National Sustainable Agriculture Coalition

July 28, 2011

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

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Submitted via: http://www.regulations.gov
Emailed to Melissa Schmaedick, Melissa.Schmaedick@ams.usda.gov

Re: Proposed National Marketing Agreement Regulating Leafy Green Vegetables

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Doc. No. AO-FV-09-0138; AMS-FV-09-0029; FV09-970-1

Dear Hearing Clerk and Ms. Schmaedick:

We are submitting this letter in response to the proposed National Leafy Greens Marketing Agreement (NLGMA).

The National Sustainable Agriculture Coalition (NSAC) is an alliance of grassroots farm and rural organizations that advocates for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. Our vision of agriculture is one where a safe, nutritious, ample, and affordable food supply is produced by family farmers who make a decent living pursuing their trade, while protecting the environment, and contributing to the strength and stability of their communities. Many NSAC organizations include small and mid-size agricultural producers of leafy green vegetables.

NSAC strongly opposes the proposal and urges USDA to withdraw it for the following reasons.

1. **The Proposed NLGMA is Inconsistent with Statute and Should Therefore be Withdrawn.**

The Agricultural Marketing Agreement Act of 1937 establishes marketing orders and marketing agreements for the purpose of creating "orderly marketing conditions" in interstate commerce for

the benefit of agricultural producers. In addition, consumers are to be protected from inordinately high prices, and marketing research and development may be provided for "as will be in the public interest." Finally, "orderly marketing conditions" and "an orderly flow" of supplies is to be fostered "in the interests of producers and consumers."[1]

An agreement proposed by handlers that is objected to by many farmers, farmer organizations, and consumer organizations should never have been cleared for publication as a proposed agreement. USDA is absolutely correct in labeling the proposal an "industry proposal" in its summaries of the NLGMA and as such the Department has overstepped its authority in moving a handler-initiated proposal as a proposed marketing agreement under the terms of a law which does not include industry handlers as a protected class. Giving industry leaders the authority, through effective control of the marketing agreement (see section 11 below), to administer a program that will effectively regulate their growers creates at the very least the appearance of insider abuse and manipulation. USDA should not be party to such an agreement and should have rejected it on that basis.

The proposed NLGMA not only serves the wrong constituency relative to the congressionally mandated purposes of the program, but it also does nothing to serve the overriding purpose of the statute to create orderly marketing conditions. In fact, quite to the contrary, it fosters more market disruption and confusion by introducing a new and potentially contradictory overlay to the Food Safety Modernization Act passed by Congress last year and signed into law by the President at the beginning of 2011. Proposing multiple regulations by multiple government agencies or government-sponsored entities on the same subject violates important "good government" principles. Having seen this would so clearly be the case as the Food Safety Modernization Act was becoming law, USDA should have rejected the proposed agreement instead of bringing it forward as a proposal in the Federal Register.

2. <u>Congress Rejected Marketing Agreements as a Food Safety Tool and USDA Should Not Provide Industry with a Shady, Back Door Mechanism to Achieve What Congress Rejected.</u>

The House version of what became the 2008 Farm Bill (Food, Conservation, and Energy Act of 2008) authorized the implementation of specialty crop marketing agreements for food safety. Industry sought this amendment precisely because they believed, correctly, that current law did not provide for comprehensive food safety controls via marketing agreements. After heated debate, the Conference Committee rejected the House provision, precisely based on the argument that marketing agreements are not the right instrument to address food safety concerns and that the Agricultural Marketing Service is not a food safety agency.

Put simply, the leafy green and other specialty crop industry associations lost in their legislative campaign to change the law to provide authority for food safety marketing agreements such as the pending NLGMA. In order to save face, the industry scrambled to get language added to the Conference Report indicating that some marketing orders already issued by USDA have included "quality related provisions intended to enhance the safety of commodities" and that therefore the proposed statutory change was unnecessary. This "cover your losses" report language flies in the face of the industry's arguments in pursuing the amendment to begin with, and is at any rate

[1] Agricultural Marketing Agreement Act of 1937, Section 2, Declaration of Policy.

irrelevant to the current consideration of the NLGMA. The NLGMA is not a broad marketing agreement that happens to touch on a few quality-related provisions that have some effect on food safety. It is through and through a food safety agreement, period.

It is outrageous that USDA would help shepherd an agreement administratively that was rejected outright by Congress in the most recent farm bill. If USDA wants to propose a new food safety role for AMS and a new food safety purpose for marketing agreements and marketing orders, it should send proposed legislation to Congress for consideration in the 2012 Farm Bill. We hope USDA does not do that, as it would be a serious mistake. That, nonetheless, would be the appropriate remedy, not trying to do an end run around Congress fresh on the heels of consideration of the 2008 Farm Bill and the 2010 Food Safety Modernization Act.

