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## Part III

# Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1033

Milk in the Mideast Marketing Area; Decision on Proposed Amendments to Marketing Agreement and to Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

[Docket No. AO–361–A35; DA–01–04]

Milk in the Mideast Marketing Area: Decision on Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes to adopt as a final rule, order language contained in the interim final rule published in the Federal Register on July 26, 2002, concerning pooling provisions of the Mideast Federal milk order. This document also sets forth the final decision of the Department and is subject to approval by producers.

[EXCERPTS]



A witness from Dean Foods, appearing on behalf of the Handlers, testified that the current pool supply plant provisions permitting handlers to pool and de-pool milk causes market instability. The witness noted the occurrence of a class-price inversion (when the blend price is lower than the Class III price) as an example of when supply plants have the economic incentive to opt out of pooling their milk supplies. Nevertheless, the Dean witness was of the opinion that a 6-month re-pooling delay would serve to assure consistent and reliable association of milk with the marketing area and in meeting the market's Class I demands.

Opposition to Proposal 6 was raised by DFA. DFA was of the opinion that class-price inversions are a function of the order providing advanced pricing to handlers for Class I and II milk. The witness indicated advanced pricing is a needed and good provision of Federal milk marketing orders. However, if the Class I sector of the market were not provided advanced pricing, reasoned the DFA witness, depooling might never occur. Nevertheless, noted the DFA witness, there should be no reason why Class III and IV handlers should ever have to equalize class-use values with the blend price by paying this difference into the pool for the benefit of Class I handlers simply because of price inversion. Imposing a 6-month re-pooling delay may cause Class III and IV handlers to pay into the pool only to retain pool status, but doing so can result in causing financial damage to the reserve and balancing sectors of the market, maintained the DFA witness.

Proposal 5, offered by the

Providing a 6-month re-pooling delay whenever a supply plant opts not to meet the pooling standards for the month would not tend to provide for orderly marketing conditions in the Mideast marketing area. As noted in the tentative final decision, the record indicates that handler interests seek every assurance for a steady and reliable milk supply as the order can reasonably provide. Providing pooling standards that may cause a supply plant to consider the longer-term implications of dropping off the pool may also tend to ensure the desired outcome of assuring reliable deliveries of milk to fluid handlers. However, the need for a provision to prohibit a supply plant from rejoining the pool through proper performance after a 6-month delay is not supported by the record and is not adopted in this final decision.

Milk marketing orders are instruments for promoting stability in the marketing relationship between producers and handlers. In this regard, and considering the marketing conditions of the Mideast marketing area, promoting stability in this manner is not appropriate or needed. As noted in the tentative decision, the record indicates that fluid milk handlers have not had significant difficulties in securing milk supplies since the implementation of milk order reform. To the extent that handlers fear the potential disruption to the market that may arise from depooling, that fear to date is only speculative.

The most important evidence provided on the record that provides any justification for adopting a 6-month re-pooling delay rests on the possible occurrence of a class-price inversion. Handlers see the issue of opting off-and-on the pool as rushing to join the pool to secure the advantages of price protection and dropping from the pool when prices for Class III and IV milk are higher than the order's blend price. Further, handlers worry that during such times, their ability to obtain needed milk supplies is diminished. The DFA witness is of the opinion that penalizing supply plants, often cooperative owned, may cause financial damage to be borne by the manufacturing sectors of the market. Additionally, DFA does not endorse the notion that producers should incur any penalty because of price outcomes which, they conclude, are the result of the order program providing for the advance pricing of Class I and II milk that serves the interest of handlers.

The tentative decision and this final decision make no finding on whether advance pricing is a cause or contributor to class-price inversions. Additionally, neither the tentative decision or this final decision make any findings regarding the damage that may result to cooperatively owned manufacturers by being prevented from rejoining the pool. These are both far beyond the scope of this proceeding. However, the tentative decision and this final decision do find that the amendments to the pooling standards adopted by this final decision, taken as a whole, strengthen the effectiveness of the order for the benefit of both producers and handlers, will provide for more orderly marketing conditions, and provide for a more consistent supply of milk to Class I handlers.

