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**UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
BEFORE THE SECRETARY OF AGRICULTURE**

In the Matter of:)	Docket No.: AO-FE-09-0138
)	AMS-FV-09-0029
NATIONAL LEAFY GREEN VEGETABLES)	FV-09-970-1
HANDLED IN THE UNITED STATES; HEARING)	
ON PROPOSED)	
MARKETING AGREEMENT NO. 970)	
)	

**PROPONENT GROUP'S BRIEF
IN SUPPORT OF A FEDERAL MARKETING AGREEMENT
FOR LEAFY GREEN VEGETABLES**

**Jason E. Resnick, General Counsel
WESTERN GROWERS
17620 Fitch, Irvine, CA 92614-6022
Telephone: (949) 885-2253
Fax: (949) 809-6253**

Attorney for THE PROPONENT GROUP

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BRIEF IN SUPPORT OF A FEDERAL MARKETING AGREEMENT FOR LEAFY GREEN VEGETABLES

1. INTRODUCTION

This is a proceeding to enact a marketing agreement regulating the handling of leafy green vegetables in the United States (7 CFR, Part 970). The Proponent Group urges the Secretary of Agriculture to approve a National Leafy Greens Marketing Agreement (“NLGMA”) under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 674) (“AMAA”) to cover the handling of leafy green vegetables in the United States.

The Proponent Group consists of:

- Arizona Farm Bureau
- Arizona Leafy Green Products Shipper Marketing Agreement
- California Farm Bureau
- California Leafy Greens Marketing Agreement
- Georgia Farm Bureau
- Georgia Fruit and Vegetable Growers Association
- Grower-Shipper Association of Central California
- Imperial Valley Vegetable Growers Association
- Leafy Greens Council
- Produce Marketing Association
- Texas Vegetable Association
- United Fresh Produce Association
- Western Growers

Following a proposal submitted to the Department of Agriculture by a large cross section of producer and handler members of the fresh produce industry in general, and the leafy green vegetables industry in particular (collectively, the “Proponent Group”), the Department issued a Notice of Hearing on September 3, 2009, published in the Federal Register at Vol. 74, No. 170 (Record [“R.” 10-11; Exhibit [“Ex.”] 1) containing the terms of the proposed Marketing Agreement, with certain amendments offered at the hearing. Copies were widely distributed to interested persons (R. 10; Ex. 2).

A public hearing was conducted in seven sessions between September 22 and October 22, 2009, as follows:

- September 22 through 24, Monterey, California
- September 30 through October 1, Jacksonville, Florida
- October 6, Columbus, Ohio
- October 8, Denver, Colorado
- October 14 and 15, Yuma, Arizona

- October 20, Syracuse, New York
- October 22, Charlotte, North Carolina

The hearing record clearly establishes the need for a marketing agreement to enhance the quality of fresh leafy green vegetable products available in the marketplace through the application of good agricultural production, handling and manufacturing practices through the implementation of a uniform, auditable, science-based food quality enhancement program.

The record further establishes that:

- The handling of leafy green vegetable products sold in the United States directly affects interstate commerce;
- The economic and marketing conditions of leafy green vegetables in the United States is such that the benefits of the proposed marketing agreement far outweighs any perceived or actual burdens; and
- The proposed marketing agreement, including the modifications suggested at the hearing, would effectuate the purposes of the AMAA by, among other things:
 - Providing a mechanism to enable leafy green vegetable handlers to organize;
 - Providing for USDA validation and verification of program compliance;
 - Fostering greater collaboration with local, state and federal regulators; and
 - Improving consumer confidence in leafy greens.

