- 17 extrapolating to concerns about the type of
- 18 metrics that could be and we fear will be
- 19 developed under the national LGMA. I think
- 20 that is consistent with a lot of testimony we
- 21 have heard today from the proponents about why
- 22 they are trying to go national with this

- 1 agreement, and how they would view working
- 2 similarly to how the California LGMA has
- 3 worked.
- 4 MS. SCHMAEDICK: So some of the
- 5 concerns that have been raised about potential
- 6 negative impacts of metrics and how they are
- 7 interpreted are those comments always made in
- 8 reference to people who are complying with the
- 9 California program, or are sometimes those
- 10 comments the result of people complying with
- 11 super metrics?
- MR. ETKA: It's both.
- MS. SCHMAEDICK: Both?
- 14 MR. ETKA: I mean obviously what
- 15 farmers and growers are dealing with is the
- 16 proliferation of various standards. We don't
- 17 see the California LGMA in any way as stopped
- 18 the super metrics. We think that is just one
- 19 example of the type of audits that growers are
- 20 facing, and I think some of our witnesses that
- 21 will be testifying later will delve in a bit
- 22 more to some of the wildlife destruction

- 1 implications of the California LGMA.
- 2 MS. SCHMAEDICK: So are there
- 3 differences between the California program and
- 4 super metrics?
- 5 MR. ETKA: We have heard some of
- 6 the proponent groups I think mention some
- 7 differences. Some that I've heard them
- 8 mention, and I've heard some of our folks
- 9 mention as well, is like differences in buffer
- 10 zones. For example I think I heard mention
- 11 there is a difference between the California
- 12 LGMA and some of the super metrics in buffer
- 13 zones between large livestock operations and
- 14 their farms.
- So I believe there are some
- 16 differences, yes, which is part of the point
- 17 about how farmers are having audit fatigue,
- 18 because they have a bunch of different
- 19 standards that they have to comply with.
- MS. SCHMAEDICK: Have you read
- 21 the proposed language?
- MR. ETKA: Yes.

- 1 MS. SCHMAEDICK: Does the
- 2 proposed language have any regulation in it
- 3 with regard to metrics specifically?
- 4 MR. ETKA: I think the word that
- 5 was used earlier, yesterday, was it creates a
- 6 template for the metrics. It creates the
- 7 structure that will determine how those
- 8 metrics are put together. It creates the
- 9 administrative committee, and the technical
- 10 committee, and the market review board as the
- 11 bodies that will help put together those audit
- 12 metrics, and then ultimately approve them and
- 13 move them forward to the secretary. There is
- 14 nothing in here other than very broad
- 15 generalities about what type of metrics will
- 16 be developed.
- 17 MS. SCHMAEDICK: So if I'm
- 18 understanding you correctly you're saying that
- 19 there are authorities to develop metrics, but
- 20 there aren't metrics being proposed in the
- 21 agreement.
- 22 MR. ETKA: There is a template

- 1 for the development of the metrics, and a
- 2 procedure to create the power for this
- 3 industry led board to develop these food
- 4 safety metrics.
- 5 MS. SCHMAEDICK: I'd like to go
- 6 to your testimony and ask some questions about
- 7 statements that you've made.
- 3 Just in general do you believe
- 9 that there is a correlation between quality
- 10 and whether or not a product is contaminated?
- 11 MR. ETKA: I think the point of
- 12 disagreement that we have about the term,
- 13 quality, is as we've seen on AMS' website it
- 14 was referred to as measureable traits. We see
- 15 what's proposed in the national LGMA to be an
- 16 entirely different beast in the sense that it
- is not looking at measureable traits; it's
- 18 creating a food safety process which is
- 19 different than just quality of what the final
- 20 product is.
- 21 We view that food safety process
- 22 to be something that should be in the realm of

- 1 a food safety agency to assure that the
- 2 science and the expertise that is most
- 3 relevant to that food safety task which should
- 4 be something that applies for the whole public
- 5 should be done by a food safety agency, and
- 6 not by a marketing agency.
- 7 MS. SCHMAEDICK: Are you aware of
- 8 cooperative working relationships between USDA
- 9 and FDA?
- 10 MR. ETKA: Yes, in fact that's
- 11 one of the important parts of our testimony
- is, while we believe that FDA should be the
- 13 lead agency for the development of those
- 14 standards, we feel very, very strongly that
- 15 they should be working in close coordination
- 16 with USDA and AMS to make sure that the
- 17 standards that are developed are practical,
- 18 and we believe you all have much more
- 19 expertise in terms of understanding how food
- 20 safety regulations that have developed can and
- 21 will be implemented on the farm.
- 22 So not in any way am I saying that

- 1 FDA should do it in a vacuum. To the contrary
- 2 they should be doing it in close coordination
- 3 with you all, and we actually would prefer
- 4 that USDA be the agency for the enforcement of
- 5 those regulations on farms. So yes, I am
- 6 aware of those close working relationships,
- 7 and I think that's very important.
- 8 And one other thing I'd just
- 9 mention on that is, in looking at the
- 10 technical committee that is proposed for the
- 11 national LGMA, it seems to me that that would
- 12 be a very appropriate type of technical board
- 13 to give advice to FDA in their regulatory
- 14 process. If that board were to be fleshed out
- 15 to have more diversity I think it would be a
- 16 very good collaborative relationship to have
- 17 industry, consumers, conservationists giving
- 18 direct feedback to FDA in their food safety
- 19 regulation process.
- MS. SCHMAEDICK: Are you aware
- 21 that the proposed language currently has
- 22 member seats for FDA on that technical review

- 1 board?
- 2 MR. ETKA: I think two of what it
- 3 says in here are 13 members of that technical
- 4 review board I'm having trouble with the
- 5 math, because it looks like 14 to me but
- 6 two, in other words, a small minority of the
- 7 members would be FDA members.
- 8 Also on that point I am aware that
- 9 there are food safety experts that are
- 10 supposed to be put on that board, but I think
- 11 we have a concern that if those experts are
- 12 restricted as the language proposes to only
- 13 those folks from the national land grant
- 14 universities, and can only be elected by the
- 15 producer and handler members from that zone,
- 16 that you are going to be getting a very narrow
- 17 committee in terms of diversity of food safety
- 18 perspectives and science perspectives in food
- 19 safety.
- 20 We think that those restrictions
- 21 would result in very little diversity of
- 22 background and scientific perspective.

- 1 MS. SCHMAEDICK: In your comments
- 2 I understand that or what I think I am
- 3 hearing you say is that cooperation and
- 4 process that involves input from a diverse
- 5 background of knowledge and interests would be
- 6 appropriate; is that correct?
- 7 MR. ETKA: Yes.
- 8 MS. SCHMAEDICK: So you would not
- 9 be opposed to a process that involves
- 10 representation of these different interest
- 11 groups?
- MR. ETKA: Well, just to clarify,
- our bottom line is, we oppose the creation of
- 14 a National Leafy Greens Marketing Agreement.
- 15 My comments about the need for more diversity
- 16 of scientific background and of perspectives
- 17 goes not only to the specifics of this
- 18 agreement, which in general we opposed, But
- 19 it's the same comments that I'm making with
- 20 regard to FDA regulation for example. That
- 21 would be true across the board that we feel
- 22 like organic farmers, small scale operations,

- 1 consumers, conservationists, should be well
- 2 represented in any forum where food safety
- 3 regulations are being developed.
- 4 MS. SCHMAEDICK: Were you aware
- 5 of the proponent group and their activities to
- 6 draft the proposed agreement?
- 7 MR. ETKA: Was I aware?
- 8 MS. SCHMAEDICK: Were you aware
- 9 that there was an agreement being drafted by
- 10 a proponent group?
- 11 MR. ETKA: To be honest with you
- 12 it's something that has been on our radar
- 13 screen only for my organization, the National
- 14 Organic Coalition, only more recently. I
- 15 think a lot of some of our members have been
- 16 focused on it more than we have as a whole
- 17 organization. And certainly some of the folks
- 18 we are collaborating with, and organizations
- 19 we are collaborating with here today, from
- 20 California, have been acutely aware of it for
- 21 a long time.
- 22 So it's a relatively new issue for

- 1 our organization.
- MS. SCHMAEDICK: So perhaps this
- 3 is a question that might be more appropriate
- 4 for other witnesses, but my question is, I
- 5 hear your statement that you are opposed to
- 6 the proposal as it is. Yet you are aware of
- 7 its being drafting that it was being
- 8 drafted. And we heard from a previous witness
- 9 that there was a concerted effort to reach out
- 10 and seek input in the development of the
- 11 draft. So my question is, did you attempt to
- 12 participate in the drafting?
- MR. ETKA: No, I was not
- 14 contacted by anyone to seek my input.
- 15 MS. SCHMAEDICK: Are you aware of
- 16 any of your members who were contacted and
- 17 invited to participate?
- 18 MR. ETKA: I am not directly
- 19 aware of that, no. I will say that I believe
- 20 as I mentioned earlier that some of the other
- 21 organizations that we are collaborating with
- 22 on this issue have been aware of this for a

- 1 long time and have been raising concerns about
- 2 it for a long time. And I'll let them speak
- 3 more to their direct involvement.
- 4 MS. SCHMAEDICK: In your
- 5 statement you mentioned that it's important
- 6 that regulation be development in open, public
- 7 and transparent process. In your opinion are
- 8 public hearings and public comment periods
- 9 part of a public and transparent process?
- 10 MR. ETKA: Yes, I think this
- 11 process is very open and very transparent and
- 12 very lengthy. But I think what we are
- 13 referring to is the much more closed box of
- 14 development of the metrics that we see
- 15 outlined here. I already talked about my
- 16 concerns about the limitation on the
- 17 scientific background of the folks involved
- 18 with this. It is very, if you read it, very
- 19 focused on marketing, not surprising given
- 20 that it's an AMS proposal, or a proposal to be
- 21 run through AMS.
- 22 So our concern is that that

- 1 procedure will limit public involvement,
- 2 because it is so dominated by large produce
- 3 handlers, which is not in our view the people
- 4 who should be in charge of developing food
- 5 safety standards for the country.
- 6 MS. SCHMAEDICK: Do you have any
- 7 suggestions as to additions or modifications
- 8 that could be made to this technical review
- 9 board that might result in a better
- 10 representation of the interests and
- 11 information you are concerned about?
- MR. ETKA: Well, I already
- 13 mentioned in my testimony an interest in
- 14 seeing if there was on the administrative
- 15 committee, which is the committee that
- 16 ultimately has the most power of those three
- 17 and ultimately makes the decision, we think
- 18 that there ought to be explicit organic farmer
- 19 representation on there, as well as consumer
- 20 representation and environmental conservation
- 21 group representation.
- In terms of the technical

- 1 committee, I already mentioned some of my
- 2 concerns about the way that the food safety
- 3 experts are chosen for that. I think that
- 4 needs to be changed so that you truly do have
- 5 a diverse group of food safety scientists on
- 6 that board who can't be chosen based on their
- 7 agreements with the producers and handlers on
- 8 that board.
- 9 I think that is one of my big
- 10 concern is that you have folks who have only
- 11 one narrow perspective about food safety. And
- 12 I think there is a very diverse and strong
- debate going on about the sources of food
- 14 safety, and food illness, food-borne pathogen
- 15 outbreaks. And if you don't have that full
- 16 diversity represented on the technical
- 17 committee, I think you are going to be
- 18 limiting the benefit of the outcome.
- 19 MS. SCHMAEDICK: Do you or does
- 20 your organization have some alternate proposed
- 21 language for those sections, something that
- 22 would present the record with an idea of your

- 1 what you are looking for specifically?
- 2 MR. ETKA: We have not written
- 3 language specific to that, no. But some of
- 4 the comments that I'm making could be
- 5 reflected in writing.
- 6 MS. SCHMAEDICK: Okay. You've
- 7 been here from the beginning of this hearing,
- 8 is that correct?
- 9 MR. ETKA: Yes.
- 10 MS. SCHMAEDICK: And have you
- 11 heard the testimony that was given earlier
- 12 where witnesses discussed the process through
- 13 which metrics would be developed and the
- 14 importance of having different interest groups
- 15 represented in that process? Did you hear
- 16 that testimony?
- 17 MR. ETKA: I heard some of that.
- 18 I was out of the room for parts of it. So I
- 19 did hear some of that.
- 20 MS. SCHMAEDICK: You mentioned
- 21 that you have a concern about the way that the
- 22 zones were drafted, is that correct?

- 1 MR. ETKA: Yes.
- MS. SCHMAEDICK: Do you have any
- 3 recommendations on alternate definitions?
- 4 MR. ETKA: No specific
- 5 recommendations. I did hear some of the
- 6 testimony delving into the distinction between
- 7 zones and regions. I don't think that is
- 8 very well fleshed out at all in this proposal,
- 9 and I'd be interested in hearing more about
- 10 that distinction. We don't have a proposal
- 11 for fixing that problem, because in general we
- 12 are opposing the creation of it altogether.
- MS. SCHMAEDICK: Do you believe
- it would be helpful to make a recommendation
- 15 for perhaps a different approach to the way
- 16 that the zones are currently being proposed?
- 17 MR. ETKA: It is something we've
- 18 talked about, and I understand the difficulty
- in putting those zones together; that's not an
- 20 easy task. We don't have a specific proposal
- 21 to fix the problem. I think throughout this
- 22 hearing process we will be probably having

- 1 more discussions about that.
- 2 MS. SCHMAEDICK: I want to go
- 3 back to some of the comments you've made about
- 4 how there might be scientific evidence that
- 5 supports a different approach to quality and
- 6 food safety than what is currently being
- 7 identified or has been identified in the
- 8 California program and other types of
- 9 programs.
- 10 Are you aware of any is there
- 11 any information that speaks to a set of
- 12 metrics that would be applicable and would
- 13 address these concerns at a very small grower
- 14 or handler level? I don't know if I'm making
- 15 myself clear.
- 16 MR. ETKA: I think several of the
- 17 things that have gone on with California LGMA
- 18 metrics we mentioned wildlife habitat
- 19 destruction based on assumptions of pathogen
- 20 risk from certain wildlife types, there is a
- 21 growing debate about whether some of those
- 22 assumptions initially made about the risk of

- 1 deer and frogs and other animals, whether
- 2 those really do pose a pathogen risk for
- 3 example. And there was a reference yesterday
- 4 to the California Department of Fish & Game
- 5 analysis which I think one of our subsequent
- 6 witnesses will be talking about in greater
- 7 detail that has, after a couple of years of
- 8 analysis, still midstream on that research,
- 9 but after a couple of years they have put out
- 10 some information suggesting that those
- 11 pathogen risks are very low for those animals
- 12 that have been targeted and have been the
- 13 reasons for all the habitat destruction.
- I mention that as one example of
- 15 the type of active debate that is going on
- 16 right now about the science that is being used
- 17 to drive what actions are being taken on
- 18 farms.
- We are arguing that wildlife
- 20 habitat is very important from a food safety
- 21 standpoint. From an organic standpoint
- 22 specifically, it's where that habitat is

- 1 critical for habitat for beneficial insects
- 2 that are part of an organic farms plan to not
- 3 use pesticides basically, alternative pest
- 4 control methods. But we also feel that
- 5 wildlife habitat and filter strips help
- 6 actually filter out pathogens that may be
- 7 coming from other areas.
- 8 So there is really a conflict in
- 9 views on the science, which drives what
- 10 happens on those farms. So I am aware of some
- 11 studies in that regard, and we are working to
- 12 compile a list of that science that I don't
- 13 have ready for this hearing here, but we are
- 14 participating in future regional hearings, and
- 15 I hope to put that into the record in a more
- 16 comprehensive way.
- 17 MS. SCHMAEDICK: I apologize, I
- 18 don't think I asked my question very clearly.
- 19 My understanding based on what
- 20 you've said is that food safety is important.
- 21 MR. ETKA: Yes.
- MS. SCHMAEDICK: And having a

- 1 quality product is important.
- 2 MR. ETKA: Yes.
- 3 MS. SCHMAEDICK: And that in your
- 4 opinion there are very valid and
- 5 scientifically based approaches to meeting
- 6 that goal of a quality and safe product, yet
- 7 following some very different types of actions
- 8 than what are currently being used; is that
- 9 correct?
- 10 MR. ETKA: Than are currently
- 11 being used under the California LGMA.
- MS. SCHMAEDICK: Correct, thank
- 13 you, yes. So my question is, if you are aware
- 14 of these practices that ultimately end up at
- 15 the same goal, can you bring those practices
- 16 to light? Is that part of what your
- 17 presentation will include? And if given the
- 18 opportunity to participate in the development
- 19 of metrics, would that be important
- 20 information to bring to the table?
- 21 MR. ETKA: Again, based on my
- 22 testimony what we are saying is that if in the

- 1 development of food safety standards that
- 2 should be done via FDA, and we are aware of
- 3 the guidance that they have issued. We will
- 4 be commenting on those guidances, and part of
- 5 our comments frankly many of our comments to
- 6 them have been similar to what I'm saying
- 7 here, that any food safety practices that are
- 8 developed for farms, particularly for smaller
- 9 scale operations, for organic operations, need
- 10 to be fully understanding of what goes on on
- 11 those farms from a food safety benefit
- 12 standpoint, need to be sensitive to the unique
- 13 needs of those operations.
- I will mention, and I think we'll
- 15 probably hear more about this in the Syracuse
- 16 hearing, there are some of our members in the
- 17 Northeast who have started to develop programs
- 18 whereby organic certifiers start to do on-farm
- 19 audits for organic farms, and are compiling
- 20 some of those concepts of working with organic
- 21 farms, particularly on food safety protocols.
- 22 And I think we will probably hear more about

- 1 that either at the Syracuse or the Charlotte,
- 2 North Carolina hearings.
- 3 MS. SCHMAEDICK: I believe it's
- 4 on page three of your testimony, bottom --
- 5 MR. ETKA: I have a large print
- 6 so I don't have the same pages you do.
- 7 MS. SCHMAEDICK: Oh, okay, so I
- 8 will you just said that a national LGMA -
- 9 and I'm just going to paraphrase here would
- 10 result in more time, cost and paperwork for
- 11 growers, which will disproportionately affect
- 12 small growers.
- Do you have some examples, some
- 14 quantified examples of what those additional
- 15 costs would be, how they would be
- 16 disproportionate?
- 17 MR. ETKA: I think I'm aware of a
- 18 recent study by UC Davis small farm program
- 19 that has attempted to quantify some of those
- 20 data. And I think some of our subsequent
- 21 witnesses will be talking about that a little
- 22 bit, and I'm hoping that some of that data

- 1 will be part of the record in a very explicit
- 2 way. I think we also heard anecdotally from
- 3 the witness from Lakeside Organic Farm about
- 4 some of the costs that were unique to his
- 5 operation in terms of dealing with LGMA as
- 6 well as super metrics, and how those differed
- 7 from some of the average figures that were
- 8 testified to earlier.
- 9 MS. SCHMAEDICK: But for your
- 10 statement you don't have any specifics that
- 11 you could draw from right now, some examples
- 12 of what additional costs might occur as a
- 13 result of the implementation of this
- 14 agreement?
- 15 MR. ETKA: I think one of the
- 16 things we've heard a lot is that if you have
- 17 a diversified farm, and you have a lot of
- 18 different crops in your that you have very
- 19 intense crop rotations, you have audits that
- 20 are crop-specific, that you your expenses
- 21 will be very high for those audits relative to
- 22 someone who has one or two crops over many,

- 1 many acres, and they only have to deal with
- 2 the audits for that particular crop.
- What it means is that a larger
- 4 operation can take advantage of the economies
- 5 of scale to spread that cost out over many,
- 6 many acres, and I think that is one of the
- 7 examples of how the audit fatigue that was
- 8 referenced earlier ends up making a
- 9 diversified operation's life very difficult.
- 10 But again in terms of specifics I
- 11 think the most recent data I've seen is out of
- 12 UC Davis, and I think some of our subsequent
- 13 witnesses will be testifying on that.
- MS. SCHMAEDICK: Were you here
- 15 earlier for Mr. Horsfall's testimony on
- 16 assessments and inspections?
- 17 MR. ETKA: I think I did miss
- 18 that one.
- 19 MS. SCHMAEDICK: Oh, okay. As I
- 20 understand your proposal and what has been
- 21 presented, the actual cost of the audit would
- 22 be an expense that is paid for by the handler

- 1 through the assessments that are collected.
- 2 Again, that's based on my understanding of the
- 3 information as it has been presented.
- 4 Is that your understanding?
- 5 MR. ETKA: I think that's your
- 6 understanding. So I'm not aware of that. But
- 7 I am aware, I think the witness from Lakeside
- 8 Organic Farm talked about the audits, and the
- 9 cost of those , not only the actual costs but
- 10 I think the disruption of that process if you
- 11 are always dealing with audits, and you are
- 12 having to meet different protocols, so it's
- 13 not just the outright cost of the audits, but
- 14 the disruption to the operation as well if you
- 15 have 20 different crops on 100 or 200 acres.
- 16 But I did not hear his testimony on that
- 17 point.
- 18 MS. SCHMAEDICK: Okay. I think
- 19 that's it for the moment. Thank you.
- JUDGE HILLSON: Anyone else?
- 21 MS. DESKINS: I have a couple of
- 22 questions.

- 1 JUDGE HILLSON: Yes.
- 2 MS. DESKINS: You said that you
- 3 were part of a coalition, and you read some
- 4 names off at the end. Are those all members
- 5 of the coalition?
- 6 MR. ETKA: No, they are not.
- 7 Some are, and some are not.
- 8 MS. DESKINS: Could you just tell
- 9 us for the record what members of the
- 10 organizations are members of the coalition?
- 11 MR. ETKA: I can read the members
- 12 of our coalition if that would be helpful.
- 13 Currently our members are the following
- 14 organizations: Beyond Pesticides; Center for
- 15 Food Safety; Equal Exchange; Food and Water
- 16 Watch; Maine Organic Farmers and Gardeners
- 17 Association; Midwest Organic and Sustainable
- 18 Education Service; National Cooperative
- 19 Grocers Association; Northeast Organic Dairy
- 20 Producers Alliance; Northeast Organic Farming
- 21 Association; the Interstate Policy Council;
- 22 Rural Advancement Foundation International;

- 1 and the Union of Concerned Scientists.
- MS. DESKINS: And just in general
- 3 do you have a business address or a web
- 4 address?
- 5 MR. ETKA: We have a web address
- 6 of www.nationalorganiccoalition.org.
- 7 MS. DESKINS: And then in terms
- 8 of your members, do you have any idea how many
- 9 of them would be regulated by this agreement?
- 10 MR. ETKA: I don't have that
- 11 number right now, but we could probably try to
- 12 assuming that it would go national, try to
- 13 get a sense of that.
- MS. DESKINS: Okay. You also
- 15 talked about you had some there were some
- 16 surveys that had been done. Do you recall
- 17 that testimony?
- 18 MR. ETKA: I talked about the
- 19 survey of that was done by UC Davis, the
- 20 small farm program, about the costs of
- 21 complying with the California LGMA, and I
- 22 think that is going to be testified to later.

- 1 I think there have been some analyses done by
- 2 some of the RC&D people in this region,
- 3 looking at some of the conservation practices
- 4 and how wildlife habitat has been taken out in
- 5 reaction to the California LGMA.
- 6 MS. DESKINS: Okay, I was just
- 7 wondering for the record if you knew the exact
- 8 name of the survey just so it will be clear in
- 9 the record what you are referring to?
- 10 MR. ETKA: Some of our subsequent
- 11 witnesses are going to testify specifically to
- 12 that, so I hesitate to just give you the exact
- 13 name because I don't have that in front of me.
- 14 MS. DESKINS: Okay. You also
- 15 testified about a concern that if this
- 16 proposal did go through that the committee
- 17 wouldn't have a diversification of views on
- 18 food safety. Do you recall that testimony?
- 19 MR. ETKA: Yes.
- 20 MS. DESKINS: One of the issues
- 21 you brought up was that there might be a lot
- 22 of people from land grant communities that

- 1 would be on the technical committee. Am I
- 2 understanding that correctly?
- 3 MR. ETKA: Yes.
- 4 MS. DESKINS: I was just
- 5 wondering, is there a variation in the
- 6 application of scientific theories on food
- 7 safety that varies from region to region or
- 8 university to university?
- 9 MR. ETKA: I believe there is.
- 10 MS. DESKINS: If you just know,
- 11 can you briefly tell us what it is?
- MR. ETKA: Other than to say that
- 13 there is a diversity of opinion I'm not sure
- 14 how much more specific I can be.
- 15 MS. DESKINS: Okay. I think you
- 16 have said this for the record, but I want to
- 17 make sure I understand it. You are opposed to
- 18 this agreement, so you don't have any
- 19 amendments to propose that would make the
- 20 agreement acceptable to your organization?
- 21 MR. ETKA: I think overall we are
- 22 opposed. Some of the suggestions that I've

- 1 made in my testimony are that the boards be
- 2 more diverse and that there be more power
- 3 given to the growers; that there be more power
- 4 given to organic growers specifically; and
- 5 that broader involvement by consumers and
- 6 environmental groups be incorporated into
- 7 those boards, and that there be more food
- 8 safety expertise allowed on the boards,
- 9 particularly the technical committee.
- 10 Other suggestions that we made are
- 11 that there be a recognition of differential
- 12 level of regulation needed based on scale of
- 13 operations and procedures used on those
- 14 operations. And we have argued that the
- 15 bagged salad mixes and ready-to-eat products
- 16 has been shown to have to be a place of
- 17 higher risk than some of the fresh product.
- 18 I'm not stating that as a blanket. I'm saying
- 19 that in general we believe that to be true,
- 20 and as I mentioned in my example that there
- 21 ought to be a differential level of focus on -
- from a regulatory perspective, based on the

- 1 type of operation that is involved.
- 2 MS. DESKINS: And you also were
- 3 testifying about wildlife habitat destruction,
- 4 and part of what you said was, did you want to
- 5 incorporate any recommendations about that?
- 6 MR. ETKA: I think that gets to
- 7 some of the ongoing debate about the science
- 8 of what animals are at risk. I think we would
- 9 argue that large scale livestock operations
- 10 can be of much greater risk than deer and
- 11 frogs, and but a lot of the attention at
- 12 least in terms of the on the ground effects of
- 13 the California LGMA has been to focus on
- 14 wildlife as being some of the biggest concerns
- 15 for pathogen vectors.
- MS. DESKINS: Thank you.
- 17 JUDGE HILLSON: Go ahead, Ms.
- 18 Carter.
- 19 MS. CARTER: Antoinette Carter
- 20 with USDA. Just a few followup questions for
- 21 you.
- You mentioned RC&D. Could you

- 1 clarify what does that mean?
- 2 MR. ETKA: I was afraid you were
- 3 going to ask that. Resource Conservation and
- 4 Development, I believe? And Districts, okay.
- 5 And that is generally within RCS, is that
- 6 correct? USDA?
- 7 JUDGE HILLSON: We need to keep
- 8 the we can't have a colloquy. If you know
- 9 the answer, answer the question. If you don't
- 10 know it, maybe someone else can testify.
- MS. CARTER: Yes, perhaps someone
- 12 else can.
- 13 MR. ETKA: As I mentioned some of
- 14 our other folks are going to be testifying
- 15 more specifically on that, so I'll let you
- 16 give the specifics of where that sits in the
- 17 exact acronym.
- 18 MS. CARTER: Okay, just to follow
- 19 up on some questions with regards to your
- 20 organization's memberships.
- 21 MR. ETKA: Yes.
- MS. CARTER: How many of your

- 1 members or farmers are specifically leafy
- 2 green producers?
- 3 MR. ETKA: Some of our members in
- 4 the East Coast have leafy greens. We're a
- 5 relatively new organization, and we're in the
- 6 process of getting more grower involvement
- 7 from the West in terms of organizations.
- We have organizations who have a
- 9 presence in California, for example, Center
- 10 for Food Safety and Food and Water Watch both
- 11 have offices here in California, and they work
- 12 quite a bit with the farmers directly.
- I think that a lot of our
- 14 involvement on this issue has been as I
- 15 mentioned before through some of our new
- 16 partners who are not formally members of our
- 17 organization, but with whom we collaborate
- 18 quite a bit on agriculture issues. And they
- 19 do have direct grower representation, and I
- 20 think some of them will be speaking today.
- 21 MS. CARTER: Okay. Do you happen
- 22 to know what percentage of U.S. produced leafy

- 1 greens are produced organically?
- 2 MR. ETKA: I have heard figures,
- 3 but I would hesitate to give that for the
- 4 record because they have been conflicting.
- 5 MS. CARTER: Are you currently
- 6 aware of current AMS audit verification
- 7 programs that are currently in existence?
- 8 MR. ETKA: I am aware of them. I
- 9 don't feel like I'm an expert on them.
- 10 MS. CARTER: Well, would you -
- 11 from what based on the best of your
- 12 knowledge, are those quality programs that
- 13 place standards that are related to food
- 14 safety to the best of your knowledge of those
- 15 programs?
- 16 MR. ETKA: I don't feel like to
- 17 know enough about the specifics of that -
- 18 those audits to answer the question.
- MS. CARTER: Okay, that's all I
- 20 have. Thank you.
- JUDGE HILLSON: Go ahead, Ms.
- 22 Staley.

- 1 MS. STALEY: One of the areas
- 2 that you talk about is Kathleen Staley -
- 3 that USDA should sponsor regional training and
- 4 educational programs to help small processors
- 5 and handlers, as well as small and medium
- 6 farmers address food safety.
- 7 Do you have any awareness of the
- 8 current programs that we have been
- 9 participating in to outreach to those
- 10 particular segments of the production?
- 11 MR. ETKA: I am somewhat aware.
- 12 I think what I'm referring to is as the food
- 13 safety regulation and/or legislation moves
- 14 forward, that those specific regulations build
- in some deliberate outreach to those groups,
- 16 not just in food safety in general, but also
- in terms of how to implement those regulations
- 18 that don't exist yet.
- 19 And the other part of that
- 20 recommendation was that auditors, also, have
- 21 that type of training. I think we talked a
- 22 little bit about how part of the problems of

- 1 some California LGMA metrics is the way they
- 2 are being interpreted by the auditors. And
- 3 how there is a great variability in some of
- 4 those audit interpretations, and how there is
- 5 an insensitivity by some of those auditors to
- 6 the needs of organic farmers, and smaller
- 7 scale farms. So that recommendation goes hand
- 8 in hand with the one about the need to do
- 9 outreach to small farmers themselves as well
- 10 as the handlers.
- 11 MS. STALEY: Earlier in the
- 12 testimony, I specifically asked the question
- 13 about the outreach and education that was
- 14 conducted while it was addressed that it was
- done in a very short period of time because of
- 16 the nature to get the program in place
- 17 guickly. California did do outreach and
- 18 education to growers to help them get prepared
- 19 for the program. Were you aware of that?
- 20 MR. ETKA: I was aware of it, and
- 21 have become aware of it through this hearing.
- 22 But I have not been involved with that. I

- 1 think as I mentioned before, some of the
- 2 organizations with whom we are collaborating
- 3 at this hearing probably know more about that
- 4 on a firsthand basis than I do.
- 5 MS. STALEY: Thank you, that's
- 6 all.
- 7 JUDGE HILLSON: Anyone else?
- 8 Why don't you go, Ms. Dash.
- 9 MS. DASH: Suzanne Dash. In your
- 10 example of large farm with centralized washing
- 11 facility, and you compare it to a smaller farm
- 12 and suggest that the two operations be treated
- 13 differently when it comes to addressing food
- 14 safety risks, could you expand on that? How
- 15 do you mean? Because it could be interpreted
- 16 different ways. I just want to know what you
- 17 mean by that.
- 18 MR. ETKA: As regulation is being
- 19 developed we are urging that there be a
- 20 deliberate effort to target what is shown to
- 21 be the riskiest practices and the place where
- 22 the highest potential for food borne pathogen

- 1 outbreaks. I think anecdotally we've seen
- 2 that a lot of the food borne illnesses have
- 3 been related to some of the process products,
- 4 the fresh cut, the bagged product, the ready
- 5 to eat. I'm not saying that that is true all
- of the time, but what we are talking about is
- 7 targeting food safety regulations to the areas
- 8 of highest risk, and what we are arguing is
- 9 that those areas should be the areas where
- 10 there is the most scrutiny in terms of dealing
- 11 with the most illness problems.
- MS. DASH: Okay, thank you.
- 13 What do you mean by a
- 14 sterilization model of farming?
- MR. ETKA: What I'm referring to
- 16 is two different systems of agriculture at
- 17 play. One that is dominant in organic and
- 18 diversified farms where you have intensive
- 19 crop rotations; where you have a lot of
- 20 noncrop vegetation; where you have filter
- 21 strips along riparian zones where you have
- 22 diversity of crops and in some cases of

- 1 animals, where you use manure. On organic
- 2 farms that is usually by regulation, very
- 3 strict regulations about how you use the
- 4 manure. How all of that builds together into
- 5 a what we would consider to be a sustainable
- 6 farming system, and what we've seen is that
- 7 the interpretation of the California LGMA
- 8 metrics has led to a model that is much more
- 9 in line with more of a large scale
- 10 monocultural system where you don't have a lot
- 11 of wildlife habitat, where you try to minimize
- 12 or eliminate any wildlife or animals in the
- 13 area at all; where you avoid the use of manure
- 14 and you rely more on synthetic fertilizers and
- 15 pesticides to make that system work. And that
- 16 is what I'm referring to as a sterilization
- 17 model.
- MS. DASH: Thank you.
- 19 Your concern that if a certain
- 20 number of handlers join that in effect it will
- 21 no longer be voluntary, is there some reason
- 22 why you picked 50 percent?

- 1 MR. ETKA: I may be wrong on
- 2 this. It was my understanding that there had
- 3 to be a majority of handlers to join for it to
- 4 go into effect, and the number is not
- 5 necessarily that important, but the point is
- 6 that if a majority of handlers join it becomes
- 7 very difficult for other handlers to decide
- 8 not to join. It becomes the de facto
- 9 standard.
- 10 And I think some of the
- 11 testimony from the proponents has suggested
- 12 that, that I think there was some testimony
- 13 from Mr. Pezzini that you really can't ship to
- 14 Canada or Mexico without following the LGMA
- 15 standard. So I think what I'm saying is that
- 16 for handlers if a majority of the handlers
- 17 sign up, that you really have to end up
- 18 signing up yourself as a handler.
- 19 And for growers you have no choice
- 20 at all. Because if the handlers to whom you
- 21 sell are part of it, then you have to follow
- 22 those metrics.

- 1 MS. DASH: I think the California
- 2 and Arizona models are really good to talk
- 3 about, because they are the best evidence of
- 4 what a national agreement might be similar to.
- 5 But to get maybe some distinction between
- 6 requirements under the California agreement
- 7 and buyer requirements, are you aware of your
- 8 members having difficulty meeting buyer
- 9 requirements outside of California and
- 10 Arizona, so that it could be attributed to
- 11 buyer requirements rather than California or
- 12 Arizona agreements?
- 13 MR. ETKA: I think some buyers
- 14 are requiring California LGMA, so it's ---
- 15 there are some buyer requirements that as I
- 16 mentioned in my testimony are super metric
- 17 requirements that go beyond that.
- 18 Particularly I think I have heard from some of
- 19 our members in the East about burdens that
- 20 their members are facing just in terms of the
- 21 audit fatique, and auditors not being aware of
- 22 what organic farmers are supposed to be doing

- 1 on their farm, and how they have to have
- 2 wildlife habitat on there to meet their
- 3 organic standards, and how they are required
- 4 to meet certain standards for manure use to
- 5 address some of the pathogen concerns as well
- 6 as other issues; and how those auditors are
- 7 just unaware of those requirements, and not
- 8 sensitive to those needs.
- 9 MS. DASH: Are you concerned that
- 10 national leafy greens agreement could
- 11 potentially put organic farmers out of
- 12 business? Or small farmers out of business?
- 13 MR. ETKA: I am concerned about
- 14 that, and I'm also concerned that it may force
- 15 a change in what happens on those farms; that
- 16 it may make small to medium scale organic
- 17 farmers' farms that are diversified, it may
- 18 make that system much more difficult and force
- 19 folks into a much larger scale one or two crop
- 20 kind of operation.
- 21 MS. DASH: That's all the
- 22 questions I have. Thank you.

- 1 JUDGE HILLSON: Ms. Schmaedick,
- 2 are you the only one left with questions on
- 3 the panel? You do have one, right? Go
- 4 ahead.
- 5 MS. SCHMAEDICK: This is Melissa
- 6 Schmaedick. Just again a couple of questions
- 7 to clarify making sure I understand what your
- 8 concerns are.
- 9 Based on your understanding of the
- 10 proposal, would a grower who also handles
- 11 their own product and let's say a direct sales
- 12 to consumer environment, would they be a
- 13 handler?
- MR. ETKA: Initially on my read
- of this I thought that they might not be, but
- in listening to testimony yesterday and today
- 17 it seems a little unclear to me, the degree to
- 18 which growers are often handlers, and in
- 19 California and the West Coast is I think sort
- 20 of blurred some of those lines. So it is a
- 21 little unclear to me from that testimony.
- 22 MS. SCHMAEDICK: Okay. Based on

- 1 your knowledge, what portion of the industry
- 2 just what portion of the industry is
- 3 involved only in direct sales to consumers, or
- 4 only in sales through farmers' markets and
- 5 CSAs, what portion of the industry sells both
- 6 in that environment as well as to larger
- 7 handlers that source from multiple sources;
- 8 and what portion of the industry delivers only
- 9 to handlers taking multiple sources.
- 10 MR. ETKA: I don't have that
- 11 data. I would love to have that data. I was
- 12 hoping NAS or someone else might have that.
- 13 MS. SCHMAEDICK: But in your
- 14 opinion is there a portion of the industry
- 15 that really sort of operates within an area
- 16 that is limited to direct sales to consumers,
- 17 farmers markets and CSAs?
- 18 MR. ETKA: There is a portion,
- 19 and it's an important portion to our
- 20 membership. But I want to make clear that my
- 21 testimony is not only about that portion. We
- 22 are talking about a full range of sustainable

- 1 organic farming operations. Many of them do
- 2 do direct sales. Many of them who sell to
- 3 wholesalers. So it's a whole spectrum of
- 4 those.
- 5 MS. SCHMAEDICK: Thank you for
- 6 that clarification. I believe that that is
- 7 the way I was understanding your testimony.
- 8 What I would like to clarify is
- 9 your understanding that the definition of
- 10 handle again based on the testimony that I
- 11 have heard and what is presented in the
- 12 notice, could apply to a grower, handler, that
- only sells within a direct sales to consumer,
- 14 farmers market, or CSA environment, and if
- 15 that were the case, would that individual have
- 16 the ability to make a choice about whether or
- 17 not they wanted to become a signatory?
- 18 MR. ETKA: I think I heard some
- 19 testimony yesterday, and I'm not sure exactly
- 20 who made the comment, but that you might if
- 21 you are selling directly you might become your
- 22 own handler, in essence, which would mean in

- 1 theory he would have a choice about whether to
- 2 sign up for the proposed LGMA. My concern
- 3 that I mentioned earlier is that if this
- 4 becomes the baseline standard in practicality
- 5 you may not really be able to make a choice.
- 6 And many of those folks, while they may sell
- 7 directly, they may also sell to wholesalers,
- 8 so they would be dealing with those protocols
- 9 anyway.
- 10 I think many of the folks that do
- 11 sell direct also sell to wholesalers as well;
- 12 not everyone, but there are a percentage of
- 13 those that would do both, and will be caught
- 14 in that web.
- MS. SCHMAEDICK: But you don't
- 16 have an idea of what portion of the industry
- 17 kind of fits in both of those things?
- 18 MR. ETKA: I don't have a figure.
- 19 MS. SCHMAEDICK: Okay. One last
- 20 thing. One thing I wanted to read a section
- 21 of the language as it was published in the
- 22 notice. It's Section 970.67, audit metrics.

- 1 It's really just the first sentence that I
- 2 want to read.
- 3 It says: Audit metrics shall be
- 4 recommended by the committee to USDA for
- 5 approval after consultation with the technical
- 6 review board.
- 7 So with that sentence in front of
- 8 you, can you tell me in your opinion who has
- 9 the ultimate authority to implement metrics?
- 10 MR. ETKA: USDA, based on a
- 11 proposal put before them by an industry-led
- 12 body. And that goes to our original concern
- 13 about AMS, and I realize it says USDA, not
- 14 AMS, but about AMS playing a food safety
- 15 agency role when it by its own statements is
- 16 not a food agency.
- 17 So while I believe USDA should be
- 18 part of that process, I do not believe USDA
- 19 should be the lead authority for the federal
- 20 government on this process with regard to
- 21 produce.
- MS. SCHMAEDICK: But my question

- 1 was, just to clarify, that in the process of
- 2 developing metrics approval from USDA is
- 3 required. I believe earlier in your statement
- 4 you said that the administrative committee
- 5 would have ultimate authority.
- 6 MR. ETKA: Let me clarify. What I
- 7 meant to say was that within the board and
- 8 committee structure of the LGMA, the
- 9 administrative committee is the one who
- 10 decides what is moved forward to the
- 11 secretary. The technical committee gives
- 12 advice to the administrative committee who
- 13 makes that decision, and moves that forward
- 14 for the secretary. So you are correct.
- 15 MS. SCHMAEDICK: Okay. That was
- 16 my last question. Thank you.
- 17 JUDGE HILLSON: How about the
- 18 proponents? Do you have any questions of this
- 19 witness? Okay, go ahead, Mr. Wilkinson.
- 20 MR. WILKINSON: Robert Wilkinson
- 21 on behalf of the Western Growers. Good
- 22 morning, if it's still morning.