[END OF EXCERPTS]

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# BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE

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|---|---|
| **In the Matter of** | **:** |
| | **: Docket Nos.:** |
| **Milk In The Mideast** | **: AO-166-A68 et al;** |
| | **: DA-01-04** |
| **Marketing Area** | **:** |

## BRIEF FOR DAIRY FARMERS OF AMERICA (DFA), MICHIGAN MILK PRODUCERS ASSOCIATION (MMPA), AND PRAIRIE FARMS DAIRY, INC.

[EXCERPTS]

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**Date: December 12, 2001**

## I. INTRODUCTION

This brief is submitted by DFA, MMPA, and Prairie Farms in accordance with the briefing schedule established at the close of the hearing. It addresses all proposals at the hearing, those advanced by these proponents and those proposals advanced by other parties. The hearing proposals primarily concern pooling issues, as well as an important producer payment issue.

It is important, and significant, to note from the outset that all hearing participants, individual producers, cooperatives, and proprietary handlers alike, agreed that the pooling provisions of the Order need to be tightened. To the extent that there were differences, they involved varying views on which provisions to tighten and how tight to make them. On the basis of this industry consensus, the proposals should be adopted as discussed hereafter.

## II. FACTUAL BACKGROUND

### Proponents

1. Dairy Farmers of America, Inc., (DFA) is a Capper-Volstead cooperative association of 16,905 dairy farms producing milk in forty-six (46) states. DFA regularly markets milk on 10 of the 11 federal milk orders, including Order 33. (Tr. 132; Exh. 12, p.1)

2. Michigan Milk Producers Association (MMPA) is a Capper-Volstead cooperative association of more than 2,600 members. MMPA members produce milk in Michigan, Ohio, Indiana, and Wisconsin. MMPA is engaged exclusively in the marketing of milk and dairy products. (Tr. 132; Exh. 12, p.1)

3. Prairie Farms Dairy, Inc., is a Capper-Volstead cooperative owned by 800 dairy farmer members. Prairie Farms owns and operates a number of milk processing plants and regularly markets milk in Order 33. (Tr. 132; Exh. 12, p.1)

There was no evidence presented at the hearing to suggest that the split plants serve any useful economic purpose. Lacking a useful function, and being the clear source of paper-pooling mischief, the provision should be eliminated and proposal 5 adopted.

## IX. PROPOSAL 8 SHOULD NOT BE ADOPTED

These cooperatives oppose the adoption of Proposal 8 which is an attempt by the proponent fluid milk handlers to constrain the ability of an operator of a supply plant to pool or depool the plant for economic purposes. This proposal should not be adopted for a number of reasons.

First, the proposal by being addressed to supply plants only would only limit plant pooling, to the extent it was effective at all. It would not limit the depooling of diversions to manufacturing plants, including such diversions by distributing plant operators. Consequently, the fluid handlers want the ability, under their proposal, to freely pool or depool milk associated with their plants while tying the hands of supply plant operators, particularly cooperatives, from pooling or depooling their plants for the very same reasons. That inequitable proposal should not be adopted.

Furthermore, the attempt to address the phenomenon of depooling is an attack upon a by-product of advance pricing for Class I[9], demanded by the fluid handlers. It is only because of advance pricing that the basis of depooling manufacturing classes ever arises. Consequently, it is our position that the fluid handlers should not be able to require other handlers to suffer injury which occurs solely because of granting a benefit to the fluid handlers.

Finally, it would appear that the proposal has actually been addressed at a problem which

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[9] We fully support advance Class I pricing which furthers orderly marketing in all federal orders. We do not want our comments to be interpreted otherwise.

arises out of the operation of the Pennsylvania Milk Marketing Board individual handler pool system, and not because of any federal order dynamics. Consequently, it is aimed at something that the federal order does not, and cannot, address and should not serve as a basis for any amendment to the order.