3. **<u>The Agricultural Marketing Service Is Not a Food Safety Agency and Therefore Should Not be Moving Down this Road.</u>**

The Agricultural Marketing Service, according to its website, is comprised of the following programs:

> The Agricultural Marketing Service includes five commodity programs--Dairy, Fruit and Vegetable, Livestock and Seed, Poultry, and Cotton and Tobacco. The programs provide standardization, grading and market news services for those commodities. They enforce such Federal Laws as the Perishable Agricultural Commodities Act and the Federal Seed Act. AMS commodity programs also oversee marketing agreements and orders, administer research and promotion programs, and purchase commodities for Federal food programs.
>
> The AMS National Organic Program (NOP) develops, implements, and administers national production, handling, and labeling standards for organic agricultural products. The NOP also accredits the certifying agents (foreign and domestic) who inspect organic production and handling operations to certify that they meet USDA standards.
>
> The AMS Science and Technology Program lends centralized scientific support to AMS programs, including laboratory analyses, laboratory quality assurance, coordination of scientific research conducted by other agencies for AMS, and statistical and mathematical consulting services.
>
> The AMS Transportation and Marketing Program brings together a unique combination of traffic managers, engineers, rural policy analysts, international trade specialists, and agricultural marketing specialists to help solve problems of U.S. and world agricultural transportation., provides better quality products to the consumer at reasonable cost, improves market access for growers with small-to medium sized farms, and promotes regional economic development.
>
> AMS is part of the Marketing and Regulatory Programs (MRP) mission area. MRP agencies facilitate the domestic and international marketing of U.S. agricultural products and ensure the health and care of animals and plants. MRP agencies are active participants in setting national and international standards.

Interestingly, there is not a single mention of a food safety mission or food safety expertise.

The AMS strategic plan list four goals:

> For 2008–2013, AMS Strategic Goals are to:
>
> 1. Support our customers in making verifiable market-enhancing claims about how their products are produced, processed, and packaged.
>
> 2. Provide benefits to the agriculture industry and general public by delivering timely, accurate, and unbiased market information; supporting marketing innovation; and purchasing commodities in temporary surplus and donating them for Federal food and nutrition programs.
>
> 3. Enable agriculture groups to create marketing self-help programs designed to strengthen the industry's position in the marketplace.
>
> 4. Monitor specific agricultural industries/activities to ensure that they maintain practices established by regulation to protect buyers, sellers, and other stakeholders.

Again, there is no mention of food safety being a strategic goal of the agency. Appropriately, given the mission of the agency, the focus is on various aspects of marketing. Indirectly, the strategic plan in goal 4 possibly refers to food safety regulation, but only in the context of assisting industry to meet regulation, not establishing regulations.

In general, the stated purposes of the agency's marketing programs include the development of more efficient and equitable marketing, demand expansion, and/or to aid producers in maintaining their purchasing power. The NLGMA moves the agency away from its mission and into an area it is not designed to address.

The agency has very considerable expertise in the market for agricultural commodities and is therefore very rightly at the table at the Food and Drug Administration as FDA develops regulations for certain produce-related food safety measures. It should continue this important activity, but cease and desist from attempting insert itself directly into the food safety business.

4. **Food Safety Should be Pre-Competitive but this Proposed Agreement Threatens that Fundamental Core Principle and is Thus Dangerous and Unreasonable.**

By adding food safety to its repertoire and by creating a marketing agreement for food safety, AMS would send an inherently biased message that marketing promotion and food safety are interconnected. Consumers should not be led to believe that by selecting products of a particular marketing agreement or brand that they are therefore purchasing "safer" foods.

The members of the National Sustainable Agriculture Coalition have issued a statement containing 16 core principles about food safety. The very first of those principles states:

> **Food safety is noncompetitive and transparent.** Everyone who lifts a fork has a right to safe and healthy food, just as they have a right to choose foods based on the qualities most important to them. "Food safety" should not be a competitive marketing food-trait, lest the most vulnerable people end up with access to only the least safe food, or simply fewer choices. Every person has a right to expect the safest possible food, and a right to absolute transparency about its production

processes, no matter what they can afford to pay for it. Completely open, public information about what makes a food "safe" is not negotiable. [2]

Contrary to this principle, marketing agreements are designed to manage and promote the sales of products. It is an important purpose, but it is not a food safety purpose and it is fundamentally at odds with food safety principles. Food safety is not a marketable quality trait like a particular vegetable variety or a particular size of fruit or a particular production process with marketable attributes. By making food safety a marketable attribute the NLGMA flies in the face of the pre-competitive principle.