- 1 You are not saying that there
- 2 should be no quality standards for leafy
- 3 greens, are you?
- 4 MR. ETKA: I am not. I am
- 5 arguing for targeting regulation and metrics
- 6 toward the bagged products, the processed
- 7 products, the fresh cut ready to eat. I am
- 8 not arguing that there should be no food
- 9 safety processes at all on fresh produce.
- 10 MR. WILKINSON: Are you saying
- 11 that there should be no quality standards for
- 12 organic farmers for leafy greens?
- MR. ETKA: No.
- 14 MR. WILKINSON: Are you saying
- 15 there should be no quality standards for small
- 16 diversified farmers for leafy greens?
- 17 MR. ETKA: No, I am saying that
- 18 there needs to be a differential level of
- 19 regulation.
- 20 MR. WILKINSON: Is there anything
- in the proposal as published that wouldn't
- 22 allow the USDA or the administrative committee

- 1 to differentiate between different kinds of
- 2 operations?
- 3 MR. ETKA: I don't see anything
- 4 explicitly in the proposal that suggests an
- 5 openness or a willingness to that.
- 6 MR. WILKINSON: Do you see
- 7 anything that expresses an unwillingness to do
- 8 that?
- 9 MR. ETKA: By the omission of any
- 10 explicit membership of organic farmers, I
- 11 would argue yes.
- MR. WILKINSON: Other than your
- 13 alleged exclusion of certain sectors of the
- 14 industry, is there anything else you can point
- 15 to that would prohibit the administrative
- 16 committee and the USDA from taking into
- 17 account differences in operations?
- 18 MR. ETKA: There is nothing
- 19 explicitly that says that they may not do it.
- MR. WILKINSON: The USDA, the is
- 21 the organization that regulates organic farms,
- 22 am I right?

- 1 MR. ETKA: Yes.
- 2 MR. WILKINSON: And one of your
- 3 concerns is that in effect you'll be
- 4 whipsawed, that there will be safety
- 5 regulations and they won't be consistent with
- 6 the regulations having to do with the
- 7 definition of organic foods; correct?
- 8 MR. ETKA: That is one of my
- 9 concerns, yes.
- 10 MR. WILKINSON: But here the
- 11 proposal is to have a quality regulations
- 12 under the same agency as regulates the
- 13 definition of organic food. So in effect what
- 14 I'm saying is you have it all in one house.
- 15 What about that is objectionable to you?
- 16 MR. ETKA: We do not believe that
- 17 AMS has the capability or the expertise to
- 18 develop food safety regulations. The organic
- 19 regulations are not food safety regulations.
- As we mentioned earlier, we
- 21 believe that AMS should have a very critical
- 22 role in enforcement of and coordination with

- 1 the food safety agency, FDA, in development of
- 2 those regulations. But to have an economics
- 3 and marketing agency take the lead on food
- 4 safety science is concerning to our members.
- 5 MR. WILKINSON: What I'm
- 6 interested in, on page one, and I know you
- 7 have a different pagination for your
- 8 statement, but page one in the handout,
- 9 paragraph three, you talk about how the FDA
- 10 should coordinate closely with the National
- 11 Organic program within the AMS of the USDA.
- 12 I take it you would want the same thing if the
- 13 USDA was going to be responsible for the
- 14 quality standards, you would want the USDA to
- 15 coordinate closely with the national organic
- 16 program within the AMS and USDA, correct?
- MR. ETKA: For organic farms,
- 18 yes.
- 19 MR. WILKINSON: Now are you you
- 20 are not saying that wildlife can't be a vector
- 21 for disease, are you?
- MR. ETKA: No, I'm saying that

- 1 there is a very active debate about the degree
- 2 to which wildlife is a vector for disease. I
- 3 am not saying that that would never be true.
- 4 Again, looking at targeting for the riskiest
- 5 areas.
- 6 MR. WILKINSON: And you are not
- 7 opposed to evaluating the risk level presented
- 8 by wildlife in a scientific manner?
- 9 MR. ETKA: No.
- 10 MR. WILKINSON: Is there anything
- 11 about the proposal as it is currently written
- 12 that indicates that a barrier of round buffers
- 13 would be required?
- 14 MR. ETKA: I think that in the
- 15 proposal for the national, no, I think this is
- 16 again extrapolating from the experience of the
- 17 California LGMA, which is the only example we
- 18 have right now. And it seems to be the model
- 19 for what's being proposed for the national
- 20 LGMA, and goes to the earlier conversation
- 21 about how those metrics are being interpreted,
- 22 and the pressure that is on farms, farmers, to

- 1 for lack of a better phrase, when in doubt
- 2 rip it out, because they are being told that
- 3 they have to get rid of any threats from
- 4 wildlife, or else potentially lose their
- 5 ability to sell their product.
- 6 MR. WILKINSON: Would you be
- 7 willing to share with the administrative
- 8 committee and the technical committee
- 9 regarding the utility of or the lack of
- 10 utility of barrier buffer zones?
- In other words when you take part
- 12 in the scientific discussion over whether
- those are necessary or not necessary?
- MR. ETKA: I would be willing to
- 15 do that. I would rather that people who are
- 16 food safety scientists and researchers on that
- 17 point take the lead on that. But if there was
- 18 such an administrative committee set up, I
- 19 certainly would like to engage them on that
- 20 point.
- 21 MR. WILKINSON: Well, the
- 22 technical committee provided under 970.45 is

- 1 largely weighted toward technical experts,
- 2 correct?
- 3 MR. ETKA: Correct, although I'd
- 4 argue that it's a limited breadth of technical
- 5 expertise.
- 6 MR. WILKINSON: But they are
- 7 generally scientists. I understand your
- 8 objection to the breadth, but we are talking
- 9 about people who have scientific training.
- 10 MR. ETKA: It sounds like seven
- 11 of the 13 or 14 are.
- MR. WILKINSON: So the majority?
- MR. ETKA: Well, I was counting
- 14 it as 14. This says 13 in here; but seven is
- 15 half.
- MR. WILKINSON: So seven is a
- 17 majority of 13?
- 18 MR. ETKA: Yes, it is.
- 19 MR. WILKINSON: Now and as I
- 20 understand it you have no complaint about the
- 21 process here, about your opportunity to
- 22 testify?

- 1 MR. ETKA: No.
- 2 MR. WILKINSON: And do you
- 3 understand you would have the same opportunity
- 4 in the promulgation of any standards under the
- 5 proposed order that there would be notice and
- 6 comment, rulemaking in effect?
- 7 MR. ETKA: I do understand that.
- 8 My concern is that the template and the
- 9 baseline for what the secretary will be
- 10 considering will be developed by an industry-
- 11 led body, and that USDA themselves does not
- 12 necessarily have the expertise being the
- 13 agency putting that forth to the public.
- MR. WILKINSON: Do you have a
- 15 copy of the order in front of you?
- MR. ETKA: The proposal?
- 17 MR. WILKINSON: The proposed
- 18 agreement.
- 19 MR. ETKA: Yes.
- 20 MR. WILKINSON: Could you look at
- 21 Section 970.49 subdivision (c). And for the
- 22 sake of the record I'll just read that into

- 1 it. It says: to adopt with the approval of
- 2 the secretary after notice and comment, audit
- 3 metrics to administer the terms and provisions
- 4 in Sections 970,9, 970.10, 970.66, and 970.67.
- 5 Do you see that there?
- 6 MR. ETKA: Yes.
- 7 MR. WILKINSON: And would you be
- 8 willing to participate in that process?
- 9 MR. ETKA: Yes.
- 10 MR. WILKINSON: And there is
- 11 certainly no unfairness that would there is
- 12 no unfairness today, correct, in terms of your
- 13 participation?
- 14 MR. ETKA: In terms of mine there
- 15 is not. I think there is just a logistical
- 16 problem in terms of the time that the growers
- 17 have to come here and to testify. And I think
- 18 that is a problem for everyone. It's just a
- 19 lot of time that folks need to spend here. So
- 20 personally it's not an unfairness. I think
- 21 for a lot of the groups that we are trying to
- 22 get on it's hard for them to wait around for

- 1 a number of days.
- 2 MR. WILKINSON: But would you
- 3 agree with me that that is true regardless of
- 4 your position on the merits of the proposed
- 5 agreement?
- 6 MR. ETKA: Yes.
- 7 MR. WILKINSON: Whether a
- 8 proponent, or opponent --
- 9 MR. ETKA: I do believe it's a
- 10 harder burden for growers than it is for some
- 11 of the rest of us.
- MR. WILKINSON: And there are
- indeed proponent growers, and it would be an
- 14 equal hardship for them, correct?
- MR. ETKA: Correct.
- 16 MR. WILKINSON: Is there anything
- 17 that you can point to or point out for me in
- 18 the proposed agreement that would prohibit the
- 19 administrative committee or the technical
- 20 committee or the secretary from taking into
- 21 account level of risk when they promulgate
- 22 metrics?

- 1 MR. ETKA: There is nothing that
- 2 would specifically prohibit them from doing
- 3 that. I don't believe that they have the
- 4 expertise to do that.
- 5 MR. WILKINSON: But you'd be
- 6 willing to come and loan some of that
- 7 expertise, I take it?
- 8 MR. ETKA: No, I would be willing
- 9 to. I don't think I have the expertise
- 10 either.
- 11 MR. WILKINSON: But I take it
- 12 that your organization presumably could help
- 13 people come forward who do have the expertise
- 14 to make those types of comments?
- MR. ETKA: Yes.
- 16 MR. WILKINSON: In a comment and
- 17 rulemaking atmosphere?
- 18 MR. ETKA: We would certainly
- 19 seek to provide that.
- 20 MR. WILKINSON: That's all I
- 21 believe. I believe Mr. Resnick has some
- 22 questions.

- 1 MR. RESNICK: Good morning, Mr.
- 2 Etka. It's morning for a few more minutes,
- 3 and I'll try to make my questions brief.
- 4 I just do want to follow up on
- 5 some questions that were asked by the
- 6 department concerning your coalition, and I
- 7 just want to understand who you represent and
- 8 where you are based.
- 9 Where are you based?
- 10 MR. ETKA: I am based in
- 11 Alexandria, Virginia, right outside of
- 12 Washington, D.C. We're a federal policy
- oriented group, so I am hired to represent
- 14 them on federal policy which is why we are in
- 15 D.C.
- MR. RESNICK: And when was the
- 17 National Organic Coalition established?
- 18 MR. ETKA: I believe it was 2002.
- 19 MR. RESNICK: How long have you
- 20 been retained by the coalition?
- 21 MR. ETKA: Since the beginning.
- 22 MR. RESNICK: Are you yourself a

- 1 farmer?
- 2 MR. ETKA: No.
- 3 MR. RESNICK: Or involved in
- 4 farming?
- 5 MR. ETKA: No.
- 6 MR. RESNICK: Are you aware of -
- 7 generally aware of what is required to become
- 8 certified organic?
- 9 MR. ETKA: Yes, generally aware.
- MR. RESNICK: For the record
- 11 would you just briefly summarized what is
- 12 required to be some of the steps that one
- 13 must take to become certified organic?
- MR. ETKA: Sure, one of the
- 15 things is, you have to agree to work with a
- 16 certified organization who are considered
- 17 agents of USDA in putting together an organic
- 18 system plan for your farm. You have to manage
- 19 your farm as organic for three years at a
- 20 minimum before you can market your product as
- 21 organic. The general overlay of what's
- 22 involved is, you cannot use synthetic

- 1 fertilizers on your farm. You have to follow
- 2 specific procedures for use of manure on your
- 3 farm, either composted or long waiting periods
- 4 before it comes into contact with product
- 5 going to consumers. You are restricted on the
- 6 type of pesticides that you can use on your
- 7 farm. Generally they are prohibited and there
- 8 is a list of exceptions to that. That's just
- 9 a quick overview of what's involved.
- 10 MR. RESNICK: So there are a
- 11 number of processes that one must take in
- 12 terms of which pesticides may or may not be
- 13 applied, going through the process of auditing
- 14 and so forth?
- MR. ETKA: Yes.
- 16 MR. RESNICK: So in the case of
- 17 leafy greens, to have leafy green products
- 18 certified organic, is that certified organic,
- 19 is that a trait of the leafy green itself, or
- 20 is it a process?
- 21 MR. ETKA: It is a process
- 22 established from a marketing standpoint. It

- 1 is not a food safety process.
- 2 MR. RESNICK: And that
- 3 certification as organic falls under the
- 4 auspices of USDA?
- 5 MR. ETKA: Yes.
- 6 MR. RESNICK: And being based in
- 7 Virginia, when did you become aware of the
- 8 California Leafy Green Marketing Agreement?
- 9 MR. ETKA: I don't remember
- 10 exactly when I first heard about it. I know
- 11 I've heard discussion in the organic community
- 12 for awhile about growing problems that organic
- 13 farmers were having dealing with the metrics
- 14 of California of LGMA, as well as super
- 15 metrics for private buyers. I think probably
- 16 within the last year is really when it came to
- 17 the forefront in terms of leading up to the
- 18 proposal that the proponent group made to USDA
- 19 to formally move forward with national LGMA.
- 20 And that has coincided with a similar timeline
- 21 for FDA in terms of regulation, food safety
- 22 regulations for produce as well as legislation

- 1 moving forward in Congress on food safety.
- 2 So because of all three of those
- 3 things coinciding, it's become a larger
- 4 priority for our organization within the last
- 5 year.
- 6 MR. RESNICK: So you were not
- 7 involved in the development of the LGMA in
- 8 California?
- 9 MR. ETKA: Correct.
- 10 MR. RESNICK: If there is a food
- 11 borne illness outbreak in leafy greens, does
- 12 that negatively affect your constituents?
- 13 MR. ETKA: Yes. I mean I think I
- 14 would argue it negatively affects everyone,
- 15 both producers and handlers as well as
- 16 consumers.
- 17 MR. RESNICK: And specifically
- 18 the organic leafy green industry, if there is
- 19 a food borne illness in leafy greens, does
- 20 that market suffering occurring in the
- 21 organic as well, regardless of where that food
- 22 borne illness occurred, whether it was in

- 1 organic or non-organic products?
- 2 MR. ETKA: I would speculate that
- 3 yes, it does. Anecdotally I've heard that it
- 4 does; I don't have data on market effects.
- 5 MR. RESNICK: And are you aware
- 6 whether the e. coli outbreak that occurred,
- 7 incident of that occurred on a organic farm or
- 8 non-organic farm?
- 9 MR. ETKA: The 2006 event?
- 10 MR. RESNICK: Correct.
- 11 MR. ETKA: I've heard mixed data
- 12 on that, so I don't want to speculate on the
- 13 outcome of that analysis.
- 14 MR. RESNICK: If I were to
- 15 represent to you that it in fact occurred on
- 16 an organic farm, do you have any data that
- 17 disputes that notion?
- 18 MR. ETKA: Not in front of me.
- 19 MR. RESNICK: Do you have any
- 20 data at all on the outbreak in 2006 in
- 21 spinach?
- MR. ETKA: Not in front of me.

- 1 I've heard the testimony provided by the
- 2 proponents' group on that. I don't think I
- 3 heard reference to the exact details of the
- 4 vectors and the trace back on that. Most of
- 5 the references from the proponent witnesses
- 6 were just that the event happened and what the
- 7 effects have been.
- 8 MR. RESNICK: And prior to the
- 9 testimony that you've heard in these hearings
- 10 do you have data, not necessarily in front of
- 11 you, but in your possession or in your office,
- 12 that suggests that the e. coli outbreak from
- 13 spinach did not occur on an organic farm?
- MR. ETKA: I have heard some
- 15 argument about that, or disagreement on that
- 16 point. Whether or not that is valid or not,
- 17 I have not done a full assessment of it.
- 18 MR. RESNICK: What is the source
- 19 of data that suggests that perhaps the e. coli
- 20 outbreak in 2006 did not occur on an organic
- 21 farm?
- MR. ETKA: I don't have a

- 1 specific source.
- 2 MR. RESNICK: I have nothing
- 3 further at this time, thank you.
- 4 JUDGE HILLSON: Were you
- 5 gentlemen going to ask questions?
- 6 MR. HORSFALL: I have one real
- 7 quick question. Scott Horsfall. One quick
- 8 question. In looking at our board here in the
- 9 LGMA in California, a good 30 40 percent of
- 10 the 20 companies who are members do grow
- 11 organically, either in part or in total in
- 12 various sizes. Would that level of organic
- 13 representation on the national board settle
- 14 your concerns about the interests of the
- 15 organic industry being represented in the
- 16 program?
- 17 MR. ETKA: I think one of the
- 18 concerns we have about representation is not
- 19 only organic, but also the scale of organic.
- 20 And again that is not our only concern about
- 21 the proposal, but obviously we would prefer to
- 22 have organic representation from a range of

- 1 different scales represented on any board if
- 2 it is created.
- 3 MR. GICLAS: Hank Giclas, Western
- 4 Growers.
- 5 Mr. Etka, thank you for your
- 6 testimony. I have just a kind of brief series
- 7 of questions just for my understanding and
- 8 clarification.
- 9 You do agree that in the context
- 10 of the written proposal, draft proposal, there
- 11 are no metrics established in that document?
- 12 MR. ETKA: I agree. It's a
- 13 template for the creation of those metrics.
- MR. GICLAS: Do you believe that
- 15 food safety goals and environmental
- 16 conservation goals are mutually exclusive?
- 17 MR. ETKA: I believe they should
- 18 not be. I have seen evidence that as
- 19 implemented in the California LGMA, they have
- 20 been viewed as being at odds.
- 21 MR. GICLAS: But well, can you
- 22 point to a reference, to a citation, in the

- 1 California metrics that for example requires
- 2 the removal of habitat?
- MR. ETKA: No, and that gets to
- 4 the point I was making earlier about the
- 5 interpretation and the pressure that farmers
- 6 feel. The metrics talk about the dangers of
- 7 wildlife, and therefore, from the pathogen
- 8 standpoint, and create an incentive to get rid
- 9 of wildlife habitat, because the risks of
- 10 losing your market as so high if you don't do
- 11 everything you can to get rid of any potential
- 12 risk that may be identified by the auditors.
- 13 So there is nothing I have seen in
- 14 there that says, thou shalt rip out habitat.
- 15 But there are very strongly worded metrics
- 16 that talk about the dangers of wildlife, from
- 17 a pathogen standpoint, and you need to do
- 18 everything to insulate your farm from those
- 19 dangers. So the rest of it becomes how the
- 20 auditors interpret those words.
- 21 MR. GICLAS: Do you know if the
- 22 auditors are actually through their

- 1 interpretation of the written document
- 2 instructing people that it would be advisable
- 3 to remove habitat?
- 4 MR. ETKA: Anecdotally I have
- 5 heard that they have. I think some of our
- 6 subsequent witnesses can testify more directly
- 7 on that.
- 8 MR. GICLAS: And those are the
- 9 auditors that are associated with the
- 10 California Leafy Greens Marketing Agreement?
- 11 MR. ETKA: As well as super
- 12 metrics, so it's both. That anecdotally is
- 13 what I've heard, and some of our other
- 14 witnesses have more direct knowledge about
- 15 that.
- 16 MR. GICLAS: So your contention
- 17 is that state auditors that are associated
- 18 with the California leafy greens marketing
- 19 agreement, as well as third party auditors
- 20 that might be required by a buyer are both
- 21 instructing growers to remove habitat?
- MR. ETKA: Either instructing or

- 1 encouraging the removal of habitat to get rid
- 2 of wildlife risks.
- 3 MR. GICLAS: Do you think that
- 4 the right mix or composition of industry
- 5 advisers, academics, and regulatory bodies all
- 6 sitting down at a table over the course of
- 7 days and weeks, et cetera, are capable of
- 8 designing a program that fosters co-management
- 9 of food safety and environmental conservation
- 10 goals?
- MR. ETKA: Define what you mean
- 12 by comanagement.
- MR. GICLAS: Well, encouraging
- 14 food safety and conservation in the same
- 15 program if you will. You I think in your
- 16 testimony contend that sustainable practices
- 17 are part of the food safety solution. So if
- 18 that in fact is the case, could the right mix
- 19 of experts sit at a table and design a program
- 20 that would foster both the safety enhancement
- 21 goals as well as conservation sustainability
- 22 qoals?

- 1 MR. ETKA: Absolutely, and I
- 2 think that type of forum should be directly
- 3 involved in an advisory capacity with a food
- 4 safety agency like FDA.
- 5 MR. GICLAS: Do you agree that
- 6 FDA would want to seek counsel and expertise
- 7 from the industry and auditing agencies and
- 8 others are they put together that kind of a
- 9 program?
- MR. ETKA: Yes.
- 11 MR. GICLAS: So I guess one final
- 12 question. If that type of a program was
- 13 created, and there was a specific list of
- 14 audit criteria, or metrics if you will, do you
- 15 think that inspection service at AMS is
- 16 capable of taking that metric document out
- into the field on the farm and making the
- 18 observations or doing the verification audits?
- 19 MR. ETKA: I do. I believe that
- 20 AMS much more so than FDA is the appropriate
- 21 agency and in some cases their agents, in the
- 22 case of organic certified organizations, to be

- 1 doing that. My disagreement is through which
- 2 agency are the metrics developed. I believe
- 3 it should be through a food safety agency.
- 4 MR. GICLAS: A couple of times
- 5 during the course of your testimony and the
- 6 questions you talked about targeting the
- 7 riskiest practices. Do you know what those
- 8 riskiest practices are?
- 9 MR. ETKA: We have some testimony
- 10 coming up later today or tomorrow that has
- 11 shown anecdotally where the food borne
- 12 pathogen outbreaks have occurred in terms of
- 13 crush cut versus processed, and I think some
- 14 of that data I'm not suggesting that's the
- 15 only data but I think there will be later
- 16 testimony showing that consistently not
- 17 exclusively, but consistently most of the
- 18 outbreaks have been in the processed side of
- 19 the equation to a greater extent than fresh.
- 20 So that's where I'm suggesting the highest
- 21 level of scrutiny should be.
- 22 MR. GICLAS: Okay. So then let

- 1 me ask: you would agree that raw product or
- 2 raw harvested product is generally fed into a
- 3 processor for processing, for coring, slicing,
- 4 chopping, shredding, et cetera, right?
- 5 MR. ETKA: Yes.
- 6 MR. GICLAS: Do you know where in
- 7 the supply chain the contamination occurs?
- 8 MR. ETKA: I do not. I'm not
- 9 sure that the data exists to answer that
- 10 question conclusively.
- 11 MR. GICLAS: So it could occur in
- 12 the field as well as in the processing plant?
- 13 MR. ETKA: Which is part of the
- 14 reason I'm not suggesting it's a blanket
- 15 exemption. I'm suggesting that there is a
- 16 differential level of scrutiny, and that some
- of the anecdotal data has suggested that the
- 18 problems are more related to the processed
- 19 product. Because if it were occurring in the
- 20 field consistently, I would argue that you
- 21 would see more outbreaks related to fresh
- 22 product versus processed product.

- 1 MR. GICLAS: Are you aware that
- 2 any FDA or public health agency trace backs or
- 3 investigations associated with any of the
- 4 outbreaks that definitely pinpoint where
- 5 contamination occurred in the supply chain?
- 6 MR. ETKA: I don't have any firm
- 7 data on that.
- 8 MR. GICLAS: So what you are
- 9 talking about is the anecdotal references?
- 10 MR. ETKA: And what I'm talking
- 11 about is development of scientifically based
- 12 targeting mechanisms that based on anecdotal
- 13 evidence it would seem that the higher risks
- 14 are in the processed product. I don't think
- 15 FDA should take my word for that. I think
- 16 there should be more science on that as
- 17 opposed to just assuming it's uniform
- 18 contamination across the board.
- 19 MR. GICLAS: Okay, I have no
- 20 further questions.
- 21 MR. WILKINSON: Robert Wilkinson,
- 22 I have one follow up question.

- 1 Are you aware that AMS is part of
- 2 the USDA?
- 3 MR. ETKA: Yes.
- 4 MR. WILKINSON: Then you would
- 5 trust the AMS to enforce the quality
- 6 standards, correct?
- 7 MR. ETKA: If they are developed
- 8 by a food safety agency, that is our
- 9 recommendation.
- 10 MR. WILKINSON: And doesn't a
- 11 food safety agency have input on the
- 12 development of the recommendations under the
- 13 agreement as presently written?
- JUDGE HILLSON: Oh, yes, we're
- 15 way passed that. Multiple times, I think.
- 16 Does anyone else have any other
- 17 cross examination of this witness?
- 18 Okay, Mr. English, do you have any
- 19 redirect?
- MR. ENGLISH: No.
- JUDGE HILLSON: You may step
- 22 down, sir. Thanks for testifying.

- 1 (Witness excused)
- 2 JUDGE HILLSON: Now according to
- 3 my count I have 11 witnesses who have to
- 4 testify this afternoon. If they each take two
- 5 hours it's going to be a really interesting
- 6 afternoon. So what I want to do is, I have a
- 7 few people who I think we are going to go to
- 8 lunch. I'm going to ask after lunch, I'm
- 9 going to hear from Mr. Willey and Mr. Coke and
- 10 Mr. Stevens in that order. They are all I
- 11 believe relatively short. If I'm wrong, then
- 12 it won't be the first time.
- But those are the first three.
- 14 And then I know, Mr. English, you have several
- 15 people who have to testify today who I haven't
- 16 mentioned. And I have a couple I have three
- 17 other names as well. I just want to get these
- 18 three in because I think they are going to be
- 19 relatively short.
- 20 MS. DESKINS: Judge Hillson, if
- 21 we could remind people to bring not just
- 22 copies for the record but extra copies of

- 1 their testimony, and any exhibits.
- 2 JUDGE HILLSON: That would be a
- 3 good idea to have extra copies.
- 4 MR. ENGLISH: And I hope and trust
- 5 that every one of my witnesses will have.
- 6 JUDGE HILLSON: Okay, it's just
- 7 about 12:20 by my watch. So let's come back
- 8 at 1:20, and we're off the record.
- 9 (Whereupon, the above-entitled
- 10 matter went off the record at
- 11 12:20 p.m. and resumed at 1:23
- 12 p.m.)
- MS. DESKINS: I would like to put
- 14 into the record that we have extended the
- 15 hearing until Friday. And I have already
- 16 given you a copy of what has been marked as
- 17 Exhibit 18. It's a certificate of mailing.
- 18 It's a certificate of notice to officials.
- 19 And also it's a certificate that the press
- 20 release was sent out regarding the extension
- 21 of the hearing.
- 22 JUDGE HILLSON: Okay, there's no

- 1 guarantee that we will have to use that, but
- 2 I think it's good to have it on the record.
- 3 So I'm going to receive as Exhibit 18
- 4 basically the documents associated with
- 5 extending the date of the Monterrey hearing up
- 6 through Friday as Exhibit 18.
- 7 (Whereupon the aforementioned
- 8 document having been previously
- 9 marked for identification as
- 10 Exhibit No. 18 was received into
- 11 evidence)
- 12 JUDGE HILLSON: Okay, Mr. Willey,
- 13 are you ready to testify? Come on up here and
- 14 have a seat.
- 15 (Off-mic comments)
- 16 Mr. Willey, I'm marking your
- 17 statement as Exhibit No. 19.
- 18 (Whereupon the aforementioned
- 19 document was marked for identification as
- 20 Exhibit No. 19)
- 21 Whereupon,
- 22 THOMAS WILLEY

- 1 Was called as a witness by counsel for the
- 2 proponents, and, after having been first duly
- 3 sworn, was examined and testified as follows:
- 4 JUDGE HILLSON: Okay, can you
- 5 please state your name and spell it for the
- 6 record?
- 7 MR. WILLEY: My name is Thomas H.
- 8 Willey, T-h-o-m-a-s H W-i-l-l-e-y.
- JUDGE HILLSON: Okay, you have a
- 10 statement you want to read, right, sir?
- MR. WILLEY: Yes,
- 12 JUDGE HILLSON: Proceed.
- 13 DIRECT EXAMINATION BY COUNSEL FOR THE
- 14 PROPONENTS
- MR. WILLEY: My wife and I own
- 16 and operate a 75-acre certified organic truck
- 17 form just outside of Madera in the central San
- 18 Joaquin Valley. We grow over 50 vegetable
- 19 crops, including many in the leafy green
- 20 category, farming the year round to supply
- 21 West Coast specialty retailers, restaurants
- 22 and our own local subscriber network of 800

- 1 families who are members off T&D Willey Farms
- 2 CSA.
- 4 30-year history pursuing the knowledge and
- 5 the art of biologically intensive soil
- 6 management in an effort to gain a reputation
- 7 for the most tasteful and nutritious produce
- 8 in the market place. I am proud to boast that
- 9 a handful of my soil harbors nearly six
- 10 billion living microbial organisms of a vast
- 11 diversity, equal to the number of human beings
- 12 inhabiting earth, which generously power the
- 13 fertility cycle upon which we all depend for
- 14 our very lives.
- 15 Eschewing toxic inputs while
- 16 relying only on biological processes to grow
- 17 high quality high yield vegetable crops is a
- 18 stimulating intellectual and scientific
- 19 challenge for which I and my customers have
- 20 been well rewarded. But I'm afraid some
- 21 significant problems in food safety and
- 22 misguided approaches to their solution, like

- 1 the National Leafy Greens Marketing Agreement,
- 2 could derail achievements in biological
- 3 agriculture, and the greater promise of food
- 4 made safe, through respect for and cooperation
- 5 with the microbial community which owns and
- 6 operates this planet on which we are merely
- 7 quests.
- 8 And antibiotic resistant and
- 9 increasingly virulent organisms contaminating
- 10 our produce from time to time are mutant
- 11 creatures, introduced into the larger
- 12 environment from confined industrial animal
- 13 operations across the American countryside.
- 14 Confined animal feeding operations, using as
- 15 much as 70 percent of the nation's annual
- 16 antibiotic supply, in sub-therapeutic regimes,
- 17 to mitigate crowding, stress and unnatural
- 18 diets, have been documented by the Pew
- 19 Commission on Industrial Farm Animal
- 20 Production to have created at least several of
- 21 the very dangerous pathogens which
- 22 episodically threaten today's produce supply.

- 1 This Commission's membership includes such
- 2 environmental wackos as Dan Glickman, former
- 3 USDA secretary of Agriculture, and John
- 4 Curlin, former Kansas governor.
- 5 Why our vegetable industry refuses
- 6 to throw rocks at the glass house of
- 7 industrial animal production is beyond me to
- 8 comprehend. Instead we pretend that it is
- 9 possible to superimpose a paradigm of
- 10 sterility over vegetable farms by implementing
- 11 the more extreme practices suggested by LGMA,
- or road buyers or processors, to mollify an
- 13 ignorant and nervous public.
- 14 If animal manures were an
- 15 inherently dangerous agricultural input the
- 16 human race would have long since become
- 17 extinct. Instead it judicious use has
- 18 remained a hallmark of good fertility
- 19 management for centuries if not millennia.
- 20 If manure is now uniquely
- 21 dangerous, we must investigate why and rectify
- 22 it or prepare to pack animal waste into space

- 1 capsules for rocketing to the moon. The
- 2 cornerstone of my farms' fertility program is
- 3 thermophilically digested composts from both
- 4 dairy cows and urban green materials. These
- 5 are produced through rigorous National Organic
- 6 Program standards and regularly tested for the
- 7 absence of human pathogens. Robust and
- 8 diverse soil microbial communities enhanced by
- 9 additions of quality compost, have been
- 10 demonstrated to be less friendly environments
- 11 for human pathogens by excluding or more
- 12 quickly eliminating them.
- 13 There is no recognition given this
- 14 proven strategy in the leafy green marketing
- 15 agreement metrics. On the contrary a great
- 16 pall is cast over the use of manure or compost
- 17 that would frighten your average grower to
- 18 death. We test our water for human pathogens,
- 19 and impose worker sanitation protocols. But
- 20 I refuse to soak my produce in chlorine or
- 21 ozone baths out of respect for a health
- 22 association people require with soil life for

- 1 digestion, nutrient absorption, and healthy
- 2 immune function.
- 3 Besides disruptive microbial
- 4 ecologies, even on leafy surfaces, offer
- 5 greater colonization opportunities for
- 6 pathogens also completely unrecognized in
- 7 current LGMA metrics.
- 8 So in short I do not wish to join
- 9 the club, which I'm told is my sole
- 10 prerogative. But leafy green marketing
- 11 agreement competitors pursuing sterility will
- 12 sport a USDA approved seal, suggesting their
- 13 produce is safer than mine, when the opposite
- 14 could very well be true.
- I have already lost my Canadian
- 16 accounts as that nation's government in
- 17 ignorance prohibits imports of leafy produce
- 18 not signatory to the current LGMA. The
- 19 alternative potential of unleashing moon-
- 20 suited FDA squads over vegetable farms may be
- 21 less palatable than a privately regulated LGMA
- 22 under the Department of Agriculture authority.

- 1 However I cannot personally endorse an
- 2 approach to produce safety which is
- 3 essentially a marketing gimmick as is the LGMA
- 4 scheme. Our entire society must take more
- 5 responsibility for the quality and the safety
- 6 of the food we eat. Much more publicly funded
- 7 research and education will be required to
- 8 forward greater food safety in our over
- 9 industrialized cheap food system.
- 10 Fortunately, the National
- 11 Institutes of Health has recently launched a
- 12 five-year research initiative, the Human
- 13 Microbiome Project, to uncover the complex
- 14 relationships our species enjoys with
- 15 cohabiting microbes enhancing human health.
- 16 On and within the body the a healthy adult
- 17 living microbial cells outnumber human cells
- 18 by a factor of 10 to one. The human body is
- 19 more properly described as an ecosystem,
- 20 hosting trillions of microbial hitchhikers in
- 21 elegant symbiosis.
- 22 I've dedicated my farming career

- 1 to the enhancement of these interspecies
- 2 relationships through the food that I grow for
- 3 my customers. Misguided approaches to food
- 4 safety arising from an atmosphere of hysteria
- 5 and ignorance threaten to disrupt the genuine
- 6 advances this nation requires to improve its
- 7 food, and our citizens' health.
- JUDGE HILLSON: Thank you, Mr.
- 9 Willey. I'm going to receive your written
- 10 statement into evidence as Exhibit No. 19.
- 11 (Whereupon the aforementioned
- 12 document having been previously marked for
- 13 identification as Exhibit No. 19 was received
- 14 into evidence)
- 15 JUDGE HILLSON: And then I'm
- 16 going to ask the USDA panel if they have
- 17 questions.
- 18 Go ahead, Ms. Schmaedick.
- 19 CROSS-EXAMINATION BY COUNSEL FOR THE USDA
- MS. SCHMAEDICK: Good afternoon,
- 21 Mr. Willey.
- MR. WILLEY: Good afternoon.

- 1 MS. SCHMAEDICK: This is Melissa
- 2 Schmaedick, and thank you for your testimony.
- I just have a few quick questions
- 4 for you. Based on my understanding of your
- 5 testimony you have spent quite a long time,
- 6 and energy, invested in developing your
- 7 particular way of farming; is that correct?
- 8 MR. WILLEY: An entire well not
- 9 quite an entire farming career, but for the
- 10 greatest part of it, as I'm nearing the end
- 11 rather than the beginning.
- MS. SCHMAEDICK: Do you feel like
- 13 you have information that is important to
- 14 contribute to the general farming community?
- 15 MR. WILLEY: I do, and I do so.
- 16 That's why at hearings like this, I have a
- 17 monthly radio show, I'm well known for
- 18 proselytizing my views and my opinions. So I
- 19 do share that guite a bit.
- 20 MS. SCHMAEDICK: So if invited
- 21 to participate in a dialogue would that be
- 22 something that you would consider, a dialogue

- on the development of metrics, for example?
- 2 MR. WILLEY: Certainly I would be
- 3 interested in making input. I'm certainly not
- 4 a scientist. I'm a practical artist on the
- 5 soil. But I do study a lot of science, and I
- 6 think I know about some of the emerging
- 7 science that is coming out about how we
- 8 coexist with microbiology and how that
- 9 interacts with the way we grow our food and
- 10 remain healthy and I'm perfectly willing to
- 11 share that with anyone who is willing to
- 12 listen.
- MS. SCHMAEDICK: In your
- 14 testimony on page two, you specifically say
- 15 there is no recognition given to this proven
- 16 strategy which is your strategy in LGMA
- 17 metrics. On the contrary a great pall is cast
- 18 over the use of manure and compost. I'm a
- 19 little bit confused. This current proposal
- 20 that we are discussing is on the National
- 21 Leafy Greens Marketing Agreement. Have you
- 22 read that proposed language?

- 1 MR. WILLEY: In the most part,
- 2 and it doesn't include the metrics. I'm
- 3 referring to the metrics that currently exist
- 4 in California. But since the federal program
- 5 has the same name, I suspect that the
- 6 California program will be generally the model
- 7 for whatever federal program emerges. If this
- 8 effort is successful.
- 9 MS. SCHMAEDICK: Because it has
- 10 the same name? That's why you believe?
- 11 MR. WILLEY: Well, it has the
- 12 same name, and it has the same proponents,
- 13 folks that started the California Leafy Green
- 14 Marketing Agreement are the ones that are
- 15 proposing to take it nationally, so I think we
- 16 can reasonably expect that it's going to be a
- 17 similar animal.
- 18 MS. SCHMAEDICK: You also say
- 19 that, you say that you do not wish to join the
- 20 club, yet I am told this is my sole
- 21 prerogative I'm curious, I haven't heard a
- 22 statement yet at this public hearing that

- 1 would indicate that you would not have a
- 2 choice as to whether or not you could
- 3 participate. Could you clarify where that was
- 4 said?
- 5 MR. WILLEY: Certainly I would
- 6 have a choice, and have already made a choice
- 7 not to join the California one as such. But
- 8 as a result I've lost my Canadian produce
- 9 business for that reason. Because of the
- 10 appearance that signatories of the leafy green
- 11 agreement may have safer product that those
- 12 who don't sign it and join it, then I feel
- 13 like aspersions on the quality or the safety
- of my product are cast that may not be
- 15 accurate or warranted.
- 16 MS. SCHMAEDICK: Okay, you state
- 17 that you are a grower obviously. Are you
- 18 aware of the SBA definitions of large and
- 19 small business entities?
- 20 MR. WILLEY: Not that familiar.
- 21 MS. SCHMAEDICK: Okay. The FDA
- 22 defines a small business, a small growing

- 1 operation, as one having gross receipts of
- 2 less than \$750,000.
- 3 MR. WILLEY: My operation is
- 4 larger than that.
- 5 MS. SCHMAEDICK: So you would be
- 6 a large grower?
- 7 MR. WILLEY: I would, apparently.
- 8 But I try to watch what I eat.
- 9 MS. SCHMAEDICK: Your business
- 10 fits into that category, shall we say.
- 11 MR. WILLEY: Yes, that is correct.
- MS. SCHMAEDICK: Those are all
- 13 the questions I have. Thank you.
- 14 JUDGE HILLSON: Any other
- 15 questions from the panel? Ms. Dash.
- MS. DASH: Suzanne Dash.
- 17 Do you also consider yourself a
- 18 handler?
- 19 MR. WILLEY: That I don't know.
- 20 I've read the definition of a handler in this
- 21 proposed agreement or this proposal, and I'm
- 22 scratching my head over that. Because I grow

- 1 and I harvest and I package my own product,
- 2 and we sell it to whoever buys it directly
- 3 from ourselves for the most part. So whether
- 4 that makes me a handler or not, I don't know.
- 5 I'm concerned as to whether that --
- 6 MS. DASH: Okay.
- JUDGE HILLSON: Okay, any
- 8 questions, Mr. English?
- 9 Okay, how about the proponents?
- 10 Mr. Resnick.
- 11 CROSS-EXAMINATION
- 12 MR. RESNICK: Jason Resnick.
- 13 Thank you.
- 14 You mentioned that you lost your
- 15 Canadian business as a result of not being a
- 16 signatory of the California Leafy Green
- 17 Marketing Agreement.
- 18 MR. WILLEY: That's correct.
- 19 MR. RESNICK: What percentage of
- 20 your business was Canadian business?
- 21 MR. WILLEY: That'd probably be
- 22 hard to characterize. I suspect 5 percent or

- 1 maybe even less.
- 2 MR. RESNICK: Thank you. I have
- 3 no further questions.
- 4 JUDGE HILLSON: Anything else
- 5 over here?
- 6 Thank you very much for coming in
- 7 and testifying. You may be excused.
- 8 MR. WILLEY: Do I get a prize for
- 9 going fast?
- 10 (Applause)
- 11 JUDGE HILLSON: Small ovation
- 12 from the audience.
- 13 (Witness excused)
- 14 JUDGE HILLSON: Is Mr. Coke here?
- 15 Whereupon
- 16 DALE COKE
- 17 Was called as a witness by counsel for the
- 18 opponents and, after having been first duly
- 19 sworn, was examined and testified as follows:
- JUDGE HILLSON: Would you please
- 21 state your name and spell it for the record?
- MR. COKE: My name is Dale Coke,

- 1 D-a-l-e C-o-k-e.
- JUDGE HILLSON: Okay, and you
- 3 have a statement you want to read, sir?
- 4 MR. COKE: I do.
- 5 JUDGE HILLSON: Go right ahead.
- 6 DIRECT EXAMINATION
- 7 MR. COKE: Coke Farm is a cooling,
- 8 shipping, sales company established in 1980.
- 9 We are located in San Juan Bautista,
- 10 California. We represent, sell, and ship
- 11 approximately 50 kinds of fruits and
- 12 vegetables for about 15 organic growers in
- 13 California Central Coast region across the
- 14 nation, and in Canada.
- 15 For the proposed definitions,
- 16 although we "receive, sell, ship and
- 17 distribute" almost all the crops proposed to
- 18 be "leafy greens," Coke Farm does not
- 19 "handle," as far as I can tell, any "fresh-cut
- 20 packaged leafy greens." It seems by way of
- 21 the proposal that we would be defined as a
- 22 broker.

