

A Mixed Response to The Food Safety Modernization Act of 2009

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A 2007 report by the Department of Homeland Security states: “The food sector could experience several types of adverse events. Amongst these, intentional food contamination is of the greatest concern to many in the food security and safety fields.”¹ A concurrent concern with regard to the food safety and security field is the protection of the food supply from food-borne illnesses, like the 2006 E.coli spinach outbreak and the more recent salmonella contamination originating from an Iowa egg producer.² This apprehension about the perils facing the national food supply gave rise to the proposed Food Safety Modernization Act of 2009.³ This act aims to create more detailed procedures for dealing with food-borne illnesses, including the mandate for food producers to have certain preventive measures in place.⁴ However, while the ideological intent of this act has had widespread support, the particular application of this act, namely its potential consequences for local farming and the sustainable food movement, has drawn criticism.⁵ For instance, in North Carolina, particularly, there was concern about

¹ Dept. of Homeland Security, *The Department of Homeland Security's Role in Food Defense and Critical Infrastructure Prevention*, OIG-07-33, (2007), http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-33_Feb07.pdf.

² David Brown, *Salmonella-tainted Eggs From Big Producer in Iowa Have Sickened at Least 1,200*, The Washington Post, August 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/story/2010/08/19/ST2010081904477.html?sid=ST2010081904477>.

³ Margaret A. Hamburg, M.D., *Food Safety Modernization Act: Putting the Focus on Prevention*, The White House Blog, January 3, 2011, <http://www.whitehouse.gov/blog/2011/01/03/food-safety-modernization-act-putting-focus-prevention>

⁴ FDA Food Safety Modernization Act, Senate. S.510, 1. § 103 (2010).

⁵ Ezra Klein, Michael Pollan on the Food Safety Act, The Washington Post, November 18, 2010, http://voices.washingtonpost.com/ezra-klein/2010/11/michael_pollan_on_the_food_saf.html

how the Food Modernization Act would affect its burgeoning local food economy.⁶

Many of these same critics also questioned the necessity for this federal regulation when the issues at stake could have been more effectively addressed by North Carolina state policy.⁷

One particularly contested element of the Food Safety Modernization Act is from Section 103:

(a) In General- The owner, operator, or agent in charge of a facility shall, in accordance with this section, evaluate the hazards that could affect food manufactured, processed, packed, or held by such facility, identify and implement preventive controls to significantly minimize or prevent the occurrence of such hazards and provide assurances that such food is not adulterated under section 402 or misbranded under section 403(w), monitor the performance of those controls, and maintain records of this monitoring as a matter of routine practice.⁸

This section of the act is referred to as Hazard Analysis and Risk-Based Preventive Controls.⁹ These controls are a part of Hazard Analysis and Critical Control Points (HACCP), an approach to food safety regulation and prevention.¹⁰ Continuing in this vein, Section 103 goes on to mandate the production of a written analysis of these hazards, both intentional and unintentional.¹¹

A second section of the act relevant to this discussion is Section 105, which amends 21 U.S.C 341 of the Federal Food, Drug, and Cosmetic Act.¹² Of Section 105, Dr, Margaret Hamburg, Commissioner of Food and Drugs, notes that, “Section 105

⁶ Roland McReynolds, *Hurting NC's Local Food Harvest: The Unintended Consequences of Federal Food Safety Legislation on North Carolina's Small Agricultural Enterprises*, www.carolinafarmstewards.org/.../Hurting_NC's_Local_Food_Harvest042010.PDF

⁷ Neil D. Hamilton, *Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 *DRAKE J. OF AGRICULTURAL L.* (2002).

⁸ FDA Food Safety Modernization Act, Senate. S.510, 1. § 103 (2010).

⁹ *Id.*

¹⁰ The International HACCP Alliance, <http://www.haccpalliance.org/sub/index.html>

¹¹ FDA Food Safety Modernization Act, Senate. S.510, 1. § 103 (2010).