(R. 48-49; Ex. 6)

The testimony given at the hearing discussed in detail each of the sections of the proposal, each of the proposed amendments thereto, and the justification for the particular language used. (R. 351-467; 542-550; 2940-2966; Exs. 14; 15; 79)

2. THE NLGMA IS APPROPRIATE UNDER THE AMAA

The purpose of this proceeding is to determine whether there is sufficient evidence to implement a marketing agreement under Section 608(b) of the AMAA. Marketing agreements are authorized by the AMAA as amended (7 U.S.C. §§ 601-14; 671-74), and are administered by the Agricultural Marketing Service ("AMS"), under the auspices of the USDA. While opponents to the NLGMA have argued that the Secretary does not have authority under the AMAA to regulate food safety, *per se*, there is little doubt that the AMAA allows for marketing agreements such as NLGMA, and the purposes of the AMAA would be effectuated by implementing the NLGMA.

Other marketing agreements and orders have made the connection between food wholesomeness and food quality. For example, the marketing order that regulates almonds grown in California addresses both food safety and food quality issues. Marketing Order 981 was revised in 2007 to mandate the pasteurization of some almonds to reduce the potential for Salmonella bacteria. Similarly, the marketing agreement and order for pistachios grown in California was enacted in part to ensure overall food quality by limiting the presence of aflatoxin to safe levels. (Marketing Order 983)

Accordingly, the AMAA provides authority to create the leafy greens marketing agreement, just as it permits food safety provisions in other programs established under this same authority. It is simply incorrect to claim that AMS does not conduct programs related to food safety. It conducts inspection programs under the Agricultural Marketing Act of 1946, including programs that verify HACCP and even verify that cattle are free from Mad Cow disease.¹ Ironically, some opponents claim that organic certification provides an assurance of food safety but that too is a program run by AMS (7 USC 6501). The agency also conducts the Pesticide Data Program (21 USC 346a) that tests for pesticide residues in food and when it purchases commodities for the school lunch program, it imposes additional food safety requirements over and above what is required by FDA or the Food Safety and Inspection Service.

Clearly, AMS marketing orders and agreements can and do address safety-related issues because “[t]he presence or absence of harmful pathogens, toxins, or other contaminants is considered a quality characteristic. (David R. Shipman, Acting Administrator, Agriculture Marketing Service, USDA, testifying before the House Committee on Agriculture, Subcommittee on Horticulture and Organic Agriculture, 111th Cong. 1st sess., May 14, 2009, 1)² Regarding the proposed National Marketing Agreement for Leafy Greens, the Acting Administrator emphasized that any requirements under the NLGMA “would be consistent with FDA guidance and regulation requirements” and that “[a]ny product deemed an immediate threat to public health by USDA inspection would be reported by USDA to FDA.” (*Id.*)

Moreover, best practices that address the safety of growing and handling of fresh leafy greens are intrinsically linked to the quality and marketability of leafy greens. Good agricultural, handling, and manufacturing practices that provide assurance of safety also improve quality. Implementing best practices is intrinsically linked to competitiveness and market share. Proof of use of best practices is essential to the marketability of fresh produce. Growers that demonstrate the use of good agricultural practices, good handling practices, and good manufacturing practices are likely to have better marketing opportunities than those that cannot demonstrate that they have a food safety and quality management program in place. (R. 55)

¹<http://www.usda.gov/wps/portal/!ut/p/s.7.0.A/7.0.1RD?printable=true&contentidonly=true&contentid=2004/10/0464.xml>

²<http://agriculture.house.gov/testimony/111/h051409/Shipman.pdf>

Accordingly, the fresh leafy green industry believes that the USDA is an appropriate federal agency to oversee a national food quality enhancement program because it has significant expertise and experience in the design and delivery of programs that involve inspections for product quality and verification of production practices. (R. 52; 354-355) The FDA has been supportive of the utilization of marketing agreements and orders to address food safety issues and has worked with the fruit and vegetable industry and the USDA in developing and implementing best practices included in marketing agreements and orders. (R. 3635-3655; Ex. 103-108)

3. THE NEED FOR THE NATIONAL LEAFY GREENS MARKETING AGREEMENT

A. The NLGMA Will Improve Food Quality by Reducing Food-Borne Illness Outbreaks, Thereby Contributing to Consumer Health and Confidence in Leafy Green Vegetables.