- 1 Beyond I've got a partner with my
- 2 wife in a growing operation, which would be
- 3 one of the growers that Coke Farm represents,
- 4 and that would be I suppose a producer as far
- 5 as the definition.
- 6 I had concerns in the past. The
- 7 marketing agreements, as far as the ones I've
- 8 been aware of, were used for specific
- 9 commodities to ensure grade standards or
- 10 compliance or increase consumer confidence in
- 11 that particular commodity. This proposal is
- 12 different from usual marketing agreements.
- 13 The proponents are trying to use the proposed
- 14 marketing agreement in a way to sell consumers
- on the idea that the agreement to provide
- 16 food safety for a mixture of commodities.
- 17 These crops are used for precut salads as well
- 18 as being harvested as full heads or bunched
- 19 greens. They have also included herbs.
- 20 The concept seems incongruous and
- 21 beyond the scope of other marketing
- 22 agreements. I have a concern that food safety

- 1 for precut salads, while it may be an issue
- 2 that a marketing agreement is the right way,
- 3 it seems an odd way to sell the safety of
- 4 these salads to consumers.
- 5 The proposed agreement doesn't
- 6 seem to include growers or brokers of the
- 7 vegetables proposed as leafy greens that
- 8 aren't selling or delivery to a signatory of
- 9 the agreement, so I'm not sure that I'm
- 10 technically included. Our customers and
- 11 growers are confused by this proposed
- 12 definition of leafy greens. The California
- 13 leafy greens marketing agreement originally
- 14 defined leafy greens as 14 crops. The
- 15 proposed national agreement defines it as 24
- 16 crops, and any other leafy green vegetable
- 17 recommended by the committee and approved by
- 18 the secretary.
- 19 Prior to the outbreak e.coli in
- 20 spinach in '06 leafy greens were a nebulous
- 21 category; nothing was defined. So they sought
- 22 to define this, and I think to our detriment.

- 1 Defining specific crops as leafy
- 2 greens isn't logical. The definition of leafy
- 3 greens should include any crops that are
- 4 processed for ready to eat salads. Food
- 5 safety risks are significantly greater for
- 6 crops used for precut salads than for crops
- 7 grown to be harvested as whole heads or
- 8 bunched. The proponents' definition of leafy
- 9 greens fails to differentiate the food safety
- 10 risks of those different commodities.
- 11 Ready to eat salads for retail
- 12 sale are a fairly recent phenomenon. They
- 13 have become right popular, and unfortunately
- 14 the rise in our market share is paralleled by
- 15 an increase in the food related disease
- 16 outbreaks associated with these salads. Our
- 17 customers are growers are confused why
- 18 specific crops proposed as leafy greens are
- 19 singled out as having some special inherent
- 20 food safety risks, when food disease related
- 21 outbreaks have been associated primarily with
- 22 processed salads.

- 1 A combination of things like high
- 2 density plantings, machine harvest that
- 3 everything that is on the bed, and a common
- 4 water bath for processing, provides
- 5 significantly more opportunities to
- 6 contaminate the large batches of salad that
- 7 could potentially affect many more people.
- 8 I guess the multitude of cut
- 9 surfaces on these salads can provide a
- 10 potentially more beneficial conditions for
- 11 pathogen colonization. One of the most
- 12 difficult challenges for precut salad
- 13 processors is trying to maintain the cold
- 14 chain all the way to the end, the consumers'
- 15 refrigerators. Absent continuing
- 16 refrigeration, packaging becomes an ideal
- incubator for any pathogens that might be
- 18 present in the salad leaves.
- 19 For hundreds if not thousands of
- 20 years the crops that proponents seek to define
- 21 as leafy greens have been planted, grown,
- 22 harvested and eaten with no food safety

- 1 worries. These crops have been selectively
- 2 harvested by trained human harvesters as whole
- 3 heads, bunched greens, field packed into
- 4 cartons. The cartons are precooled on
- 5 palettes, shipped to distributors and stores
- 6 or restaurants. The people at the stores or
- 7 restaurants further inspect, trim, clean and
- 8 prepare the crops for sale or consumption.
- 9 Crops grown like this don't have anywhere near
- 10 the same risk of pathogenic contamination as
- 11 those harvested for ready to eat salads. It's
- 12 important to recognize the difference and
- 13 amend the definition proposed.
- 14 If the current indiscriminate
- 15 definition is used, much greater acreage will
- 16 be unnecessarily affected by metrics devised
- 17 primarily for salad crops. California's
- 18 experience holds true for the nation. There
- 19 will be more environmental damage, and more
- 20 growers will be subject to time and cost to
- 21 implement gaps that should have been focused
- 22 specifically on precut salads.

- JUDGE HILLSON: Okay, I'll mark
- 2 your testimony as Exhibit No. 20, and I'll
- 3 receive it into evidence.
- 4 (Whereupon the aforementioned
- 5 document was marked for
- 6 identification as Exhibit No. 20
- 7 and received into evidence)
- 8 JUDGE HILLSON: And I'll ask the
- 9 USDA panel if they have any questions? Go
- 10 ahead, Ms. Schmaedick.
- 11 MS. SCHMAEDICK: Good afternoon,
- 12 Mr. Coke. This is Melissa Schmaedick.
- 13 So just to clarify here, are you
- 14 yourself a grower or leafy green products?
- MR. COKE: Technically yes. In
- 16 one capacity I would be a grower, and in
- 17 another capacity I suppose the definitions
- 18 are a little confusing, so I don't seem to be
- 19 a handler, but then I'm not sure, it seems
- 20 like broker would be we don't take
- 21 possession of the crop for other growers.
- 22 They pack in their own boxes. Bring it in.

- 1 We just provide the cooling and the shipping
- 2 point and a common place for trucks to pick
- 3 up. So I'm not sure, but we do have some I
- 4 am here in dual capacities.
- 5 MS. SCHMAEDICK: Okay, so in one
- 6 capacity as a grower, are you familiar with
- 7 the SBA definitions of large and small
- 8 business entities for growers and handlers?
- 9 MR. COKE: Right from the last -
- 10 we would be considered a large grower.
- MS. SCHMAEDICK: A large grower?
- 12 Okay.
- MR. COKE: But a small processor
- 14 or handler, if that were --
- MS. SCHMAEDICK: The SBA
- 16 definition for a handler business is grocery
- 17 revenues of less than \$7 million.
- 18 MR. COKE: Yes, we would be
- 19 considered a small if we were considered a
- 20 handler, we'd be considered a small handler.
- MS. SCHMAEDICK: Okay, and you
- 22 said that you are involved in activity such as

- 1 cooling and storing?
- 2 MR. COKE: Yes.
- 3 MS. SCHMAEDICK: You have
- 4 facilities that leafy green products actually
- 5 come into and go out of?
- 6 MR. COKE: Yes, like a
- 7 refrigerated cold storage facility, and it has
- 8 the capability to do precooling of product
- 9 that growers bring in. Usually they field
- 10 pack in boxes, and they bring it in. We
- 11 precool it, put it into storage, and then we
- 12 sell it out of storage, load the trucks that
- 13 back up to the dock and ship it out.
- MS. SCHMAEDICK: Within your
- 15 business do you have a set of practices that
- 16 you follow to ensure that the product let's
- 17 say stays cool to a specific temperature, or
- 18 that areas of operation are clean?
- 19 MR. COKE: Yes, we standard
- 20 operating procedures for the cooler, so that
- 21 we confirm that products are brought to proper
- temperature and is held at proper temperature.

- 1 There are daily cleaning logs that are
- 2 maintained for the cooler and to confirm the
- 3 temperature levels. We also use sodium
- 4 hypochlorite and citric acid at levels that
- 5 are acceptable for organic production for
- 6 precooling some product.
- 7 MS. SCHMAEDICK: Are you familiar
- 8 with the definition of GHP, good handling
- 9 practices, and GMP, good manufacturing
- 10 practices?
- MR. COKE: Yes, there seem to be
- 12 several sets of GAPs and GMPs. Are you
- 13 specifically referring to specific ones?
- 14 MS. SCHMAEDICK: I actually did
- 15 not ask about GAPs. I'm asking about GHPS,
- 16 which are good handling practices?
- MR. COKE: Oh, I'm sorry.
- 18 MS. SCHMAEDICK: And GMPs, which
- 19 are good manufacturing practices. Are you
- 20 familiar with those?
- 21 MR. COKE: I'm familiar, but we
- 22 don't engage in manufacturing.

- 1 MS. SCHMAEDICK: Okay. When did
- 2 you first become aware of the effort to
- 3 develop a proposed national marketing
- 4 agreement?
- 5 MR. COKE: Oh, I want to say
- 6 sometime last year, 2008, I'm not sure. I
- 7 don't remember exactly.
- 8 MS. SCHMAEDICK: You have in your
- 9 statement a sentence that says: Our customers
- 10 and growers are confused by the specific crops
- 11 proposed as leafy greens are singled out as
- 12 having some special inherent food safety risk.
- 13 And then it continues.
- 14 At any point over the past year
- 15 were you ever invited to participate in the
- 16 development of the draft proposed language?
- 17 MR. COKE: No. I was contacted by
- 18 a representative of the Western Growers
- 19 Association, inquiring as to why we were no
- 20 longer a member of that organization, and as
- 21 to where the membership or where the
- 22 organization went wrong, keeping us attracted

- 1 to it I guess. I've gotten announcements of
- 2 webinars, or a webinar from them. But I was
- 3 involved early on when California's leafy
- 4 green marketing agreement was being talked
- 5 about publicly in Salinas right after the
- 6 spinach outbreak. And I raised questions
- 7 about why they were including all sorts of
- 8 specific vegetables instead of just like
- 9 commodity that was the bagged salads
- 10 basically. And I got no answers. No one
- 11 cared to answer it, Farm Bureau or the Western
- 12 Growers, as to why that determination was
- 13 made, because it doesn't cover all the
- 14 vegetables you could use. It includes
- 15 vegetables like kale and chard that are often
- 16 harvested as bunched items that would be
- 17 cooked that would effectively kill staph or
- 18 the pathogen, like a bunch of spinach would.
- 19 So there is a difference in relative risks
- 20 that I apparently wasn't successful in
- 21 convincing anyone of value there.
- So I haven't been contacted any

- 1 further.
- 2 MS. SCHMAEDICK: When you state
- 3 in the past marketing agreements were used for
- 4 a specific commodity, are you speaking to
- 5 federal marketing agreements or state
- 6 marketing agreements?
- 7 MR. COKE: I confess I don't know.
- 8 I was thinking of state marketing agreements,
- 9 I think primarily thinking of fruit, I think.
- 10 And I assume the federal would be similar, but
- 11 I don't know that.
- MS. SCHMAEDICK: So as far as the
- 13 proposed program is concerned, are you opposed
- 14 to its implementation?
- 15 MR. COKE: As proposed I would be.
- 16 As I am opposed to the California basically
- 17 due to the definition of leafy greens. Precut
- 18 salad producers, processors, have a difficult
- 19 commodity to try to market to people. It
- 20 seems to have problems. It should be
- 21 addressed separately. But there is no reason
- 22 to apply metrics to growers that aren't

- 1 growing for that product. And it makes no
- 2 sense to include something like chard or kale
- 3 in any form, and not include celery or
- 4 broccoli or carrots. Why not, if you have a
- 5 food safety issue with all vegetables, then
- 6 let's deal with all of them. But there is no
- 7 logic in singling out specific vegetables, why
- 8 its increased, and now it includes herbs in
- 9 the proposed national apparently I haven't
- 10 heard of any outbreaks of herbs, food safety
- 11 outbreaks with herbs. But somehow it seems
- 12 like it's kind of mushrooming.
- MS. SCHMAEDICK: Were you here
- 14 yesterday?
- MR. COKE: Only for a little bit.
- 16 MS. SCHMAEDICK: So you did not
- 17 hear any testimony that explains the
- 18 definition of leafy green vegetables?
- 19 MR. COKE: I didn't.
- 20 MS. SCHMAEDICK: Okay. That's
- 21 all the questions I have.
- JUDGE HILLSON: Anything else

- 1 from the USDA panel? Ms. Dash, go ahead.
- MS. DASH: Suzanne Dash. I was
- 3 just wondering if you could tell us who you
- 4 sell to, and do you sell in farmers' markets
- 5 and supermarkets and restaurants? Just
- 6 generally.
- 7 MR. COKE: Right. Coke Farm sells
- 8 to wholesalers and retailers, distributors.
- 9 Everything goes out on trucks that are
- 10 arranged by the buyer, and go across the
- 11 country. We have also been impacted by sales
- 12 to Canada. We can't sell into Canada anything
- 13 that is considered a leafy green now without
- 14 being signatories to the agreement.
- The farming company also does some
- 16 sales to farmers' markets. There are two
- 17 farmers' markets that are done, but it amounts
- 18 to a fraction of the and we don't do any
- 19 CSAs or any other direct marketing. We are
- 20 kind of in that small wholesale end I quess.
- JUDGE HILLSON: Anything else?
- 22 Mr. English, do you have any questions of this

- 1 witness? Anyone else in the audience?
- Okay, to the proponents.
- 3 CROSS-EXAMINATION BY COUNSEL FOR THE
- 4 PROPONENTS
- 5 MR. WILKINSON: Robert Wilkinson
- 6 on behalf of Western Growers.
- 7 You're not against food quality
- 8 standards as a concept, are you?
- 9 MR. COKE: Food quality standards?
- 10 MR. WILKINSON: Correct.
- 11 MR. COKE: No, I'm not.
- MR. WILKINSON: And have you read
- 13 the agreement that is being proposed?
- MR. COKE: I have.
- MR. WILKINSON: Are you aware of
- 16 any scientific studies that indicate that the
- 17 problem with pathogens is greater with precut
- 18 salads than it is for other forms of lettuce
- 19 and leafy greens?
- 20 MR. COKE: FDA, CDC websites
- 21 indicate that predominantly the outbreaks
- 22 associated with when they started tracking

- 1 them were associated with bagged product
- 2 versus whole product.
- MR. WILKINSON: And do you have
- 4 references to those?
- 5 MR. COKE: I don't have them here.
- 6 They're on their website. I can provide that
- 7 for you if you like.
- 8 MR. WILKINSON: Yes. Would you
- 9 be willing to participate in the process by
- 10 which metrics would be developed for leafy
- 11 greens?
- 12 MR. COKE: I would. I found
- 13 previous experience with the California Leafy
- 14 Greens Marketing Agreement to be less than
- 15 satisfactory as far as it's industry driven;
- 16 it's driven by the people that are the big
- 17 marketers of salad products. And there is
- 18 tokens made apparently, token agreements with
- 19 environmental groups that came after the fact.
- 20 But if it was something that was
- 21 more than just a token, I would be willing to
- 22 participate.

- 1 MR. WILKINSON: Do you understand
- 2 the metrics would be ultimately approved by
- 3 the department, by the USDA?
- 4 MR. COKE: Yes.
- 5 MR. WILKINSON: And do you have
- 6 any quarrel with that?
- 7 MR. COKE: No, I think it's
- 8 probably better than the FDA, as long as it
- 9 wasn't the FDA coming out to the farm, I think
- 10 USDA would be more appropriate. Understand
- 11 the reason behind trying to get the marketing
- 12 agreement with USDA as far as the farming -
- 13 from a farm standpoint, I just don't agree
- 14 with the definitions.
- MR. WILKINSON: So you have no
- 16 problem with the USDA running the program?
- 17 Your problem is with the definitions?
- MR. COKE: Pretty much, yes.
- 19 MR. WILKINSON: That's all I
- 20 have, Your Honor.
- JUDGE HILLSON: Mr. Giclas.
- MR. GICLAS: Hank Giclas with

- 1 Western Growers. Mr. Coke, thank you for your
- 2 testimony.
- I just had one question. Are you
- 4 aware, generally aware, of industry recalls
- 5 that occur? Do you track those as a producer?
- 6 MR. COKE: I'm generally aware,
- 7 probably. I don't track them I don't have
- 8 something that comes in my in box that tells
- 9 me each one.
- 10 MR. GICLAS: In your knowledge of
- 11 recalls are there ever recalls that are
- 12 associated with bunched product or boxed
- 13 product as opposed to processed product?
- 14 MR. COKE: I believe there was one
- 15 recently with bunched spinach. I think it had
- 16 something to do with salmonella. It was
- 17 discovered by the department of ag in Michigan
- 18 was it, or Wisconsin?
- 19 MR. GICLAS: That's correct.
- 20 Thank you, that was my question.
- 21 JUDGE HILLSON: Okay, thank you
- 22 for testifying. You may step down.

- 1 (Witness excused)
- 2 Whereupon,
- 3 BILL STEVENS
- 4 Was called as a witness by counsel for the
- 5 National Organic Coalition and, after having
- 6 been first duly sworn, was examined and
- 7 testified as follows:
- JUDGE HILLSON: Please state your
- 9 name and spell it for the record.
- 10 MR. STEVENS: My name is Bill
- 11 Stevens, S-t-e-v-e-n-s.
- 12 JUDGE HILLSON: And you have a
- 13 statement you want to read?
- MR. STEVENS: Yes, I do.
- JUDGE HILLSON: Go right ahead.
- 16 DIRECT EXAMINATION
- 17 MR. STEVENS: My name is Bill
- 18 Stevens with the National Marine Fishery
- 19 Service. I work out of Santa Rosa,
- 20 California. The National Marine Fishery
- 21 Service is responsible for the conservation,
- 22 protection and recovery of listed species.

- 1 Our interest in providing comments on the
- 2 proposed national marketing agreement stems
- 3 from the fact that anadromous fish in their
- 4 habitat are affected by agricultural
- 5 activities.
- 6 Long before the current food
- 7 safety issue was in existence, salmon and
- 8 steelhead populations have been facing many
- 9 challenges, from loss of habitat due to dams
- 10 and loss of water due to diversions. We can't
- 11 let food safety practices further degrade the
- 12 ecosystem upon which these populations depend.
- 13 We support a national marketing
- 14 agreement that truly provides for the co-
- 15 management of realistic food safety goals and
- 16 adequate environmental protection. We support
- 17 a Marketing Agreement that is based on
- 18 scientific principles, utilizing the best
- 19 scientific and commercial data available that
- 20 truly contributes to food safety. And we
- 21 support a marketing agreement that
- 22 incorporates and implements state and federal

- 1 resource protection guidelines.
- 2 And national marketing agreement
- 3 must put an end to the knee jerk reactions
- 4 where fish or wildlife habitat is destroyed
- 5 under the misguided direction that natural
- 6 habitat equals unsafe food. A marketing
- 7 agreement must avoid any conflict with state
- 8 and federal resource protection regulation.
- 9 And it must avoid the supermetrics issue we
- 10 have experienced here in California.
- 11 We recommend the state of
- 12 California and federal and state fish and
- 13 wildlife agencies be well represented in the
- 14 various committees being suggested at the
- 15 national and regional levels as the marketing
- 16 agreement is developed. We expect this will
- 17 ensure co-management of public trust resources
- 18 and food safety goals. We expect the
- 19 marketing agreement can be implemented without
- 20 precluding the conservation, protection and
- 21 recovery of listed species such as salmon and
- 22 steelhead.

- 1 In conclusion, the national
- 2 marketing agreement must be based on
- 3 scientific principles using the best
- 4 scientific data. The national marketing
- 5 agreement must not contradict state or federal
- 6 law, nor direct landowners or others towards
- 7 practices that are harmful to the ecosystem.
- 8 The USDA must consult with
- 9 appropriate fish and wildlife agencies in the
- 10 development of a national marketing agreement.
- 11 Food safety concerns have put the
- 12 agriculture industry in a difficult situation.
- 13 A national marketing agreement that is well
- 14 crafted should allow for safe food and a
- 15 protected ecosystem.
- 16 JUDGE HILLSON: Thank you. I
- 17 have marked your written statement as Exhibit
- 18 21, and I will receive it into evidence.
- 19 (Whereupon the aforementioned
- 20 document was marked for
- 21 identification as Exhibit No. 21
- and was received into evidence)

- 1 JUDGE HILLSON: And I will ask
- 2 the USDA panel if they have any questions of
- 3 you?
- 4 CROSS EXAMINATION
- 5 MS. SCHMAEDICK: Melissa
- 6 Schmaedick. Good afternoon.
- 7 Mr. Stevens, you mentioned that
- 8 you work for NOAA is the acronym. Can you
- 9 tell us what that stands for, n-o-a-a?
- 10 MR. STEVENS: National Oceanic
- 11 Atmospheric Administration. We're a
- 12 department of Congress.
- MS. SCHMAEDICK: So are you
- 14 representing the Department of Commerce in
- 15 your testimony?
- MR. STEVENS: I'm an employee of
- 17 the Department of Commerce. This is at the
- 18 regional level, our regional office is in Long
- 19 Beach, California.
- MS. SCHMAEDICK: So you are
- 21 representing the position then of the regional
- 22 office?

- 1 MR. STEVENS: Correct.
- MS. SCHMAEDICK: So not the
- 3 department necessarily.
- 4 MR. STEVENS: Not necessarily.
- 5 MS. SCHMAEDICK: Are you aware of
- 6 any discussions of this topic that have
- 7 occurred in other regions?
- 8 MR. STEVENS: I'm not sure how
- 9 much discussion has gone on outside our
- 10 region.
- 11 MS. SCHMAEDICK: Or at the
- 12 national level in D.C.?
- MR. STEVENS: Correct.
- MS. SCHMAEDICK: Okay. I really
- 15 only have one question for you. The last
- 16 sentence in your testimony says a national
- 17 marketing agreement that is well crafted
- 18 should allow for safe food and a protected
- 19 ecosystem.
- 20 Does that statement indicate that
- 21 you believe that both food safety issues and
- 22 environmental issues can be addressed jointly

- 1 and cooperatively?
- 2 MR. STEVENS: I think so, yes.
- 3 MS. SCHMAEDICK: And obviously in
- 4 your statement you are suggesting that your
- 5 organization would like to be involved in the
- 6 discussions if this program were implemented,
- 7 and metrics were discussed?
- 8 MR. STEVENS: Yes.
- 9 MS. SCHMAEDICK: Okay, thank you.
- 10 JUDGE HILLSON: Anything else
- 11 from the USDA panel? Ms. Deskins?
- MS. DESKINS: Yes. You used a
- 13 term called co-management. Can you tell us
- 14 what you mean by that term?
- 15 MR. STEVENS: Managing for
- 16 resource protection and managing for safe
- 17 food.
- 18 MS. DESKINS: Okay, but I'm
- 19 trying to see, by co-management, who do you
- 20 see as being part of the co-management?
- 21 MR. STEVENS: I see the co-
- 22 management being the fish and wildlife

- 1 agencies, and the USDA.
- 2 MS. DESKINS: That was my second
- 3 question. You have mentioned about fish and
- 4 wildlife agencies. Can you tell us for the
- 5 record what agencies those are?
- 6 MR. STEVENS: I don't want to
- 7 speak for those agencies. But for example
- 8 there is a California Department of Fish &
- 9 Game, and there is the U.S. Fish & Wildlife
- 10 Service.
- 11 MS. DESKINS: Thank you.
- 12 JUDGE HILLSON: Anything else
- 13 from the panel? Mr. English, do you have any
- 14 questions. Anyone else in the audience?
- Okay, opponents, Mr. Resnick.
- 16 MR. RESNICK: Thank you, Your
- 17 Honor. Jason Resnick.
- 18 You've read the proposed National
- 19 Leafy Greens Marketing Agreement?
- MR. STEVENS: Yes.
- 21 MR. RESNICK: And based on what
- 22 you've read do you believe it's well crafted

- 1 and allows for safe food and a protected
- 2 ecosystem as written?
- 3 MR. STEVENS: Not as written.
- 4 The metrics haven't been developed yet.
- 5 MR. RESNICK: Do you believe that
- 6 the agreement as written provides a framework
- 7 to incorporate metrics at a later time that
- 8 could balance natural resources and safe
- 9 foods?
- MR. STEVENS: Yes.
- 11 MR. RESNICK: So generally you're
- in support of the proposal?
- MR. STEVENS: Of the process. As
- 14 my testimony says if an agreement does what we
- 15 hope for, yes.
- 16 MR. RESNICK: You said that the
- 17 national marine fisheries service is
- 18 interested in participating in the process?
- MR. STEVENS: Yes.
- 20 MR. RESNICK: And just for the
- 21 record would you elaborate on what steps the
- 22 proponent group or others involved in the

- 1 process would have to take in order to secure
- 2 that involvement?
- 3 MR. STEVENS: Well, as I
- 4 understand it, we are thinking the USDA is
- 5 going to have to consult with potentially the
- 6 fish and wildlife service and national fishery
- 7 service, under Section 7 of the Federal
- 8 Endangered Species Act. That's one way.
- 9 But I think before that, before we
- 10 actually potentially consult, is for NIMS to
- 11 work with the USDA and the proponents on the
- 12 metrics.
- MR. RESNICK: That's all I have.
- 14 Thank you.
- 15 JUDGE HILLSON: Thank you for
- 16 testifying. You may step down.
- 17 (Witness excused)
- 18 JUDGE HILLSON: In order to
- 19 accommodate the witnesses that we have to get
- 20 out today, we sort of agreed during lunch that
- 21 Mr. English is going to call the next three
- 22 witnesses, and then after that I am going to

- 1 give Claudia Reid, Elisa Odabashian and Steve
- 2 Shimek opportunities to testify. So it's up
- 3 to you, Mr. English.
- 4 MR. ENGLISH: The next witness
- 5 will be Patty Lovera from Food & Water Watch.
- 6 Your Honor, I note that a laptop
- 7 has appeared on the lectern.
- 8 JUDGE HILLSON: It's your lucky
- 9 day.
- 10 MR. ENGLISH: If I may just move
- 11 it to use the lectern. It appears to belong
- 12 to the hotel.
- 13 Whereupon,
- 14 PATTY LOVERA
- 15 Was called as a witness by counsel for the
- 16 proponents, and, after having been first duly
- 17 sworn, was examined and testified as follows:
- 18 JUDGE HILLSON: Please state your
- 19 name and spell it for the record?
- 20 MS. LOVERA: Patty Lovera, P-a-t-
- 21 t-y L-o-v-e-r-a.
- JUDGE HILLSON: Okay, do you have

- 1 any preliminary questions?
- 2 MR. ENGLISH: Question, statement,
- 3 in order to save some time we do want the
- 4 whole statement to go in, but Ms. Lovera is
- 5 going to skip some statements that either are
- 6 some statements similar to what Mr. Etka made.
- 7 So there aren't a lot, but there are about
- 8 four or five places I think where she will
- 9 skip two or three sentences, but we want the
- 10 whole thing to be in.
- 11 JUDGE HILLSON: Fair enough. At
- 12 the conclusion of the testimony I will put it
- in. So you may make your statement.
- 14 DIRECT EXAMINATION
- 15 MS. LOVERA: My name is Patty
- 16 Lovera, and I'm the assistant director for
- 17 Food & Water Watch, which is a nonprofit
- 18 consumer advocacy organization. We have
- 19 offices in Washington, D.C. and San Francisco.
- Food & Water Watch has 8,500
- 21 members across the country, and more than
- 22 120,000 supporters who participate in our

- 1 advocacy program, and they are very concerned
- 2 about the safety of produce such as leafy
- 3 greens. More than 7,000 people signed a
- 4 petition we circulated last week that urged
- 5 the USDA not to proceed with this national
- 6 version of a marketing agreement for leafy
- 7 greens.
- 8 Consumers have been increasingly
- 9 concerned and often frustrated as illness
- 10 outbreaks and recalls related to produce
- 11 continue to occur regularly. Many have lost
- 12 confidence in specific products in the wake of
- 13 illnesses or recalls, and public opinion
- 14 polling reveals strong support for reform of
- 15 the food safety system.
- 16 But this concern about the need
- 17 for standards for produce safety should be
- 18 confused with a willingness to accept food
- 19 safety programs that are unworkable for some
- 20 farms or damaging to the environment. Our
- 21 members and supporters are extremely concerned
- 22 about the methods used to produce food, the

- 1 impact food production has on the environment,
- 2 and the economic visibility of small
- 3 diversified and organic farms, as well as
- 4 regional and local food systems, and they
- 5 expect any food safety requirements to be
- 6 developed with these things in mind.
- 7 Because of the concerns about the
- 8 possible negative impacts of the proposed
- 9 National Leafy Greens Marketing Agreement on
- 10 these sectors as well as concerns about the
- 11 appropriateness of addressing food safety in
- 12 a marketing arena, Food and Water Watch is
- 13 opposed to the proposal to create a National
- 14 Leafy Greens Marketing Agreement with several
- 15 specific areas of our concern.
- 16 The first is that food safety is
- 17 not a marketing issue. Marketing agreements
- 18 are intended to help an industry solve
- 19 problems faced in marketing their products.
- 20 Marketing agreements for produce have been
- 21 designed on a premise that participating in
- 22 the agreement offers an advantage in the

- 1 marketplace, and marketing efforts often try
- 2 to distinguish between brands on the basis of
- 3 different product characteristics.
- 4 While the industry may view
- 5 decreasing consumer confidence and the safety
- 6 of leafy greens as a marketing problem,
- 7 consumers are less likely to view the safety
- 8 of the food they buy as something that should
- 9 be dealt with through marketing claims, or
- 10 that should vary between brands. Whether ore
- 11 not a product has been grown and processed in
- 12 a way that minimizes the chance that it
- 13 contains pathogens that contain illness is not
- 14 a quality attribute. It's a critical issue
- 15 that rises above other characteristics like
- 16 size, variety or appearance; and the issue of
- 17 whether minimum safety standards were followed
- is not something that should be subject to
- 19 efforts to distinguish between competing
- 20 brands.
- 21 It's unfair to ask consumers to
- 22 determine which products were produced with

- which food safety standards, and it's
- 2 unacceptable to make the penalty for buying
- 3 the wrong brand an increased risk of illness.
- 4 Safe food is something that all
- 5 consumers deserve, no matter what brand they
- 6 buy.
- 7 Our next concern is that AMS is
- 8 not a food safety agency. Simply put we
- 9 believe that the Agricultural Marketing
- 10 Service is the wrong government agency to deal
- 11 with the safety of leafy greens. As discussed
- 12 earlier by Mr. Etka, we have some concerns
- 13 about or we believe it's been put out
- 14 there by various administrators of AMS, and
- 15 that expertise of AMS is not in food safety.
- 16 Allowing the leafy green industry to develop
- its own standards with the blessing of AMS,
- 18 which is an agency with expertise in
- 19 marketing, is not sufficient assurance for
- 20 consumers, and it's a poor substitute for a
- 21 regulation developed in a transparent public
- 22 process by an agency with expertise in food

- 1 safety such as FDA, the Food & Drug
- 2 Administration.
- 3 Establishing minimum standards for
- 4 safety is a function of the government, not
- 5 the market, and should be done by a government
- 6 agency that is accountable to the public
- 7 through oversight by Congress, not by the
- 8 industry itself.
- 9 Finally or one more concern that
- 10 we have is the details of the proposed
- 11 agreement that we are here discussing today.
- 12 We have several specific concerns with that
- 13 proposal.
- 14 First, as it's currently written,
- 15 the proposal provides no way for consumers to
- 16 be involved in the development of the metrics
- 17 that are at the heart of the agreement. In
- 18 the proposal there is no participation by
- 19 consumers required in the technical committee
- 20 that is the actual metrics to be followed by
- 21 the industry. The option to name a consumer
- 22 member to the marketing committee is not

- 1 sufficient.
- 2 The marketing committee's job is
- 3 to sell this program, not to ensure that the
- 4 program is based on standards or adequately
- 5 protects the public health.
- 6 Another concern with the proposal
- 7 is the structure of the committee that
- 8 administers the agreement. Specifically the
- 9 way the country divides the country into zones
- 10 raises several questions. One is the
- 11 significant difference in growing conditions
- 12 and climate between states that have been put
- in the same zone. It seems unfair to ask
- 14 representatives to the various committees to
- 15 adequately understand the growing conditions
- 16 across such a wide geography. And another
- 17 concern is that the largest players in the
- 18 leafy green industry are in different zones
- 19 under this proposal, potentially allowing them
- 20 to control the seats from several zones and
- 21 control the makeup of the committee.
- 22 Some sectors of the leafy green

- 1 industry are extremely consolidated, with a
- 2 small number of companies controlling a vast
- 3 amount of the market. For example last year
- 4 two firms controlled almost 80 percent of the
- 5 fresh cut bagged salad market.
- 6 Given this consolidation it's
- 7 vital that the structure of the proposal
- 8 includes some safeguards to ensure that the
- 9 largest players in the industry do not control
- 10 the process.
- 11 On top of the absence of consumers
- 12 on the committee, we believe that small and
- 13 organic producers could be left out of this
- 14 process as well. This could increase the
- 15 likelihood that the metrics developed for the
- 16 agreement are more achievable for larger
- 17 operations. It could also mean that the
- 18 committee could fail to identify conflicts
- 19 between the marketing agreement's metrics and
- 20 other requirements like organic standards or
- 21 environmental protection programs.
- 22 Finally we are concerned with the

- 1 scope of the proposed agreement. We believe
- 2 there is a real void in what we know about the
- 3 risk posed by different production and
- 4 processing methods for leafy greens. It's
- 5 past time for research to be done to better
- 6 understand these risks. But what we do know
- 7 is that while no segment of leafy greens
- 8 production is risk free, not all leafy greens
- 9 are the same. We think that the proposal's
- 10 inclusion of products that are eaten raw as
- 11 well as those that are normally cooked misses
- 12 the opportunity to focus on the highest
- 13 priorities for reducing risk, and as
- 14 previously discussed by some other speakers,
- 15 we have some concern about the role of
- 16 processing in this industry.
- 17 One more concern, one area of
- 18 concern for us is that what we've seen in
- 19 California, the impacts of the California
- 20 agreement. After two years in operation the
- 21 California Leafy Greens Marketing Agreement
- 22 offers valuable insight into the impact of the

- 1 marketing agreement focused on food safety,
- 2 and causes some concern for us. The
- 3 California agreement's focus on growing
- 4 conditions with less attention paid to
- 5 processing has led to dramatic changes in the
- 6 way that some farms are operating. Other
- 7 speakers at this hearing can offer more detail
- 8 on these changes, and the impact the agreement
- 9 has had on water quality protection efforts,
- 10 wildlife habitat and other methods encouraged
- 11 or required by organic certification.
- 12 But initial research has shown
- 13 some disturbing trends. The majority of
- 14 central coast growers surveyed in the spring
- of 2007 reported that they had adopted at
- 16 least one measure to discourage or eliminate
- 17 wildlife, ranging from removing vegetation to
- 18 poison baiting. In 2009 researchers reported
- 19 that the pressure to comply with food safety
- 20 programs, both the LGMA and other programs,
- 21 could be having a chilling effect on
- 22 participation in federal conservation

- 1 programs, such as the environmental quality
- 2 incentives program.
- 3 After decades of effort to improve
- 4 agriculture's impact on the environment, and
- 5 in light of the requirement that certified
- 6 organic producers work to minimize their
- 7 environmental impact and protect biodiversity
- 8 it's disheartening to see that food safety
- 9 metrics under this agreement in private super
- 10 metrics that continue to be used in such
- 11 direct conflict with conservation and
- 12 environmental goals.
- We believe it's also important to
- 14 note that the requirements often cited as
- 15 being in conflict with environmental and
- 16 conservation goals, such as removal of
- 17 vegetation from buffer zones, a focus on
- 18 encroachment by all animals including those
- 19 that may not pose a risk of pathogen
- 20 transmission, and discouragement of natural
- 21 soil amendments could in fact be the wrong
- 22 approach.

- 1 The controversy over the
- 2 California agreement among small, diversified
- 3 and some organic growers is also troubling.
- 4 Consumers are responding as never before to
- 5 efforts to rebuild local and regional food
- 6 systems, connect farms and institutions and
- 7 promote less industrialized models of food
- 8 production. It's exactly these types of farms
- 9 that are leading the way in this effort that
- 10 have objected to the California agreement. So
- 11 it's vital that these operations be able to
- 12 comply with and flourish under any new type of
- 13 food safety program. And the experience with
- 14 the California Marketing Agreement casts doubt
- on whether the marketing agreement model can
- 16 achieve this.
- 17 And finally from a consumer
- 18 perspective, the fact that several recalls of
- 19 leafy greens produced under the California
- 20 LGMA offers reason to pause and consider if
- 21 the agreement is providing real protection to
- 22 consumers. It again begs the question of the

- 1 California's agreement's weaker emphasis on
- 2 processing and the potentially riskier types
- 3 of products like ready-to-eat bagged product.
- 4 So in conclusion, Food & Water
- 5 Watch believes that the proposed national
- 6 marketing agreement does not meet the criteria
- 7 outlined for the purpose of marketing
- 8 agreements. It will not eliminate confusion
- 9 in the marketplace, because it shifts the
- 10 responsibility for determining if food was
- 11 produced with good practices to consumers, who
- 12 must depend on a label to tell them if minimum
- 13 standards were followed.
- 14 The agreement does not have the
- 15 authority to stop the proliferation of super
- 16 metrics for other protocols, and the agreement
- 17 could also serve as a barrier that prevents
- 18 some producers from entering wholesale or
- 19 retail markets effectively trapping them in
- 20 niche markets and hurting efforts to diversify
- 21 production and reestablish local and regional
- 22 food systems.

- 1 Consumers are anxious for some
- 2 movement on produce safety, but that does not
- 3 mean that this flawed proposal should go
- 4 forward. Consumers deserve more than a plan
- 5 that lets the leafy green industry write its
- 6 own standards; that might be impossible for
- 7 small organic producers to achieve; and that
- 8 introduces yet another label into a
- 9 marketplace that is already crowded with
- 10 competing claims. Food safety is too
- 11 important to be relegated to becoming a
- 12 marketing issue, and we believe it should not
- 13 be subject to a National Leafy Greens
- 14 Marketing Agreement.
- 15 MR. ENGLISH: Does that conclude
- 16 your statement?
- 17 MS. LOVERA: Yes.
- 18 MR. ENGLISH: I will move
- 19 admission of Exhibit No. 22, Your Honor.
- JUDGE HILLSON: Okay, Exhibit No.
- 21 22 is received into evidence.
- 22 (Whereupon the aforementioned

- document was marked for
- 2 identification as Exhibit No. 22
- and received into evidence)
- 4 JUDGE HILLSON: Do you have any
- 5 further questions?
- 6 MR. ENGLISH: Yes, sir.
- 7 Mr. Etka was asked some questions
- 8 about a survey, and you I believe have
- 9 referenced a survey from the Central Coast
- 10 growers from the spring of 2007; correct?
- MS. LOVERA: Yes.
- MR. ENGLISH: Was that prepared by
- 13 the Resource Conservation District of
- 14 Monterrey County?
- MS. LOVERA: Yes.
- 16 MR. ENGLISH: Entitled A Growers
- 17 Survey Reconciling Food Safety and
- 18 Environmental Protection?
- 19 MS. LOVERA: Yes.
- 20 MR. ENGLISH: I believe the
- 21 Department asked, and we are prepared to make
- 22 this available. Do you have your own copy?

- 1 MS. LOVERA: No, you have it.
- 2 MR. ENGLISH: I have the other
- 3 copy. WE are prepared to make copies or do
- 4 whatever. I don't know if you want to mark it
- 5 now, Your Honor, or how you want to deal with
- 6 it. The department asked for, I believe, if
- 7 there was such a survey. An alternative is to
- 8 take official notice. I believe it's
- 9 available on the website, but I think it might
- 10 be better.
- 11 JUDGE HILLSON: It's easier to
- 12 have everything marked. So why don't we just
- 13 reserve No, 23 for that one, okay?
- 14 (Whereupon the aforementioned
- 15 document was marked for identification as
- 16 Exhibit No. 23)
- 17 JUDGE HILLSON: And you can make
- 18 copies available either today or tomorrow
- 19 morning.
- 20 MR. ENGLISH: I assure you that I
- 21 will do that, Your Honor.
- JUDGE HILLSON: You don't have

- 1 any objection, I assume, since you requested
- 2 copies?
- 3 MR. RESNICK: Yes, as long as we
- 4 get a copy, and we'll be able to call the
- 5 witness to discuss it.
- 6 JUDGE HILLSON: I think the last
- 7 part of it well, she's not a witness. She
- 8 didn't write the study.
- 9 So I have marked this grower
- 10 survey as Exhibit No. 23. Did you want to ask
- 11 some questions about the survey, Mr. English?
- MR. ENGLISH: No, she's referenced
- 13 it. And if somebody wants to ask her
- 14 questions, that's fine. I think the main
- 15 point was that the department asked an earlier
- 16 witness if there were such surveys to make it
- 17 available for the record.
- JUDGE HILLSON: So you are not
- 19 vouching as to the accuracy?
- 20 MR. ENGLISH: No, except I would
- 21 point out that it is at least prepared by a
- 22 public agency rather than a private party, and

- 1 therefore has what indicia, but no, I do not
- 2 represent the Resource Conservation District
- 3 of Monterrey County. I don't believe Food &
- 4 Water represents them. We are making
- 5 available for the record that document that
- 6 has been referenced by a survey, and note that
- 7 it at least has been prepared by a public
- 8 agency.
- 9 JUDGE HILLSON: Okay, I will
- 10 receive it into evidence, and the government,
- 11 the secretary, can give it the value that it
- 12 believes is appropriate.
- 13 (Whereupon the aforementioned
- 14 document previously marked for
- 15 identification as Exhibit No. 23
- 16 was received into evidence)
- 17 JUDGE HILLSON: Are you all done
- 18 with the witness?
- 19 MR. ENGLISH: I have the witness
- 20 available for cross-examination.
- JUDGE HILLSON: Okay, it's set up
- 22 for the USDA panel. Who would like to go

- 1 first, Ms. Schmaedick, go right ahead.
- 2 CROSS-EXAMINATION BY COUNSEL FOR USDA
- 3 MS. SCHMAEDICK: This is Melissa
- 4 Schmaedick. Good afternoon, Patty Lavera, is
- 5 that your last name?
- 6 MS. LOVERA: Yes.
- 7 MS. SCHMAEDICK: Ms. Lavera,
- 8 thank you for your testimony.
- 9 So my first question is have you
- 10 had a chance to read the proposed language?
- MS. LOVERA: Yes.
- MS. SCHMAEDICK: Okay. So on
- 13 page two of your testimony you talk about
- 14 competing brands, and that it's unfair to ask
- 15 consumers to determine which products were
- 16 produced with which food safety standards.
- 17 Can you tell me what the basis is for your
- 18 stating that there would be competing brands?
- 19 MS. LOVERA: Oh, we believe when
- 20 you deal with communicating that this program
- 21 is followed by saying it will have this label
- 22 on it, that that could be a distinguishing

- 1 characteristic between one brand that is a
- 2 signatory or was handled by a signatory and
- 3 another brand that wasn't. And in most retail
- 4 scenarios there is more than one product
- 5 competing for people to buy them. And it's
- 6 the difference between those two.
- 7 MS. SCHMAEDICK: So it's your
- 8 understanding that the proposed market
- 9 certification would be used on consumer
- 10 packaging?
- 11 MS. LOVERA: That's my
- 12 understanding. That's how the seal transmits
- 13 the information.
- 14 MS. SCHMAEDICK: You also mention
- 15 that marketing agreements are intended to help
- 16 an industry solve problems. You talk about
- 17 marketing agreement purposes. I'm just
- 18 curious, how much work have you had in the
- 19 area of working with federal marketing
- 20 agreements or orders?
- 21 MS. LOVERA: I mean it's been in
- 22 the course of getting familiar with this

- 1 proposal and getting ready for this, I've been
- 2 doing a lot of reading trying to understand
- 3 the venue we are in for this proposal, which
- 4 is a marketing agreement.
- 5 MS. SCHMAEDICK: So you do not
- 6 have a background or history or education in
- 7 federal marketing orders or agreements?
- 8 MS. LOVERA: No.
- 9 MS. SCHMAEDICK: Okay. Do you
- 10 have a copy of the proposed language in front
- 11 of you?
- MS. LOVERA: I don't think I do.
- 13 No.
- MS. SCHMAEDICK: Section 97, day
- 15 69, official certification mark. Paragraph
- 16 (b) says: the committee may license
- 17 signatories to affix the official
- 18 certification mark to bills of lading or
- 19 manifests, subject to the verification system,
- 20 revocation requirements. And then if I recall
- 21 correctly we also had testimony yesterday on
- 22 this particular section where it was stated

- 1 that the proponent groups intent was to not
- 2 put it on consumer packaging. I don't have
- 3 that exhibit in front of me, but I can find
- 4 it.
- 5 MR. ENGLISH: Can you just read
- 6 the whole sentence, that says, or any other
- 7 uses recommended by the committee?
- 8 MS. SCHMAEDICK: Yes, that is the
- 9 rest of the sentence. But my point is that in
- 10 the proponent's presentation of this language,
- 11 were you here for that?
- MS. LOVERA: Yes.
- MS. SCHMAEDICK: Was there a
- 14 discussion about use of the mark on consumer
- 15 packaging?
- MS. LOVERA: I actually don't
- 17 remember. I was here for most of it.
- 18 MS. SCHMAEDICK: Okay. On page
- 19 three of your testimony you state that the
- 20 proposed agreement does not have enough
- 21 emphasis on processing, especially of ready-
- 22 to-eat fresh cut products. Are you aware that

- 1 in the proposed language that it includes a
- 2 reference to good handling practices as well
- 3 as good manufacturing processes, and that the
- 4 term, process and manufacturing, are included
- 5 in this proposal?
- 6 MS. LOVERA: Yes, but it is still
- 7 an area of concern for us.
- 8 MS. SCHMAEDICK: You state that
- 9 you are opposed to the proposal in general?
- MS. LOVERA: Yes.
- 11 MS. SCHMAEDICK: Yet you point
- 12 out several areas where you see weaknesses?
- MS. LOVERA: Yes.
- MS. SCHMAEDICK: Are you
- 15 suggesting that there might be modifications
- 16 that could be made to improve the draft?
- MS. LOVERA: We are opposed to
- 18 putting food safety in this venue or this
- 19 track of government action. We don't think
- 20 this is the right place to do it. In addition
- 21 to that broad objection we have specific
- 22 concerns about the proposal.