According to the AMS summary of the NLGMA on its website, "A signatory handler's compliance with the program would be signified by the use of a program certification mark on producer and handler sales transaction and shipping paperwork (bills of lading, manifests, etc.)." In other words, meeting the food safety terms of the NLGMA would be communicated both by the farmer and by the handler as product moves through the supply chain. Handlers who do not participate in the agreement, and farmers who supply those handlers, as well as farmers who do not operate through handlers at all because they opt to use more direct marketing mechanisms, would be implicated by this system as subpar or out of compliance.

This is the very definition of a system that intends to use food safety as a marketing mechanism. This is an extremely dangerous road to go down. It has the potential, if repeated in other parts of the food system, of bringing down the entire food safety regime in this country, a regime that is already in a precarious state of affairs. USDA should not start down this road and put one the most basic food safety principles at extreme risk.

5. **The NLGMA Creates a Classic Conflict of Laws Problem and an Unnecessary and Confusing Dual Agency Food Safety Implementation Regime that Will Exacerbate Rather than Help Solve Food Safety Problems.**

The proposed Agreement, to be overseen by AMS, is a confusing, unnecessary overlap of government agency regulation. The Food and Drug Administration (FDA), not AMS, has historically regulated the leafy greens market, as well as other agricultural sectors other than meat and poultry, with regard to food safety.

Passed last year, the Food Safety Modernization Act (FSMA) directs FDA to improve the safety of our nation's food supply in a variety of ways. FDA now needs time, and space, to implement the Act. FDA, not AMS, is comprised of our federal government's food safety experts. In today's difficult economic climate, at a time when Congress is working to shore up government spending, it is irresponsible to create a dual implementation mechanism.

In explaining how the NLGMA might work, the AMS Administrator explained to NSAC member organizations that FDA regulations pursuant to the FSMA that affect leafy greens might or might not be a ceiling or a floor with respect to the NLGMA. Rather, a decision on the precise inter-relationship between FDA rules and NLGMA rules would be up to the NLGMA Technical Review

[2] "A Sustainable Agriculture Perspective on Food Safety", http://sustainableagriculture.net/wp-content/uploads/2010/12/Sustainable-Food-Safety.final_.pdf

Committee. Any recommendations they make with respect to increasing or decreasing the scope of FDA regulations would be forwarded to the Secretary and then submitted for public comment.

The Administrator also commented that the NLGMA will implement any FDA regulations but could also "amplify" them and could also "adjust" them for particular regions of the country to make them more regionally appropriate.

These statements make it abundantly clear that the intent of the proposed Agreement is to allow industry, though control of the review process, to effectively adjust and change the regulations to be issued by FDA. Granted, these adjustments and changes would need to be approved by the Secretary for publication and public comment which could put some constraints in place. It nonetheless begs the question of why even start down the path of eventually having to make decisions that could put USDA in direct conflict with FDA when FDA has clear statutory authority and USDA quite frankly has none. We may like FDA's forthcoming rules or we may hate them, but there will clearly be no certainty about them if the NLGMA Technical Review Committee is given the authority to determine whether they are a floor or a ceiling or appropriate or not appropriate for particular regions of the country.

Setting up a situation where there will almost certainly be a conflict of law is unwise. In the best case scenario it is redundant and unnecessary, but the far more likely outcome is direct conflict and, in all likelihood, litigation. This is a waste of taxpayer resources. It will lead to confusion among agricultural producers. It will weaken the public trust in government. It should therefore be withdrawn.

6. **<u>The NLGMA Could Remove the Legal Protections Provided Small and Mid-Sized Diversified Family Farms in the Food Safety Modernization Act as Approved by Congress and Signed into Law by the President.</u>**

We have sought repeated unqualified assurances from USDA that all of the protections carefully built into the FSMA by Congress to protect the interests of small and mid-sized farms, diversified farming operations, direct market operations, and local food producers would be fully recognized and scrupulously respected under the NLGMA. No such unqualified assurances were forthcoming. In fact, to the contrary, we were told by the Administrator that the ultimate decisions on issues like this would rest with the Review Committee and that while it is assumed that FDA regulations and implementation process will be adopted by the NLGMA, there is a chance these particular issues would be among those that the NLGMA might amend through the process established in the proposed Agreement.

Farmers from family farm and sustainable and organic agriculture organizations from around the country spent the better part of two years using the democratic process to achieve these important protections and they continue to follow with great interest the rule writing process at FDA. USDA does an enormous disservice to these farmers and to the democratic process by opening a door that could lead to the nullification of these legal protections. We object in the very strongest terms possible. If the NLGMA were to move forward, we will insist on complete congruity with each and every provision we fought so hard to achieve in the FSMA and will be prepared to defend that position through every means possible. In the meantime we can only be alarmed and saddened that USDA would even consider a mechanism that could result in an end run around the laws of the United States.