The proposed NLGMA program would be a voluntary program that would provide a clear and logical framework for signatory handlers to improve the quality of U.S. and imported leafy green products. A national leafy greens marketing agreement would empower industry representatives to engage proactively with USDA, FDA, and others in the development of production and handling practices (best practices, or metrics). Formation of these best practices within the agreement framework would ensure the adoption of science-based, scalable, and regionally flexible metrics in conformance with the FDA's Good Agricultural Practices (GAPs), Good Handling Practices (GHPs) and Good Manufacturing Practices (GMPs). Coupled with a corresponding audit-based verification program, these best practices would minimize microbial contamination of fresh leafy green vegetables in the growing and handling processes, enhance the overall quality of fresh product in the marketplace, and boost public confidence in these commodities. Ultimately, an agreement would support the marketability of fresh leafy green vegetables and overall stability of the industry.

Michele Jay-Russell, Ph.D.³ testified that she “see[s] an urgent need to implement science-based strategies to reduce the risk of future leafy green-related outbreaks and recalls” and that the NLGMA represents such an avenue. (R. 3253) Dr. Jay-Russell testified that there are two potential mechanisms of food-borne pathogen transmission from domestic animals or wildlife to leafy greens and both of these routes are addressed by the NLGMA. The first is direct transmission, where fecal defecation or runoff, for example, from a cattle operation, comes into contact with the plant material. The second is indirect transmission, where the fecal contamination of water (including surface or well), soil, sediment, and/or bioaerosols may contaminate the plant. (R. 3256)

³ Dr. Jay-Russell, Ph.D. candidate in microbiology, is Program Manager of the Western Center for Food Safety (WCFS) at the Western Institute for Food Safety and Security at the University of California, Davis, and a nationally recognized expert in food-borne illness.

Dr. Jay-Russell testified that even low levels of contamination at the pre-harvest level may represent a serious food safety risk because the infectious dose for many of these pathogens is very low, especially for the young, the elderly and immunocompromised. Downstream failures during processing, transport, and handling, such as temperature abuse, may allow pathogens that were introduced to the crop in the field to grow to more deleterious numbers. (R. 3257) Studies of outbreaks related to fresh produce demonstrate the potential for domestic animals and wildlife near produce fields to carry food-borne pathogens. According to Dr. Jay-Russell, this “strongly supports the inclusion of GAP metrics that address these risks as defined in the NLGMA.” (R. 3260)

Joe Pezzini, Chief Operating Officer of Ocean Mist Farms⁴ and the current Chairman of the Advisory Board of the California Leafy Greens Marketing Agreement, testified that three years ago the FDA issued an unprecedented "do not eat" advisory related to spinach. The FDA had been tracking a national outbreak of *E. coli* 0157:H7, an outbreak that eventually sickened over 200 people and caused three deaths. In the wake of the FDA advisory, sales of spinach plummeted, and the entire leafy greens industry across the country was dramatically and negatively affected. (R. 47)

The devastation that food-borne disease outbreaks, such as the 2006 *E. coli* 0157:H7 outbreak, can cause to the patients and their families and the industry, as well as the impacts on consumer confidence and the burden these outbreaks cause on our already stressed public health system are well understood. (R. 3253)

It was obvious to the Proponent Group that measures had to be taken to reduce the incidence of microbial contamination in leafy green vegetables, which would ultimately improve consumer confidence that leafy green vegetables sold in the U.S. are safe to eat. To address the issue, the Proponent Group considered various alternatives including the pursuit and promulgation of state law and the development of regulation at both the state and federal levels. (R. 354) However, it was ultimately determined that the state and federal marketing authority would provide the industry with the best option to work collaboratively with state and federal regulators in the design and implementation of a program that would enhance the quality of leafy greens by allowing willing handlers to voluntarily subject themselves to, and pay for, mandatory audits and verification processes, ensuring every possible preventative step has been taken to make certain that leafy greens put into commerce and ultimately consumed worldwide have been grown and handled according to the best available scientific data.