- 1 MS. SCHMAEDICK: So you don't
- 2 have any recommendations on modifications to
- 3 the draft proposal?
- 4 MS. LOVERA: I think that is
- 5 premature. We don't want the proposal to go
- 6 forward. We don't want this to be a marketing
- 7 agreement. So later on if that happened maybe
- 8 we would have suggestions. But right now we
- 9 are here to say we don't want this to happen.
- 10 MS. SCHMAEDICK: Okay. Last
- 11 question for you on page five, you state that
- 12 consumers deserve more than a plan that lets
- 13 the leafy green industry write its own
- 14 standards. So that might be impossible for
- 15 small and organic producers to achieve.
- 16 My question is, if you've read the
- 17 proposal, do you what is your understanding
- 18 of the way metrics would actually be
- 19 implemented?
- 20 MS. LOVERA: Implemented, after
- 21 they are developed how they would be
- 22 implemented?

- 1 MS. SCHMAEDICK: The whole
- 2 process from beginning to end.
- 3 MS. LOVERA: That the technical
- 4 committee makes the recommendations, the
- 5 administrative committee makes the
- 6 recommendations to the AMS, who puts them out.
- 7 MS. SCHMAEDICK: Okay, so and
- 8 does the proposed language also state that the
- 9 FDA and the government agencies and other
- 10 interest groups need to be involved in that
- 11 process?
- 12 MS. LOVERA: Some. I mean there
- is some in the proposal, the various
- 14 committees, there is some way for some parties
- 15 to be involved.
- 16 MS. SCHMAEDICK: Okay. Those are
- 17 all the questions I have.
- 18 JUDGE HILLSON: Other panelists
- 19 have questions?
- 20 MS. DESKINS: Yes, I have a
- 21 couple of questions. In terms of your
- 22 organization, do you know how many members in

- 1 your organization you said you read the
- 2 proposal, this agreement?
- 3 MS. LOVERA: Yes.
- 4 MS. DESKINS: In your
- 5 understanding of the proposal do you know how
- 6 many of the members would be leafy green
- 7 growers or handlers, if you know?
- 8 MS. LOVERA: I don't know. That
- 9 does not tend to be our constituency.
- 10 MS. DESKINS: Okay. And also you
- 11 said in your testimony that there was a
- 12 petition signed by 7,000 people. Just say for
- 13 the record.
- MS. LOVERA: Yes.
- 15 MS. DESKINS: Can you tell us how
- 16 many of those would be either leafy green
- 17 growers or handlers, if you know?
- 18 MS. LOVERA: We don't ask. I
- 19 don't know.
- 20 MS. DESKINS: And then also in
- 21 terms of this petition that 7,00 people that
- 22 signed it, were they from any particular area

- 1 of the country?
- 2 MS. LOVERA: I have a copy with
- 3 me. They are from all over the country.
- 4 MS. DESKINS: Okay.
- 5 JUDGE HILLSON: Was it an online
- 6 petition?
- 7 MS. LOVERA: Yes, we have a system
- 8 to communicate with people online.
- 9 MS. DESKINS: Okay, and the other
- 10 question I have, understanding your objection
- 11 to the old agreement, you did say there was a
- 12 problem with the zones as set up under the
- 13 agreement?
- 14 MS. LOVERA: Yes, I identified it
- 15 as something about the proposal that concerns
- 16 us. Specifically, I think it was discussed
- 17 earlier when Mr. Etka was talking about the
- 18 variation in the zones, and another concern
- 19 that we have is kind of who is making the
- 20 decision on these committees because of the
- 21 zone structure.
- MS. DESKINS: Okay, would you

- 1 have any recommendations of how that could be
- 2 structured in a way you think would alleviate
- 3 your concerns?
- 4 MS. LOVERA: I think it would
- 5 have to be discussed if we go forward. I
- 6 think Mr. Etka identified several things
- 7 about other people that could be involved.
- 8 I'm not prepared to make them now. I think it
- 9 should be a source of discussion if this goes
- 10 forward. But we have been focusing on making
- 11 the point that it shouldn't go forward.
- MS. DESKINS: Okay, thank you.
- 13 JUDGE HILLSON: Ms. Carter.
- 14 MS. CARTER: Good afternoon,
- 15 Antoinette Carter with USDA.
- 16 I just wanted to direct your
- 17 attention to page one of your prepared
- 18 statement. In paragraph three, you indicate
- 19 that you state that that this concern
- 20 about the need for standards for produce
- 21 safety should not be confused with the
- 22 willingness to accept food safety programs

- 1 that are unworkable for small farms and
- 2 damaging to the environment.
- 3 Can you explain what you are
- 4 referencing there? Are you referencing the
- 5 proposed national agreement, or are you
- 6 referencing current state marketing agreements
- 7 that are already in existence?
- 8 MS. LOVERA: I think in that I
- 9 was trying to sum up I think it's a
- 10 combination of concerns about what we are
- 11 already seeing here in California under the
- 12 California LGMA, plus the super metrics that
- it's failed to stop, and concerns about how we
- 14 see that possibly getting replicated in a
- 15 national proposal. So past experience and
- 16 concern that it grows in the future under this
- 17 proposal.
- MS. CARTER: Okay, could you
- 19 provide some specifics in terms of what
- 20 components of the California program are not
- 21 workable for small farms? Are there any
- 22 specific examples that you can provide of

- 1 components of that program that have been
- 2 difficult for --
- 3 MS. LOVERA: Yes, I think we are
- 4 also going to have some other folks, hopefully
- 5 later this afternoon, that will give more
- 6 specifics, because they have had more
- 7 interaction with people in California. But my
- 8 understanding is that there are folks and we
- 9 just heard from a grower who didn't sign up
- 10 because of his concern he couldn't meet the
- 11 metrics. So I think there are several areas.
- 12 One is folks who didn't see themselves being
- able to deal with this so they didn't sign up,
- 14 and they discussed earlier today losing
- 15 markets because of that.
- 16 There is concern about the
- 17 changing practices, how people change their
- 18 wildlife management practices, are they not
- 19 signing up for things like EQIP so that kind
- 20 of disincentive to do other environmental
- 21 programs that are very important. And then a
- 22 lot of concern among organic producers about

- 1 how is this compatible with the things they
- 2 need to do to stay certified organic. So it's
- 3 kind of in several areas, and we have been
- 4 tracking some of the media on it, talking to
- 5 people about it, and there are folks that are
- 6 going to talk later this afternoon that have
- 7 more direct experience with it.
- 8 MS. CARTER: And so the best of
- 9 your knowledge, for those I guess producers,
- 10 organic producers, that have stated that
- 11 they'd experience problems, do they currently
- 12 have food safety programs in place that they
- 13 have implemented on their own, to the best of
- 14 your knowledge?
- MS. LOVERA: I have spoken to
- 16 people who do, but I can't speak for everyone
- 17 obviously. And then e are also of the opinion
- 18 that this is not a venue today to talk about
- 19 how to fix all problems in food safety. It's
- 20 a venue to talk about is this proposal the way
- 21 to do it. We don't think that it is. We are
- 22 involved in many other discussions about food

- 1 safety, and ways to deal with that broader
- 2 topic.
- 3 MS. CARTER: I think on some
- 4 earlier questions that were posed with regard
- 5 to current AMS marketing agreements and some
- 6 of the programs that are in place that are
- 7 quality programs that regulate quality, in
- 8 your opinion is quality a factor related to
- 9 food safety?
- 10 MS. LOVERA: Our take on this,
- 11 and this is based what we think is kind of a
- 12 common understanding of this is, is that they
- 13 are viewed as separate. Quality is something
- 14 that may vary between different products, and
- 15 may be about desirability or differences that
- 16 are not as vital to public health as whether
- 17 or not they may put people at risk of
- 18 something. So we think things like what
- 19 variety something is, what size is, kind of
- 20 grading issues, things like that, is what
- 21 people are used to thinking about as quality,
- 22 not, does this cross the line between high

- 1 risk and low risk, or things that are kind of
- 2 held as more of a core expectation when people
- 3 buy something, that that is a given. And one
- 4 terms that gets thrown around a lot is pre-
- 5 competitive, so that it should be just a
- 6 baseline expectation that certain minimum
- 7 standards that will be met, not that it
- 8 depends which one you're buying.
- 9 MS. CARTER: And one final
- 10 question. On page three of your statement, at
- 11 the second paragraph, you state that on top of
- 12 the absence of consumers on the committee -
- 13 are you referencing the proposed national
- 14 agreement here?
- MS. LOVERA: Yes.
- 16 MS. CARTER: If I could direct
- 17 your attention to Section 40, establishment
- 18 and membership provisions. I believe it's
- 19 paragraph (a)(8), it provides for one public
- 20 member from the production area. Would that
- 21 allowance for the public member, could that be
- 22 a consumer?

- 1 MS. LOVERA: We were confused by
- 2 the use of the word, public. Possibly it
- 3 could, but maybe it's some other it's
- 4 interesting that it wasn't a consumer
- 5 representative. And then there is also some
- 6 concern about how those folks are chosen, if
- 7 those folks are chosen by the handlers and
- 8 growers in that region, not or zone, sorry -
- 9 not from the public at large.
- MS. CARTER: Thank you.
- 11 JUDGE HILLSON: Anything else
- 12 from the panel?
- 13 MR. RESNICK: Excuse me, Your
- 14 Honor, if I may. I'm going to ask to look at
- 15 the petition, and I thought to speed things up
- 16 I would look at it during the department's
- 17 cross examination.
- 18 JUDGE HILLSON: Okay. Go ahead,
- 19 Ms. Dash.
- 20 CROSS-EXAMINATION
- 21 MS. DASH: The research that you
- 22 talk about concerning the pressure to comply

- 1 with food safety programs, where was that
- 2 reported? Is it published?
- MS. LOVERA: It was a survey by
- 4 the Resource Conservation District, and I
- 5 think we turned it in here, and I believe I
- 6 read a writeup in I believe it was California
- 7 Agriculture. I have seen articles about the
- 8 results which I have in my papers.
- 9 MS. DASH: Okay. And then my
- 10 other question was, are you here representing
- 11 consumers?
- MS. LOVERA: Yes, we consider
- ourselves a consumer advocacy organization, so
- 14 I'm representing our members.
- MS. DASH: Okay.
- JUDGE HILLSON: Are you done?
- MS. DASH: I'm sorry, yes.
- 18 JUDGE HILLSON: Panel is all
- 19 done? Opponents?
- 20 CROSS-EXAMINATION
- MR. WILKINSON: Your Honor,
- 22 Robert Wilkinson on behalf of Western Growers.

- 1 If indeed the agreement is approved, would you
- 2 be willing to take part in the process by
- 3 which the metrics are determined?
- 4 MS. LOVERA: I don't know. We
- 5 have to weigh whether we think how the
- 6 committees that end up are going to be worth
- 7 our time, whether we think we are going to be
- 8 heard. It's a decision we have to make later.
- 9 MR. WILKINSON: Now you
- 10 understand pursuant to Section 970.49
- 11 subdivision (c) that the metrics ultimately
- 12 are going to be approved by the Secretary?
- 13 You understand that?
- MS. LOVERA: Yes.
- 15 MR. WILKINSON: Does that help to
- 16 address your concerns that the metrics will
- 17 somehow be controlled by the industry?
- 18 MS. LOVERA: No.
- 19 MR. WILKINSON: Can you explain
- 20 that?
- 21 MS. LOVERA: We just feel like,
- 22 we believe based on what we've heard from

- 1 California and other places that the way it is
- 2 starting, and the way the recommendation is
- 3 coming originally from members of the
- 4 industry, it's starting from a point that
- 5 isn't how we would recommend the food safety
- 6 process be started.
- 7 MR. WILKINSON: Who would you
- 8 recommend oversee a food safety program?
- 9 MS. LOVERA: I mean at this point
- 10 we think the Food & Drug Administration is the
- 11 place where this should be happening.
- MR. WILKINSON: Now in your
- 13 statement you complain that the promulgation
- 14 of the agreement and this is on page two,
- 15 the fourth paragraph it's not being
- 16 developed in a transparent process. Do you
- 17 recall that language?
- 18 MS. LOVERA: Yes.
- 19 MR. WILKINSON: And so you are
- 20 here today to object against the agreement in
- 21 its entirety; correct?
- MS. LOVERA: Yes.

- 1 MR. WILKINSON: And is this not
- 2 transparent?
- 3 MS. LOVERA: I think this
- 4 particular step of this overall process has
- 5 some overall public component, but it's
- 6 different and we are comparing it to a
- 7 regulatory process at FDA, and we feel that
- 8 that as a process in total is a more
- 9 transparent process, and it also gives more
- 10 accountability to citizens because of the way
- 11 there are different tracks of different
- 12 entities.
- MR. WILKINSON: Are you familiar
- 14 with notice and comment rulemaking?
- MS. LOVERA: Yes.
- 16 MR. WILKINSON: So if you could
- 17 look at Section 970.49, subdivision (c) that
- 18 the metrics will be adopted with the approval
- 19 of the secretary after notice and comments, do
- 20 you understand that to be notice and comment
- 21 rulemaking?
- MS. LOVERA: Yes, after several

- 1 other steps have happened there are notes and
- 2 comment on that step.
- 3 MR. WILKINSON: And that would be
- 4 transparent, would it not?
- 5 MS. LOVERA: I think that step,
- 6 when they put something out, is public, and
- 7 you can see it. We have questions about how
- 8 transparent is the whole process leading up to
- 9 that.
- 10 MR. WILKINSON: And do you have
- 11 any understanding that the public would not be
- 12 able to attend committee meetings?
- MS. LOVERA: No, but I didn't see
- 14 that they would either. It was a question for
- 15 us.
- MR. WILKINSON: If the public was
- 17 able to attend those meetings, would that
- 18 alleviate your concern?
- 19 MS. LOVERA: Partially.
- 20 MR. WILKINSON: And what more
- 21 would you need other than being able to attend
- 22 those meetings, and then attend the notes and

- 1 comment sessions?
- 2 MS. LOVERA: I mean I think we
- 3 want to see it at the FDA. I mean there is
- 4 only so much I can do I think to talk about
- 5 what would make us happy with this proposal
- 6 when we don't think this is the right way to
- 7 go.
- 8 MR. WILKINSON: Okay, so really
- 9 at the end of the day the objection is it's
- 10 the USDA as opposed to the FDA?
- MS. LOVERA: And the concept of
- 12 putting it in a marketing program as opposed
- 13 to a food safety regulatory program.
- MR. WILKINSON: Well, quality is
- 15 certainly a marketing issue, is it not?
- 16 MS. LOVERA: Right, but I think
- 17 you and I are defining quality differently.
- 18 MR. WILKINSON: Do you include
- 19 food safety as one component of quality?
- 20 MS. LOVERA: No, I think we would
- 21 put food safety in a separate category.
- MR. WILKINSON: Now turning to

- 1 page three of your statement, the third
- 2 paragraph beginning with, finally, you have a
- 3 statement here that essentially all leafy
- 4 greens get treated the same. Where do you
- 5 find that in the proposed agreement?
- 6 MS. LOVERA: This is similar to
- 7 some of the discussion we heard earlier from
- 8 several of the growers, and Steve Etka as
- 9 well. I mean the list of what is considered
- 10 to be leafy greens is one indication to us
- 11 that there are a lot of things on it, and we
- 12 feel like in a conversation at FDA or in a
- 13 process at FDA, or in a process at FDA, a
- 14 regulatory process, a part of that discussion
- 15 would be where do you focus it, defining risk
- 16 and things like that. And it's less clear to
- 17 us in this process that that is going to
- 18 happen.
- 19 MR. WILKINSON: Well, if indeed
- 20 risk was being taken into consideration
- 21 depending on the circumstances of the grower
- 22 or the product, would that alleviate your

- 1 concern in that regard?
- 2 MS. LOVERA: I didn't understand
- 3 the question.
- 4 MR. WILKINSON: Let me rephrase
- 5 it then.
- 6 If the metrics as proposed for
- 7 example differentiated between product that is
- 8 sold in bunches and product that is sold
- 9 precut, and differentiated among other
- 10 different methods of selling product, would
- 11 that help alleviate your concern?
- MS. LOVERA: Not with the whole
- 13 proposal, because we still think this is not
- 14 the right place to do food safety. So I mean
- 15 there is a lot of speculation we could do
- 16 about what's in the metrics, but we don't
- 17 think that this is the way to deal with food
- 18 safety or that this is the right agency or the
- 19 right process.
- 20 MR. WILKINSON: So if
- 21 consideration for risks between conventional
- 22 farming and organics was taken into

- 1 consideration, that would not satisfy you
- because this is not the FDA; am I correct?
- 3 MS. LOVERA: Because this is a
- 4 marketing agreement, yes.
- 5 MR. WILKINSON: And I could go on
- 6 and mention other factors pre-cut versus
- 7 bunch, but again you would not be satisfied
- 8 because it's not the FDA?
- 9 MS. LOVERA: That's a
- 10 conversation. We are having food safety
- 11 conversations all over the government right
- 12 now, in every branch and every agency, and
- 13 this has to be part of the conversation, and
- 14 we bring it up, and a lot of people bring it
- 15 up. But we don't like this agreement, and we
- 16 don't like this way of tackling food safety.
- 17 MR. WILKINSON: We would
- 18 certainly like you to make comments on
- 19 regulations or metrics under consideration.
- 20 And thank you for your testimony indeed today.
- Now in terms of developing certain
- 22 metrics, are you saying that by developing

- 1 metrics at all that the government or the
- 2 committee would be responsible for super
- 3 metrics?
- 4 MS. LOVERA: No, I'm not sure I
- 5 understand the question. But what I was
- 6 trying to point out was we don't think the
- 7 National Leafy Greens Marketing Agreement has
- 8 any guarantee that it is going to stop the
- 9 proliferation of super metrics that we have
- 10 heard about.
- 11 MR. WILKINSON: But certainly
- 12 buyers, they are entitled to put whatever
- 13 conditions they want on the purchase of a
- 14 product. You wouldn't quibble with that,
- 15 correct?
- MS. LOVERA: No.
- 17 MR. WILKINSON: So if the
- 18 industry if you will could present a
- 19 persuasive case to the buyers that indeed it
- 20 has a scientifically based system for
- 21 protecting the quality of the produce, that
- 22 that may indeed result in a reduction of super

- 1 metrics; correct?
- 2 MS. LOVERA: I don't know that.
- 3 I don't know what's going to happen.
- 4 MR. WILKINSON: That's all I have
- 5 for now, Your Honor. Thank you.
- JUDGE HILLSON: Mr. Resnick.
- 7 MR. RESNICK: Jason Resnick.
- 8 Thank you, Ms. Lovera keep that
- 9 in front of you, please, because I am going to
- 10 ask you a take a look at it. Thank you for
- 11 giving us the brief opportunity to review the
- 12 petition that you referred to in your
- 13 testimony, and I took the opportunity during
- 14 the last couple of moments to look at it.
- Would you just please read the
- 16 petition for the record?
- MS. LOVERA: Yes, so the top of
- 18 the petition is to the Honorable Tom Vilsack.
- 19 I oppose the proposed National Leafy Greens
- 20 Marketing Agreement. Food safety is not a
- 21 marketing issue, and the produce industry
- 22 should not be allowed to set its own standards

- 1 for safety. I urge the USDA not to create a
- 2 National Leafy Greens Marketing Agreement.
- 3 And then there are signatures.
- 4 MR. RESNICK: Is that the
- 5 entirety of the petition?
- 6 MS. LOVERA: Yes.
- 7 MR. RESNICK: Did the petition
- 8 include a copy of the proposal, proposed
- 9 National Leafy Greens Marketing Agreement?
- 10 MS. LOVERA: No, I don't believe
- 11 it did.
- MR. RESNICK: So anyone who
- 13 signed the petition may or may not have had
- the opportunity to review the agreement they
- 15 were commenting upon?
- MS. LOVERA: Right.
- 17 MR. RESNICK: Was there an alert
- 18 that was sent out to your members asking them
- 19 to sign the petition?
- MS. LOVERA: Yes.
- MR. RESNICK: And was there any
- 22 explanation with the alert of what was

- 1 contained in the petition?
- MS. LOVERA: Yes, we do have an
- 3 introduction for people. When they open the
- 4 email they read what we are communicating
- 5 about.
- 6 MR. RESNICK: Do you have a copy
- 7 of that alert?
- MS. LOVERA: I don't think that I
- 9 do. I can probably look it up online and
- 10 print it for tomorrow.
- 11 MR. RESNICK: Your testimony, you
- 12 stated that more than 7,000 people signed the
- 13 petition. Do you have the exact number of
- 14 what that number was?
- MS. LOVERA: I would have to open
- 16 up the computer and get the spreadsheet and
- 17 get the exact number. I don't know if off the
- 18 top of my head.
- 19 MR. RESNICK: And as I believe
- 20 you said earlier, no one actually signed the
- 21 petition, they just acknowledged their
- 22 agreement with that statement via email?

- 1 MS. LOVERA: We have an online
- form, basically yes, they can use the website
- 3 to add their name.
- 4 MR. RESNICK: And could you just
- 5 briefly explain that process?
- 6 MS. LOVERA: So if someone
- 7 chooses to get notices from us they sign up
- 8 and say yes, I'm going to get updates from
- 9 you. A lot of businesses and groups do this.
- 10 So we sent out an email to them, with usually
- 11 some introductory explanation about an issue.
- 12 And then we say, something we invite them to
- 13 then click on something which takes them to a
- 14 website where they can sign a petition or send
- a note to a public official, things like that.
- 16 They have to choose to click on a link which
- 17 then takes them to a website where they can do
- 18 some action.
- 19 MR. RESNICK: And if somebody
- 20 wants to sign more than once, is there
- 21 anything that bars them from doing so?
- 22 MS. LOVERA: It doesn't bar them

- 1 from doing it. When we pull it out and print
- 2 it out and develop it, we try to make sure
- 3 there are not duplicates.
- 4 MR. RESNICK: And I'm sorry, did
- 5 you say you had the number of people who
- 6 signed it?
- 7 MS. LOVERA: I could go get my
- 8 computer, open the spreadsheet, and get you
- 9 the exact number. I don't have it in front of
- 10 me.
- 11 MR. RESNICK: The number that you
- 12 have which is more than 7,000, is that number
- 13 does that number constitute that list?
- MS. LOVERA: Yes, we printed out
- 15 the list.
- 16 MR. RESNICK: Could you open to
- 17 the first page of signatures? Do you see a
- 18 name, Burt Hayes? Just scan down, take your
- 19 time.
- MS. LOVERA: Yes.
- 21 MR. RESNICK: Do you see that
- 22 name appearing twice?

- 1 MS. LOVERA: Yes.
- 2 MR. RESNICK: Does that mean that
- 3 Mr. Hayes signed the petition twice?
- 4 MS. LOVERA: Possibly.
- 5 MR. RESNICK: That is the same
- 6 person? Same email address?
- 7 MS. LOVERA: Yes.
- 8 MR. RESNICK: Going down do you
- 9 see the name, Eta Cortamelia?
- MS. LOVERA: Yes.
- 11 MR. RESNICK: Does that name
- 12 appear more than once?
- MS. LOVERA: Yes.
- 14 MR. RESNICK: On page two, do you
- 15 see the name, Randy Hosmond?
- MS. LOVERA: Yes.
- 17 MR. RESNICK: And that name
- 18 appears twice as well?
- MS. LOVERA: Yes.
- 20 MR. RESNICK: On page three, do
- 21 you see the name, Caleb Layevski?
- MS. LOVERA: No. Let me keep

- 1 looking. Three?
- JUDGE HILLSON: Is that going to
- 3 be the same sort of situation?
- 4 MS. LOVERA: Yes, I don't see it,
- 5 but maybe I have the pages turned around.
- 6 MR. RESNICK: Would you accept my
- 7 representation that that name appears twice on
- 8 page three?
- 9 MS. LOVERA: I didn't see it, but
- 10 it could be.
- 11 MR. RESNICK: And if I were to
- 12 represent to you that Mr. Layevski's name also
- 13 appears on page four, for the third time,
- 14 would you accept that representation?
- 15 JUDGE HILLSON: I think we get
- 16 the point.
- 17 MS. LOVERA: There are some
- 18 repeats. And we can clean up the list. This
- 19 was done very quickly.
- MR. RESNICK: So the point is,
- 21 the 7,000 you don't know how many?
- MS. LOVERA: We can do a cleanup

- 1 and get you the number.
- 2 JUDGE HILLSON: The document is
- 3 not in evidence anyway, this document. But
- 4 she is giving an example of this.
- 5 MS. LOVERA: This goes on for a
- 6 bunch of hearings. We bring an updated
- 7 petition. We didn't have a lot of time to get
- 8 ready for this hearing.
- 9 MR. RESNICK: I understand. I
- 10 just wanted to bring up the point that
- 11 obviously in that number, there are a number
- 12 of duplications.
- MS. LOVERA: That's for pointing
- 14 it out. We will fix it.
- MR. RESNICK: And that's all I
- 16 have at this point. Thank you.
- 17 JUDGE HILLSON: Mr. Giclas.
- 18 MR. GICLAS: Hank Giclas, Western
- 19 Growers.
- I have a question about one of
- 21 your statements on page three of your prepared
- 22 testimony. In regards to the RCD survey that

- 1 has been submitted, you suggest in the last
- 2 line on that page that Central Coast growers
- 3 surveyed in the spring of excuse me, the
- 4 majority of Central Coast growers surveyed in
- 5 spring of 2007 reported that they had adopted
- 6 at least one measure to discourage or
- 7 eliminate wildlife. Do you know what the
- 8 majority of Central Coast growers is? Do you
- 9 know the methodology of the RCDC survey that
- 10 was conducted? Are we talking about a
- 11 majority of the growers that exist in the
- 12 Central Coast?
- MS. LOVERA: I believe it was
- 14 respondents to the survey.
- 15 MR. GICLAS: And do you know what
- 16 percentage responded to the survey?
- MS. LOVERA: Not off the top of
- 18 my head.
- 19 MR. GICLAS: Do you know the
- 20 survey methodology? Was it a telephone
- 21 survey? Was it a mailing survey? Was it --
- MS. LOVERA: You know, I read it,

- 1 and I don't remember. I'd have to reread it.
- 2 MR. GICLAS: I also wanted to ask
- 3 you, on the very next page, page four, at the
- 4 top, you've got a reference in here: in 2009
- 5 researchers reported that the pressure to
- 6 comply with food safety programs, both the
- 7 LGMA and other programs, could be having a
- 8 chilling effect on participation in federal
- 9 conservation programs such as EQIP, or such as
- 10 the Environmental Quality Incentives Program.
- 11 Could you provide us with the
- 12 research report that asserts that? I am
- 13 unfamiliar with that, and would like to see
- 14 it?
- 15 MS. LOVERA: Yes, what I can do
- 16 is that was communication between a member
- 17 of our staff and the researcher. I believe
- 18 it's not published yet. We have used it in
- 19 some of our materials, and I could give you
- 20 those materials in a footnote.
- 21 MR. GICLAS: So you say it's not
- 22 published research?

- 1 MS. LOVERA: Not yet.
- 2 MR. GICLAS: Are you aware of any
- 3 followup surveys that have been conducted by
- 4 the RCD?
- 5 MS. LOVERA: I am not.
- 6 MR. GICLAS: Thank you. That's
- 7 all the questions I have.
- JUDGE HILLSON: Anything else?
- 9 Mr. English, do you have any redirect?
- 10 Do you have a question?
- 11 MR. HORSFALL: Let me do this
- 12 real quick.
- 13 Scott Horsfall, LGMA. In your
- 14 testimony you talk about the impact on
- 15 consumer attitudes because of recalls of
- 16 California leafy greens. What recalls are you
- 17 referring to?
- 18 MS. LOVERA: I have a note here.
- 19 I think there were in our trying to match up
- 20 the recalls we've seen and signatories, I
- 21 think we saw three. One of Romaine lettuce,
- 22 one of spinach and one of parsley.

- 1 MR. HORSFALL: Okay, setting
- 2 aside that parsley is not part of the
- 3 marketing agreement, the other two then, the
- 4 recent recalls, are you aware that either of
- 5 them had anything to do with processing of
- 6 bagged salads?
- 7 MS. LOVERA: Yes.
- 8 MR. HORSFALL: You are? So you
- 9 finish this paragraph after introducing the
- 10 recalls by saying that that begs the question
- 11 by which I think you mean raises the
- 12 question of the California agreement's
- 13 weaker emphasis on processing, and the
- 14 potentially riskier types of products like
- 15 ready to eat bagged products.
- 16 How do you draw that conclusion
- 17 from recalls that had nothing to do with
- 18 bagged products?
- 19 MS. LOVERA: The way I was
- 20 wrapping that up is, if the focus of the
- 21 California LGMA is on the growing conditions,
- 22 and these were bunched products, and we still

- 1 ended up with recalls. And then there has
- 2 been less focus on the processing sector, what
- 3 does that mean that that is not being given
- 4 the same attention in the agreement.
- 5 MR. HORSFALL: Thank you.
- 6 JUDGE HILLSON: Go ahead, Mr.
- 7 Wilkinson.
- 8 MR. WILKINSON: Thank you, Your
- 9 Honor.
- 10 Are you aware that the proposed
- 11 agreement provides for audits of handlers?
- MS. LOVERA: Yes.
- MR. WILKINSON: And provides for
- 14 audits of manufacturers?
- MS. LOVERA: Yes.
- MR. WILKINSON: And that would
- 17 address your concern relative to bag salads,
- 18 would it not?
- 19 MS. LOVERA: It's a difference
- 20 between the California agreement and this
- 21 potential national agreement. With knowing
- 22 the metrics I don't know if it would address

- 1 my concern. What the audit looks like for
- 2 them it hasn't happened yet.
- 3 MR. WILKINSON: Well, for the fact
- 4 that it's looking at manufacturers, at
- 5 baggers, that would be an improvement from
- 6 your point of view, would it not?
- 7 MS. LOVERA: I don't know. It
- 8 depends how they do it; it depends on what the
- 9 metrics are.
- MR. WILKINSON: Thank you.
- 11 MR. RESNICK: Jason Resnick. In
- 12 light of my cross-examination and the
- 13 responses thereto, I would ask that the
- 14 statement that more than 7,000 people signed
- 15 the petition be stricken from the testimony
- 16 since that has not been verified.
- JUDGE HILLSON: I'm going to deny
- 18 that. It's in there. It's the secretary
- 19 can value that for what he believes it's
- 20 worth. But I'm not going to have it stricken.
- 21 That was her statement under oath, and it has
- 22 been modified somewhat.

- 1 And you may step down. Thank you
- 2 for testifying.
- 3 (Witness excused)
- 4 JUDGE HILLSON: Mr. English,
- 5 ready to call your next witness?
- 6 MR. ENGLISH: Garth Kahl from
- 7 Oregon Tilth, Your Honor.
- 8 Whereupon,
- 9 GARTH KAHL
- 10 Was called as a witness by counsel for the
- 11 opponents and, after having been first duly
- 12 sworn, was examined and testified as follows:
- 13 JUDGE HILLSON: Please state your
- 14 name and spell it for the record.
- MR. KAHL: My name is Garth Kahl,
- 16 G-a-r-t-h K-a-h-l.
- 17 JUDGE HILLSON: Okay, and Mr.
- 18 English, do you have any questions you want to
- 19 ask, or do you want him to go ahead with a
- 20 statement?
- 21 MR. ENGLISH: Well, first I note
- 22 he has a two-page statement. And then he has

- 1 two documents I think he is going to
- 2 reference, one which has already been
- 3 referenced once or twice in this proceeding,
- 4 which is the Growers Compliance Across the
- 5 Leafy Greens Marketing Agreement.
- 6 JUDGE HILLSON: I'll mark his
- 7 statement as Exhibit 24.
- 8 (Whereupon the aforementioned
- 9 document was marked for
- identification as Exhibit No. 24)
- JUDGE HILLSON: Do you want me to
- 12 separately mark the --
- 13 MR. ENGLISH: I think one of the
- 14 two documents that he is --
- 15 JUDGE HILLSON: So the one that
- 16 begins, growers compliance, I'll call it 24A.
- 17 (Whereupon the aforementioned
- 18 document was marked for
- 19 identification as Exhibit 24A)
- 20 MR. ENGLISH: Then there is an
- 21 attachment.
- JUDGE HILLSON: The one-page

- 1 attachment at the end, is that what it is?
- 2 MR. ENGLISH: Yes.
- JUDGE HILLSON: From Fish & Game?
- 4 MR. ENGLISH: Yes.
- 5 JUDGE HILLSON: I'll call it 24B.
- 6 (Whereupon the aforementioned
- 7 document was marked for
- 8 identification as Exhibit No. 24B)
- JUDGE HILLSON: Okay, those are
- 10 all marked.
- MR. ENGLISH: Okay, thank you.
- JUDGE HILLSON: You may proceed
- 13 with the statement.
- 14 DIRECT EXAMINATION
- MR. KAHL: My name is Garth Kahl.
- 16 I am the farm program coordinator for Oregon
- 17 Tilth, certified organic. Oregon Tilth is an
- 18 NOP accredited certifier representing over
- 19 1,200 certified crop and handling operations
- 20 through the United States, Canada, Mexico and
- 21 Chile.
- I am also a veteran organic

- 1 inspector with over 13 years experience
- 2 inspecting both crop and processing operations
- 3 throughout the Americas.
- In the course of my career I have
- 5 undertaken thousands of organic crop
- 6 inspections, and have received formal training
- 7 in HACCP, Hazardous Analysis Critical Control
- 8 Point implementation and evaluation, as well
- 9 as ISO 9000-1, 2000 lead auditor training, in
- 10 addition to experience with a wide variety of
- 11 industry specific traceability and audit
- 12 control systems.
- Oregon Tilth and our members share
- 14 a concern about food safety, and also have a
- 15 strong belief that diversified farming systems
- 16 with well managed soils, vegetative buffers,
- 17 and high levels of biodiversity are highly
- 18 compatible with safe food, and in fact, serve
- 19 to enhance and promote this goal.
- 20 However, Oregon Tilth and many of
- 21 our growers and members are particularly
- 22 concerned about several aspects of this

- 1 proposed agreement.
- One, Oregon Tilth and our
- 3 membership have a great deal of concern that
- 4 many of the measures promoted by the LGMA will
- 5 penalize farms that promote wildlife habitat
- 6 and natural tests and pathogen control through
- 7 conservation practices such as vegetative
- 8 buffer and filter strips. Several growers
- 9 based here in California have already voiced
- 10 concerns to us about the effects of the
- 11 California leafy greens agreement which has
- 12 led to the clearing of hedge rows, riparian
- 13 buffer areas, and the construction of fences
- 14 that are an impediment to wildlife.
- 15 We assert that these measures are
- 16 based on assumptions about the pathogen risk
- 17 from deer and other wildlife that preliminary
- 18 data suggests are completely misplaced.
- 19 According to a recent California Department of
- 20 Fish & Game Report, reference one, recent
- 21 research results from a joint California Fish
- 22 & Game slash USDA study suggest less than one-

- 1 half of one percent of mammalian wildlife
- 2 tested positive for e. coli 0157H7. This
- 3 would suggest that the removal of wild
- 4 riparian and insectory habitat might at best
- 5 be unnecessary and at worst counterproductive.
- 6 There is nothing in the LGMA that
- 7 suggests that the proliferation of so-called
- 8 super metrics responsible for some of the
- 9 worst abuses observed under California LGMA
- 10 would cease or decrease.
- 11 We are also concerned about the
- 12 high costs to small and medium sized growers
- in complying with the metrics mandated by the
- 14 LGMA, and the seeming one-size-fits-all
- 15 approach to food safety inherent in this
- 16 agreement, particularly the costs of updated
- 17 handling facilities, maintenance of HACCP
- 18 programs, et cetera.
- 19 According to a recent UC small
- 20 farm program research brief, additional costs
- 21 to growers for compliance with the California
- 22 LGMA are estimated at \$100 an acre, with the

- 1 highest costs being borne by small and mid-
- 2 sized growers. This is consistent with what
- 3 I had personally witnesses through my
- 4 inspection work in Mexico, where many small
- 5 growers report having to assume considerable
- 6 debt or even switch crop types to comply with
- 7 other recently enacted marketing agreements
- 8 for buyer-mandated food safety programs,
- 9 particularly the California LGMA.
- 10 In particularly many growers
- 11 report what some have termed audit fatigue,
- 12 for the proliferation of audits mandated by
- 13 handlers, private food safety entities and
- 14 organic inspection.
- 15 Oregon Tilth and our members are
- 16 concerned that far from being a voluntary
- 17 agreement, the LGMA will in fact become
- 18 mandatory for at least the majority of medium
- 19 to large-sized leafy growers in the country.
- 20 If 50 percent or more buy volume of the leafy
- 21 greens handlers sign up for the agreement it
- 22 will be very difficult for other handlers to

- 1 decline to sign the agreement. The National
- 2 LGMA standard will essentially become the
- 3 governing baseline standard for handlers and
- 4 producers selling to them.
- 5 Oregon Tilth believes that
- 6 marketing agreements are a bad way to
- 7 implement food safety in that food safety
- 8 regulations, where necessary, should be
- 9 developed in an open, public and transparent
- 10 process with the lead role going to a food
- 11 safety agency such as the FDA in close
- 12 coordination with the USDA.
- We further believe that any food
- 14 safety regulation must be developed in close
- 15 coordination with the national organic program
- 16 to ensure that regulations do not result in
- 17 unintended conflict with the organic
- 18 standards.
- 19 In addition standards should not
- 20 ignore the benefits inherent under the
- 21 existing NOP program. Such as the strict
- 22 requirements for the documented composting and

- 1 manure.
- We further believe that the
- 3 regulation should take the scale of operations
- 4 into account, and target the areas of greatest
- 5 risk. With the assessment of those risks -
- 6 and that the assessment of those risks should
- 7 be scientifically based.
- 8 Part of the analysis of risk
- 9 should also be recognition that scale of
- 10 operation plays a role in determining that
- 11 risk. And I will add as an afterword that
- 12 this is an issue that just in the last week
- 13 and a half as I have been preparing this
- 14 testimony has become very, very important to
- our membership, and we received a lot of
- 16 impromptu phone calls from members concerned
- 17 about this.
- 18 JUDGE HILLSON: Do you have any
- 19 further direct?
- 20 MR. ENGLISH: You referenced -
- 21 there is reference one in your testimony,
- 22 which I believe is now marked 24B; is that

- 1 correct?
- 2 MR. KAHL: That's correct.
- 3 MR. ENGLISH: And reference two,
- 4 ironically, reference two is 24A, is that
- 5 correct?
- 6 MR. KAHL: I believe that is
- 7 correct.
- 8 MR. ENGLISH: You don't work for
- 9 UC Davis, right?
- 10 MR. KAHL: I do not.
- 11 MR. ENGLISH: So you are just
- 12 submitting this as a study that you have
- 13 reviewed?
- MR. KAHL: That's correct.
- 15 MR. ENGLISH: And similarly you
- 16 don't work for the Department of Fish & Game,
- 17 correct?
- 18 MR. KAHL: That is correct.
- MR. ENGLISH: But they are a
- 20 government agency, ands you have reviewed this
- 21 document, correct?
- MR. KAHL: That's correct.