## X. PROPOSAL 4 TO AMEND THE PARTIAL PAYMENT REQUIREMENTS OF THE ORDER SHOULD BE ADOPTED

The payment provisions for Order 33 presently provide that partial payment be made to producers for their milk deliveries during the first fifteen (15) days of the month at a rate equal to the lowest class price for the prior month. Experience since January 1, 2000 under the class prices now prevailing demonstrates that that rate results in a payment to dairy farmers which is lower than it has been historically and it should therefore be increased appropriately. The change in Class 3 and 4 prices under federal order reform, coupled with the use of the "higher of" for the Class I mover has led to an increasing spread between the "effective" blend price and the lowest class price. There is nothing in the federal order reform final decision to suggest that this was intended; and there has been no argument advanced to support a reduction. Consequently, the order should be changed to increase the rate of payment required of handlers pursuant to 7 C.F.R. § 1033.73. These cooperatives support revision of the rate of payment to require payment at the rate of 105percent of the prior month's lowest class price.

Exh. 22[10] demonstrates the erosion of the effective rate of partial payments to producers under Order 33 since January 2000. For the period from January 1997 through August 2001, fifty-six (56) months, the monthly average spread between the Class 3 price and the blend price

[10] The attached document (Exh. C) is the exhibit as revised post-hearing to correct the inadvertent computational errors noted at the hearing. (TR. 498-499)

BEFORE THE UNITED STATES
DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

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|---|---|
| In the Matter of: | Docket No.: |
| Milk in the Mideast | AO-166-A68 |
| Marketing Area | DA-01-04 |
| | VOLUME II |

Wednesday, October 24, 2001

The Holiday Inn Express Motel
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Wadsworth, Ohio

BEFORE:

THE HONORABLE JILL CLIFTON
Administrative Law Judge

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# I N D E X



# E X H I B I T S

whomever you have the addresses conveniently available to you by e-mail or other, but that might not reach everyone.

MR. BESHORE: I understand.

JUDGE CLIFTON: Thank you, Mr. Beshore.

MR. BESHORE: And I would note that all of the data in the these tables, and correct me if I am wrong, the data is published statistical data.

THE WITNESS: That is correct.

MR. BESHORE: It explains the calculations that you have made, which numbers are added or subtracted or divided or multiplied by a given ratio and therefore, the final calculations can be checked or double-checked for published information by anyone. There is nothing in terms of the raw data here that is anything that you have generated as proprietary information or otherwise.

THE WITNESS: No, nothing.

BY MR. BESHORE:

Q Now, with those loose ends from prior issues, do you have a statement with respect to opposition to proposal eight and then a short summary and conclusion, concluding statement which also addresses the issue of the emergency status of the hearing?

A I do.

Q Would you proceed with both of those statements, please.

A The members of our group oppose proposal eight. Its purpose is misguided. The problem that it seeks to correct, commonly known as de-pooling occurs when one or more of the class prices is higher than the blend price and the handler reporting pounds of the higher valued classification does not put them on their pool report. Thus, the value derived from those poolings do not get entered into the blend price pool.

The problem that it seeks to correct is a function of advanced pricing. If the Class I sector of the market did not get the benefit of advanced price, simple arithmetic would guarantee and there would never be de-pooling.

Advanced pricing is a good practice as it allows the added value products to maximize their returns, which benefits all parties affected by the orders.

There can be no valid reason why the balancing sectors should have to pay into the pool on the occasional times when the advanced price causes a price inversion. Doing so could cause damage to the reserve and balancing sectors of the market here.

The reserve and balancing sectors would at times not be able to clear the market profitably if they wore advanced priced because of the volatility of dairy commodity markets.

If the proponents desire to change this happening, perhaps they should consider eliminating the advanced price provisions of the order

Proposal eight should not be adopted. This issue has been debated in other orders, but has never been found for by the Secretary.

Summary and conclusions. Data presented in this order indicates that milk from distant locations is being pooled on Federal Order 33 at increasing volumes. This milk volume reduces the blend price to local suppliers. Additional evidence shows that due to distance and economic return, this milk would never supply the market regularly.

Testimony from day-to-day operatives in the market and from bottling handlers in the market conclude that the dramatic increase in market reserve supplies as far beyond any level required to service the market.

We have demonstrated, on the basis of conclusions in the final rule, that milk such as these supplies generally and, in this case, from these specific locations was never intended to be a part of the Federal Order 33 marketing area. Geographically, it was never considered a part of the supply area and from a performance perspective, it cannot meet the requirements.