The NLGMA will include the scientifically-based best practices for production and handling in order to reduce to the extent practicable the incidence of contamination. It will also allow for the verification of the use of best practices by government audits. (R. 60 - 61) The primary goal of the NLGMA is to implement best practices that are uniform, auditable, and

⁴ Ocean Mist Farms is an 85-year-old family-owned grower-packer-shipper of vegetables in California and in Arizona, which farms approximately 10,000 acres of lettuce and leafy greens.

science-based, and to provide for USDA validation and verification, so as to reduce the incidence of microbial contamination in leafy greens, which is protective of public health, and will ultimately improve consumer confidence in, and demand for, the industry's products. (R. 56, 58, 61, 197)

Even while the NLGMA hearings were taking place, the Center for Science in the Public Interest published its "List of the Ten Riskiest Foods Regulated by the U.S. Food and Drug Administration." Appearing at the top of its list was leafy greens. (R. 3066) The NLGMA, with its rigorous standards, can act as a powerful force to counter these public perception issues, and help boost consumer confidence in the quality of leafy green vegetables. (*Id.*)

B. The NLGMA Will Potentially Move the Industry to a Single Standard

A recurring theme by both the proponent and opposition witnesses is the proliferation of multiple food safety standards, including "super metrics," that are required by various buyers. A major difference in opinion exists as to whether the NLGMA will effectively reduce or eliminate differing standards or move the leafy greens industry toward a single uniform standard. Opposition witnesses decry the NLGMA because they say there is no guarantee it will stop the proliferation of "super metrics." It is true that no one can say whether or not buyers will adopt the NLGMA standards and discard their super metrics. Buyers are free to impose whatever requirements they choose, and handlers are free to sell their product to such buyers or not.

While no one has a crystal ball, the proponent witnesses are generally hopeful and optimistic that the NLGMA will become a unifying standard within the industry. (R. 334; R. 4376) There is good reason for optimism. Since the implementation of the CLGMA, buyers have increasingly adopted the CLGMA metrics, or comported their requirements, with the CLGMA's metrics, fostering consistency among buyers. (R. 334) Handlers across the country testified that they have adopted the CLGMA metrics. (E.g., Ex. 74, 75) New York based retailer Wegman's, which has 74 stores on the east coast, has adopted the CLGMA metrics for the leafy greens it purchases and testified in support of the NLGMA. (Ex. 112) However, the NLGMA will better serve the country as a whole since the NLGMA will account for regional differences, will have government oversight, will streamline the audit process and will incorporate the latest science. (R. 2683, 2702; Ex. 129)

One thing is certain: without the NLGMA, the industry, the buying community and consumers are stuck with the status quo. With the NLGMA, a feasible alternative to buyers' super metrics will be available on a national scale, and the blue print for a uniform standard will emerge.

4. THE ECONOMIC IMPACT OF THE NLGMA WILL INURE TO THE BENEFIT OF PRODUCERS AND CONSUMERS

A. Expected Economic Impact of the NLGMA

Testimony presented by witnesses across the country support the proponent's economic premise that collective action is justified and prudent. When the leafy green market fails to adequately invest in food safety, it affects leafy green product safety throughout the US as occurred in the 2006 *E. coli* outbreak in spinach. Industry response to the outbreak, while strong, was localized and resulted in an uneven playing field among leafy green growers and handlers. Only a nationwide action can provide an assurance that there is adequate investment in food safety and reduce the potential of exposing consumers to food-borne illnesses.

Based on statements from both small and large growers and handlers, it is clear the benefits of the proposed program will substantially outweigh the costs that will inure to both individual companies and the collective leafy greens industry upon the establishment and implementation of the proposal. The positive economic impact of the proposed program is substantial since it protects a public good, food safety, and removes costly free ridership, at a financial cost acceptable to the industry.