- 1 MR. ENGLISH: There were some
- 2 questions yesterday about that report. And
- 3 how how long it goes back. Do you have any
- 4 information to add to the record about when
- 5 that started?
- 6 MR. KAHL: Well, according to the
- 7 report, this is a preliminary report after two
- 8 years investigation. And I believe there was
- 9 some testimony yesterday which may have been
- in error which suggested that it had been in
- 11 the area of six months.
- MR. ENGLISH: Testimony or cross
- 13 examination?
- 14 MR. KAHL: Testimony or cross-
- 15 examination, I don't remember which.
- 16 MR. ENGLISH: I move the
- 17 admission of 24, 24A and 24B.
- 18 JUDGE HILLSON: Any objection? I
- 19 will receive Exhibits 24, 24A and 24B into
- 20 evidence.
- 21 (Whereupon the aforementioned
- documents having been previously

- 1 marked for identification as
- 2 Exhibits Nos. 24, 24A and 24B were
- 3 received into evidence)
- 4 MR. ENGLISH: And the witness is
- 5 available for cross-examination.
- 6 JUDGE HILLSON: Does the USDA
- 7 panel have any questions of this witness? Go
- 8 ahead, Ms. Schmaedick.
- 9 CROSS-EXAMINATION
- 10 MS. SCHMAEDICK: This is Melissa
- 11 Schmaedick with USDA. Good afternoon, Mr.
- 12 Kahl, is it?
- MR. KAHL: Yes.
- 14 MS. SCHMAEDICK: Your testimony
- 15 states that you are a farm program coordinator
- 16 for Oregon Tilth Certified Organic?
- 17 MR. KAHL: That is correct.
- 18 MS. SCHMAEDICK: And that is an
- 19 NOP accredited certifier?
- 20 MR. KAHL: That is correct.
- MS. SCHMAEDICK: NOP stands for
- 22 the National Organic Program?

- 1 MR. KAHL: Yes, it does.
- MS. SCHMAEDICK: Is that part of
- 3 USDA?
- 4 MR. KAHL: Yes, it's part of USDA
- 5 AMS, ag marketing service.
- 6 MS. SCHMAEDICK: You mentioned
- 7 training in HACCP. Can you tell me what HACCP
- 8 is, H-A-C-C-P?
- 9 MR. KAHL: Yes, I'm sorry, I
- 10 thought I explained that in the testimony,
- 11 Hazardous Analysis Critical Control Point.
- MS. SCHMAEDICK: And where is
- 13 that training received from?
- 14 MR. KAHL: I received that
- 15 training from AIB, American Institute of
- 16 Baking. I believe it was in 2002.
- 17 MS. SCHMAEDICK: And the HACCP
- 18 program in general which government agency is
- 19 that attached to?
- MR. KAHL: I don't know.
- 21 MS. SCHMAEDICK: On your point
- 22 number two, page one, you're saying that you

- 1 are concerned about high costs to small and
- 2 medium sized growers complying with metrics
- 3 mandated by the LGMA. So you are speaking to
- 4 the California state program; is that correct?
- 5 MR. KAHL: No, we are speaking to
- 6 what we based on the experience of the
- 7 California state program what we believe may
- 8 be metrics imposed by the national LGMA.
- 9 MS. SCHMAEDICK: Okay, and have
- 10 you read the proposed language?
- 11 MR. KAHL: Yes, I have read the
- 12 proposed language, and thanks for the
- 13 gentleman from Western G rowers, I've had it
- 14 read to me over the last few days, which was
- 15 actually quite helpful.
- MS. SCHMAEDICK: So in your
- 17 opinion are metrics included in the proposed
- 18 language?
- 19 MR. KAHL: Metrics are not
- 20 specifically included in the proposed
- 21 language. The proposed language lays out a
- 22 framework for the development of metrics, but

- 1 no, metrics are not included in the proposed
- 2 language.
- 3 MS. SCHMAEDICK: You mentioned in
- 4 your background you have quite a bit of
- 5 experience working with certification of
- 6 organic farms, small and medium.
- 7 MR. KAHL: That is correct.
- 8 MS. SCHMAEDICK: Based on your
- 9 experience, do you have any cost estimates for
- 10 small and medium farms, and how much it costs
- 11 to become organically certified?
- 12 MR. KAHL: Yes, I have
- 13 experience. Organic certification varies
- 14 considerably from certified credit between
- 15 certified accreditation bodies. It varies;
- 16 for a small grower, for Oregon Tilth for
- 17 example, it's roughly \$500. There are
- 18 certification agencies that charge less than
- 19 that; certification agencies that charge more
- 20 than that. There is a significant variation
- 21 in those costs.
- 22 MS. SCHMAEDICK: What about the

- 1 cost to prepare a farm or a business to comply
- 2 with those regulations? Do you have any cost
- 3 estimates on that?
- 4 MR. KAHL: I do not. That really
- 5 depends, I hypothesize that that depends a lot
- 6 on the scale of the operation, but it also
- 7 depends on a number of factors including
- 8 inputs, the type of crops being grown, this
- 9 kind of thing. Again that would vary widely
- 10 from one operation to another.
- MS. SCHMAEDICK: In your
- 12 testimony are you stating that you are opposed
- 13 to the proposed national marketing agreement?
- 14 MR. KAHL: Yes, Oregon Tilth is
- 15 opposed to the national leafy greens marketing
- 16 agreement.
- 17 MS. SCHMAEDICK: So a discussion
- 18 of potential modifications to the proposed
- 19 language is not an area that would be worth
- 20 entertaining?
- 21 MR. KAHL: At this time, no. Now
- 22 going forward if this does become law, then

- 1 yes, we would certainly want to be party to
- 2 such discussions. But at this point we would
- 3 prefer that the marketing agreement not be
- 4 implemented.
- 5 MS. SCHMAEDICK: So at this point
- 6 you have no recommendations as to
- 7 modifications to the technical review board,
- 8 administrative committee structure, zone
- 9 structure, any part of the proposed language?
- 10 MR. KAHL: No, other than what
- 11 I've entered into testimony in terms of a
- 12 critique of it, no.
- MS. SCHMAEDICK: I'm finished,
- 14 thank you.
- JUDGE HILLSON: Anything else?
- 16 Go ahead, Ms. Deskins.
- 17 MS. DESKINS: Good afternoon. I
- 18 have a question about the organization, Oregon
- 19 Tilth. You have in your testimony it's a
- 20 certified organic NOP accredited certifier.
- 21 Is that is it a corporation, a group of
- 22 organizations? What exactly is it?

- 1 MR. KAHL: Oregon Tilth is a
- 2 501(c)(3). We have in addition to undertaking
- 3 accreditation under the U.S. National Organic
- 4 Program standard, we certify under a number of
- 5 different standards. We also have a research
- 6 and education arms, so we undertake research
- 7 and education in agriculture, ecological
- 8 agriculture, horticulture, and provide
- 9 education to students who are also working on
- 10 conjunction with the Oregon Department of
- 11 Agriculture to provide organic master gardener
- 12 program, for example.
- MS. DESKINS: Okay, just to
- 14 clarify your testimony, of the 1,200
- 15 operations you list, are those members or --
- MR. KAHL: No, those are
- 17 accredited those are farm and processing
- 18 operations that are accredited to the NOP, the
- 19 National Organic Program.
- 20 MS. DESKINS: How many members
- 21 does your organization have? If it has
- 22 members?

- 1 MR. KAHL: It does have members.
- 2 I don't know that figure exactly. I could get
- 3 it to you. We have far more members than we
- 4 have accredited bodies. We have individual
- 5 members, organizational members, some of who
- 6 are not involved at all in certification or
- 7 production or handling.
- 8 MS. DESKINS: To your knowledge do
- 9 you have any idea how many of your members
- 10 would be leafy green handlers or growers as
- 11 defined in this agreement?
- 12 MR. KAHL: In anticipate of that
- 13 question I did a little bit of manipulation of
- 14 our database this morning. And this is very,
- 15 very rough data, so I would preface this with
- 16 that. At the very least I believe 120 of our
- 17 certified entities could possibly be affected
- 18 by that, and this is based on a search through
- 19 the database on entities that are certified
- 20 with those particular crop types that are
- 21 defined under the National LGMA language.
- 22 MS. DESKINS: I'm just trying to

- 1 clarify. So the certified the people that
- 2 come to you for certification of their crops,
- 3 are you representing them here today?
- 4 MR. KAHL: Yes.
- 5 MS. DESKINS: Okay, but if you are
- 6 certifying them, are they also members of your
- 7 organization?
- 8 MR. KAHL: Some are, and some are
- 9 not. Entities can be certified by us and
- 10 choose not to become voting members, or
- 11 members of the organization.
- 12 MS. DESKINS: I'm kind of
- interested in how many of your members, rather
- 14 than people you certify, would be either leafy
- 15 green handlers or growers as defined in this
- 16 agreement if you know?
- 17 MR. KAHL: I don't know that.
- 18 MS. DESKINS: And the other
- 19 question I had for you the other thing is,
- 20 your organization, does it have a board of
- 21 directors?
- MR. KAHL: Yes.

- 1 MS. DESKINS: And they've taken a
- 2 position on this particular agreement?
- 3 MR. KAHL: Given the timeframe
- 4 that we were made aware of the agreement, and
- 5 that we chose to take a position on it, I
- 6 don't know that the board has taken a
- 7 position. I know that our executive
- 8 management team has, and they directed me to
- 9 come and give testimony.
- 10 MS. DESKINS: The other question I
- 11 had for you is, you spoke about the costs as
- 12 it relates to small growers in Mexico, is that
- 13 correct?
- MR. KAHL: Yes.
- MS. DESKINS: Do you have any
- 16 numbers on small growers in the United States?
- 17 MR. KAHL: I'm sorry, small
- 18 growers in the United States affected? I'm
- 19 sorry, I don't understand the question.
- 20 MS. DESKINS: Well, your testimony
- 21 here is, you said, I have personally witnessed
- 22 through my inspection work in Mexico with many

- 1 small growers report having to assume
- 2 considerable debt or even switch to crop types
- 3 to comply with other recently enacted
- 4 marketing agreements.
- 5 And I'm just trying to find out if
- 6 you have any knowledge or numbers for small
- 7 growers in the United States?
- 8 MR. KAHL: I don't personally
- 9 know. My primary work area and my normal kind
- 10 of scope is Latin American growers. So in
- 11 terms of growers who have recently been
- 12 affected by LGMA all of my personal experience
- 13 would come from Mexico.
- 14 MS. DESKINS: I don't know a lot
- 15 about Mexican agriculture. Do they also have
- 16 marketing orders or agreements in Mexico?
- MR. KAHL: No, these are growers
- 18 who were affected by the California LGMA
- 19 because they were selling to handlers who were
- 20 signatories to the LGMA in Mexico I mean,
- 21 I'm sorry, in California.
- MS. DESKINS: Thank you.

- 1 JUDGE HILLSON: Anybody else from
- 2 the panel?
- 3 How about the proponents, any
- 4 questions from the proponents? Your witness.
- 5 (Off-mic comments)
- 6 MR. WILKINSON: Robert Wilkinson
- 7 on behalf of Western growers.
- Is 1,200, are those the number of
- 9 handling and crop operations you have
- 10 certified, or the numbers of members of Oregon
- 11 Tilth?
- MR. KAHL: No, those are the
- 13 numbers of handling and crop operations
- 14 combined that we certified to the NOP
- 15 standard.
- MR. WILKINSON: And how many
- 17 members do you have as opposed to the number
- 18 of operations you certified?
- 19 MR. KAHL: As I said to the woman
- 20 over there, I don't know. I don't have that
- 21 number. I can probably get it for you by the
- 22 time the afternoon is over.

- 1 MR. WILKINSON: And were your
- 2 members canvassed on their position on the
- 3 proposed marketing agreement?
- 4 MR. KAHL: No, again, because of
- 5 the timeframe involved.
- 6 MR. WILKINSON: Now, paragraph
- 7 two of the first page of your statement, you
- 8 talk about that the proposed agreement has a
- 9 one-size-fits-all approach, do you see that in
- 10 the first sentence?
- 11 MR. KAHL: Second paragraph or
- 12 second sentence?
- 13 MR. WILKINSON: Number two.
- MR. KAHL: Yes, I see that.
- 15 MR. WILKINSON: Where do you draw
- 16 that from?
- 17 MR. KAHL: In general I draw that
- 18 because at least the current agreement as
- 19 written does not appear to give any
- 20 consideration to scale; it doesn't appear to
- 21 give any consideration to crop type, i.e.
- 22 fresh as opposed to processed salad mix; and

- 1 it doesn't appear to give any special
- 2 consideration to organic growers.
- 3 MR. WILKINSON: You can see that
- 4 the metrics have not been written into the
- 5 agreement at this stage; correct?
- 6 MR. KAHL: Yes, I can see that.
- 7 MR. WILKINSON: And how is it
- 8 that these factors that you say have not been
- 9 considered being that the metrics haven't been
- 10 written yet?
- 11 MR. KAHL: Well, part of that
- 12 derives from the way in which heretofore the
- 13 agreement has been created. We contend that
- it was created by a very small group of
- 15 interested parties, and that at least
- 16 heretofore there has not been significant
- 17 public comment or significant avenues for many
- 18 affected groups, whether it be small to mid-
- 19 sized growers, organic growers,
- 20 conservationists, consumers, to have input.
- 21 MR. WILKINSON: You were here
- 22 earlier when Mr. Simonds testified about the

- 1 outreach efforts?
- 2 MR. KAHL: I don't recall that,
- 3 but I probably was.
- 4 MR. WILKINSON: You don't have
- 5 any information to indicate that what he was
- 6 saying about outreach was not the case?
- 7 MR. KAHL: No.
- 8 MR. WILKINSON: And do you hold
- 9 the agreement responsible for the super
- 10 metrics that are imposed by private buyers?
- 11 MR. KAHL: Which agreement are
- 12 you referring to?
- MR. WILKINSON: Well, here,
- 14 looking at paragraph one, numbered one, on
- 15 page one of your statement, the last sentence,
- 16 there is nothing in the LGMA that suggests the
- 17 proliferation of so-called super metrics
- 18 responsible for some of the worst abuses
- 19 observed under the California LGMA would cease
- 20 or decrease. And the question is, is either
- 21 the proposed LGMA or the California LGMA
- 22 responsible for these so-called super metrics?

- 1 MR. KAHL: I don't believe that
- 2 either the LGMA, California LGMA or the
- 3 national LGMA are responsible. However, I
- 4 submit that this current that this
- 5 agreement, the national LGMA as written does
- 6 not appear to do anything or impose any limits
- 7 on super metrics.
- 8 MR. WILKINSON: Well, could the
- 9 USDA or the agreement somehow prohibit private
- 10 buyers from establishing their own standards
- 11 for purchasing product?
- MR. KAHL: Yes, obviously, they
- 13 could.
- MR. WILKINSON: They could?
- MR. KAHL: They could, yes.
- MR. WILKINSON: So the government
- 17 could order a buyer about what the buyer has
- 18 to buy?
- 19 MR. KAHL: The government could
- 20 as it has in other national standards
- 21 establish a standard as either a floor or a
- 22 ceiling, thereby limiting the extent of super

- 1 metrics.
- 2 MR. WILKINSON: Are you
- 3 suggesting that the metrics be a ceiling as
- 4 opposed to a floor?
- 5 MR. KAHL: I think there are some
- 6 inherent benefits to growers and other people
- 7 in the industry to know what requirements they
- 8 are going to have to be judged by and not
- 9 having a shifting playing field.
- 10 MR. WILKINSON: Now the last
- 11 paragraph of your statement, you say that you
- 12 believe that regulations should take the scale
- of operations into account and target the
- 14 areas of greatest risk. Is there anything
- about the agreement the way it's written now
- 16 that would keep that from happening?
- 17 MR. KAHL: Again, many of those
- 18 details as you pointed out would need to be
- 19 worked out in the metrics. However, we feel
- 20 that by nature of the way the agreement has
- 21 been crafted, by nature of the fact that the
- 22 agreement is taking place in the venue of a

- 1 marketing agreement and not a food safety
- 2 agreement under the auspices of FDA, we feel
- 3 that that there has not been enough weight
- 4 given to the question of scale.
- 5 MR. WILKINSON: But as you
- 6 mentioned earlier, I believe in response to
- 7 Ms. Schmaedick's questions, if indeed the
- 8 agreement goes through you would be kind
- 9 enough to come back and help us evaluate those
- 10 scales of operation?
- 11 MR. KAHL: We would certainly
- 12 consider it, yes.
- 13 MR. WILKINSON: Thank you very
- 14 much.
- 15 JUDGE HILLSON: Any questions
- 16 from the Forest Service? Any from the
- 17 audience?
- 18 Could you identify yourself,
- 19 please, and if you represent somebody who that
- 20 is, please.
- 21 MS. MILLS: Yes, Your Honor, my
- 22 name is Laura Giudici Mills, and I'm here

- 1 representing Mets Fresh which is a handler.
- 2 Mr. Kahl, my initial questions are
- 3 regarding your reference one, Exhibit 24B, the
- 4 Department of Fish & Game's preliminary
- 5 results on their e.coli study. Are you
- 6 familiar that that study has been suspended
- 7 due to a lack of funding?
- 8 MR. KAHL: No, I'm not.
- 9 MS. MILLS: Are you familiar with
- 10 the fact that the majority of the samples for
- 11 e. coli, the colon samples were taken from
- 12 deer off of Ft. Hunter Liggett?
- MR. KAHL: No, I am not.
- MS. MILLS: Do you know where Ft.
- 15 Hunter Liggett is located?
- MR. KAHL: Yes.
- 17 MS. MILLS: Do you know if there
- 18 are any leafy greens grown in the vicinity of
- 19 Ft. Hunter Liggett?
- 20 MR. KAHL: I do not know that.
- 21 MS. MILLS: I can tell you, I
- 22 live in Lockwood adjacent to Ft. Hunter

- 1 Liggett. There are no leafy greens growing in
- 2 Lockwood.
- 3 Are you familiar with the fact
- 4 that the researchers with UC Davis who
- 5 partnered with the California Department of
- 6 Fish & Game did not want to release
- 7 preliminary results for this study?
- 8 MR. KAHL: I'm not familiar with
- 9 that. This information was obtained from a
- 10 California Department of Fish & Game website,
- 11 so I would be surprised at that.
- MS. MILLS: Do you know why the
- 13 preliminary results were released?
- MR. KAHL: No, I do not.
- MS. MILLS: The Department of
- 16 Fish & Game wanted them to be released in
- 17 order to protect deer.
- 18 I had a couple of other questions
- 19 for you --
- JUDGE HILLSON: I just wanted to
- 21 say that if you do want to testify, I don't
- 22 know if you signed up to testify later.

- 1 MS. MILLS: I will later. I have
- 2 just a couple of more questions, Your Honor.
- JUDGE HILLSON: Okay, but there
- 4 is a distinction between asking a question and
- 5 answering it too. But you can ask away. Go
- 6 ahead.
- 7 MS. MILLS: Thank you.
- 8 You mentioned earlier during the
- 9 cross-examination from the USDA that your
- 10 organization has a board of directors?
- 11 MR. KAHL: That's correct.
- MS. MILLS: Do your bylaws
- 13 require your board of directors to approve for
- 14 their representatives to testify in a setting
- 15 such as this or approve the message or the
- 16 position that your organization takes?
- 17 MR. KAHL: No, they do not. To
- 18 my knowledge they do not require that.
- 19 MS. MILLS: Did your board of
- 20 directors have an opportunity to review your
- 21 testimony or the position that your
- 22 organization is representing here at today's

- 1 hearing?
- 2 MR. KAHL: I don't know that.
- 3 MS. MILLS: Thank you.
- 4 JUDGE HILLSON: Okay, any other
- 5 questions from the audience? Do you have any
- 6 redirect, Mr. English?
- 7 MS. DESKINS: Your Honor?
- JUDGE HILLSON: I'm sorry, go
- 9 ahead.
- 10 MS. DESKINS: I have two quick
- 11 questions.
- 12 Could you just state for the
- 13 record where your organization is located?
- MR. KAHL: Yes, our organization
- is based you want me to give the name and
- 16 the full address?
- 17 MS. DESKINS: If you could?
- 18 MR. KAHL: Oregon Tilth is based
- 19 in Salem, Oregon at 470 Lancaster Drive NE,
- 20 Salem, Oregon 97301.
- 21 MS. DESKINS: Thank you.
- JUDGE HILLSON: Is there anything

- 1 else?
- 2 MS. SCHMAEDICK: This is Melissa
- 3 Schmaedick. I'd like to ask you to look at
- 4 Section 970.67, paragraph D. And I'll just
- 5 read it for efficiency here. It says: audit
- 6 metrics may be developed and recommended to
- 7 accommodate differences in production and
- 8 handling environments of different region and
- 9 different leafy green vegetable products.
- 10 What is your understanding of that
- 11 language?
- MR. KAHL: My understanding of
- 13 that language is that gives flexibility to the
- 14 technical panel that is developing the audit
- 15 metrics to take a myriad of things into
- 16 account. Obviously some of those things take
- into account size and scale, obviously
- 18 climate. To me that seems like a criteria
- 19 that you would want to have if you were going
- 20 to develop any kind of effective audit
- 21 metrics. Obviously climate conditions,
- 22 microbiological conditions, are vastly

- 1 different between the northeast and Arizona.
- MS. SCHMAEDICK: And I'm sorry,
- 3 did I hear you say that it could also
- 4 acknowledge differences in sizes or scales of
- 5 operations?
- 6 MR. KAHL: Yes, obviously the
- 7 avenue is there for that.
- 8 MS. SCHMAEDICK: Thank you.
- 9 JUDGE HILLSON: Is that it?
- Okay, you may step down.
- 11 (Witness excused)
- JUDGE HILLSON: And I'm about to
- 13 call a break. But I just want to say I just
- 14 want to go over that Mr. English, you are
- 15 going to call one more witness that hasn't
- 16 testified today, right?
- 17 MR. ENGLISH: Yes.
- 18 JUDGE HILLSON: Yes, and then I'm
- 19 going to have Ms. Reid, Ms. Odabashian and Mr.
- 20 Shimek will testify next. And if there is
- 21 anyone else who needs to testify today, better
- 22 come up during the break and let me know.

- 1 So let's take a full 15, okay?
- 2 Off the record.
- 3 (Whereupon, the above entitled
- 4 matter went off the record at 3:43
- p.m. and resumed at 4:02 p.m.)
- 6 JUDGE HILLSON: Back on the
- 7 record.
- 8 Mr. English, why don't you call
- 9 your next witness?
- 10 MR. ENGLISH: Sure. Jo Ann
- 11 Baumgartner.
- 12 Whereupon,
- 13 JO ANN BAUMGARTNER
- 14 Was called as a witness by counsel for the
- 15 opponents and, after having been first duly
- 16 sworn, was examined and testified as follows:
- 17 JUDGE HILLSON: Could you please
- 18 state your name and then spell it for the
- 19 record?
- 20 MS. BAUMGARTNER: Jo Ann
- 21 Baumgartner, B-a-u-m-g-a-r-t-n-e-r.
- JUDGE HILLSON: Okay, and I have

- 1 a written testimony that I've marked as
- 2 Exhibit No. 25.
- 3 (Whereupon the aforementioned
- 4 document was marked for
- 5 identification as Exhibit No. 25)
- 6 JUDGE HILLSON: And there is an
- 7 attachment to that testimony, WFA policy
- 8 paper, Food Safety Requires a Healthy
- 9 Environment, that I've marked as Exhibit No.
- 10 25A.
- 11 (Whereupon the aforementioned
- 12 document was marked for identification as
- 13 Exhibit No. 25A)
- MS. BAUMGARTNER: Okay.
- JUDGE HILLSON: And Mr. English,
- 16 do you have any preliminary questions, or do
- 17 you want her just to read her testimony.
- 18 DIRECT EXAMINATION BY COUNSEL FOR OPPONENTS
- 19 MR. ENGLISH: Let me just
- 20 identify for a moment what 25A is, or have the
- 21 witness identify it.
- 22 Could you are you going to refer

- 1 to that in your testimony and not read 25A,
- 2 correct?
- 3 MS. BAUMGARTNER: Yes.
- 4 MR. ENGLISH: But what is 25A for
- 5 the record?
- 6 MS. BAUMGARTNER: It's a policy
- 7 paper on food safety that we wrote a year ago,
- 8 and it looks at the environmental destruction
- 9 that has occurred since the spinach
- 10 contamination in 2006.
- MR. ENGLISH: Why don't you
- 12 proceed with your statement.
- MS. BAUMGARTNER: Thank you for
- 14 the opportunity to share Wild Farm Alliance's
- 15 perspective on the proposed National Leafy
- 16 Greens Marketing Agreement. WFA is a 10-year-
- 17 old organization promoting a health, viable
- 18 agriculture that protects and restores wild
- 19 nature. We have been drawn into this debate
- 20 on food safety because of the conservation
- 21 conflicts occurring with leafy green
- 22 production on California's Central Coast.

- 1 The marketing of leafy greens to
- 2 increase sales is a fitting undertaking of the
- 3 USDA AMS. However, it is questionable for AMS
- 4 to be involved with a program that markets
- 5 food safety. Inherent contradictions between
- 6 food safety and marketing occur with the
- 7 California LGMA. It's instructive to review
- 8 these challenges, since the California LGMA
- 9 will ultimately be used as a model if the
- 10 national LGMA is created.
- 11 The California LGMA's unstated
- 12 guiding principle is to market the perception
- of safe food rather than always basing
- 14 decisions on best science. Wildlife and
- 15 ecosystems have suffered when perception and
- 16 science have not been aligned.
- 17 The USDA, NRCS and other agencies
- 18 and nonprofits have invested millions in farm
- 19 conservation efforts that are now in jeopardy
- 20 due to the California LGMA and third party
- 21 super metrics.
- 22 Farmers are forced to choose

- 1 between buyers' demands and stewardship
- 2 practices that can improve food safety. UC
- 3 Davis researchers have shown that grasses and
- 4 wetlands have the ability to filter up to 99
- 5 percent of e. coli during rain events. It has
- 6 long been known that windbreaks reduce dust,
- 7 and this is an important function if a source
- 8 of pathogenic dust such as a cattle loafing
- 9 area is nearby. Food safety and marketing
- 10 perception conflicts arise when wildlife are
- 11 targeted because they are attracted to habitat
- 12 that can help to improve the safety of food.
- 13 On the surface the California LGMA
- 14 seems much more reasonable than super metrics
- 15 because it only focuses on animals of
- 16 significant risk, which are defined as cattle,
- 17 sheep, goats, feral and domestic pigs and
- 18 deer. In reality a critical part of their
- 19 metrics refers only to animals. And I have a
- 20 foot note here. You can see Table 5: animals
- 21 at significant risk, activity in the field and
- 22 the California LGMA metrics. They are on the

- 1 website.
- 2 Growers have reported to us that
- 3 auditors penalize their farms for any animals
- 4 present not just animals at risk. By having
- 5 this loophole the California LGMA can market
- 6 the perception that their products are safe to
- 7 the many buyers who demand zero risk. Yet
- 8 there is never zero risk in nature.
- 9 Before the unfortunate E. coli
- 10 0157:h7 spinach contamination in 2006,
- 11 auditors were inspecting leafy green fields
- 12 for the presence of small animals or other
- 13 foreign objects that could be caught up in the
- 14 harvest and end up in the bagged product.
- 15 It's obviously bad publicity for
- 16 mouse or frog parts to be in salad mix. The
- 17 UC Cooperative extension paper reports that to
- 18 date rodents are not a food safety issue, and
- 19 there is a footnote for that exact paper.
- 20 No studies have been done in
- 21 California that show amphibians carry human
- 22 pathogens, and no one to our knowledge has

- 1 been made ill from pathogens on animal parts
- 2 in salad mix.
- 3 Therefore, animal parts are a food
- 4 quality perception issue, not a food safety
- 5 issue. But by checking for rodent and not
- 6 amphibian harborage using its loopholes, the
- 7 California LGMA addresses the perception that
- 8 the food is safer.
- 9 In addition the California LGMA
- 10 includes deer on their animals of significant
- 11 risk list with questionable science to back it
- 12 up. In April 2009, the California Department
- 13 of fish & Game and collaborators released a
- 14 preliminary report that has been put in as an
- 15 exhibit stating that only half of one percent
- of wildlife carry e. coli 0157:H7, and that
- 17 none of the 331 deer tested positive (one
- 18 feral pig, two elk and one coyote did).
- 19 Other studies show that deer were
- 20 found with 0.3, 0.6, 1.8 and 2.4 percent
- 21 e.coli 0157. In Nebraska, Southern states,
- 22 Louisiana, and Kansas respectively. The

- 1 highest percentage, 2.4 percent, was found
- 2 where deer and cattle intermingle. Cattle are
- 3 the major source of e. coli 0157:H7 on the
- 4 landscape.
- 5 For salmonella one percent of deer
- 6 tested positive in Nebraska. Deer are not a
- 7 significant risk, but by including them on the
- 8 California LGMA significant risk list, it
- 9 again improves the perception that the food is
- 10 safer for some buyers.
- 11 One way or the other, to conserve
- or to fence or to destroy non-crop vegetation
- 13 that may attract wildlife is costly for
- 14 farmers because of misquided food safety
- 15 requirements. Through the spring of 2007
- 16 growers now I'm referring to another
- 17 exhibit, the RCD survey growers managing
- 18 140,000 acres on California's Central Coast
- 19 responded to a survey conducted by the
- 20 Resource Conservation District of Monterrey
- 21 County, and noting the California LGMA began
- 22 before that, in the winter of 2007, farmers

- 1 indicated that they have adopted
- 2 environmentally destructive practices in order
- 3 to comply with food safety audit requirements
- 4 and keep their market. Eighty nine percent of
- 5 respondents reported that they have actively
- 6 removed conservation practices for water
- 7 quality and wildlife habitat. One farmer
- 8 reported a \$17,500 loss for deer tracks, and
- 9 several other reported losses because of frogs
- 10 or nearby habitat.
- 11 Survey respondents that use bare
- 12 ground buffers owned or rented a total of
- 13 almost 92,000 acres, 65 percent of the
- 14 respondents. Those that used fencing owned or
- rented a total of about 66,000 acres, which is
- 16 47 percent.
- 17 In another report, the Small Farm
- 18 Center's recent cost analysis of the
- 19 California LGMA showed that farmers had the
- 20 opportunity cost of 1-2 percent of their
- 21 acreage because they were required to have a
- 22 buffer between crops and environmental uses.

- 1 The Center also reported that it cost about
- 2 \$11 an acre for some of those farmers to
- 3 remove non-crop vegetation and about \$17 an
- 4 acre to put up fences.
- 5 Excerpts below from the RCD report
- 6 that growers have serious concerns about the
- 7 conflict.
- Quote from one grower: Our
- 9 experience has been that food safety auditors
- 10 have been very strict about any vegetation
- 11 that might provide habitat. We are very
- 12 concerned about upsetting the natural balance,
- 13 but we have to comply with our shipper's
- 14 requests.
- 15 Another farmer said: There is too
- 16 much fear about food safety, and not enough
- 17 good science. Providing habitat for wildlife
- 18 is very important to me.
- 19 And a third farmer: My concern is
- 20 that they want us to kill all wildlife. This
- 21 is not the threat. We all need wildlife.
- 22 On the next page there is a

- 1 picture showing riparian trees that have been
- 2 cut down, and the caption reads, mature
- 3 riparian trees 100 feet wide and a mile long
- 4 along the Salinas River were removed due to
- 5 food safety concerns.
- 6 Then going on with my text, no one
- 7 knows for certain how the spinach was
- 8 contaminated in 2006. Without concrete
- 9 answers, wildlife have become easy scapegoats.
- 10 Not just industry for the FDA has made broad
- 11 statements backed by faulty science. In FDA's
- 12 recent melon guidance, they state that food
- 13 safety concerns with amphibians, and then cite
- 14 an article about the amphibian chytrid fungus
- 15 which is caused by Chytridiomycosis that's
- 16 a long one a pathogen not linked to any
- 17 human health ailments. And I have a cite for
- 18 that on the CDC website.
- 19 However, in FDA's guide to
- 20 minimize microbial food safety hazards for
- 21 fresh foods and vegetables, they make an
- 22 important and reasonable distinction that is

- 1 not made in the California LGMA. Pro-active
- 2 measures should be taken when there are high
- 3 concentrations of wildlife, such as deer,
- 4 waterfowl in a field, not just single animals.
- 5 Risk increases when there is a large number of
- 6 anything with a small risk.
- 7 Organic farmers are required to
- 8 conserve biodiversity by the National Organic
- 9 Program rule. The definition of organic
- 10 production includes conserving biodiversity
- 11 and the Standard 205.200 requires that farmers
- 12 maintain or improve the natural resources of
- 13 their operation, including soil, water,
- 14 wetlands, woodlands and wildlife. Several
- 15 organic farmers have told WFA that they have
- 16 had to convince their California LGMA auditors
- 17 that habitat helped to ensure food safety, and
- 18 that they could not remove it without fear of
- 19 losing their organic status.
- 20 At the May, 2009 national organic
- 21 standards board meeting a comprehensive plan
- 22 was adopted to better ensure biodiversity

- 1 conservation takes place on organic farms.
- 2 And the USDA AMS fully supported this
- 3 decision.
- 4 The Central Coast Regional Water
- 5 Quality Control Board who spoke yesterday
- 6 requires farmers to protect water quality, and
- 7 has a policy to fine farmers who don't. One
- 8 of the easiest ways to ensure clean water
- 9 leaves the farm is to have all waterways
- 10 vegetated. But as stated, farmers are being
- 11 forced to take out these water quality
- 12 protections, and in addition are contributing
- 13 to the decline of threatened Steelhead, which
- 14 occurs in the Salinas River, as NOAA fisheries
- 15 mentioned.
- 16 Steelhead have many stressors from
- 17 dams and poor river habitat and water quality
- 18 to over-fishing. Adding further pollutants
- 19 from farms without vegetative buffers makes no
- 20 sense, and could push this fish closer to
- 21 extirpation from the Salinas River.
- 22 Besides removing habitat, farmers

- 1 are poisoning frogs. No doubt these farmers
- 2 do not know if they are poisoning a red-legged
- 3 frog or a common invasive bullfrog.
- 4 Besides the problem of marketing
- 5 the perception of safe food, the USDA should
- 6 consider that fresh-cut bagged leafy greens
- 7 are periodically not safe, as Dale Coke
- 8 mentioned, and as Community Alliance with
- 9 Family Farmers will report later on in the
- 10 testimony.
- 11 If the California LGMA was working
- 12 no outbreaks would have occurred since it was
- 13 instituted. One of the most problematic
- 14 aspects of the national LGMA is that it will
- 15 spur the creation of a large number of
- 16 supermetrics around the country.
- 17 Some of the most egregious
- 18 supermetrics require a 450-foot sterile ground
- 19 buffer between crops and habitat. Many of the
- 20 signatories of the LGMA have their own
- 21 supermetrics, and many were created after the
- 22 LGMA as a part of a race to prove that they

- 1 have the best product.
- We also saw the spread of food
- 3 safety metrics to other crops like Brussels
- 4 sprouts after the creation of the California
- 5 LGMA. Because they are proprietary, the exact
- 6 number is not known.
- 7 While some of the companies that
- 8 have endorsed the California LGMA are national
- 9 or international and must already require
- 10 their farmers to conform with their
- 11 supermetrics on those large scales, many
- 12 companies outside of California-Arizona have
- 13 not created supermetrics. If a national LGMA
- 14 were to be established, many of the new
- 15 companies that sign on in a country would
- 16 certainly also create their own supermetrics.
- 17 Not only would this be hard on
- 18 farmers to comply with multiple metrics for
- 19 one harvest, but it would amplify the
- 20 conservation conflict. It should not be
- 21 assumed that the supermetrics will somehow go
- 22 away because the proposed national LGMA would

- 1 have a larger base. If the California LGMA
- 2 was not able to control supermetrics in
- 3 California, it cannot be expected to do so
- 4 nationally without further effort.
- 5 If the national LGMA should
- 6 institute internal controls that do not allow
- 7 the supermetrics to go above and beyond the
- 8 USDA AMS national organic program can be used
- 9 as a model. It only allows entities to use
- 10 their seal that have equal footing.
- 11 Additionally, by doing this, the supermetrics
- 12 would be made transparent, which would reduce
- 13 the proliferation, and ultimately reduce the
- 14 cost for farmers to comply with so many
- 15 standards.
- 16 The Small Farm Center's report
- 17 which I mentioned earlier also pointed out
- 18 that the probably costs for joining the
- 19 California LGMA was on the average of around
- 20 \$100 per acre, which is about 1 percent of the
- 21 gross, with the upper end of about \$150 an
- 22 acre. As a former small farmer, I know that

- 1 expenses such as the LGMA compliance will not
- 2 be passed on to the consumer but will come out
- 3 of the net profits.
- 4 When I mentioned this to Shermain
- 5 Hardesty, the Center's director, she made a
- 6 comparison to the production of iceberg
- 7 lettuce using a recent report just published
- 8 by Karen Klonsky and coauthors for iceberg
- 9 head lettuce. And she says that when
- 10 comparing the LGMA costs to iceberg lettuce,
- 11 the \$100 per acre represents 17.4 percent of
- 12 the net return above total cost, and that the
- 13 \$150 per acre represents 28-1/2 percent. And
- 14 I have a footnote here that explains exactly
- 15 how she got this calculation.
- 16 Not many farmers could make ends
- 17 meet and comply with California LGMA at this
- 18 rate.
- 19 While we do not recommend adoption
- 20 of the national LGMA, the following points
- 21 will reduce its detrimental impact:
- 22 All appointments to the Advisory

- 1 Committee, Technical Committee and Marketing
- 2 Committee should be made by the Secretary,
- 3 including those made in later years when terms
- 4 have expired. Otherwise the national LGMA
- 5 will become an insider group.
- 6 And that is similar to what
- 7 happens with the National Organic Program.
- 8 Nominations are made from the public, and then
- 9 the Secretary decides. So it's not an insider
- 10 group, and it works very well.
- 11 Second bullet: ensure that
- 12 concerns regarding the national LGMA not make
- 13 the same mistakes with loopholes, and the
- 14 definition of "animals of significant risk,"
- 15 (only cattle, sheep, goats, feral and domestic
- 16 pigs should be included), and that these are
- 17 conveyed to the Technical Committee.
- 18 Ensure that studies documenting
- 19 non-crop vegetation filtering pathogens such
- 20 as grasses and wetlands are shared with the
- 21 Technical Committee so that they can craft the
- 22 audit metrics to encourage that these habitat

- 1 components will be maintained.
- 2 Recommend to the Technical
- 3 Committee that a thorough review of wildlife
- 4 research related to food safety is done before
- 5 species are labeled a significant risk.
- 6 Review audit metrics yearly
- 7 instead of as few as every three years which
- 8 is what it says in the Federal Register so
- 9 that new research is considered on a timely
- 10 basis.
- 11 Include a proportional number of
- 12 organic handlers and farmers that reflect the
- 13 percentage of organic leafy greens grown, so
- 14 that the organic industry can protect its
- 15 interests including the conservation of
- 16 biodiversity.
- 17 Include an environmental advocate
- 18 and a consumer advocate on the advisory
- 19 committee.
- 20 Including a representative from
- 21 Fish & Wildlife Service, and California
- 22 Department of Fish & Game, I'm adding, and

- 1 NOAA Fisheries to the Technical Committee in
- 2 order to ensure that common and rare wildlife
- 3 are protected.
- 4 Include a representative from Cal
- 5 EPA state water quality control board to the
- 6 Technical Committee, so that water quality and
- 7 food safety practices can be comanaged.
- 8 Institute internal controls that
- 9 do not allow supermetrics to go above and
- 10 beyond the LGMA seal, and require that they
- 11 become transparent.
- I have added one more bullet:
- 13 advisory and technical committee decisions
- 14 should be made by the consensus minus one,
- 15 which means that minus one would be so that
- 16 the committee does not get stalled, instead of
- 17 by a majority; and that way everyone would
- 18 have equal footing.
- In conclusion, unless a well
- 20 though out and biodiversity positive national
- 21 LGMA that accommodates the needs of small
- 22 farmers is created, we are opposed to this

- 1 process. Besides the degradation of soil,
- 2 water and wildlife habitat wherever leafy
- 3 greens are grown in the U.S., millions of
- 4 public dollars are at stake. Farmers in
- 5 markets that require the LGMA and supermetrics
- 6 will be encouraged to take out previously
- 7 installed conservation practices, and will be
- 8 hesitant to put in new ones that protect our
- 9 natural resources.
- 10 Such misguided food safety
- 11 requirements are counterproductive.
- 12 JUDGE HILLSON: Any further
- 13 direct, Mr. English?
- MR. ENGLISH: Your Honor, just
- 15 moving admission of 25 and 25A.
- 16 JUDGE HILLSON: Okay, Exhibits 25
- 17 and 25A are received into evidence, and I will
- 18 turn it over to the panel for their questions.
- 19 (Whereupon the aforementioned
- 20 documents having previously been
- 21 marked for identification as
- 22 Exhibits 25 and 25A were received

- into evidence)
- 2 CROSS-EXAMINATION BY COUNSEL FOR THE USDA
- 3 MS. SCHMAEDICK: This is Melissa
- 4 Schmaedick with USDA. Good afternoon, Ms.
- 5 Baumgartner. Is that correct?
- 6 MS. BAUMGARTNER: Baumgartner.
- 7 MS. SCHMAEDICK: Okay. So I'm a
- 8 little bit confused here. A large portion of
- 9 your statement speaks to the California state
- 10 program; is that correct?
- MS. BAUMGARTNER: Yes, as an
- 12 example, because it's likely to be used as a
- 13 model for the national.
- 14 MS. SCHMAEDICK: In your opinion
- it's likely to be used as a model?
- 16 MS. BAUMGARTNER: Yes, and the
- 17 way it's written in the Federal Register it
- 18 seems there is enough room for that to happen.
- 19 MS. SCHMAEDICK: Okay. On page
- 20 five you have a number of bulleted
- 21 recommendations. First you state that you do
- 22 not recommend the adoption of the NALGMA, but

- 1 then you have a number of bullet points.
- 2 So my question is, how long have
- 3 you been aware of this process of drafting the
- 4 proposed national agreement?
- 5 MS. BAUMGARTNER: We submitted
- 6 comments back when back in the December or
- 7 November of 2007 to the USDA when the proposed
- 8 rule was put out.
- 9 MS. SCHMAEDICK: I think I'm
- 10 not certain --
- 11 MS. BAUMGARTNER: The whole
- 12 concept, there was a request for input to the
- 13 USDA on whether we should have a national
- 14 leafy green marketing agreement. And many
- 15 people, farmers and others, commented on that.
- 16 I'm sure you are familiar with it. You got
- 17 3,500 comments.
- 18 MS. SCHMAEDICK: I believe that
- 19 you are speaking to a separate rulemaking
- 20 proceeding. So you might want to confer and
- 21 let us know which proceeding you are speaking
- 22 to. To my knowledge the notice of public --

- 1 MS. BAUMGARTNER: Well, for the
- 2 specific one that Western Growers and others
- 3 have put forward, I was made aware of that
- 4 sometime this spring.
- 5 You and I spoke in the spring
- 6 about it.
- 7 MS. SCHMAEDICK: Yes, that's
- 8 correct.
- 9 And were you encouraged at all to
- 10 provide input or suggestions or describe your
- 11 concerns to the proponent group?
- MS. BAUMGARTNER: I did email
- 13 Hank Giclas from Western Growers and told him
- 14 that we weren't in support of it. Later on we
- 15 and Defenders of Wildlife in a similar letter
- 16 the state board sent a letter to the
- 17 California Leafy Green Marketing Agreement and
- 18 suggested multiple changes, many of which are
- 19 reflected in my presentation today, saying
- 20 that we would like these changes because we
- 21 knew it was going to be used as a model for
- 22 the national program, and wanted to get it

- 1 right here in California.
- 2 MS. SCHMAEDICK: Was that
- 3 information shared with the proponent group
- 4 that was drafting this proposed agreement?
- 5 MS. BAUMGARTNER: Western Growers
- 6 was part of the proponent group.
- 7 MS. SCHMAEDICK: And were you
- 8 given other opportunities to be involved in
- 9 having an impact on the --
- 10 MS. BAUMGARTNER: That was a
- 11 significant letter that we put together, and
- 12 we got a response saying, I think, from LGMA,
- 13 saying we should talk to Hank, and I called
- 14 Hank.
- MS. SCHMAEDICK: Did you or your
- 16 organization have the opportunity to meet with
- 17 USDA representatives and express your
- 18 concerns?
- MS. BAUMGARTNER: Yes.
- 20 MS. SCHMAEDICK: So do you feel
- 21 like you had the opportunity to voice your
- 22 concerns?