¹² *Id.*

requires adherence to science-based safety standards for fresh produce to minimize the risk of serious adverse health consequences or death.”¹³ This section goes on to provide for the inspection of said facilities involved in the production and distribution of produce and again drew criticism for its failure to distinguish between larger and smaller food producing operations.¹⁴

It is these two sections of the Food Safety Modernization Act of 2009, Sections 103 and 105, which have received the most opposition.¹⁵ A particularly lucid dissent comes from the Carolina Farm Stewardship Association in a study entitled “Hurting NC’s Local Food Harvest: The Unintended Consequences of Federal Food Safety Legislation on North Carolina’s Small Agricultural Enterprises.”¹⁶ The main thrust of this study is to show how the proposed federal legislation treats all food producing entities as though they were large-scale operations, an action which would threaten the existence of smaller producers as they may not have the resources to comply with federal regulations such as those in Sections 103 and 105.¹⁷ Included in the study is a cost analysis completed by farmer and environmental engineer Chris Hardin and, “[t]his analysis shows that a typical small farm doing on- farm processing would need 150 hours to create, implement and monitor the [mandated federal] plan, and spend \$9,500 per year on consulting and testing

¹³ Margaret A. Hamburg, *Keeping America's Families Safe: Reforming the Food Safety System*, U.S. FOOD & DRUG ADMIN. (Oct. 22, 2009), <http://www.fda.gov/NewsEvents/Testimony/ucm187566.htm>.

¹⁴ Patrik Jonsson, *Food Safety Bill 101: What Are the Facts and Myths?* Christian Science Monitor, November 23, 2010, <http://www.csmonitor.com/USA/Politics/2010/1123/Food-safety-bill-101-What-are-the-facts-and-myths>

¹⁵ *Id.*

¹⁶ Roland McReynolds, *Hurting NC's Local Food Harvest: The Unintended Consequences of Federal Food Safety Legislation on North Carolina's Small Agricultural Enterprises*, www.carolinafarmstewards.org/.../Hurting_NC's_Local_Food_Harvest042010.PDF.

¹⁷ *Id.*

costs.”¹⁸ Furthermore, the addition of a professional consultant, a measure likely to be needed, as most food producing entities do not have this expertise on site, would add another \$20,000 to the bill.¹⁹ The study goes on to note that several of the more costly proposed requirements within the Food Safety Modernization Act would also be largely unnecessary and perhaps redundant.²⁰ “For example, a small farm milking goats to supply an on-farm creamery would have to develop, implement, monitor, document and revise a plan for addressing the risk of a terrorist attack on the farm.”²¹

Perhaps as a result of concerns such as this one, the Senate introduced a Manager’s Package to S.510 before its vote following the summer recess.²² This package helps to accommodate smaller operations and to prevent excessive and costly regulation.²³ The Manager’s Package also allows for USDA grants to these smaller food operations to receive the necessary training:

(c) Priority.—In awarding grants under this section, the Secretary shall give priority to projects that target small and medium-sized farms, beginning farmers, socially disadvantaged farmers, small processors, or small fresh fruit and vegetable merchant wholesalers.²⁴

Under consideration as well, is an amendment from Senator John Tester of Montana and Senator Kay Hagan of North Carolina.²⁵ In short, this amendment proposes to exempt certain operations whose gross yearly sales are under \$500,000 and certain operations

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Helena Bottemiller, *Politics, Small Farm Deal Stall Food Safety Bill*, Food Safety News, November 19, 2010, <http://www.foodsafetynews.com/2010/11/politics-small-farm-deal-bogs-down-food-safety-bill/>

²³ Manager's Package (2010), available at <http://help.senate.gov/imo/media/doc/WHI10337.pdf>.

²⁴ *Id.*

²⁵ Chelsea Krotzer, *Tester Promotes Amendment to Food Safety Bill*, The Billings Gazette, November 17, 2010, http://billingsgazette.com/news/local/article_43411811-48fc-5fbf-a074-e4bf7bd22480.html

that direct market to consumers from some of the preventative regulations in the Food Safety Modernization Act.²⁶ As Senator Tester says of the amendment, “food-borne illnesses don't come from family agriculture As we do the vital work to make sure the food on our kitchen tables is safe, we've also got to make sure we don't treat small producers the same way we treat big corporate farms. That's exactly what my amendment will fix.”²⁷ The National Sustainable Agriculture Coalition also supports this amendment.²⁸