B. Leafy Green Market Failure

Dr. Timothy Richards⁵ testified that food safety failures are costly and the economic harm is indiscriminate and potentially catastrophic for producers. Dr. Richards testified that the 2006 spinach outbreak resulted in a total industry revenue reduction of 80% (R. 293) and that based on modeling, industry could expect a similar loss once every 10 years in the absence of control measures like those proposed in the national marketing agreement (R. 296).

Dr. Mechel Paggi, Director of the Center for Agricultural Business at California State University Fresno, testified that both spinach volumes and prices declined and losses were sustained in the wake of the outbreak (R. 1153-1154). Regardless of where spinach was produced, the outbreak adversely affected income (R. 332, 1384). Almost all of the witnesses testified that the negative public health impact as well as the financial harm to producers, handlers and others in the supply chain from leafy green-related illness is unacceptable (R. 56, 293-294, 1175; Ex. 8-10, 12, 31). Furthermore, sales losses were prolonged due to eroded public confidence.⁶ Dr. Richards estimated the long term impact of the erosion in goodwill will be a 10% reduction in demand for leafy green produce. (Ex. 12)

⁵ Dr. Richards, earned his Master's degree and Ph. D. in Agricultural Economics from Stanford University and currently sits as the Marvin and June Morrison Chair of Agribusiness at Arizona State University,

⁶ (R. 297, 347, 1147, 1152-1155, 1297-1298, 3560-3561, 3842-3844, 3966-3967)

C. Need for Collective Action to Protect Public Good

In his testimony, Dr. Timothy Richards identified food safety as a “weaker link public good.” “A weaker link public good is one where an individual can derive some benefit from their investment but their investment will be diminished, the value of their investment will be diminished if someone else doesn’t invest (R. 286).” He also stated that the 2006 *E. coli* outbreak in spinach occurred because of an underinvestment in food safety (R. 279), i.e., all companies were not investing in food safety (“free rider effect”). Dr. Richards went on to say that, “it is well known that that is standard in economic theory to reduce the free rider effect is to incentivize a cooperative effect among growers” (R. 304). To address this free rider issue, Dr. Richards supports the proposed marketing agreement as a means of reducing produce outbreaks. Dr. Richards testified that “the real economic issue here is the value of the cooperative effort” and that since the market “fails in the public good case” a marketing agreement would prevent or minimize that failure. Dr. Richards testified, “That is what the marketing agreement does” and “My sole recommendation is to either have a marketing agreement or marketing order” (R. 311, 312).

Even opponents to the proposed agreement recognize the need for safer food using best practices (R. 1272, 1556) and expressed a willingness to work together on an agreement assuming regional differences, cost of implementation and farm size are taken into consideration (R. 1566-1567, 4713). Chris Sawyer of Jakes Farm and Carolina Organic Growers stated, “I think there might be a way that we could all come together and come up with a way that we could all have safer food, but not suffer the big expenses” (R. 4728).

Witnesses testified that a national program is necessary to protect food safety. ⁷Joe Pezzini stated “the marketing agreement is collective action for the good of the public. Contamination of food endangers the health of consumers. At worst, contaminated food can cause illness and even death...The marketing agreement is a collective action for the good of the industry. Every contamination problem, whether real or perceived, has a detrimental financial impact on the growers and handlers of the affected food product”. (R. 56)

Absent a national program, free riders are able to participate in the public good of food safety without paying the costs of participation (individual handler and grower food safety costs). Dr. Richards stated that, “it is well known that that is standard in economic theory to reduce the free rider effect is to incentivize a cooperative effect among growers” (R. 304). This of course is exactly the cooperative effort that Congress envisioned in establishing marketing agreements and orders, and likely to promote the policies of the AMAA, including ensuring minimum quality for orderly marketing.

Dr. Richards said; “Any time there is a market failure, if we can enable growers to get together to do cooperative efforts like this, particularly voluntary agreements, it is the most

⁷ (R. 51, 60-61, 336, 1193, 1429, 1439, 1454, 3539)