- 1 MS. BAUMGARTNER: Yes.
- 2 MS. SCHMAEDICK: On the first
- 3 bullet point on page five, you state that all
- 4 opponents to the advisory committee, technical
- 5 committee and marketing committee should be
- 6 made by the Secretary, including those made in
- 7 later years when terms have expired.
- 8 So my first question is, what is
- 9 your understanding of the committee member
- 10 selection and nomination and selection process
- 11 for the advisory committee?
- MS. BAUMGARTNER: The Secretary
- 13 selects the handlers and producers, and then
- 14 they nominate the rest of the people. And the
- 15 advisory committee is that right? Oh you're
- 16 asking me. I can read it here. It says,
- 17 committee shall consist of 22 members, each of
- 18 whom shall have an alternate who shall have
- 19 the same qualifications of a member for whom
- 20 he or she is an alternate. Blah blah blah.
- 21 You don't want to hear me read all this, I'm
- 22 sure.

- 1 MS. SCHMAEDICK: Well, maybe
- 2 that's a question we can deal with at a
- 3 later point.
- 4 And then you added a bullet point
- 5 that's not in your statement, but you added it
- 6 verbally to your testimony on that consensus
- 7 minus one. Can you explain that a little bit
- 8 more in detail? I'm not exactly sure what
- 9 your recommendation is.
- 10 MS. BAUMGARTNER: When any of
- 11 these committees meet, that all their members
- 12 have consensus would mean all their members
- 13 have equal footing, and either they all agree
- 14 or they don't agree. But consensus minus one
- 15 allows for that little room for somebody who
- 16 is holding out and holding the rest of the
- 17 whole group kind of hostage. So it allows for
- 18 decisions to move forward.
- 19 MS. SCHMAEDICK: And is that
- 20 something that you are submitting as a
- 21 proposed addition to your bullet points here?
- MS. BAUMGARTNER: Yes.

- 1 MS. SCHMAEDICK: The first
- 2 sentence under your conclusion says, unless a
- 3 well thought out and biodiversity positive
- 4 NLGMA that accommodates the needs of small
- 5 farmers is created, we are opposed to this
- 6 process. I am wondering what parts of the
- 7 proposed language lead you to the conclusion
- 8 that accommodation of small farmers and
- 9 biodiversity would not be included?
- 10 MS. BAUMGARTNER: I'm assuming as
- 11 I said previously that the national LGMA will
- 12 use the California LGMA as a model, and that
- 13 model needs a lot of improvement.
- MS. SCHMAEDICK: Okay, thank you.
- JUDGE HILLSON: Ms. Staley.
- MS. STALEY: Good afternoon.
- 17 Kathleen Staley.
- 18 You talk a lot about animals of
- 19 significant risk. Are you familiar with the
- 20 Food & Drug Administration Guide to minimize
- 21 microbial food safety hazards for fresh fruits
- 22 and vegetables?

- 1 MS. BAUMGARTNER: Yes.
- 2 MS. STALEY: One of the areas of
- 3 concern is animal feces. And if you will
- 4 allow me, I'll read: animal feces is a known
- 5 source of pathogens that can cause food borne
- 6 illness. It doesn't specify any particular
- 7 animal. It then later goes on and talks
- 8 about, in addition, high concentrations of
- 9 wildlife, such as deer or waterfowl, in a
- 10 field, may increase the potential for
- 11 microbial contamination. This is the FDA Food
- 12 Safety Guidance.
- So I'm confused about your concern
- 14 about animals not being a risk, their feces.
- MS. BAUMGARTNER: Well, I did
- 16 quote that exact guide and said that high
- 17 concentrations were a problem when even
- 18 animals that were not at significant risk are
- 19 present. So I think that that guide is much
- 20 better written I'm glad to see this referred
- 21 to in the Federal Register, and I think that
- 22 wording should be included in the LGMA.

- 1 MS. STALEY: My next question is
- 2 about, if you could help me understand on page
- 3 four you talk about the USDA AMS National
- 4 Organic Program can be used as a model. It
- 5 only allows entities to use their seal that
- 6 have equal footing.
- 7 I'm not sure I understand how that
- 8 ties into this proposal National Leafy Greens
- 9 Marketing Agreement?
- 10 MS. BAUMGARTNER: Before the
- 11 organic federal rule came into being there
- were a lot of certification programs, organic
- 13 programs, that went further than the NOP, and
- 14 some weren't didn't address as many issues.
- 15 So when the NOP came into being it stated that
- 16 all if you want to use the USDA organic seal
- 17 you had to address all the same issues, every
- 18 certifier did, or they couldn't be accredited
- 19 by the USDA.
- 20 So similarly if a national LGMA
- 21 comes into being it will use a seal, and that
- 22 seal could define what is in it. So it could

- 1 say if farmers are don't have filter strips
- 2 for instance that protect from pathogens that
- 3 are in water, because these filter strips are
- 4 filtering out pathogens, then they could
- 5 eliminate some of these supermetrics that say
- 6 you should have 450 feet of sterile ground
- 7 buffer. It seems like it would make sense.
- 8 MS. STALEY: Okay, thank you.
- 9 JUDGE HILLSON: Anyone else? Ms.
- 10 Carter.
- MS. CARTER: Good afternoon.
- 12 Antoinette Carter with the USDA. I just had
- 13 one question for you. Could you describe or
- 14 explain briefly the membership composition for
- 15 Wild Farm Alliance?
- 16 MS. BAUMGARTNER: We are not a
- 17 membership organization. We do have a
- 18 newsletter that we send to about 2,000 people
- 19 who have signed up to receive it, so we keep
- 20 them updated on issues.
- 21 MS. DESKINS: Charlene Deskins,
- 22 USDA. You said in your testimony that you

- 1 used to be a farmer. Are you currently
- 2 farming?
- 3 MS. BAUMGARTNER: No, I'm not
- 4 currently farming.
- 5 MS. DESKINS: Also in your
- 6 testimony you talk about the California leafy
- 7 greens marketing agreement and the effects
- 8 it's had on the Central Coast. I really
- 9 don't know a lot about the California
- 10 agreement. Does it only cover Central
- 11 California?
- MS. BAUMGARTNER: No, it covers
- 13 all of California, anybody who grows leafy
- 14 greens. The reason why the report we wrote
- 15 focused mainly on that and I mention that is
- 16 because we are here in this area. We are
- 17 based in Watsonville which is only 45 minutes
- 18 away, and another probably 45 minutes from
- 19 here is where the spinach contamination
- 20 occurred. So this is kind of ground central.
- 21 There have been a lot of conservation
- 22 conflicts here because of that, but it is not

- 1 just here. It's spreading. We've heard that
- 2 it's down in Imperial Valley. We have heard
- 3 that there are some conflicts in Arizona.
- 4 MS. DESKINS: Also in terms of
- 5 leafy greens in California, is the majority of
- 6 them grown in the central California area, if
- 7 you know?
- 8 MS. BAUMGARTNER: I think that is
- 9 right. There is also a lot grown down in
- 10 Imperial Valley.
- 11 MS. DESKINS: Also you testified
- 12 that one of the concerns you had about this
- 13 National Leafy Greens Marketing Agreement is
- 14 that it would spur more supermetrics. Can you
- 15 tell us how the agreement would do that
- 16 specifically?
- 17 MS. BAUMGARTNER: Well, we saw
- 18 supermetrics started to increase in 2007.
- 19 Part of that was undoubtedly because of the
- 20 spinach contamination. But part of it had to
- 21 do with the leafy green marketing agreement
- 22 being created. There was a model that private

- 1 companies could take and upgrade and say, no,
- 2 my product is better, you should buy from me.
- 3 And there has been an arms race, which is
- 4 unfortunate because it's an arms race that has
- 5 been scapegoating wildlife and conservation.
- 6 MS. DESKINS: Can I ask you about
- 7 this particular national agreement. Is there
- 8 any section in here or any part of it that you
- 9 would see causing this supermetrics effect
- 10 nationally if it got approved?
- 11 MS. BAUMGARTNER: Well, I think
- 12 the same thing is going to happen, what
- 13 happened here. The company, once they sign on
- 14 to this agreement, will realize that all these
- other companies have their own supermetrics,
- 16 and they better step up to the plate and write
- 17 their own.
- 18 MS. DESKINS: That's all the
- 19 questions I have, thank you.
- JUDGE HILLSON: Anyone else on
- 21 the panel have any questions? How about the
- 22 opponents?

- 1 MR. RESNICK: Thank you, Jason
- 2 Resnick.
- 3 Thank you for your testimony
- 4 today. You mentioned that you believe that
- 5 there are flaws in the California leafy green
- 6 marketing agreement. Is that fair?
- 7 MS. BAUMGARTNER: Yes.
- 8 MR. RESNICK: And have you been
- 9 here since the beginning of the testimony,
- 10 since the hearings began?
- 11 MS. BAUMGARTNER: Yes, although I
- 12 stepped out periodically.
- 13 MR. RESNICK: Did you hear
- 14 testimony to the effect that it is the intent
- 15 of the department or the intent of the
- 16 proponent group to institute a framework where
- 17 there would be a co-management of food safety
- 18 and resource concerns?
- MS. BAUMGARTNER: Yes.
- 20 MR. RESNICK: Do you feel that
- 21 the California leafy green marketing agreement
- 22 has that co-management in place?

- 1 MS. BAUMGARTNER: I think they
- 2 stopped short of where they need to go.
- 3 MR. RESNICK: So if in fact the
- 4 national agreement were to have a more robust
- 5 co-management of preservation of natural
- 6 resources and food safety, would that be an
- 7 improvement over the status quo?
- 8 MS. BAUMGARTNER: Yes.
- 9 MR. RESNICK: And did you hear
- 10 the testimony to the effect that if there were
- 11 a national agreement, that the California
- 12 agreement would be rendered obsolete?
- MS. BAUMGARTNER: I had heard
- 14 that that was the probable way it would go,
- 15 but it wasn't for sure.
- 16 MR. RESNICK: And would it be
- 17 fair to say that then the national agreement
- 18 presents an opportunity to improve upon the
- 19 status quo?
- MS. BAUMGARTNER: That's a
- 21 possibility.
- 22 MR. RESNICK: That's all I have.

- 1 Thank you.
- JUDGE HILLSON: Any further
- 3 questions? Any questions from the audience?
- 4 Any redirect?
- 5 REDIRECT EXAMINATION
- 6 MR. ENGLISH: Charles English to
- 7 clarify.
- 8 In answering the questions from
- 9 the government panel you indicated that you
- 10 submitted some comments. And then I guess
- 11 there was some confusion about what that was.
- 12 Did you submit those comments in response to
- 13 Agricultural Marketing Services advanced
- 14 notice of proposed rulemaking in 2007?
- MS. BAUMGARTNER: Yes. Thank
- 16 you.
- 17 MR. ENGLISH: So that was this
- 18 proceeding, effectively? It was the advanced
- 19 version of this proceeding, correct?
- 20 MS. BAUMGARTNER: Yes.
- 21 MR. ENGLISH: And those comments
- 22 were available to everybody including

- 1 proponents, correct?
- 2 MS. BAUMGARTNER: Yes.
- 3 MR. ENGLISH: In fact all the
- 4 comments that were submitted there, all 3,500,
- 5 could have been used by proponents in drafting
- 6 the agreement, correct?
- 7 MS. BAUMGARTNER: That's right.
- 8 MR. ENGLISH: Thank you.
- JUDGE HILLSON: Thank you for
- 10 your testimony. You may step down.
- 11 (Witness excused)
- JUDGE HILLSON: Ms. Reid, you're
- 13 the next person I promised an opportunity to
- 14 testify.
- 15 And you have already submitted
- 16 copies of your statement, right? Okay, and I
- 17 am going to mark your statement as Exhibit No.
- 18 26.
- 19 (Whereupon the aforementioned
- 20 document was marked for
- 21 identification as Exhibit No. 26)
- Whereupon,

- 1 CLAUDIA REID
- 2 Was called as a witness by counsel for the
- 3 opponents and, after having been first duly
- 4 sworn, was examined and testified as follows:
- JUDGE HILLSON: Please state your
- 6 name and spell it for us.
- 7 MS. REID: My name is Claudia
- 8 Reid, C-l-a-u-d-i-a R-e-i-d.
- JUDGE HILLSON: Okay, Ms. Reid,
- 10 you have a statement that I have marked as
- 11 Exhibit No. 26, and I think you are going to
- 12 read that statement, is that correct?
- 13 MS. REID: I'm going to read
- 14 parts of that statement. In the interests of
- 15 time I have deleted quite a few paragraphs.
- 16 JUDGE HILLSON: You are going to
- 17 submit the entire statement?
- 18 MS. REID: I will submit the
- 19 entire statement, but I'm only going to
- 20 verbally hit some points that haven't already
- 21 been made.
- JUDGE HILLSON: Go right ahead.

- 1 DIRECT EXAMINATION
- 2 MS. REID: Thank you very much
- 3 for the opportunity to testify and comment on
- 4 the proposed marketing agreement, No. 970,
- 5 leafy green vegetables handled in the United
- 6 States.
- 7 My name is Claudia Reid. I'm the
- 8 policy and program director for CCOF, Inc.
- 9 CCOF stands for California Certified Organic
- 10 Farmers, but we certify more than California
- 11 and we certify more than farms. CCOF is a
- 12 nonprofit organization founded in 1973, and is
- 13 one of the oldest and largest organic
- 14 certification agencies in North America.
- 15 Since the development of the
- 16 National Organic Program rule in 2002 we
- 17 comprise three separate organizations. I work
- 18 for the trade association, CCOF, Inc. in
- 19 addition we have a certification arm, CCOF
- 20 LLC, and we have a 501(c)(3) foundation.
- 21 We certify 2,300 organic producers
- 22 and processors. We have 350 supporting

- 1 members. We certify in 35 states in America,
- 2 and three other countries.
- 3 Of the 2,300 members that we
- 4 certify, 74 percent are farmers/producers, and
- 5 26 percent are processors. Because of the
- 6 diversity of our clientele with regard to both
- 7 type of business and size of operation, we
- 8 represent a few members who strongly support
- 9 the development of this National Leafy Greens
- 10 Marketing Agreement and many members who
- 11 strongly oppose the development of the NLGMA.
- 12 A few of our processor members are
- integrally involved in California's LGMA, and
- 14 more processor members are also signatories to
- 15 the California LGMA. Ouite a few of our
- 16 farmer and producer members have been
- 17 struggling with the impact of the California
- 18 LGMA. As a certification organization we are
- 19 also sometimes frustrated by the California
- 20 LGMA since it is often in direct conflict with
- 21 organic practices.
- 22 My comments I want to tell you

- 1 about the process that I used to write these
- 2 comments. I have a government affairs
- 3 committee. We are a committee run
- 4 incorporated side of the business, trade
- 5 association. And I have a subcommittee or
- 6 task force on food safety. And I also provide
- 7 information to the board.
- 8 So I took OTA's initial comments,
- 9 sent it out to people, asked for their input.
- 10 And much of the comment that you hear today is
- 11 a compilation of report back from many of our
- 12 members on both sides of the issue. The
- 13 result is that I was asked specifically that
- 14 CCOF remain neutral on whether or not there
- 15 should be a National Leafy Greens Marketing
- 16 Agreement.
- 17 Despite that, because I like to
- 18 talk, we do have some concerns and some
- 19 comments on the process.
- 20 Most of the concerns come out of
- 21 previous testimony that you have already heard
- 22 about the potential conflict between

- 1 certifying somebody to an organic standard and
- 2 upholding a metric that is contained in the
- 3 California leafy green marketing act, or a
- 4 supermetric.
- 5 In the interests of time and
- 6 because I value this process, I don't want to
- 7 go into verbal detail about the California
- 8 leafy green marketing act. Suffice it to say
- 9 that just like everybody else who has sat
- 10 here, we have concerns based on what happens
- 11 in California about what might happen on a
- 12 national level, and we would welcome the
- 13 opportunity for making the national process
- 14 inclusive and transparent.
- 15 Although the food safety
- 16 quidelines and conservation practices should
- 17 not be mutually exclusive like somebody else -
- 18 I think it was Steve actually mentioned
- 19 earlier, there is a great deal of pressure by
- 20 inspectors, and we also have clients who have
- 21 reported to us being pressured by food safety
- 22 inspectors to remove biodiverse parts of their

- 1 farming practice.
- We have had quite a few
- 3 experiences with our certification staff
- 4 having to work with our members to make sure
- 5 they understand what it says in the NOP.
- 6 There is some reference in my testimony to the
- 7 specific sections of the NOP that speak to the
- 8 definition of natural resources, and the
- 9 definition of biologically diverse systems.
- 10 So I'm not going to go into great
- 11 detail about the scorched earth policies; you
- 12 all heard them earlier. We would also like to
- 13 acknowledge that the National Organic Program
- 14 really needs to work with its certifiers to
- 15 help develop policies and guidelines on
- 16 biodiversity so that as we move forward in the
- 17 world of food safety regulation development,
- 18 that certification agents understand how to
- 19 resonate that with the National Organic
- 20 Program. So that is a big effort that we will
- 21 be undertaking in the near future with the
- 22 National Organic Program, and we hope to be

- 1 able to do that work in conjunction with the
- 2 work that is happening on the National Leafy
- 3 Greens Marketing Agreement.
- 4 Following for the rest of my
- 5 testimony are the points that we have pulled
- 6 from the OTA that's the Organic Trade
- 7 Association recommendations. You can read
- 8 them there. I don't really want to read them
- 9 all into the verbal record because of my -
- 10 and you have heard almost every single one of
- 11 them previously today. I wasn't here
- 12 yesterday, but I'm assuming that you have
- 13 heard most of these today.
- 14 And I guess the one that I would
- 15 like to emphasize is that we also would like
- 16 to request that the leafy green vegetable
- 17 administrative committee have a proportionate
- 18 number of organic representatives on it. And
- 19 I was pleased to hear Scott remind us all that
- 20 the California committee has 20 percent
- 21 organic, and I think that is a really evidence
- 22 of how something can work.

- I need to make it clear for the
- 2 record that we Joanne, you mentioned the
- 3 comments that you submitted back in 2007, was
- 4 it? I think CCOF was a signatory to that
- 5 group letter at that time, to clarify that.
- 6 That's the end of my verbal
- 7 testimony, and I welcome your comments and
- 8 questions.
- JUDGE HILLSON: Panel? Oh you
- 10 don't have anything.
- Go ahead, Ms. Deskins.
- MS. DESKINS: I have a question.
- 13 You testified that there were comments made by
- 14 another group that would be in your testimony.
- 15 Did you get it from the Internet?
- MS. REID: Oh, no, we belong to
- 17 the Organic Trade Association.
- MS. DESKINS: Okay.
- 19 MS. REID: We also belong to some
- 20 of these organizations out here, and they
- 21 belong to us. We are reciprocal members of
- 22 Western Growers and the Farm Bureau.

- 1 MS. DESKINS: My question is, I'm
- 2 trying to find where that is. Is there a
- 3 citation to a letter or some other is it in
- 4 your statement somewhere?
- 5 MS. REID: No, just in my verbal
- 6 statement. So if you look at the top of page
- 7 three, following our comments on specific
- 8 sections of the draft and the LGMA proposal,
- 9 and the citations in italics, so the section
- 10 numbers, those are all --
- 11 MS. DESKINS: Here is my
- 12 question. You referred to the fact that you
- 13 got comments from some other place and that we
- 14 could see them there. I am trying to find out
- 15 for the record what is a citation to where
- 16 that other place is? Is it just your
- 17 testimony, or are you referring to another
- 18 source?
- 19 MS. REID: No, I'm sorry for not
- 20 being clear. I sent out a draft of this
- 21 document to a number of my members, some of
- 22 whom liked this plan and some of whom hate it.

- 1 I received a lot of response back. I tweaked
- 2 it and came up with these verbal comments, and
- 3 in that process was asked specifically that
- 4 CCOF be neutral on the development of a
- 5 National Leafy Greens Marketing Agreement
- 6 because we represent people on both sides of
- 7 the issue, and we represent large and small
- 8 scale and farmers and processors.
- 9 MS. DESKINS: My question was, in
- 10 your testimony you said you were referring to
- 11 another source. I'm trying to find out what
- 12 the citation is for that other source?
- 13 MS. REID: The trade association
- 14 provided me with their draft comments.
- 15 MS. DESKINS: Which association?
- 16 MS. REID: The Organic Trade
- 17 Association.
- 18 MS. DESKINS: Okay, and that is
- 19 not available any place else? You are just
- 20 saying orally that's what they did?
- MS. REID: Well, my counterpart
- 22 at OTA sent me their draft in email. They are

- 1 preparing theirs for later on.
- MS. DESKINS: Okay, thank you.
- JUDGE HILLSON: Anything else
- 4 from the panel?
- 5 Okay, proponents?
- 6 CROSS-EXAMINATION BY COUNSEL FOR THE OPPONENTS
- 7 MR. GICLAS: Ms. Reid, thank you
- 8 for your testimony.
- 9 I do have a question. I am just
- 10 trying to track this page three where you have
- 11 got some of these sections highlighted, and
- 12 comments underneath them. And the numbers
- 13 aren't tracking for me.
- MS. REID: I know.
- MR. GICLAS: I mean for example,
- 16 about midway through the page it says,
- 17 Sections 970.66 and 970.67, which I think are
- 18 verification audits and audit metrics, it
- 19 says, please see comments under Section 970.9.
- 20 MS. REID: That's a mistake.
- 21 MR. GICLAS: But I don't know
- 22 where 970.9 is.

- 1 MS. REID: You should strike the
- 2 sentence that says 970.66, and 970.67, and the
- 3 sentence that says, please see comments under
- 4 Section 970.9, because this was a
- 5 collaborative effort that went on until three
- 6 hours ago. The section referred to was oh,
- 7 sorry.
- 8 MR. GICLAS: Then I have another
- 9 question about Section 970.46.
- MS. REID: Yes.
- 11 MR. GICLAS: Section 970.46 is
- 12 the market review board. And the comments
- 13 that are here are referencing additional
- 14 comments under 970.45 through -54, and I don't
- 15 see that set of comments in this item.
- 16 MS. REID: The very top of page
- 17 three, Sections 970.40 54, we talk about
- 18 having organic certified organic on the
- 19 leafy green vegetable administrative
- 20 committee. And then we have another paragraph
- 21 that talks about the impact on small scale and
- 22 diversified farming operations, and so the

- 1 sentence down below, under 970.46, refers to
- 2 those two paragraphs above. I apologize if
- 3 the numbering is wrong.
- 4 MR. GICLAS: Okay, the numbering
- 5 is wrong.
- 6 MS. REID: I do plan to correct
- 7 this and submit it formally.
- 8 MR. GICLAS: So is the comment
- 9 that you are trying to make that the marketing
- 10 review board should contain organic
- 11 representatives?
- MS. REID: That was a suggestion
- 13 by one of our members. I realize that is
- 14 putting a square peg in a round hole to some
- 15 extent, so I don't know if the marketing
- 16 committee, or the market review board is the
- 17 right place to capture a suggestion to somehow
- 18 have really small scale people involved. But
- 19 if that is the right place, we'd like to see
- 20 it happen.
- 21 MR. GICLAS: Okay. Then I have
- 22 one other question, and that is about the

- 1 reference right above it, 970.75. This says
- 2 any promotion program should provide a generic
- 3 promotion under Section 970.75. And you've
- 4 read the agreement, correct?
- 5 MS. REID: The organic leafy
- 6 greens, yes.
- 7 MR. GICLAS: Right. Are you
- 8 aware, or is it your understanding, that there
- 9 are provisions for generic promotions for
- 10 leafy greens contained in the National
- 11 Marketing Agreement?
- 12 MS. REID: Not currently. I
- 13 didn't read them in the current proposal, and
- 14 I think what this sentence is referring to is
- 15 that we would like to see it added into the
- 16 current proposal. And into whatever goes
- 17 forward. I'm assuming that part of this
- 18 process you will come back with another
- 19 proposal.
- 20 MR. GICLAS: So you are
- 21 advocating that there should be generic
- 22 promotion included as part of the national

- 1 marketing agreement?
- MS. REID: Yes, this specific
- 3 request came from the Organic Trade
- 4 Association, and yes, that is what they would
- 5 like to see.
- 6 MR. GICLAS: Thank you.
- 7 JUDGE HILLSON: Any other
- 8 questions for this witness?
- 9 Okay, thank you for testifying,
- 10 Ms. Reid, you may step down.
- 11 (Witness excused)
- JUDGE HILLSON: And Ms.
- 13 Odabashian. And I will receive Exhibit 26,
- 14 which is Ms. Reid's written testimony.
- 15 (Whereupon the aforementioned
- document having previously been
- 17 marked for identification as
- 18 Exhibit No. 26 was received into
- 19 evidence)
- 20 MR. RESNICK: Your Honor, this is
- 21 Jason Resnick, as a housekeeping matter, do
- 22 you have any other individuals listed as

- 1 required?
- JUDGE HILLSON: More people
- 3 coming up to me every time, people who didn't
- 4 come up to me in the morning came up to me in
- 5 the afternoon.
- 6 MR. RESNICK: I'm asking the
- 7 question, because the proponent group have a
- 8 couple of people in that situation?
- 9 JUDGE HILLSON: I had Mr.
- 10 Hardison and Mr. Giannini both tell me that it
- 11 was today or bust basically. And I don't know
- 12 if oh I'm sorry, I apologize, and I also
- 13 have Mr. Shimek. I have no idea how to
- 14 pronounce it. He told me, I've forgotten.
- 15 He's next. He's after this witness. And then
- 16 I was going to talk with everybody and see
- 17 what we should do next.
- 18 But we'll get our current witness
- 19 sworn in, and we'll move on.
- Whereupon,
- 21 ELISA ODABASHIAN
- 22 Was called as a witness by counsel for the

- 1 opponents and, after having been first duly
- 2 sworn, was examined and testified as follows:
- JUDGE HILLSON: Can you please
- 4 state your name and spell it for the record.
- 5 MS. ODABASHIAN: Elisa
- 6 Odabashian, O-d-a-b-a-s-h-i-a-n.
- 7 JUDGE HILLSON: Okay, and I have
- 8 marked your written statement as Exhibit No.
- 9 27.
- 10 (Whereupon the aforementioned
- 11 document was marked for identification as
- 12 Exhibit No. 27)
- JUDGE HILLSON: Do you want to
- 14 read that statement?
- MS. ODABASHIAN: Yes, please.
- JUDGE HILLSON: Go right ahead.
- 17 DIRECT EXAMINATION
- 18 MS. ODABASHIAN: Good afternoon.
- 19 My name is Lisa Odabashian, and I am the
- 20 director of the West Coast office of Consumers
- 21 Union, the nonprofit publisher of Consumer
- 22 Reports magazine, and Consumer Reports online,

- 1 Consumer Reports on Health, Consumer Reports
- 2 Money, and Consumer Reports Best Buy Drugs,
- 3 with a subscription base of 8.3 million
- 4 subscribers.
- In addition we have 800,000
- 6 consumer e-activists who have contacted us and
- 7 want to be kept up to date on our issues and
- 8 take action on our issues; and we have 445,000
- 9 members who voted in the 2009 board of
- 10 directors elections that's how we define
- 11 members at Consumers Union, subscribers who
- 12 choose to vote on the board, so that is
- 13 445,000 members.
- I do appreciate this opportunity
- to speak to the USDA about the leafy green
- 16 marketing agreement that is being proposed on
- 17 the national level. We also applaud the
- industry's concern with improving safety.
- 19 The broad consumption of leafy
- 20 greens is essential to the health of consumers
- 21 both for proper nutrition and to fight the
- 22 obesity epidemic in this country. But we

- 1 oppose this plan, this proposal.
- We oppose it in the same way that
- 3 we opposed the leafy green marketing agreement
- 4 in California two years ago, and we oppose
- 5 marketing agreements in general as a way of
- 6 creating food safety standards. We don't
- 7 think it will be the it will have the
- 8 desired result that you want to create the
- 9 highest level of safety for leafy greens for
- 10 the following four reasons, some of which have
- 11 already been said, but I will say them again.
- 12 First, allowing leafy green
- industry to set its own standards and to
- 14 oversee those standards without public input
- 15 is undemocratic and contrary to key legal
- 16 precedents. Historically in this country the
- 17 way food safety problems have been addressed
- 18 is to have Congress or a state legislator pass
- 19 a law directing an agency to create food
- 20 safety standards that through a process that
- 21 allows meaningful input by a wide array of
- 22 public participants.

- 1 This process has the beneficial
- 2 effect of including a wide array of people
- 3 from different venues, with expertise that may
- 4 not have been considered by the drafters of
- 5 the regulations, of the standard. This
- 6 proposed marketing agreement would allow the
- 7 leafy green industry to develop its own safety
- 8 standards virtually all by itself with only a
- 9 minor tip of the hat to the public with regard
- 10 to input.
- 11 When it comes to product safety
- 12 consumers are rarely benefitted when industry
- 13 polices itself.
- 14 While the Secretary of Agriculture
- 15 would have to put the recommendations on the
- 16 safety standards out for public comment, we
- 17 believe that at that late stage in the game
- 18 there would be very little opportunity for
- 19 meaningful input, and to create meaningful
- 20 change. And in addition the proposal does not
- 21 lay out what would be reviewed or how long;
- 22 it's vague in that regard.

- 1 So the proposed LGVMA would set up
- 2 an administrative committee, a technical
- 3 review board, and a marketing review board to
- 4 propose food safety standards to the Secretary
- 5 of Ag, oversee the implementation of those
- 6 safety standards, and promote itself to the
- 7 public, all of which would be overwhelmingly
- 8 made up of and chosen by industry
- 9 representatives.
- 10 The 23 member administrative
- 11 committee would include only one public
- 12 representative, and that one chosen by the
- 13 leafy green industry.
- 14 The 14 member technical review
- 15 board would include five industry
- 16 representatives, five food safety experts from
- 17 agriculture schools all of whom would be
- 18 selected by the industry and one
- 19 representative each from USDA, EPA, and two
- 20 from FDA, not an independent non-governmental
- 21 food safety consumer representative in the
- 22 bunch.

- 1 The nine-member market review
- 2 board tasked with advising on how to, quote,
- 3 maximize consumer confidence through market
- 4 acceptance and recognition of the program, end
- 5 quote, would also be made up of and/or chosen
- 6 by industry.
- 7 Including the three consumer
- 8 representatives, none of whom would have a say
- 9 with regard to safety standards.
- 10 Latter committee, the one that is
- 11 promoting itself to the public, reminds us
- 12 that part of USDA's charge is promotion of the
- industry, and for that reason USDA is neither
- 14 wholly independent, nor the most appropriate
- 15 overseer of leafy green safety.
- 16 From a consumer perspective, it is
- 17 absolutely obvious that there is no way to
- 18 ensure safe standards, or ensure that there is
- 19 quote science-based, scaleable and regionally
- 20 applicable, when they are being developed by
- 21 committees made up of and controlled by
- 22 industry, which has an inherent financial

- 1 stake in reducing production costs. Often
- 2 safety standards cost.
- 3 The proposed rule states that,
- 4 quote, the metrics would reflect good
- 5 agricultural practices and good manufacturing
- 6 practices, such a those developed by FDA. The
- 7 ambiguous word, reflect, suggests that the
- 8 committee can deviate from FDA's GAPs and GMPs
- 9 if they so desire, possibly weakening them and
- 10 changing them in ways that reflect industry
- 11 needs over the needs of consumers, organic and
- 12 sustainable producers, or the environment.
- We have only to look at the
- 14 standards developed by the larger handlers who
- 15 oversee safety metrics for the California
- 16 leafy green marketing agreement to see what
- 17 can go wrong from sustainable agriculture and
- 18 ecological perspectives, when there are not -
- 19 there is no broader public input into the
- 20 development of safety standards, or
- 21 independent government oversight of them.
- 22 And the story on the front page of

- 1 the San Francisco Chronicle on July 13th, many
- 2 people have referred to what it showed. But
- 3 it exposed a range of environmental problems
- 4 caused by standards set by the California
- 5 LGMA. One farmer near Watsonville told of the
- 6 need to create sterile buffers around his
- 7 field with no vegetation, water, or wildlife
- 8 of any kind permitted. Previously he had
- 9 planted hedges of fennel and flowering
- 10 cilantro around his fields to harbor
- 11 beneficial insects as an alternative to
- 12 pesticides, but those plants had to be ripped
- 13 out.
- One of his fields showed evidence
- 15 of deer tracks, but no evidence of plants
- 16 having been eaten. He was forced to destroy
- 17 all crops within 30 feet of each side of the
- 18 tracks.
- The environmentalists from the
- 20 Central Coast Regional Water Quality Review
- 21 Board spoke of demands to create 450-foot dirt
- 22 buffers around fields which removes the agency

- 1 primary means of preventing pollution from
- 2 entering streams and rivers.
- 3 Other farmers were told that using
- 4 ponds to recycle irrigation water was unsafe,
- 5 so they were forced to bulldoze them. Another
- 6 farmer in Santa Cruz County was told that no
- 7 children younger than five years old could be
- 8 allowed on his farm for fear of contamination
- 9 from diapers.
- 10 The California leafy green
- 11 marketing agreement's scorched earth tactics
- 12 as they call them do not promote farming that
- is sustainable, organic, or ecologically
- 14 rationale. Furthermore, despite the existence
- 15 of the leafy green marketing agreement in
- 16 California, we continue to have incidents of
- 17 contamination in leafy greens, such as this
- 18 week's recall of loose spinach because of
- 19 potential salmonella contamination.
- 20 A second major concern for
- 21 Consumers Union is that since participation in
- 22 the marketing agreement is voluntary, not all

- 1 leafy green growers and processors would be
- 2 covered. Consumers cannot therefore be
- 3 assured that all leafy greens that reach the
- 4 marketplace will be as safe as possible.
- 5 The Arizona leafy greens marketing
- 6 agreement for example only covers 75 percent
- 7 of the leafy greens produced in the state.
- 8 Experts agree that government
- 9 standards and enforcement of GAPS on every
- 10 farm, and GMPs and HACCP programs at every
- 11 processing facility are essential to
- 12 maintaining the safety of leafy greens, and
- 13 thereby consumers confidence and the financial
- 14 health of the industry.
- 15 If not all leafy greens in the
- 16 marketplace are subject to these best
- 17 practices, the door remains open for
- 18 contaminated produce to reach consumers with
- 19 all the attendant negative health effects and
- 20 negative publicity that that incurs.
- 21 Thirdly, we are concerned that the
- 22 leafy greens marketing agreement proposes the

- 1 use of a USDA certification mark. And while
- 2 it is vague, you pointed out in the actual
- 3 plan there is enough vagueness in it to
- 4 concern us about the certification mark. It
- 5 says, the committee may license signatories to
- 6 affix the official certification mark to bills
- 7 of lading or manifests, or any other such uses
- 8 recommended by the committee and approved by
- 9 the secretary to carry out the purposes of
- 10 this agreement. So it is still a matter of
- 11 concern to us.
- 12 In essence using a certification
- 13 mark turns safety into value added in the
- 14 marketplace. Consumers have a right to
- 15 expect, and government authorities must
- 16 quarantee, the highest level of safety for all
- 17 food that enters the marketplace. Safety
- 18 should not be something that consumers must
- 19 search out and possibly pay more for.
- 20 Furthermore if spinach or Romaine
- 21 lettuce for example are implicated in a future
- 22 e. coli outbreak, many consumers are not going

- 1 to care whether there is a certification mark
- 2 on it, they are simply going to stop buying
- 3 that product for a long time a they did with
- 4 spinach.
- 5 Finally, Consumers Union is
- 6 concerned that this proposal for a national
- 7 marketing agreement to set safety standards
- 8 for leafy greens through a predominantly
- 9 closed industry-led process is being
- 10 considered at a time when Congress is in the
- 11 midst of passing legislation that would
- 12 require FDA to develop standards for leafy
- 13 greens through an open, public and democratic
- 14 process. H.R. 2749 overwhelmingly passed the
- 15 House, and S.B. 510 is pending in the Senate.
- 16 The authorization of both FDA and
- 17 USDA to set and oversee leafy green safety
- 18 standards will likely lead to two different
- 19 and potentially conflicting sets of standards,
- 20 possibly confusing and harming both consumers
- 21 and industry.
- In sum, because of the insular

- 1 exclusive way in which leafy green safety
- 2 standards are being developed and overseen by
- 3 the leafy green or would be by the leafy
- 4 green marketing agreement, and more
- 5 importantly, because this process would not
- 6 cover all leafy green growers and processors
- 7 in the United States, Consumers Union believes
- 8 that this agreement will not provide industry
- 9 with the extremely high standard of safety
- 10 that it must adhere to in order to retain and
- 11 expand its market.
- 12 And again we are deeply concerned
- 13 about the use of beginning to use safety in
- 14 the marketplace as something that can be a
- 15 marketing tool. We oppose the use of a
- 16 certification mark to suggest an added level
- of safety on some leafy green products, and
- 18 not on others.
- 19 Consumers Union strongly supports
- 20 legislation in Congress that would require FDA
- 21 to issue regulations governing the safe
- 22 growing and processing of leafy green

- 1 vegetables, essentially turning their
- 2 guidances into mandatory regulations.
- 3 Thank you.
- 4 JUDGE HILLSON: Thank you. And I
- 5 will receive Exhibit No. 27 into evidence,
- 6 your written statement.
- 7 (Whereupon the aforementioned
- 8 document have been previously
- 9 marked for identification as
- 10 Exhibit No. 27 was received into
- 11 evidence)
- 12 JUDGE HILLSON: And I will ask
- 13 the USDA panel if they have questions.
- Go ahead when you are ready.
- 15 MS. SCHMAEDICK: Melissa
- 16 Schmaedick, USDA. Good afternoon, Ms.
- 17 Odabashian?
- MS. ODABASHIAN: Yes.
- 19 MS. SCHMAEDICK: Thank you for
- 20 your comments.
- 21 MS. ODABASHIAN: You're welcome.
- MS. SCHMAEDICK: I'm intrigued by

- 1 two of your statements. I'm going to start
- 2 with the second major concern that you
- 3 identified on page three of your statement.
- 4 You say that your second major concern is that
- 5 since participation in the marketing agreement
- 6 is voluntary not all leafy green growers and
- 7 processors will be covered. Are you
- 8 suggesting here that a mandatory program would
- 9 be preferable for your organization?
- MS. ODABASHIAN: Yes.
- 11 MS. SCHMAEDICK: A national
- 12 mandatory program?
- MS. ODABASHIAN: Yes, safety
- 14 standards that are mandatory for all leafy
- 15 green growers and processors, yes.
- 16 MS. SCHMAEDICK: And on your
- 17 fourth comment, same page, the one that starts
- 18 with "finally, Consumers Union is concerned
- 19 about" the activity currently happening in
- 20 Congress: you state that the authorization of
- 21 both FDA and USDA to set and oversee leafy
- 22 green standards will likely lead to two

- 1 different and potentially conflicting sets of
- 2 standards.
- 3 My question for you is: is it at
- 4 all possible in your opinion that it could
- 5 lead to coordinated action between FDA and
- 6 USDA?
- 7 MS. ODABASHIAN: As long as those
- 8 standards are developed not by the industry,
- 9 perhaps absolutely with input from industry,
- 10 but not led and governed and led by and for
- 11 industry. We absolutely would love to have
- 12 FDA and USDA working hand in hand, but
- 13 historically the right hand and the left hand
- 14 have not always known what each other was
- 15 doing. So you know our expectations are low
- 16 in that regard. We would love for there to be
- 17 more coordination. But certainly when the
- 18 safety standards are generated by industry
- 19 proponents, hm, that's not going to work.
- 20 You know consumer confidence is a
- 21 tricky thing, and it's based on perception.
- 22 And if that perception is that industry, which

- 1 has a stake in lowering cost, is overseeing
- 2 their own safety standards, there is just a
- 3 cynicism that sets in, a suspicion that sets
- 4 in.
- 5 MS. SCHMAEDICK: Are you familiar
- 6 with the marketing order for California
- 7 concessions?
- 8 MS. ODABASHIAN: I know of it, but
- 9 I haven't read it thoroughly, no.
- 10 MS. SCHMAEDICK: Based on your
- 11 comments, are there any modifications,
- 12 proposals, recommendations that your
- 13 organization might offer to modify the
- 14 proposed language, so that it would meet or
- 15 address some of your concerns?
- 16 MS. ODABASHIAN: I'm afraid there
- 17 aren't. I mean my only recommendation to you
- 18 would be to not go forward with this plan.
- MS. ODABASHIAN: Okay, thank you.
- 20 JUDGE HILLSON: Any questions
- 21 from the USDA panel? Seeing none or hearing
- 22 none, I will turn it over to the proponents.