Though both the Manager's Package and the Tester-Hagan Amendment have generated support for the federal legislation from the sustainable food movement, there remains concern that such federal policy is not the only measure necessary to address food policy on a state level.²⁹ A 2002 article from the Drake Journal of Agricultural Law notes that, “the reality is farmers, rural communities, and states cannot simply rely on federal programs to provide a farm and food policy specially designed for their needs,” and that “State and local policies like these will be critical in determining the future of agriculture in the United States.”³⁰ North Carolina has certainly attempted to enact such policies and legislation at a state level as seen through its support of value-added

²⁶ Tester Amendment (2010), available at

http://tester.senate.gov/Legislation/upload/tester_amendment_agreement.pdf

²⁷ Helena Bottemiller, *Tester Offers Hope on S. 510, Help for Small Farms*, FOOD SAFETY NEWS, Sept. 27, 2010, <http://www.foodsafetynews.com/2010/09/tester-offers-positive-outlook-on-s510-amendment/>.

²⁸ *Food Safety Action Alert*, The National Sustainable Agriculture Coalition, November 23, 2010, <http://sustainableagriculture.net/blog/food-safety-action-alert-2/>

²⁹ Neil D. Hamilton, *Putting a Face on Our Food: How State and Local Food Policies Can Promote the New Agriculture*, 7 DRAKE J. OF AGRICULTURAL L. (2002).

³⁰ *Id.*

agriculture.³¹ Michigan State University has succinctly summarized value-added agriculture as “a process of increasing the economic value and consumer appeal of an agricultural commodity. It is an alternative production and marketing strategy that requires a better understanding of the rapidly changing food industry and food safety issues, consumer preferences, business savvy, and teamwork.”³² Several of the initiatives supporting value-added agriculture seen in North Carolina are: the support of shared-use kitchens and processing facilities, the Farm to Fork program, as well as the establishment of both the North Carolina Sustainable Local Food Advisory Council and the North Carolina Fresh Produce Safety Task Force.³³

The Carolina Farm Stewardship Association points out that “[t]he establishment of shared-use commercial kitchens in North Carolina has been one of the most prominent means of support for local food entrepreneurship”³⁴ These facilities are located throughout the state and one is scheduled to open in Orange County in 2010.³⁵ A study entitled *Developing Shared-Use Food and Agricultural Facilities in North Carolina*, notes that “[s]uccessful regional food processing centers have the potential for significant economic impact. These projects serve as incubators for food entrepreneurship and can

³¹ *Governor’s announcement expands N.C. Value-Added Cost Share Program*, North Carolina State University, August 17, 2010, <http://www.cals.ncsu.edu/agcomm/news-center/perspectives/governor%E2%80%99s-announcement-expands-n-c-value-added-cost-share-program/>

³² *Value-Added Agriculture: Michigan State University Extension*, <http://web1.msue.msu.edu/valueadded/> (last updated Mar. 2002).

³³ Center for Environmental Farming Systems, *From Farm to Fork: A Guide to Building North Carolina’s Sustainable Local Food Economy* (2010), www.cefs.ncsu.edu/resources/stateactionguide2010esr.pdf

³⁴ McReynolds, *supra* note 18.

³⁵ Center for Environmental Farming Systems, *From Farm to Fork: A Guide to Building North Carolina’s Sustainable Local Food Economy* (2010), www.cefs.ncsu.edu/resources/stateactionguide2010esr.pdf

be a catalyst for job creation and income generation.”³⁶ In essence, these facilities, either kitchens or processing facilities, allow smaller farmers and producers to operate in an FDA-inspected facility without solely bearing the cost of such an inspection and ensuing regulations, ultimately allowing them to directly market to their customers and to contribute to the local economy.³⁷

A second initiative in North Carolina is the Farm to Fork program.³⁸ Spearheaded by the Center for Environmental Farming Systems through North Carolina State University, “the Farm to Fork initiative focused on identifying recommendations that help us move forward at the state level, and in many cases, strengthen locally driven efforts.”³⁹ Several of this program’s goals are to increase direct marketing from producers to consumers, to procure greater funding for the N.C. Agricultural Development and Farmland preservation (ADFP), and to encourage state agencies and local government to purchase local foods.⁴⁰ The Farm to Fork initiative works cooperatively with state and local government to help in the realization of these goals.⁴¹