7. **NLGMA is Unique to the Leafy Greens Sector, Creating an Unwarranted Misimpression.**

The proposed NLGMA would create unwarranted requirements unique only to the leafy green vegetables market. By singling out leafy greens for special treatment not given to other crops that may be regulated under the FSMA, producers of lettuce, spinach, cabbage, and other leafy green vegetables would face additional requirements not found in other agricultural markets. All other produce varieties that FDA decides to include in its regulatory purview would have those FDA regulations to comply with but not a national marketing agreement nor the agreement's third party audit procedure. The leafy greens industry is not alone in exemplifying food safety problems in our nation's food supply and, more importantly, most leafy greens producers are not part of the problems that have occurred, which have been highly concentrated to the largest, nationwide distributors. It is unfair to single out only one segment of the produce sector, especially in a sector in which the largest players appear to be maneuvering to misuse food safety claims to gain a competitive advantage in the marketplace.

8. **Despite USDA Rhetoric to the Contrary, the NLGMA is Not Voluntary and USDA Should Tell Farmers the Truth**

The NLGMA is being sold as a voluntary agreement. With respect to handlers, that may be the case, but with respect to farmers who sell to handlers who have signed the agreement, the NLGMA is mandatory. USDA should cease calling the proposal voluntary and level with growers by explaining that for them it will be mandatory if their handler is a party to the Agreement.

9. **The NLGMA Attempts to Unfairly Force Farmers in 48 States to Comply with Flawed State Agreements in the Two States that Dominate the Market Yet USDA Failed in its Obligation to Determine the Merits of the Implied Industry Proposition that there is a Significant Problem to be Solved.**

According to the preamble to the proposal, only ten percent of total leafy green production occurs in states other than California and Arizona, the two states that already have Leafy Green Marketing Agreements at the state level. Moreover, the agency notes that much of the remaining ten percent comes from diversified small and mid-size farms, as does, we would quickly add, a portion of the product from the big two states. Evidently, the net gain proposed to be achieved by the NLGMA in contrast to the two existing state LGMA is to capture this remaining ten percent and require these additional farms, on average smaller in size and more diverse in production, to abide by the rules the mega operators care to adopt for themselves and also require of the small farms in their own states.

Before agreeing to such a proposition, USDA should have conducted a thorough study to determine whether or not the ten percent that is at issue in the NLGMA are a significant source of food safety concern. Its failure to do so is unconscionable. The proposal should be withdrawn for many reasons, including for the failure to make a finding a fact that would justify the proposal to begin with.

Furthermore, given the highly concentrated nature of the leafy greens sector, USDA should have completed a competitive impact analysis to determine whether the proposal would have the effect of reducing competition, increasing concentration, and negatively impacting the emerging local and

regional food movement that USDA is trying to encourage through its Know Your Farmer, Know Your Food initiative. Though there are over 9,000 farms in the U.S. growing leafy greens, in 2008 two firms controlled nearly 80 percent of the fresh-cut bagged leafy greens in the U.S. Thus, market control is already present and the NLGMA would likely serve to further this control. Given the long history and rich literature on the use of regulation, especially industry self-regulation, as a means of reducing competition and increasing market power, we are very puzzled by the apparent lack of any attention by the Department to these issues as it considered the NLGMA proposal.

10. **The NLGMA is Particularly Burdensome for Small and Mid-Sized and Diversified Producers.**

Small and medium-sized producers already face challenges in remaining afloat when up against national giants. Further complicating matters, the costs and time associated with implementing the NLGMA metrics, such as recordkeeping, are more challenging for small and medium-sized farms with more limited budgets. Additionally, adhering to crop-specific requirements is much more difficult for diversified producers growing dozens of different crops than for a producer growing only leafy green vegetables. These issues are being addressed by FDA as part of the FSMA rule writing process. USDA should not be proposing to go in the opposite direction from the direction mandated by the FSMA and being adhered to by FDA.

11. **The Proposed Governance Structure, Even as Amended, Provides Majority Control by Industry, not to the Farmers and Consumers for Whom the Agricultural Marketing Agreement Act was Created to Protect.**

The agency improved but did not ultimately rectify industry control of the Agreement and its decision making process and governance structure. Fifteen of 26 total votes on the Board are controlled by industry – 12 by leafy green handlers and one each for the food service industry, importers, and the retail sector. Only ten seats are to be held by farmers, and only two of those are specifically designated to represent the majority of all producers who are small and mid-sized operations. One seat is to be filled by a "public member," a term which is left completely undefined. In sum, the proposed governance plan is inconsistent with the purposes of the statute and is an affront to any notion of fairness or democratic participation. We believe the NLGMA proposal should be withdrawn. If it is not, we urge the agency to go back to the drawing board to create a fair system of representation that is consistent with the goals of the AMAA.

Thank you for considering our comments on the proposed National Leafy Greens Marketing Agreement. We hope the Department will move quickly to withdraw the proposal.

Sincerely,

Ferd Hoefner, Policy Director

Helen J. Dombalis, Policy Associate