- 1 CROSS-EXAMINATION
- MR. WILKINSON: Good afternoon.
- MS. ODABASHIAN: Good afternoon.
- 4 MR. WILKINSON: Thank you for
- 5 your testimony.
- MS. ODABASHIAN: Welcome.
- 7 MR. WILKINSON: In regard to your
- 8 first concern I know Consumers Union is
- 9 certainly familiar with the notice in common
- 10 rulemaking, and that's what this process
- 11 essentially is of course.
- MS. ODABASHIAN: Well, this is
- 13 notice and comment about whether to have a
- 14 closed process of developing safety standards.
- MR. WILKINSON: Well, I'm sure
- 16 you've read 970.49, where it provides for
- 17 further notice and comment rulemaking for the
- 18 actual metrics that would constitute the
- 19 technical requirements?
- MS. ODABASHIAN: Right.
- 21 MR. WILKINSON: So how is that
- 22 closed?

- 1 MS. ODABASHIAN: Well, as I said
- 2 in my testimony, at that level, at that point,
- 3 after the administrative committee has used
- 4 all the benefits of the expertise of the
- 5 industry and come up with safety standards
- 6 that benefit industry and then make those
- 7 recommendations to the secretary of
- 8 agriculture, then there is a moment when there
- 9 is an open process. But by that point we feel
- 10 that it would be too late in the process to
- 11 make meaningful changes.
- MR. WILKINSON: So are you
- 13 discounting the participation of academia that
- is provided for in the technical review board?
- MS. ODABASHIAN: Well, those
- 16 members of academia are chosen by industry.
- 17 MR. WILKINSON: If that was
- 18 modified in some fashion would that alleviate
- 19 your concerns?
- MS. ODABASHIAN: Minorly.
- 21 MR. WILKINSON: And of course the
- 22 Secretary is a politically responsible

- 1 official. So does that provide some
- 2 protection as part of the process?
- MS. ODABASHIAN: Who has as part
- 4 of his charge the promotion of the industry.
- 5 MR. WILKINSON: Which one would
- 6 assume would include maintaining the safe
- 7 nature of the product, as the industry doesn't
- 8 want to sell --
- 9 MS. ODABASHIAN: One would hope,
- 10 but consumers are usually the lowest on the
- 11 food chain when it comes to that conversation.
- MR. WILKINSON: But there is kind
- 13 of a fundamental distrust there that industry
- 14 will not watch out for the safety of the
- 15 product.
- MS. ODABASHIAN: There has been
- 17 numerous evidence that supports that. We are
- 18 all for the marketplace, and the marketplace
- 19 working, if there is full information in the
- 20 marketplace, if there is full disclosure in
- 21 the marketplace, we are very supportive of the
- 22 marketplace. It's not that we are against

- 1 industry. It's just that when industry is
- 2 developing its own safety standards consumers
- 3 often get burned.
- 4 MR. WILKINSON: However certainly
- 5 many industries regulate themselves?
- 6 MS. ODABASHIAN: Well, the car
- 7 industry doesn't regulate itself. There are
- 8 many household products that have the Consumer
- 9 Product Safety Commission overseeing safety,
- 10 NITSA is overseeing cars. There is an
- 11 independent government body who is overseeing
- 12 safety and implementation of safety standards.
- 13 MR. WILKINSON: Now in terms of -
- 14 you cite this article in the San Francisco
- 15 Chronicle at the bottom of page two of your
- 16 statement, these are all what you are doing
- 17 is you are paraphrasing the article.
- 18 MS. ODABASHIAN: That is correct.
- 19 MR. WILKINSON: So this in effect
- 20 is double hearsay?
- MS. ODABASHIAN: Well, I don't
- 22 know if you call it double hearsay, but that

- 1 is what was reported in the article which is
- 2 why I referred to the article.
- 3 MR. WILKINSON: Okay, thank you.
- 4 Now there seems to me to be some
- 5 fundamental tension. We are hearing today
- 6 from some of the small producers and organic
- 7 producers that they are worried about
- 8 overregulation. One of your objections is
- 9 that it isn't mandatory.
- 10 MS. ODABASHIAN: We believe that
- 11 safety standards should be required. The GAPs
- 12 and HACCP programs should be required.
- MR. WILKINSON: Regardless of the
- 14 size of the producer?
- MS. ODABASHIAN: Yes.
- 16 MR. WILKINSON: And regardless of
- 17 whether we are talking about conventional or
- 18 organic or not?
- MS. ODABASHIAN: Yes.
- MR. WILKINSON: Now you have a
- 21 concern that the marketing be used the
- 22 marketing to the consumer. If that was taken

- 1 out would that alleviate your concern?
- MS. ODABASHIAN: Well, that's just
- 3 one piece of it. But the overall the
- 4 overarching concern.
- 5 MR. WILKINSON: That the industry
- 6 is regulating itself?
- 7 MS. ODABASHIAN: Yes.
- 8 MR. WILKINSON: I do understand.
- 9 Thank you. That's all I have, thank you.
- 10 JUDGE HILLSON: Mr. Resnick.
- 11 MR. RESNICK: Thank you. Jason
- 12 Resnick. Have you been here since the
- 13 beginning of the hearings?
- MS. ODABASHIAN: No.
- 15 MR. RESNICK: So you didn't hear
- 16 testimony earlier about the financial losses
- 17 the industry has sustained due to outbreaks of
- 18 e. coli in 2006?
- 19 MS. ODABASHIAN: I know about
- 20 them.
- 21 MR. RESNICK: Are you aware of
- 22 them?

- 1 MS. ODABASHIAN: Yes.
- 2 MR. RESNICK: And you are aware
- 3 that the industry lost billions of dollars?
- 4 MS. ODABASHIAN: Yes.
- 5 MR. RESNICK: Would you agree
- 6 that the industry has an interest, a self
- 7 interest, in reducing food borne illness?
- 8 MS. ODABASHIAN: I would agree.
- 9 MR. RESNICK: For economic
- 10 reasons?
- 11 MS. ODABASHIAN: I would agree.
- 12 Although when the rubber hits the road, and a
- 13 farmer is trying to make ends meet, if he
- 14 doesn't have requirements, gaps and safety
- 15 standards required, he or she could cut costs.
- 16 And the first thing that is going to be cut is
- 17 the process associated with standards.
- 18 MR. RESNICK: So would you agree
- 19 then that in the absence of the federal
- 20 legislation that you would prefer that the
- 21 National Leafy Greens Marketing Agreement
- 22 would increase food safety standards to a

- 1 higher degree in the country than we have
- 2 today?
- 3 MS. ODABASHIAN: Yes.
- 4 MR. RESNICK: And would you then
- 5 agree that to the extent that food safety
- 6 standards are increased for leafy greens
- 7 nationally, that consumers would benefit from
- 8 that?
- 9 MS. ODABASHIAN: Well, that is a
- 10 rather broad statement, especially when the
- 11 metrics have not been developed, and when I
- 12 mean who knows at this point.
- MR. RESNICK: Well, assuming the
- 14 National Leafy Greens Marketing Agreement were
- 15 to be established, and that there would be
- 16 metrics that would be a part of the construct
- 17 that you read as part of the proposed
- 18 agreement; that those metrics to the extent
- 19 that they don't exist today, would improve --
- 20 MS. ODABASHIAN: Improve from what
- 21 we have now.
- 22 MR. RESNICK: So then that would

- 1 be an improvement of the status quo?
- 2 MS. ODABASHIAN: Yes, because
- 3 there are no requirements at this point.
- 4 There are just guidances and yes.
- 5 MR. RESNICK: Thank you, that's
- 6 all I have.
- 7 JUDGE HILLSON: Mr. Horsfall.
- 8 MR. HORSFALL: Scott Horsfall
- 9 with the leafy greens marketing agreement.
- 10 It's nice to meet you; see your name in the
- 11 paper all the time.
- MS. ODABASHIAN: Nice to see you.
- MR. HORSFALL: And I want to go
- 14 back to that article in the San Francisco
- 15 Chronicle, and it's not a major point, but I
- 16 do want to clarify something with you. Are
- 17 you aware that the author of that article,
- 18 pretty early on in the article, made the
- 19 statement that LGMA metrics are science based,
- 20 and that all of these examples that you have
- 21 listed are in fact, according to the author,
- 22 the result of additional requirements, so-

- 1 called supermetrics?
- 2 MS. ODABASHIAN: No.
- 3 MR. HORSFALL: Could I ask you to
- 4 re-read the article and perhaps consider
- 5 changing this language?
- 6 MS. ODABASHIAN: No, I wouldn't
- 7 actually do that. Because the fact is that
- 8 when the large industry players develop are
- 9 in charge of developing the safety standards
- 10 for the leafy green marketing agreement they
- 11 are going to be concerned about their larger
- 12 interest in the marketplace, and can impose
- 13 whatever on smaller farmers.
- 14 MR. HORSFALL: But you don't
- 15 think that you say here, a story published
- 16 in the San Francisco Chronicle exposed a range
- of environmental problems caused by standards
- 18 set by the California Leafy Greens Marketing
- 19 Agreement.
- 20 MS. ODABASHIAN: I could change
- 21 that.
- MR. HORSFALL: That's all I'm

- 1 referring to.
- 2 MS. ODABASHIAN: Yes, I will call
- 3 the author and see exactly what we are talking
- 4 about.
- 5 MS. ODABASHIAN: Thank you very
- 6 much. I did the same thing. Thank you.
- 7 JUDGE HILLSON: Anything else?
- 8 Go ahead, Mr. Giclas.
- 9 MR. GICLAS: Hank Giclas, Western
- 10 Growers. Thank you for your testimony.
- MS. ODABASHIAN: You are welcome.
- 12 MR. GICLAS: I just have one
- 13 question, and that is, you are participating
- 14 in discussions, I assume, regarding the
- 15 development of the House bills and Senate
- 16 bills on a national level that would extend
- 17 greater authority to FDA, et cetera? And
- 18 naturally mandate establishment of preventive
- 19 controls for higher risk commodities?
- 20 MS. ODABASHIAN: We are involved
- 21 in talking to legislators about the
- 22 legislation.

- 1 MR. GICLAS: So in H.R. 2749, are
- 2 you aware of any language that gives FDA the
- 3 latitude to recognize in the state or industry
- 4 programs that they view them to be sufficient
- 5 and protective?
- 6 MS. ODABASHIAN: I don't know that
- 7 I recall that in the final I don't know.
- 8 MR. GICLAS: Thank you.
- JUDGE HILLSON: Ms. Schmaedick,
- 10 do you have any questions? Go ahead.
- 11 MS. SCHMAEDICK: Melissa
- 12 Schmaedick, USDA. Just one question: are you
- 13 familiar with Federal marketing orders and
- 14 agreements, and how their committees operate
- 15 in general?
- 16 MS. ODABASHIAN: Yes well, I've
- done a lot over the years I've worked on
- 18 milk issues. I don't know much about
- 19 pistachios and things like that, but I do have
- 20 a general kind of feel for it, yes.
- MS. SCHMAEDICK: Are you aware
- 22 that committee meetings are open to the

- 1 public?
- 2 MS. ODABASHIAN: Yes I mean they
- 3 can attend.
- 4 MS. SCHMAEDICK: Yes.
- 5 MS. ODABASHIAN: And can they sit
- 6 at a table and suggest safety standards?
- 7 MS. SCHMAEDICK: I'm actually not
- 8 testifying, but is that your understanding?
- 9 MS. ODABASHIAN: It's not my
- 10 assumption that a marketing agreement is a
- 11 system whereby the public can develop safety
- 12 standards can help a government body develop
- 13 safety standards.
- MS. SCHMAEDICK: But are you
- 15 aware that the meetings are open to the
- 16 public?
- MS. ODABASHIAN: I am now.
- MS. SCHMAEDICK: Thank you.
- 19 JUDGE HILLSON: Go ahead.
- 20 MR. WILKINSON: Bob Wilkinson, I
- 21 just have one last question.
- 22 Some of the witnesses today have

- 1 suggested that if standards were promulgated
- 2 that they should be the ceiling if you will;
- 3 in other words, private purchasers of
- 4 commodities should not be able to require a
- 5 higher level of protection than what is
- 6 provided by any agreement in this case. Would
- 7 Consumers Union support that?
- 8 MS. ODABASHIAN: Well, first of
- 9 all I am not all of Consumers Union, so I
- 10 wouldn't want to say without discussing it
- 11 with my colleagues. I think we are supportive
- 12 of the marketplace and generally the
- 13 marketplace runs because a company wants to
- 14 hire quality products, and they can pretty
- 15 much demand that if they or the seller can
- 16 go to somebody else.
- 17 We think consumers are benefitted
- 18 when there is higher levels of safety and
- 19 quality.
- 20 MR. WILKINSON: Even if it
- 21 required a scorched earth buffer zone?
- MS. ODABASHIAN: No, no. No, when

- 1 it hurts farmers who are trying to do things
- 2 in a sustainable way, organic farmers and
- 3 small sustainable no, that's I'm talking
- 4 about we want common sense sort of things, not
- 5 just like bulldoze your pond because you can't
- 6 use it for irrigation, or note that children
- 7 under five on your farms you know, crazy
- 8 things like that. We are talking about if a
- 9 company wants you to provide a slightly higher
- 10 quality of product I think that is okay.
- 11 MR. WILKINSON: So there can be
- 12 higher standards, but those have to be limited
- is what I heard you say?
- MS. ODABASHIAN: Yes, I would say
- 15 so. I mean they can't yes.
- 16 MR. WILKINSON: So there would be
- 17 a ceiling? On the standards that they would
- 18 request?
- MS. ODABASHIAN: I quess so, yes.
- MR. WILKINSON: Thank you.
- 21 JUDGE HILLSON: Any other
- 22 questions.

- 1 Thank you for your testimony. You
- 2 may step down.
- 3 (Witness excused)
- 4 JUDGE HILLSON: And Mr. Shimek,
- 5 you can correct the pronunciation when you get
- 6 up there.
- 7 MR. SHIMEK: Your Honor, I have
- 8 slide, and the controller is here. How would
- 9 you like me to handle that?
- 10 JUDGE HILLSON: I think you can
- 11 do it from there.
- MR. SHIMEK: Okay.
- 13 JUDGE HILLSON: But I need to
- 14 swear you in first. Do you have any thing
- 15 written?
- MR. SHIMEK: No, I don't, Your
- 17 Honor.
- 18 Whereupon,
- 19 STEVE SHIMEK
- 20 Was called as a witness by counsel for the
- 21 opponents and, after having been first duly
- 22 sworn, was examined and testified as follows:

- 1 JUDGE HILLSON: And can you
- 2 please state your name and pronounce it and
- 3 then spell it for the record.
- 4 MR. SHIMEK: Sure, my name is
- 5 Steve Shimek, just say it fast and you'll be
- 6 fine. And I am Monterey Coastkeeper.
- 7 Monterey Coastkeeper is part of the otter
- 8 project and is water of the Waterkeeper
- 9 Alliance.
- 10 JUDGE HILLSON: Okay, so you are
- 11 going to show some slides and narrate the
- 12 slides?
- 13 MR. SHIMEK: Yes, I will.
- 14 JUDGE HILLSON: Are there copies
- 15 of the slides?
- 16 MR. SHIMEK: I do have copies of
- 17 the slides that I could leave. So I actually
- 18 have those printed out, and I have five sets.
- 19 JUDGE HILLSON: And maybe the
- 20 printed sets do you want to give me at least
- 21 one of the printed sets, and I will mark it as
- 22 an official exhibit.

- 1 MR. SHIMEK: Sure.
- 2 JUDGE HILLSON: Plus it will make
- 3 it easier to follow.
- 4 And I'm going to mark these slides
- 5 which are basically four color photos that I
- 6 have as Exhibit No. 28.
- 7 (Whereupon the aforementioned
- 8 document was marked for
- 9 identification as Exhibit No. 28)
- 10 DIRECT EXAMINATION
- 11 MR. SHIMEK: Before I start I'd
- 12 like to say that this is the first time I've
- 13 testified in this kind of situation. And I
- 14 wasn't here an hour when Ms. Laurie Giudici
- 15 Mills leaved over and threatened me with a
- 16 lawsuit. Apparently she represents Mets
- 17 Fresh. So that it is a little intimidating to
- 18 be here.
- 19 So good afternoon, Judge, USDA and
- 20 marketing service representatives, proponents
- 21 and opponents.
- 22 My name is Steve Shimek. I am

- 1 Monterey Coastkeeper. Thank you for the
- 2 opportunity so speak.
- 3 There are probably going to be
- 4 lots of questions to my testimony, and I could
- 5 even get crucified up here as far as I know
- 6 because I am not a food safety expert. I'm a
- 7 person with local knowledge of what happens
- 8 when a marketing agreement is implemented on
- 9 the ground. So that is what I'm expressing to
- 10 you.
- 11 I'd like to begin by saying within
- 12 the Federal Register notice it says what this
- 13 is about. There is a statement, and its says,
- 14 proponents state that the proposed program is
- 15 intended to minimize the potential for
- 16 microbial contamination in production and
- 17 handling systems.
- 18 So it's basically that that I
- 19 think is part of the problem here. The stated
- 20 purpose of the marketing agreement is to force
- 21 the issue to one polar extreme, that polar
- 22 extreme being pathogen pollution. The

- 1 agreement forces growers to ignore chemical
- 2 pollution yes.
- 3 (Off-mic comment.)
- 4 MR. SHIMEK: When I get to the
- 5 slides that I'll be talking about, I'm pretty
- 6 sure I will remember.
- 7 The agreement forces growers to
- 8 ignore chemical pollution, endangered species,
- 9 impacts on water quality and public values
- 10 beyond the marketability of spinach and
- 11 lettuce.
- 12 Proponents also say that the
- 13 program will be science based. It doesn't
- 14 appear to me that the California program as
- 15 implemented is science based.
- 16 My comments today are on the audit
- 17 metrics, Section 970.67, that are yet to be
- 18 really spelled out, so they are only kind of
- 19 just mentioned there.
- 20 What I hope is that USDA
- 21 appreciates the fact that the agreement and
- 22 metrics go far beyond buying guidelines and

- 1 protection for consumers. The metrics in fact
- 2 drive on-farm pratices, and some of these on-
- 3 farm practices can negatively impact water
- 4 quality, endangered species and the exposure
- 5 of the public to farm chemicals.
- I also hope that the committee
- 7 recognizes that the metrics become a base
- 8 layer that additional metrics we've heard
- 9 about the supermetrics can be layered on top
- 10 of. You might say that this that isn't your
- 11 concern, because supermetrics aren't at issue
- 12 here. But I think you can control those
- 13 supermetrics, and I think they are at issue
- 14 here.
- 15 Let me offer an example. The
- 16 California Leafy Greens Marketing Agreement
- 17 requires buffers between crops, and things
- 18 like roads or ditches. That has been
- interpreted by auditors as meaning a scorched
- 20 earth buffer, most often including the ditch,
- 21 and the interior of a ditch. This
- 22 interpretation has resulted in defoliants

- 1 being routinely sprayed on the buffer and
- 2 inside ditch banks, with overspray being
- 3 sprayed on open water. That is an illegal
- 4 practice, but it happens. I've seen it.
- Now you might say, well, that is a
- 6 practice that a leafy green marketing
- 7 agreement as California doesn't really imply
- 8 it should happen; it just requires a buffer.
- 9 Yet there has been no effort to correct that.
- 10 And that is in spite of the fact that there is
- 11 scientific evidence that shows that vegetative
- 12 buffers do in fact restrain pathogen
- 13 pollution. There is good science that says
- 14 that vegetative buffers are better than
- 15 scorched earth buffers for pathogen pollution,
- 16 and yet the agreement doesn't spell out a
- 17 vegetative buffer, and in fact when LGMA the
- 18 California LGMA folks know about that issue
- 19 they don't restrain it.
- 20 Two decades of conservation work,
- 21 the creation of vegetative buffer strips, have
- 22 been ripped out in a matter of months or short

- 1 years. Decades of conservation work are gone.
- 2 If there is a metric for buffers so here's
- 3 my suggestion that that metric should be for
- 4 vegetative buffers. That's what the science
- 5 tells us to do.
- 6 Another example is the metric
- 7 driving practices in flood control, and let's
- 8 see if this works. That's the Salinas River.
- 9 Salinas Valley growers have either already
- 10 decimated river bottom riparian corridor or
- 11 are seeking permits to rip out more riparian
- 12 habitat. And that's in the name of food
- 13 safety and flood control. Flood control is
- one of the metrics that you guys are talking
- 15 about imposing.
- So just that you know, that white
- 17 area, that's sand. Bulldozers have gone in
- 18 and taken out the riparian corridor except for
- 19 10 feet on either side of the low water
- 20 channel. Hundreds of acres of riparian
- 21 corridor have been removed. It's for flood
- 22 control, but actually the permit application

- 1 names food safety as one of the driving
- 2 forces.
- 3 So I'm here representing a
- 4 different set of values.
- 5 Another example is wildlife
- 6 encroachment oops, one more slide here. All
- 7 right, how do I advance it? There we go. So
- 8 that's just to show you that it's sand. It's
- 9 been bulldozed down to sand.
- 10 Another example is wildlife
- 11 encroachments. The proponents are saying that
- 12 the program is science based, yet hundred of
- deer have been slaughtered, and pathogenic e.
- 14 coli it does not appear to be a significant
- 15 risk in Western deer. They have found
- 16 pathogenic e. coli as I understand it in some
- 17 Eastern deer populations, but never out in the
- 18 West to my knowledge.
- 19 Another example is the war against
- 20 rodents. Rodents don't spread e. coli or
- 21 pathogenic e. coli as we know it, yet in the
- 22 Salinas Valley as have tens of thousands of

- 1 these traps. That stuff gushing out of the
- 2 ends of that pipe are poison; that's rodent
- 3 poison.
- 4 Now you might say, well, rodents,
- 5 that's a problem if you have a lettuce field.
- 6 But I would suggest to you that that is a
- 7 marketing problem; that is not a pathogenic
- 8 issue necessarily. And I would say that that
- 9 is a marketing program for bagged lettuce and
- 10 spinach, not necessarily for other products.
- 11 Now what is the problem with that?
- 12 If you want rodents gone? Well, these line
- 13 ditches. Well, what happens when they flood
- 14 the ditch? That's a row of those each
- 15 individual ones of those are poisoned. That
- 16 is a row of those rodent traps underwater. I
- 17 also could show you pictures of them within
- 18 the sprinkler lines.
- 19 I would say in my opinion that
- 20 that's the food safety problem, not the mice.
- 21 The point I'm trying to make is
- 22 that there if there is to be a marketing

- 1 agreement it needs to spell out both the
- 2 minimum practice and the maximum practices.
- 3 We actually heard that from a number of
- 4 speakers, let's put some ceilings on some of
- 5 those practices. Let's spell out some things
- 6 that should be prohibited. Otherwise the
- 7 metric becomes a tool in my opinion for
- 8 farmers' war against rodents. It becomes a
- 9 tool for the farmers' war against deer. And
- 10 I would suggest it becomes a war for same
- 11 farmers for their war against endangered
- 12 steelhead. That scorched earth Salinas River
- 13 picture that I showed, endangered steelhead
- 14 population is there, there are about 50
- 15 returning steelhead where there are anecdotal
- 16 reports in the literature of King City farmers
- 17 used to put chicken wire across the river and
- 18 fertilize some small farm fields with
- 19 steelhead. Now there are 50 left. They are
- 20 in danger.
- 21 That's what this is forcing people
- 22 to do.

- 1 Finally, consistency is a major
- 2 consideration in my opinion. It's a single
- 3 issue metric about packaging pollution. It's
- 4 swinging the pendulum way over to one side.
- 5 And consistency is important within the
- 6 federal government.
- 7 In November, A2000A, US EPA and
- 8 National Marine Fishers Service, on November
- 9 8th, they issued a biological opinion,
- 10 restricting use of certain pesticides within
- 11 500 feet of waterways with salmonids. And
- 12 requiring vegetated buffer strips. Requiring
- 13 vegetative buffer strips.
- 14 My point is that if I were to go
- 15 out and take pictures and sue against
- 16 something like that, I would essentially shut
- down farming at the base of most of these
- 18 valleys. I don't want to do that. What I
- 19 want is I'm not opposed to food safety. I'm
- 20 looking for ways that we can balance pathogen
- 21 pollution, chemical pollution, habitat
- 22 preservation, and bring them together. This

- 1 agreement specifically states that its purpose
- 2 is to swing the pendulum to one issue: the
- 3 packaging issue.
- 4 That's it, thank you.
- 5 JUDGE HILLSON: Thank you. I
- 6 will receive a copy of the slides as Exhibit
- 7 No. 28.
- 8 (Whereupon the aforementioned
- 9 document having been previously
- 10 marked for identification as
- 11 Exhibit No. 28 was received into
- 12 evidence)
- 13 JUDGE HILLSON: And you are
- 14 subject to questioning.
- MR. SHIMEK: Yes, I know that.
- 16 JUDGE HILLSON: Why don't you
- 17 come sit over here for the questioning part.
- 18 Would that be okay?
- 19 MR. SHIMEK: Sure.
- 20 JUDGE HILLSON: And I'll turn it
- 21 over to the USDA panel first.
- 22 CROSS-EXAMINATION

- 1 MS. SCHMAEDICK: Melissa
- 2 Schmaedick, USDA.
- 3 Good afternoon, Mr. Shimek.
- 4 MR. SHIMEK: Say it fast.
- 5 MS. SCHMAEDICK: Okay. Thank you
- 6 for your testimony.
- 7 My first question for you is, have
- 8 you read the proposal in its entirety, the
- 9 proposed National Leafy Greens Marketing
- 10 Agreement?
- 11 MR. SHIMEK: Yes, so I've read
- 12 the Federal Register notice, and I should also
- 13 say that I commented back in December, 2007,
- 14 when that but I do not exactly recall that
- 15 Federal Register notice in its entirety.
- MS. SCHMAEDICK: Okay. So I'd
- 17 like to ask you some questions on Section
- 18 970.35. Do you have a copy of the agreement
- 19 in front of you?
- MR. SHIMEK: No, I don't. Thank
- 21 you.
- 22 Shoot.

- 1 MS. SCHMAEDICK: Okay. So in
- 2 970.35, it's entitled, purpose. And there are
- 3 a number of items listed here under purpose.
- 4 But I would like to point your direction to
- 5 the end of that paragraph, where it says to
- 6 foster greater collaboration with local, state
- 7 and federal regulators.
- 8 MR. SHIMEK: Yes, I see that.
- 9 MS. SCHMAEDICK: Can you give me
- 10 your opinion on that language?
- 11 MR. SHIMEK: I guess what I also
- 12 look at is on page two or 45566, where it
- 13 talks about the proponents, and exactly what
- 14 they are trying to do, and I'm looking for it
- 15 really fast here. But it basically is a
- 16 statement that this is about pathogen
- 17 pollution. So I mean there is a purpose
- 18 stated there as well.
- 19 MS. SCHMAEDICK: Correct. Do you
- 20 understand that the proposed language that was
- 21 submitted by the proponent group actually
- 22 begins on page 45567, with the bold language

- 1 stating part 97 --
- 2 MR. SHIMEK: So I'm not aware of
- 3 that. What I've already answered this
- 4 question. What I'm also aware of is there
- 5 appears to be a quote of proponent language on
- 6 the earlier page.
- 7 MS. SCHMAEDICK: So you believe
- 8 that this initial summary is proponent
- 9 language?
- 10 MR. SHIMEK: It says that it's
- 11 proponent language.
- MS. SCHMAEDICK: In your opinion
- do you view that the proposed National Leafy
- 14 Greens Marketing Agreement if it were to
- 15 incorporate suggestions, could it be an
- 16 opportunity to address some of these concerns
- 17 that you brought up today?
- 18 MR. SHIMEK: Yes and no. And may
- 19 I qualify that please?
- MS. SCHMAEDICK: Sure.
- 21 MR. SHIMEK: See, I think what
- 22 you are saying is, boy, it's going to offer

- 1 all this opportunity for collaboration between
- 2 federal agencies. And again what I'm pointing
- 3 to is essentially what I believe is kind of a
- 4 preamble, that this is directed to address
- 5 pathogen pollution. And so when you say that
- 6 this could be helpful, I think that if we
- 7 drive the pendulum towards only addressing
- 8 pathogen pollution there can be many practices
- 9 which are done in the name of pathogen
- 10 pollution which could be quite harmful to
- 11 other values. So that's where I'm coming
- 12 from.
- MS. SCHMAEDICK: So do you
- 14 believe that food safety and environmental
- 15 conservation are mutually exclusive, or can
- 16 they coexist?
- 17 MR. SHIMEK: They can coexist,
- 18 but it requires balance between programs.
- 19 MS. SCHMAEDICK: So do you have
- 20 any specific suggestions on how the proposed
- 21 language might be modified to bring more
- 22 balance into the proposal?

- 1 MR. SHIMEK: Well, that's
- 2 difficult when the premise that I'm commenting
- 3 under is the fact that this addresses only one
- 4 piece of the pollution equation. So what you
- 5 are saying is I mean the way I interpret
- 6 your question is, how do we do a better job of
- 7 this, when my answer to that is, it's not
- 8 adequate to only do that. And if you only
- 9 address this one piece, this pathogen piece,
- 10 and you ignore other pieces of the puzzle on
- 11 endangered species, habitat, chemical
- 12 pollution, all these things that I think that
- 13 habitat and chemical pollution represent
- 14 threats to human health as well.
- I think that if you only address
- 16 that, and you only talk about that, I the
- 17 word that comes to mind is disservice, but I
- 18 know that is not what you are trying to do.
- 19 I respect what you are trying to do; I really
- 20 do.
- 21 MS. SCHMAEDICK: And I'm trying
- 22 not to be redundant, but so you are suggesting

- 1 to move that pendulum more towards the middle?
- 2 MR. SHIMEK: Yes, and if the
- 3 preamble of this document essentially says
- 4 that this is about only addressing one thing,
- 5 you are not moving the pendulum, you are
- 6 forcing it further to one side.
- 7 MS. SCHMAEDICK: And do you
- 8 understand that the hearing process will
- 9 result in additional documents, recommended
- 10 decision, another comment period? That this
- is just a part of a much longer process?
- MR. SHIMEK: I would also hope
- 13 that a possibility is that you drop this.
- 14 MS. SCHMAEDICK: That is another
- 15 possibility, yes.
- 16 MR. SHIMEK: Thank you for
- 17 recognizing it.
- 18 MS. SCHMAEDICK: I think that's
- 19 the end of my questions.
- MR. SHIMEK: Thank you.
- 21 JUDGE HILLSON: Any other
- 22 questions from the panel? Ms. Deskins.

- 1 MS. DESKINS: Charlene Deskins,
- 2 Office of General Council.
- 3 You showed a series of slide.
- 4 MR. SHIMEK: Yes.
- 5 MS. DESKINS: One you identified
- 6 as being the Salinas River.
- 7 MR. SHIMEK: Let's see, slide #1
- 8 was on the Salinas River. Slide #2 was on the
- 9 Salinas River. Slide #3 was along Highway 101
- 10 in the Salinas Valley. Slide #4 was along the
- 11 Highway 101 near the city of Salinas in the
- 12 Salinas Valley.
- MS. DESKINS: Did you take those
- 14 pictures yourself?
- MR. SHIMEK: Yes, I did.
- 16 MS. DESKINS: Thank you. I have
- 17 no further questions.
- 18 JUDGE HILLSON: Any other
- 19 questions from the panel?
- 20 Any questions from the proponents?
- 21 Go ahead.
- 22 CROSS-EXAMINATION

- 1 MR. WILKINSON: Robert Wilkinson
- 2 on behalf of Western Growers.
- 3 Mr. Shimek?
- 4 MR. SHIMEK: Shimek.
- 5 MR. WILKINSON: Shimek, thank you
- 6 so much. I can't quite read that, I'm getting
- 7 so old I can't see it.
- What does it say under your name?
- 9 MR. SHIMEK: Monterey
- 10 Coastkeeper, which is part of the Waterkeeper
- 11 Alliance.
- MR. WILKINSON: Okay, and who are
- 13 they?
- 14 MR. SHIMEK: Okay, I didn't
- 15 necessarily want to get into the whole
- 16 structure, because that is that is
- 17 complicated. Monterey Coastkeeper is a
- 18 program of a nonprofit called the Otter
- 19 Project. The Otter Project is about
- 20 recovering sea otters, but it became very
- 21 clear once we got involved in sea otters that
- 22 water quality was one of the most overriding

- 1 considerations, and so we started a program
- 2 called Monterey Coastkeepers. We are
- 3 licensed and we follow a set of quality
- 4 guidelines from the Waterkeeper Alliance.
- 5 MR. WILKINSON: And are you a
- 6 nonprofit?
- 7 MR. SHIMEK: Yes, the Otter
- 8 Project is a 501(c) (3) nonprofit, and the
- 9 Monterey Coastkeeper is a program of the Otter
- 10 Project.
- 11 MR. WILKINSON: Do you have
- 12 members?
- MR. SHIMEK: Yes, we have 3,000
- 14 members.
- MR. WILKINSON: Okay. And where
- 16 are they located?
- 17 MR. SHIMEK: All over the United
- 18 States and two foreign countries.
- 19 MR. WILKINSON: Okay, and have
- 20 you gone over the proposed national leafy
- 21 green marketing agreement with the board of
- 22 this organization?

- 1 MR. SHIMEK: No, and I'm not
- 2 required under our bylaws, and it doesn't
- 3 specifically say you are not required, but
- 4 there is no requirement in our bylaws that if
- 5 I want to comment on an issue that I
- 6 necessarily need to go to that board of
- 7 directors in anticipation of that issue.
- 8 MR. WILKINSON: You can do that
- 9 merely as a member of that organization? You
- 10 can come and comment that is?
- 11 MR. SHIMEK: Well, no. I mean
- 12 your question is, as a member. I am founder
- 13 of the Otter Project. I am executive director
- of Monterey Coastkeepers, so I'm sorry if I
- 15 did not make that clear.
- 16 MR. WILKINSON: And do you have a
- 17 board?
- 18 MR. SHIMEK: Yes, we do.
- 19 MR. WILKINSON: Now, you talked
- 20 about moving the pendulum all the way to
- 21 microbial elimination. Of course you
- 22 recognize that there's the Environmental

- 1 Protection Act, the Endangered Species Act,
- 2 the Clean Water Act, so we are not really
- 3 writing on a clean slate, correct?
- 4 MR. SHIMEK: I guess that would
- 5 be your interpretation, not necessarily mine.
- 6 So yes I recognize that those other laws and
- 7 acts exist. I guess my question becomes, you
- 8 know, that I ask of this group and panel, what
- 9 happens if rules are created that frankly are
- 10 contradictory to other rules, and you have a
- 11 buyers' incentive or a growers' incentive to
- 12 follow one set and not the other.
- I would suggest to you that that
- 14 is the situation we are in right now.
- 15 MR. WILKINSON: Well, earlier you
- 16 referred to for example somebody polluting the
- 17 waterways, which would be a criminal violation
- 18 of the Clean Water Act. So are you saying
- 19 that the authorities who are charged with
- 20 enforcing the Clean Water Act are failing to
- 21 follow through with their duties and that
- 22 pursuing the marketing agreement somehow would

- 1 foster their inability to enforce the Clean
- 2 Water Act?
- 3 MR. SHIMEK: I guess I would have
- 4 to answer that: I don't know. In other words,
- 5 that was such a long string of events that
- 6 it's difficult for me to answer that.
- 7 MR. WILKINSON: But I think in
- 8 your statement you said that spraying
- 9 defoliants on water was an illegal act.
- MR. SHIMEK: Yes, I did say that.
- 11 MR. WILKINSON: Okay, and would
- 12 you agree with me that the act that would be
- 13 violated is the Clean Water Act?
- MR. SHIMEK: Yes.
- 15 MR. WILKINSON: And that is
- 16 enforced by the Environmental Protection
- 17 Agency, correct?
- 18 MR. SHIMEK: Yes.
- MR. WILKINSON: And they have at
- 20 their disposal the U.S. Justice Department to
- 21 enforce that, correct?
- 22 MR. SHIMEK: Yes. I think what

- 1 you are also not recognizing is or I guess
- 2 what I would like to suggest to you is that I
- 3 could go out and get a grab sample of that
- 4 water. And then who would I have? I would
- 5 have that farm. Frankly I don't want the
- 6 farmer; I'm more interested in trying to help
- 7 the farmer comply with applicable laws and
- 8 regulations. And I think that that farmer
- 9 perhaps I know that this is speculative -
- 10 but perceives that they have to somehow have
- 11 this scorched earth buffer.
- MR. WILKINSON: Okay, so somehow
- 13 by passing or implementing the agreement, is
- 14 it your contention that we would be somehow
- 15 enabling somebody to violate the Clean Water
- 16 Act? Am I following the logic correctly?
- 17 MR. SHIMEK: I'll answer that
- 18 yes.
- 19 MR. WILKINSON: Now you have
- 20 shown us these slides of the Salinas River,
- 21 and presumably there is a stream bed permit to
- 22 allow the bulldozing that you've told us

- 1 occurred in the river, correct?
- 2 MR. SHIMEK: Yes, that's correct.
- 3 MR. WILKINSON: And do you have a
- 4 copy of the permit that you brought us today?
- 5 MR. SHIMEK: No, I don't have a
- 6 copy of the permit. I would be happy to
- 7 provide that to you as supplemental
- 8 information.
- 9 MR. WILKINSON: It's my
- 10 understanding is that what you re saying is
- 11 that the permit is given to alter the stream
- 12 beds, the purpose was food safety. Do I
- 13 understand you?
- MR. SHIMEK: No, not entirely. As
- 15 I mentioned the purpose is flood control with
- 16 also the justification of food safety. And I
- 17 would like to add that that was that that
- 18 work was done presumably, assuming it was done
- 19 under the correct permit, but it was done
- 20 presumably under a previous permit, and a
- 21 five-year permit. So it was the new permit
- 22 application that was submitted to the Army

- 1 Corps of Engineers that cites food safety.
- 2 MR. WILKINSON: Do you know when
- 3 the stream bed alteration was done?
- 4 MR. SHIMEK: I know that it was
- 5 done very, very recently through those photos.
- 6 I'm a pilot. Although I don't know if it's
- 7 exactly wise for me to be taking pictures as
- 8 I'm piloting the plane. But I'm a pilot, and
- 9 I fly the Salinas Valley often. Areas that
- 10 have been worked in the Salinas Valley sprout
- 11 grass and grow quickly after they have been
- 12 worked. So what you have there, and in the
- 13 next picture, show quite a bit of bare sand.
- 14 And so I would suggest that they have been
- 15 worked recent to those photos. The exact date
- 16 I do not know.
- 17 MR. WILKINSON: So are you saying
- 18 the permit was pulled since 2006?
- 19 MR. SHIMEK: The previous permit
- 20 had expired, and there was a new five-year
- 21 permit application proposed. And I could
- 22 provide you the text of that permit

- 1 application that cites food safety as the
- 2 major concern.
- MR. WILKINSON: And do you know
- 4 the date of that permit?
- 5 MR. SHIMEK: Sure, the date of
- 6 that permit, the application is actually
- 7 current on the you could go to the U.S. Army
- 8 Corps of Engineers website, San Francisco
- 9 office. The comment period is over. But it's
- 10 actually and that is where you would find
- 11 the permit. But again I would be happy to
- 12 provide that.
- MR. WILKINSON: We would be
- 14 interested in seeing it.
- MR. SHIMEK: Sure.
- 16 JUDGE HILLSON: Mr. Resnick.
- 17 MR. RESNICK: Thank you, Your
- 18 Honor.
- Jason Resnick. Were you reading a
- 20 portion of your statement today?
- 21 MR. SHIMEK: Yes, I was.
- MR. RESNICK: Did you submit your

- 1 written testimony?
- 2 MR. SHIMEK: No.
- 3 MR. RESNICK: I would just ask
- 4 that you would submit your written comments
- 5 for the record?
- 6 MR. SHIMEK: I actually because
- 7 I didn't read them exactly I would prefer to
- 8 let this go. I would be happy to provide you
- 9 with a copy of my comments, but again I would
- 10 have to suggest to you that they are an
- 11 approximation of what I said.
- JUDGE HILLSON: He's not required
- 13 to submit written comments. He's allowed to
- 14 testify orally, and use that as notes.
- MR. RESNICK: It's just a request.
- 16 JUDGE HILLSON: You can submit
- 17 them or not, but if you submit them they're
- 18 submitted, and we will have your oral comments
- 19 and your written comments, and they will both
- 20 be in the record.
- 21 MR. RESNICK: Thank you.
- MR. SHIMEK: My call is, because

- 1 these do not reflect exactly what I said.
- JUDGE HILLSON: I don't have a
- 3 problem with that.
- 4 MR. SHIMEK: Thank you.
- 5 MR. RESNICK: Thank you. I have
- 6 nothing further.
- 7 JUDGE HILLSON: Any other
- 8 questions on this side? Mr. English?
- 9 REDIRECT EXAMINATION
- 10 MR. ENGLISH: I've been so quiet
- 11 my voice stopped working.
- 12 Charles English with the National
- 13 Organic Coalition. And I just want to ask
- 14 some questions about the photos so that those
- of us in the room today saw them and
- 16 understood, but I think that it may be
- important for the record, so that somebody who
- 18 is looking at this someday on the road might
- 19 know something so bear with me.
- I believe photo #1 is the one with
- 21 the date 01/29/2009.
- 22 MR. SHIMEK: Yes, that is

- 1 correct.
- 2 MR. ENGLISH: And the Salinas
- 3 River running down the front. So that is
- 4 photo #1, and it's a unique date of
- 5 01/29/2009.
- 6 Photo #2 which you referred to as
- 7 sort of a close up of the sand has got the
- 8 unique date of 01/30/2009.
- 9 MR. SHIMEK: Yes.
- 10 MR. ENGLISH: Correct, that's
- 11 photo #2?
- 12 MR. SHIMEK: And may I make a
- 13 quick correction. Photo #2 was not taken by
- 14 me. So thank you for that.
- MR. ENGLISH: Now the order of
- 16 the photos electronically, in order at least
- 17 of the photos that I received, in the staple,
- 18 are a little different. So I believe the
- 19 third one you referred to, the one for the
- 20 better phrase, the rat poison one, was dated
- 21 12/06/2008. They are both dated 12/06/2008,
- 22 so the one that is dated 12/06/2008, and has

- 1 what looks like a PVC white tube as a tee,
- 2 it's an upside down tee.
- 3 MR. SHIMEK: Yes.
- 4 MR. ENGLISH: With the green
- 5 fence post.
- 6 MR. SHIMEK: Yes.
- 7 MR. ENGLISH: That is #3?
- 8 MR. SHIMEK: That is #3, yes.
- 9 And I'm sorry, there was a switch holding two
- 10 sets of the photos, so I apologize.
- 11 MR. ENGLISH: Okay, well, that's
- 12 why I'm here clarifying that.
- MR. SHIMEK: Thank you so much.
- MR. ENGLISH: And in photo #3 you
- 15 said you can see the rat poison. Is the rat
- 16 poison the sort of lighter colored powdered or
- 17 dirt material or whatever it is that is coming
- 18 out of the PVC pipe?
- MR. SHIMEK: Yes.
- 20 MR. ENGLISH: And then during
- 21 your testimony you said you can see this flood
- 22 area.