This cooperative effort is shown in the establishment of the North Carolina Sustainable Local Food Advisory Council.⁴² Through the efforts of the Center for Environmental Farming as well as others, Session Law 2009-530, Senate Bill 1067, came about as, “[a]n act to establish the North Carolina Sustainable Local Food Advisory Council to address program and policy considerations regarding the development of a

³⁶ *Developing Shared-Use Food and Agricultural Facilities in North Carolina*, SMITHSON MILLS (2007), www.smithsonmills.com/ncshareduse.pdf.

³⁷ *Id.*

³⁸ Center for Environmental Farming Systems, *From Farm to Fork: A Guide to Building North Carolina's Sustainable Local Food Economy* (2010), www.cefs.ncsu.edu/resources/stateactionguide2010esr.pdf

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

sustainable local food economy in North Carolina.”⁴³ The Council had its inaugural meeting in 2009 and its recently released Annual Report for 2010 notes that, “[a]s many more farmers and businesses begin to produce value added crops and start food processing enterprises, they find a confusing regulatory framework that was built for larger scale businesses and farms or altogether unrelated businesses.”⁴⁴ Thus, it has become the Council’s mission to foster this kind of development at a state level, ensuring that the particular needs of North Carolina and North Carolinians are accounted for.⁴⁵

In particular, the Council has fostered the development of the North Carolina Fresh Produce Safety Task Force.⁴⁶ As to the task force’s purpose, its web site states: “The North Carolina Fresh Produce Safety Task Force minimizes food safety risks and enhances the economic competitiveness of North Carolina’s fresh produce industry.”⁴⁷ It is in the creation of this task force that one can see a very direct comparison to the Food Safety Modernization Act.⁴⁸ Here, North Carolina is taking direct action on a state level rather than waiting for the impersonal federal legislation that may not fit North Carolina’s specific needs.⁴⁹

At present, the Food Safety Modernization Act has not been passed.⁵⁰ Senator Harry Reid filed a motion for cloture on the bill, and it will likely be voted on in mid-

⁴³ Session Law 2009-530. Senate. 1067, 2009-530. § 106-830 (2009).

⁴⁴ North Carolina Sustainable Local Food Advisory Council, *2010 Annual Report* (Oct. 2010), www.ncagr.gov/localfood/documents/2010NCSLFAAnnualReport.pdf.

⁴⁵ *Id.*

⁴⁶ *North Carolina Fresh Produce Safety Task Force*, N.C. MARKET READY, <http://www.ncmarketready.org/ncfreshproducesafety/taskforce.html> (last visited Jan. 1, 2011).

⁴⁷ *Id.*

⁴⁸ FDA Food Safety Modernization Act, Senate. S.510, 1. § 103 (2010).

⁴⁹ N.C. MarketReady Fresh Produce Safety Field to Family, North Carolina State University, 2010, http://ncsu.edu/enterprises/ncfreshproducesafety/files/2010/09/fresh_produce_safety_impacts_2010.pdf

⁵⁰ S.510 Update: A Movement Flexes its Muscles, Carolina Farm Stewardship Blog, September 29, 2010, <http://www.carolinafarmstewards.org/blog/?m=201009>

November.⁵¹ The bill is likely to be passed, and the Tester-Hagan Amendment is also considered likely to be added to the bill before the vote.⁵² Regardless of the outcome, North Carolina continues to value statewide action in terms of promoting its local food economy and regulating its products.⁵³

⁵¹ Helena Bottemiller, *It's Alive! Reid Files For Cloture on Food Safety Bill*, Food Safety News, September 30, 2010, <http://www.foodsafetynews.com/2010/09/its-alive-reid-files-cloture-on-food-safety-bill/>

⁵² *Id.*

⁵³ North Carolina Sustainable Local Food Advisory Council, *2010 Annual Report* (Oct. 2010), www.ncagr.gov/localfood/documents/2010NCSLFACAnnualReport.pdf.