- 1 MR. SHIMEK: Yes.
- 2 MR. ENGLISH: And I think this
- 3 was referring to photo #4.
- 4 MR. SHIMEK: Yes.
- 5 MR. ENGLISH: And photo #4 then
- 6 is a photo of a closeup of water, and you can
- 7 see I think you referenced there is the
- 8 white things that we see there that are the
- 9 PVC pipes going up and down. Those are more
- 10 of that rat poison?
- 11 MR. SHIMEK: Yes, and I actually
- 12 have a set of close up photos of those that
- 13 show them marked as poison, and closer up
- 14 underwater. So I would be able to provide
- 15 that if you would like.
- MR. ENGLISH: I just wanted to do
- 17 that to clarify for the record. And I'm
- 18 otherwise complete.
- JUDGE HILLSON: Okay, I think Ms.
- 20 Mills had a question, right? Why don't you
- 21 identify yourself again before you question.
- 22 MS. MILLS: Laura Giudici Mills

- 1 with the Mets Fresh. And I wanted to thank
- 2 Mr. Shimek for his comments.
- 3 I wanted to start off by asking
- 4 first if the images shown on photo #1 and
- 5 photo #2, if you were implying that those had
- 6 been done without permits? The work had been
- 7 done without permits?
- 8 MR. SHIMEK: Judge, may I ask a
- 9 question? This is the person that leaned over
- 10 and --
- 11 JUDGE HILLSON: You already said
- 12 that. She is asking questions about the
- 13 photographs.
- 14 MR. SHIMEK: Can I decline to
- 15 answer?
- 16 JUDGE HILLSON: I don't think so.
- 17 MR. SHIMEK: Okay.
- 18 JUDGE HILLSON: I'm not going to
- 19 lock you up. I'm not going to strike all your
- 20 testimony.
- 21 MR. SHIMEK: All right.
- 22 JUDGE HILLSON: If she starts to

- 1 push the envelope with something right now
- 2 I don't see anything.
- 3 MR. SHIMEK: I just feel
- 4 threatened by the questions. But that's fine.
- No, I wasn't implying anything.
- 6 MS. MILLS: Okay, can I ask if
- 7 you have made this presentation to the
- 8 California state fish & game commission?
- 9 MR. SHIMEK: I made a
- 10 presentation to Cal Fish & Game Commission,
- 11 yes. You're asking if I made this
- 12 presentation? No.
- 13 MS. MILLS: Okay, did you present
- 14 these photos to the California Fish & Game
- 15 Commission?
- 16 MR. SHIMEK: I showed some
- 17 photos. I don't know if I showed these exact
- 18 photos.
- 19 MS. MILLS: Okay, can you state
- 20 for the record whether or not the state fish
- 21 & game commission directed the regional fish
- 22 and game department to investigate your claims

- 1 that this work had not been done with permits?
- 2 MR. SHIMEK: I do know that the
- 3 fish that the Department of Fish & Game
- 4 staff did investigate the work. I very
- 5 honestly do not recall whether that was at the
- 6 direction of the commission.
- 7 MS. MILLS: What was the result
- 8 of the fish and game regional staff's
- 9 findings?
- 10 MR. SHIMEK: Frankly it was
- 11 unclear to me. I actually called the fish and
- 12 game staff and I asked them what their finding
- 13 was. And I would also add that I then sent a
- 14 letter to the California Fish & Game
- 15 Commission clarifying my statement.
- MS. MILLS: Have you seen the
- 17 fish and game commission's video recordings of
- 18 the hearing following the hearing where you
- 19 testified where the fish and game staff
- 20 reported that the work was in fact done with
- 21 permits?
- MR. SHIMEK: No, I have not seen

- 1 that video.
- 2 MS. MILLS: Okay, we will make
- 3 sure you get that.
- 4 Did you know that the channel
- 5 maintenance in the Salinas River was
- 6 originally authorized under the flood control
- 7 acts in Monterey County for recharge benefits
- 8 and flood control in the 1950s and 1960s after
- 9 construction of the Nacimiento and San Antonio
- 10 reservoirs respectively?
- MR. SHIMEK: No.
- MS. MILLS: You cited in your
- 13 testimony that the permit application had food
- 14 safety as a purpose.
- MR. SHIMEK: The Army Corps of
- 16 Engineers permit application for the new
- 17 permit that was not granted has food safety -
- 18 mentions food safety as one of the drivers of
- 19 the permit application, or needs for flood
- 20 control.
- MS. MILLS: Was that the
- 22 emergency 404 permit?

- 1 MR. SHIMEK: No.
- 2 MS. MILLS: In your photos taken
- 3 January 29th, and/or the photo that you said
- 4 now was not taken by you, but January 30th,
- 5 did you know that the work that was conducted
- 6 was conducted in September and October, 2008,
- 7 under the existing regional 404 permit?
- 8 MR. SHIMEK: No.
- 9 MS. MILLS: Did you know that the
- 10 work was found to be in compliance with all
- 11 the permit conditions?
- 12 MR. SHIMEK: That's your
- 13 statement, but no, I did not know that.
- MS. MILLS: Are you aware that
- 15 there is an after action report that is a
- 16 matter of public record with the U.S. Army
- 17 Corps of Engineers that is available for your
- 18 review?
- 19 MR. SHIMEK: No.
- 20 MS. MILLS: Did you know that the
- 21 Monterey County water resource agency decided
- 22 not to pursue the emergency 404 permit

- 1 application that stated food safety as a
- 2 purpose?
- 3 MR. SHIMEK: I know let me
- 4 clarify what I know.
- 5 MS. MILLS: Please.
- 6 MR. SHIMEK: What I know is that
- 7 a number of people including Monterey
- 8 Coastkeeper commented on the emergency
- 9 application, and on the new application. I
- 10 believe that U.S. EPA, although this is my
- 11 belief, and commented on the emergency
- 12 application. I believe a number of people
- 13 commented on the emergency application. I do
- 14 not know the how it got dropped. I know that
- 15 they were not granted an emergency permit.
- MS. MILLS: Thank you.
- 17 MR. SHIMEK: You are welcome.
- MS. MILLS: Were you aware that
- 19 the work that was done that was depicted in
- 20 your photos was part of the U.S. Army Corps of
- 21 Engineers regional Corps permit that included
- 22 consultation under the federal Endangered

- 1 Species Act with the U.S. Fish & Wildlife
- 2 Service and NOAA fisheries for protection of
- 3 steelhead, the California red-legged frog, and
- 4 other species as well as habitat, and then
- 5 also the Central Coast regional water quality
- 6 control board, under the Clean Water Act, for
- 7 protection of water quality?
- 8 MR. SHIMEK: I don't know what
- 9 this has to do with this, but no no.
- 10 JUDGE HILLSON: You're getting a
- 11 little far afield here in terms of what the
- 12 purpose of this hearing is all about.
- MS. MILLS: Well, because there
- 14 were some accusations about dozing the river
- 15 bottom --
- 16 JUDGE HILLSON: You are on the
- 17 witness list for tomorrow, right?
- 18 MS. MILLS: Just one more
- 19 question, Your Honor.
- 20 JUDGE HILLSON: I'll give you one
- 21 more question.
- MS. MILLS: Do you know that

- 1 there is a biological opinion that has
- 2 protections for the California red-legged
- 3 frog? You had indicated during your testimony
- 4 that the river had been bulldozed, and that
- 5 red-legged frogs were being jeopardized. But
- 6 did you know that there is a biological
- 7 opinion that has protections?
- 8 MR. SHIMEK: I did not testify
- 9 that there were protections for red-legged
- 10 frogs.
- 11 MS. MILLS: No, that they were in
- 12 jeopardy because of the bull dozing that was
- 13 being done.
- MS. MILLS: I did not address
- 15 red-legged frogs.
- 16 JUDGE HILLSON: Okay, that was
- 17 your one more question.
- 18 MS. MILLS: Thank you. Thank
- 19 you, Your Honor.
- JUDGE HILLSON: Okay. No more
- 21 questions of this witness? You may step down.
- MR. SHIMEK: Thank you.

- 1 (Witness excused)
- JUDGE HILLSON: It's 6:10. There
- 3 are a couple of people everyone who came to
- 4 me this morning and told me they needed to
- 5 testify today has now testified. But during
- 6 the last break a few more people popped up and
- 7 said they had to testify today. And my
- 8 original intention was to go to 6:30 today.
- 9 So I want to know who exactly if it's today
- 10 or never. And that's Mr. Hardison over there.
- 11 (Off-mic comments)
- 12 JUDGE HILLSON: Mr. Hardison, you
- 13 are here on your own, is that a fair
- 14 statement? You're not sponsored by one of the
- 15 parties.
- 16 I'm going to let Mr. Hardison come
- 17 up. Do you have a written statement sir?
- 18 So that is going to be it for
- 19 tonight. We are going to have Mr. Hardison
- 20 and we are going to have I didn't quite get
- 21 her name that is going to be it.
- Whereupon,

- 1 ALLEN HARDISON
- 2 Was called as a witness and, after having been
- 3 first duly sworn, was examined and testified
- 4 as follows:
- 5 JUDGE HILLSON: Could you please
- 6 state your name and spell it for the record?
- 7 MR. HARDISON: Allen Hardison, A-
- 8 l-l-e-n H-a-r-d-i-s-o-n.
- 9 JUDGE HILLSON: Now Mr. Hardison
- 10 you have handed me a double-sided document
- 11 which I am going to mark as Exhibit No. 29,
- 12 and you may proceed with your statement, sir.
- 13 (Whereupon the aforementioned
- 14 document was marked for
- 15 identification as Exhibit No. 29)
- 16 MR. HARDISON: Good afternoon.
- 17 My name is Allen Hardison. I am testifying as
- 18 VP of operations of Jacobs Farm/Del Cabo, Inc.
- 19 First I thank you fro the
- 20 opportunity to testify and for everyone's
- 21 participation.
- In the position of VP of

- 1 operations of JFDC among other things I
- 2 oversee the food safety program. We believe
- 3 that food safety is of utmost importance, and
- 4 we are pleased to see all efforts in that
- 5 arena by this August body and anybody else.
- 6 We appreciate those efforts.
- 7 For its account JFDC does have a
- 8 very large dedicated staff of managers and
- 9 technicians who oversee the program of
- 10 internal testing, external testing, audits,
- 11 procedures, et cetera. I have been a senior
- 12 executive of both conventional and organic
- 13 companies. Some of my best friends are
- 14 conventional growers, so that you know.
- 15 I've been a licensed pest control
- 16 adviser in all categories also. Depending on
- 17 how you view the statistics, I know you have
- 18 asked for this, we are a large handler by FDA
- 19 standards, but JFDC is not a large handler of
- 20 the products specifically in the LGMA.
- 21 What's important to us is the
- 22 company and parts of our vision. The founders

- 1 of the company, as well as a bunch of us, have
- 2 put together a vision statement, and we are
- 3 very much in line with helping to create a
- 4 sustainable world; provide a premium organic
- 5 product; ship great tasting organic products
- 6 to our clients. And we are also always
- 7 attempting to be very socially responsible by
- 8 training less fortunate lower income growers
- 9 and impoverished people on how to grow organic
- 10 crops.
- 11 The above statement relates to the
- 12 four following comments below.
- 13 First of all we are concerned
- 14 about the potential excess regulations and/or
- 15 supermetrics as it relates to lack of habitat
- 16 allowed in the fields. This has been hashed
- 17 out extensively. I don't see a great need to
- 18 cover it anymore.
- 19 Although this may not be the
- 20 appropriate forum for it, we are very
- 21 concerned about testing and the manner in
- 22 which testing is done. I've addressed it to

- 1 some people. What we would like to do, work
- 2 with you, anybody else, FDA, with faster
- 3 testing. Our crops are just like me, leafy
- 4 greens are very susceptible to time, and we
- 5 have been subject to great losses due to slow
- 6 testing procedures for salmonella and e. coli,
- 7 truckloads and truckloads.
- 8 I will skip #3 because it really
- 9 relates to #1 above, and as stated previous I
- 10 believe that has been hashed out enough.
- 11 One of my other big personal
- 12 concerns is #4, is this great country was
- 13 founded on small businessmen and small
- 14 farmers, and I am greatly concerned about a
- 15 lot of the costs associated with a program
- 16 such as this, as we do not want to throw these
- 17 guys out on the street. And I did not know
- 18 that there were any training programs going
- 19 on. I'd like to know what they are. I'd like
- them to be more publicized, and I'd like to
- 21 see my recommendation if you would is that
- 22 we have somehow a program to offer to the

- 1 smaller growers that is almost like, here is
- 2 a package. Because to go through the training
- 3 for a major food safety program, and to learn
- 4 it all, took months and months and months of
- 5 our people's time. And we do have a very
- 6 extensive program, and it is very good. But
- 7 for a small grower to take that kind of time,
- 8 it's either going to cost him mega bucks,
- 9 which it will not afford to do, and he needs
- 10 a program, or he or she. And the other
- 11 portion is, questions have been brought up
- 12 about cost, the fixed cost and variable cost,
- 13 as well as the startup cost can be excessive.
- 14 As an example down in Mexico now this is
- 15 Mexico, and this is dollars, not pesos, Your
- 16 Honor on the average we had more than 300
- 17 growers in the southern Baja area, and we told
- 18 them if they could not get good agricultural
- 19 practices by Seneseco GAPs that they'd be out
- 20 of our program. Only 80 of them were able to
- 21 quality and get their GAP certificate under
- 22 Seneseco, and the average costs now this is

- 1 just the startup costs, this is not the
- 2 ongoing costs is more than \$5,000. And
- 3 these are little tiny growers, literally from
- 4 three-quarters of an acre to I think probably
- 5 our biggest grower is five or six acres. So
- 6 that is the startup costs; it's not the
- 7 ongoing costs.
- I'd be more than happy to answer
- 9 any questions, and if there aren't any
- 10 questions, I'd be very happy to step down
- 11 also.
- 12 JUDGE HILLSON: Good luck with
- 13 that.
- 14 Let's start with the panel from
- 15 FDA.
- 16 CROSS-EXAMINATION
- 17 MS. SCHMAEDICK: Melissa
- 18 Schmaedick, USDA.
- 19 And thank you, Mr. Hardison, for
- 20 your testimony.
- I was a little bit intrigued by
- 22 your the portion of your statement where you

- 1 said your company is actively involved in
- 2 working with small farmers to develop food
- 3 safety programs for their operations. Did I
- 4 hear that correctly?
- 5 MR. HARDISON: That is correct.
- 6 And those are south of the border, mostly.
- 7 MS. SCHMAEDICK: So they are not
- 8 here in the United States?
- 9 MR. HARDISON: Mostly, that is
- 10 correct.
- 11 MS. SCHMAEDICK: But based on
- 12 your experience, is it possible for a small
- 13 operation to develop a system that meets the
- 14 goal of a food safety program?
- MR. HARDISON: Well, certainly
- 16 it's possible. And depending on where the
- 17 grower is, how many crops they have will go a
- 18 long ways and dictate what kind of fixed costs
- 19 and variable costs that person will incur, how
- 20 many crops they have, what types of crops, et
- 21 cetera. For some of the people it could be
- 22 very difficult. That's why I'm saying, it's

- 1 up to us, whether it's you guys or us guys or
- 2 somebody else to be socially responsible and
- 3 really to try to hand them programs on a
- 4 platter that is almost like a check off list
- 5 if you will rather than them having to
- 6 research it and spend a lot of money. Because
- 7 a lot of the expense is time, and a lot of
- 8 the costs are hard costs, start up costs.
- 9 Is that a clear statement? Did I
- 10 answer it?
- MS. SCHMAEDICK: Yes.
- MR. HARDISON: Okay.
- MS. SCHMAEDICK: So in the
- 14 language there is a process that is described
- 15 by which a technical review board would work
- 16 cooperatively with an administrative
- 17 committee. Do you see the opportunity for
- 18 your company's knowledge and experience in
- 19 working with small businesses to be used in a
- 20 pro-active way in developing metrics?
- 21 MR. HARDISON: I was hoping the
- 22 other people that you asked to volunteer would

- 1 step in, but yes, we would help, we would be
- 2 happy to help. That is the socially
- 3 responsible thing to do I believe. And that
- 4 means growers here, not just growers south of
- 5 the border.
- 6 MS. SCHMAEDICK: That concludes
- 7 my questions.
- 8 JUDGE HILLSON: Thank you. Any
- 9 more questions from the panel? Ms. Dash.
- 10 MS. DASH: Suzanne Dash.
- 11 Item #3, when you were referring
- 12 to the agreement, are you referring to the
- 13 proposed National Leafy Greens Marketing
- 14 Agreement?
- 15 MR. HARDISON: No, I met this -
- 16 we were concerned I guess I have to digress
- 17 a bit we were concerned, because I do have
- 18 copies of the California agreement and also
- 19 the audit. And that's where we first became
- 20 concerned when we were looking through the
- 21 audits. We have gone through audits by at
- 22 least six different organizations. And we

- 1 have not got through your audit ever. And so
- 2 that would have been seven.
- 3 But when I went through that I saw
- 4 a lot of those kinds of concerns. And again
- 5 when you talk about the super matrix or
- 6 metrics, excuse me we see that. We've seen
- 7 it it's for real. Because you get one guy
- 8 in here, and they're talking about that guy is
- 9 no good and this guy is no good, and ours are
- 10 better, and we have been audited by one of the
- 11 most difficult organizations, and it was
- 12 absolutely amazing. And I'll leave it at
- 13 that.
- 14 So we need reality. We need
- 15 science based. We need risk assessments. And
- 16 we need a uniform, a truly uniform, audit that
- 17 is fair to everyone.
- JUDGE HILLSON: Thank you.
- 19 Proponents, Mr. Resnick.
- 20 MR. RESNICK: Thank you for your
- 21 testimony today, Mr. Hardison. Jason Resnick
- 22 for the proponent group,

- 1 Of the six audits that you just
- 2 mentioned, are those food safety audits or
- 3 organic audits or both?
- 4 MR. HARDISON: No, food safety.
- 5 None of the organic audits are included. And
- 6 we have them, obviously GAPs as well as GMPs,
- 7 because we are a handler, we are a packer, as
- 8 well as we are a grower.
- 9 MR. RESNICK: And those were six
- 10 audits during what period of time?
- MR. WILKINSON: Year and a half,
- 12 two years max.
- MR. RESNICK: And those audits
- 14 were required of you by your buyers?
- 15 MR. WILKINSON: Right.
- 16 MR. RESNICK: That's all I have.
- 17 Thank you.
- 18 JUDGE HILLSON: Anyone else? Mr.
- 19 English? Anyone back there?
- Thank you for your testimony.
- 21 (Witness excused)
- JUDGE HILLSON: And I'm going to

- 1 receive your written testimony as Exhibit No.
- 2 29, it's received into evidence.
- 3 (Whereupon the aforementioned
- 4 document having previously been
- 5 marked for identification as
- 6 Exhibit No. 29 was received into
- 7 evidence)
- JUDGE HILLSON: And I guess we
- 9 are going to have the last witness of the day.
- 10 Have a seat, Ms. Bunin. I am
- 11 going to mark your written statement as
- 12 Exhibit No. 30.
- 13 (Whereupon the aforementioned
- 14 document was marked for identification as
- 15 Exhibit No. 30)
- 16 Whereupon,
- 17 LISA J. BUNIN
- 18 Was called as a witness and, after having been
- 19 first duly sworn, was examined and testified
- 20 as follows.
- JUDGE HILLSON: Please state your
- 22 name and spell it for the record?

- 1 MS. BUNIN: My name is Lisa
- 2 Bunin, L-i-s-a B-u-n-i-n.
- JUDGE HILLSON: And I'm sorry,
- 4 go ahead.
- 5 MS. BUNIN: Sorry, I was going to
- 6 say that there are shortened remarks. But the
- 7 full remarks I ask to be part of the public
- 8 record.
- 9 JUDGE HILLSON: Okay, that will
- 10 be find.
- 11 Mr. English, do you have any other
- 12 preliminary questions?
- MR. ENGLISH: That was what I was
- 14 going to ask her.
- JUDGE HILLSON: You may read
- 16 whatever part of your testimony you plan to
- 17 read.
- 18 DIRECT EXAMINATION
- 19 MR. RESNICK: The Center for Food
- 20 Safety would like to thank the USDA
- 21 Agriculture Marketing Service for this
- 22 opportunity to speak on the proposed marketing

- 1 agreement to cover the handling of leafy green
- 2 vegetables and products in the U.S.
- 3 CFS is a non-profit environmental
- 4 and consumer advocacy organization that works
- 5 to protect human health and the environment by
- 6 curbing the proliferation of harmful food
- 7 production technologies and by promoting
- 8 organic and other forms of sustainable
- 9 agriculture.
- 10 Our constituency is comprised of
- 11 people across the country who actively engaged
- in public policy debates on organic
- 13 agriculture, sustainable food production
- 14 technologies and food safety. They support
- organic agriculture in their communities by
- 16 consuming organic food from farmers markets,
- 17 grocery stores; as shareholders in community-
- 18 supported agriculture farms; and increasingly
- 19 by growing their own food and promoting
- 20 organic food purchases in schools and other
- 21 local institutions.
- 22 CFS is here today to express its

- 1 strong reservation about the establishment of
- 2 a National Leafy Greens Marketing Agreement as
- 3 a means to address growing food safety
- 4 concerns in the U.S. We do not believe that
- 5 the marketing arm of USDA is the appropriate
- 6 institutional home within government for
- 7 developing and enforcing food safety
- 8 standards.
- 9 Since food safety is a public
- 10 health issue and not a marketing issue, we
- 11 believe that the authority to regulate and
- 12 oversee food safety should rest with the U.S.
- 13 Food & Drug Administration in coordination
- 14 with the U.S. Department of Agriculture.
- 15 Industry-proposed marketing
- 16 agreements such as the one we are here to
- 17 discuss today do not allow for adequate
- 18 transparency, much less public accountability,
- 19 than government-developed and enforced food
- 20 safety programs. The public has the right to
- 21 know how and where their food is grown, and
- 22 this right is more likely to be preserved

- 1 through a federal rulemaking process than by
- 2 an industry-driven agreement without
- 3 representation from the organic sector or
- 4 consumers, and without public accountability.
- 5 In fact the public's right to know
- 6 could be stifled by the implementation of an
- 7 NLGMA in which industry members who develop
- 8 the agreement also decide who will join their
- 9 oversight and advisory committees, instead of
- 10 opening up membership to a fair, open, public
- 11 and impartial application process.
- 12 CSF believes that the development
- of a comprehensive food safety program is the
- 14 job of our elected officials in Congress.
- 15 While CSF wholeheartedly supports the creation
- of better guidance and training to promote
- 17 food safety and more stringent oversight and
- 18 regulation for food production, processing and
- 19 handling systems, we are deeply concerned
- 20 about the potential negative effects on the
- 21 environment and organic agriculture associated
- 22 with the adoption of the national LGMA.

1 We also wholeheartedly support the

- 2 government and leafy green industry in taking
- 3 swift action to prevent future food-borne
- 4 illnesses, but we expect that it will not be
- 5 done at the expense of small and medium sized
- 6 farms, diverse cropping systems, wildlife and
- 7 their habitat, biodiversity conservation, and
- 8 clean waterways. Particularly in the absence
- 9 of science-based evidence to support those
- 10 actions.
- In what is known as the salad bowl
- 12 of the Central Coast of California, farmers
- 13 grow over 200 crop varieties, including 82,000
- 14 tons of lettuce from Monterrey-Salinas Valley
- 15 alone. This fertile bowl is uniquely situated
- 16 within the watersheds of the Pajaro River,
- 17 Salinas River and Elkhorn Slough which empty
- 18 into the Monterrey Bay sanctuary, the largest
- 19 protected marine area in the United States.
- 20 The climate and fertile soil of
- 21 the Central Coast allows for year-round
- 22 production of a diverse range of crops.

- 1 Unfortunately this productive landscape has
- 2 become increasingly scarred and watersheds
- 3 threatened as farmers degrade the natural
- 4 environment in an attempt to comply with
- 5 California's LGMA requirements.
- 6 This is taking place even despite
- 7 the lack of scientific evidence that these
- 8 actions will achieve the desired results of
- 9 enhanced food safety.
- 10 It is worth noting that this past
- 11 Friday 1,700 boxes of spinach were recalled
- 12 from a Salinas Valley distributor who is a
- 13 signatory to the California LGMA. Despite
- 14 claims from large processors of leafy greens
- 15 that recalls will increase because of ramped
- 16 up routine inspections, such recalls do not
- 17 provide evidence or public assurance that the
- 18 source of contamination is being directly
- 19 addressed and eliminated.
- 20 For CFS and its supporters, food
- 21 safety is not just about eliminating microbial
- 22 contamination from farms and processing

- 1 facilities; it is also about looking at the
- 2 full spectrum of factors that impinge upon
- 3 delivery of safe, nutritious, affordable fresh
- 4 foods to consumers across the U.S. and abroad.
- 5 Factors that have been overlooked
- 6 in California's LGMA include the adverse
- 7 effects on farmworkers, community and
- 8 environmental health through the applications
- 9 of large doses of synthetic toxic pesticides
- 10 and fertilizer on farm; water pollution from
- 11 large livestock and poultry operations; the
- 12 removal of beneficial insect and predator
- 13 habitats that diminish the need for toxic
- 14 pesticides; and the non-therapeutic use of
- 15 antibiotics in livestock raised in confined
- 16 animal feeding operations, or CAFOs, which
- 17 contribute to widespread antibiotic-resistant
- 18 pathogens and find their ways into consumers'
- 19 salads.
- 20 All of these factors adversely
- 21 impact food safety, but have been left out of
- 22 California's LGMA which is the purported -

- 1 purported to be the model for the NLGMA.
- 2 Factors that enhance food safety
- 3 have been disregarded in California's LGMA as
- 4 well, such as the planting of trees, shrubs,
- 5 grasses to filter pathogenic dust and
- 6 pesticides, to protect against agricultural
- 7 runoff into waterways; intercropping on farms
- 8 to attract beneficial insects and predators.
- 9 And the use of green manures to build
- 10 biologically active soils that fight and
- 11 degrade pathogens.
- 12 These types of biodiversity
- 13 conservation measures among others are
- 14 required on organic farms. In fact the
- 15 National Organic Standards board recently
- 16 adopted a plan to comprehensively address
- 17 biodiversity with the full support of the
- 18 National Organic Program.
- 19 Critical social factors that are
- 20 integral to delivering a nutritious and
- 21 sustainable food supply to consumers across
- 22 the country must be carefully considered in

- 1 discussions about how to improve our nation's
- 2 foods safety. In particular the critical role
- 3 that small and medium farms play in delivering
- 4 fresh and healthy food to their communities
- 5 must be added to the discussion as well as
- 6 their contribution to the local economy.
- 7 This necessitates the creation of
- 8 flexible food safety programs rather than a
- 9 one-size-fits-all approach which discriminates
- 10 against the use of vital contributes to our
- 11 food supply and economy.
- 12 Small and medium sized growers
- 13 that do not commingle their produce with other
- 14 growers, and that sell non-bagged leafy
- 15 greens, present less risk to the public than
- 16 larger growers than makes and bag their leafy
- 17 greens.
- 18 Consumers who buy organic food
- 19 expect that it is grown in a manner that
- 20 conserves biodiversity and enhances the
- 21 natural ecology within which it is grown in
- 22 accordance with the National Organic Program.

- 1 Research has shown that organic consumers
- 2 deliberately choose to use their food dollars
- 3 to support organic and non-industrial
- 4 agriculture systems. Measures that negatively
- 5 impact the natural environment as have been
- 6 seen since the implementation of California's
- 7 LGMA are incompatible with organic farming
- 8 particularly with respect to biodiversity
- 9 conservation. They are also incompatible with
- 10 the values of our organic food consuming
- 11 public.
- 12 In conclusion, CFS believes that
- 13 food safety is not just about eliminating
- 14 microbial contamination from farms and
- 15 processing facilities. It is also about
- 16 looking at the full spectrum of factors that
- 17 impinge upon delivering safe healthy food to
- 18 consumers across the U.S. and abroad. It is
- 19 about the ability of our nation's farmers to
- 20 meet their caloric and nutritional needs of
- 21 every person in the U.S. and being able to
- 22 support themselves and their families in doing

- 1 so.
- 2 It is about sustaining and
- 3 enhancing the environment, economy and the
- 4 communities where food is grown. And it is
- 5 about safeguarding farmworker health, the
- 6 national environment and its inhabitants and
- 7 the ethical treatment of wildlife and farm
- 8 animals.
- 9 CFS does not believe that these
- 10 values and practices underpinning a safe food
- 11 system can be preserved with the introduction
- 12 of a national industry-driven LGMA. Our
- 13 nation's food safety interests are best served
- 14 through the development of an integrated
- 15 transparent food safety program at the federal
- 16 level with strict government oversight,
- 17 funding for education, training and
- 18 enforcement, and with flexibility and
- 19 implementation that allows diverse,
- 20 sustainable farms of all sizes and
- 21 configurations to thrive across the country.
- 22 MR. ENGLISH: I believe you

- 1 actually might have left out one paragraph you
- 2 didn't mean to leave out, which is the last
- 3 paragraph. You said the federal level, but I
- 4 think your statement says federal legislative
- 5 level.
- 6 MS. BUNIN: Oh, sure.
- 7 MR. ENGLISH: And that's an
- 8 important point.
- 9 MS. BUNIN: It is an important
- 10 point, thank you.
- 11 MR. ENGLISH: Your Honor, I do
- 12 not have further questions. I move the
- 13 admission of the statement.
- 14 JUDGE HILLSON: I'll receive
- 15 Exhibit No. 30 into evidence.
- 16 (Whereupon the aforementioned
- document having previously been
- 18 marked for identification as
- 19 Exhibit No. 30 was received into
- 20 evidence)
- 21 JUDGE HILLSON: And I will ask
- 22 the USDA panel if they have any questions for

- 1 this witness.
- 2 CROSS-EXAMINATION
- 3 MS. SCHMAEDICK: This is Melissa
- 4 Schmaedick, USDA.
- 5 I think I should be saying good
- 6 evening now. Isn't it officially good
- 7 evening? Okay.
- 8 And it's Ms. Bunin, is that
- 9 correct?
- MS. BUNIN: Bunin.
- 11 MS. SCHMAEDICK: Bunin, okay. So
- 12 Ms. Bunin, do you believe that there is a
- 13 relationship between the quality of food and
- 14 whether or not it has been contaminated?
- MS. BUNIN: I think when you are
- 16 talking about food quality I think of things
- 17 like grading and blemishes and size and those
- 18 sorts of issues. And contamination I think of
- 19 it more as a food safety issue.
- 20 MS. SCHMAEDICK: But if there
- 21 were a product that was contaminated, would
- 22 you be able to say that it was still a quality

- 1 product?
- MS. BUNIN: No, of course not.
- 3 MS. SCHMAEDICK: I think your -
- 4 the copy that I got were flipped; three and
- 5 four were reversed. So I apologize, I'm a
- 6 little bit discombobulated. But on page four,
- 7 I believe you stated that the California LGMA
- 8 is reported as an intended model for the
- 9 NLGMA.
- MS. BUNIN: Yes, I do.
- 11 MS. SCHMAEDICK: So I am first of
- 12 all curious, have you spent time reading the
- 13 proposed language for the national program?
- MS. BUNIN: Yes, I have.
- 15 MS. SCHMAEDICK: And am I correct
- 16 in assuming that you spent time reading the
- 17 California program as well?
- 18 MS. BUNIN: Yes.
- 19 MS. SCHMAEDICK: Do you find that
- 20 there are differences between those two
- 21 programs?
- MS. BUNIN: Well, as you know, the

- 1 proposal today on the table is without the
- 2 metrics, and the California agreement does
- 3 have metrics, so in that sense they are very
- 4 different. But my point being that the people
- 5 who have drafted the California LGMA are also
- 6 involved in the national one, and I think that
- 7 people are assuming that the California LGMA
- 8 will model for the national LGMA.
- 9 MS. SCHMAEDICK: Is the absence
- 10 of specific metrics the only difference that
- 11 you've noticed between the two proposals?
- MS. BUNIN: I think that there is
- 13 some administrative and structural
- 14 differences.
- 15 Of course that it is through the
- 16 USDA; it's not a California agreement, it's a
- 17 national agreement.
- 18 MS. SCHMAEDICK: Does the
- 19 proposed federal program discuss the need to
- 20 have verification audits for handlers and
- 21 processors?
- MS. BUNIN: I don't what I'm

- 1 here today to talk about is not to talk about
- 2 this agreement. What I'm here today to talk
- 3 about is the Center for Food Safety's position
- 4 that we believe that food safety should be
- 5 dealt with at the Congressional level and that
- 6 rulemaking should follow from that.
- 7 So I guess I'm a little bit
- 8 reluctant to go through the discussion of this
- 9 agreement, because that is a position that I'd
- 10 like to put on the table for the Center for
- 11 Food Safety.
- MS. SCHMAEDICK: Okay. Are you
- 13 representing the Center for Food Safety?
- MS. BUNIN: That is our
- 15 organization.
- 16 MS. SCHMAEDICK: Okay. On page
- 17 four you have a statement that says, in
- 18 conclusion, CFS believes that food safety is
- 19 not just about eliminating microbial
- 20 contamination from farms and processing
- 21 facilities. Do you believe that microbial
- 22 contamination can be eliminated?

- 1 MS. BUNIN: I'm uncertain.
- 2 MS. SCHMAEDICK: Do you have any
- 3 ideas about what it might take to eliminate
- 4 it?
- 5 MS. BUNIN: Well, I think first
- 6 it's important to get some science-based
- 7 research to look at what are the sources of
- 8 contamination before we can talk about an
- 9 elimination program. There is certainly
- 10 evidence to suggest that livestock are one
- 11 aspect of the contamination that benefits from
- 12 vegetative buffers, from windbreaks, from that
- 13 sort of thing. So I think that there are
- 14 opportunities for increased research and I
- 15 think really going to the source is what
- 16 matters.
- 17 MS. SCHMAEDICK: Okay. Do you
- 18 believe that the organic certification is
- 19 mutually exclusive of food safety?
- MS. BUNIN: No.
- MS. SCHMAEDICK: No? So those
- 22 two programs could coexist?

- 1 MS. BUNIN: Absolutely; I think
- 2 it's necessary.
- 3 MS. SCHMAEDICK: That is the end
- 4 of my questions. Thank you.
- 5 JUDGE HILLSON: Any further
- 6 questions from the USDA panel? Seeing
- 7 nothing, I shall turn to the proponents panel?
- 8 Mr. Wilkinson?
- 9 MR. WILKINSON: Just a couple of
- 10 questions, your Honor.
- I take it that the center is in
- 12 favor of science-based quality standards?
- MS. BUNIN: Yes, of course.
- 14 MR. WILKINSON: And you have sat
- 15 here for the past two days, have you not?
- 16 MS. BUNIN: Actually I was only
- 17 here for a full day today. I was only there
- 18 for the evening of yesterday.
- 19 MR. WILKINSON: Can you imagine
- 20 we did this all day yesterday as well?
- In your mind is this a transparent
- 22 process?

- 1 MS. BUNIN: Today, there seems to
- 2 be a lot of transparency; yes, I would say so.
- 3 MR. WILKINSON: Thank you.
- 4 JUDGE HILLSON: Anything else
- 5 from the proponents side? Any redirect, Mr.
- 6 English?
- 7 You may step down. Thank you very
- 8 much for testifying. Your witness statement
- 9 is already in evidence.
- 10 (Witness excused)
- 11 JUDGE HILLSON: Let's take two
- 12 minutes to talk abou9t tomorrow.
- Mr. English, how many more
- 14 witnesses do you anticipate calling?
- 15 MR. ENGLISH: I think three that
- 16 are mind, and one that may be coming. So
- 17 there's four total that we expect.
- 18 JUDGE HILLSON: And Mr. Resnick,
- 19 how many more I know we have a long list
- 20 here. How many do you actually think you are
- 21 going to be calling tomorrow?
- 22 MR. RESNICK: I'm going to have

- 1 to confer for a moment.
- 2 MR. ENGLISH: While he is
- 3 conferring Your Honor, I might just note for
- 4 the record, so it's clear on the record,
- 5 because Mr. Etka referenced a witness for the
- 6 Episcopal diocese, and that was a person who
- 7 we recognized there were limits today, and we
- 8 ran out of time, and she left. So she is not
- 9 going to be appearing. But I didn't want the
- 10 record to reflect and she did leave a
- 11 statement for me to submit on her behalf.
- 12 However, I know from legal precedent from some
- 13 other proceedings that not being a witness
- 14 sworn that you can't take it.
- 15 JUDGE HILLSON: Unless there is
- 16 no objection.
- 17 MR. WILKINSON: Perhaps Mr.
- 18 English can share the statement with us, and
- 19 then we can respond tomorrow.
- 20 JUDGE HILLSON: I'll tell you
- 21 what, why don't you give a copy to Ms. Deskins
- and to the proponent team, and we can talk

- 1 about it tomorrow.
- 2 MR. ENGLISH: Happy to do that.
- JUDGE HILLSON: I don't need a
- 4 copy at this point. The general rule is that
- 5 we don't allow testimony unless the person is
- 6 subject to cross-examination. But if there is
- 7 no objection --
- 8 MR. ENGLISH: Prior to May of
- 9 this year I know of proceedings in which a
- 10 statement -- unsworn statement an unsworn
- 11 statement was permitted to accompany the
- 12 record, as an unsworn statement, with the
- 13 recognition that it didn't have the indicia of
- 14 cross-examination.
- 15 Having said that, in May of this
- 16 year at a rather contentious proceeding, I
- 17 think the precedent changed, or at least was
- 18 clarified, in such a way that and I am the
- 19 last person to overturn that precedent,
- 20 because I think I would have sought it.
- 21 JUDGE HILLSON: Well, let's talk
- 22 about it tomorrow. Let's give the parties -

- 1 let's give agency counsel and the proponents
- 2 a chance to review the document. If they
- 3 don't have any problem with it, then I'll let
- 4 it in. If they do have a problem with it,
- 5 then I'll probably won't.
- 6 MS. DESKINS: Let me just put on
- 7 the record, if it does come in it goes to the
- 8 weight that is given it. Because if the
- 9 person isn't here for cross-examination, even
- 10 if it comes in it might not be given a lot of
- 11 weight.
- MR. ENGLISH: And I accept that
- 13 characterization.
- 14 JUDGE HILLSON: I don't know what
- 15 it says, so I don't know if there is anything
- 16 contentious in there anyway. So why don't you
- 17 all look it and we'll talk about that
- 18 tomorrow.
- 19 Did you come up with an acceptable
- 20 number, Mr. Resnick?
- 21 MR. RESNICK: Yes, Your Honor, we
- 22 are looking at eight and as many as 10

- 1 tomorrow; a total of 16 through Friday.
- JUDGE HILLSON: Wait, what's this
- 3 through Friday bit? You talking about having
- 4 more witnesses?
- 5 MR. RESNICK: Oh, sorry. We have
- 6 as many as 10 who are prepared to testify
- 7 tomorrow.
- JUDGE HILLSON: Okay, because we
- 9 may finish tomorrow.
- 10 MR. RESNICK: We have at least
- 11 that many that will --
- 12 JUDGE HILLSON: Well, Mr. English
- has three or four, and we don't know how many
- 14 walk-ins we're going to have.
- 15 MR. RESNICK: We had 14 the other
- 16 day according to my count.
- 17 JUDGE HILLSON: I didn't count.
- 18 I have us doing 26 altogether.
- 19 MR. RESNICK: We would anticipate
- 20 from the proponents' side it'll go much faster
- 21 except perhaps for one witness who is an
- 22 economist.

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JUDGE HILLSON: Okay, shall we
 1
     start at the same time, 8:00 o'clock tomorrow?
 2
     These 11-hour days are sort of inspiring in a
 3
 4
     way.
                 Okay, we will adjourn until 8:00
 5
     a.m. tomorrow. Thank you very much. Off the
 6
 7
     record.
 8
                  (Whereupon at 6:49 p.m. the
 9
     proceeding in the above-entitled matter was
     adjourned.)
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