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RECEIVED  
May 16, 2006

Hon. Mike Johanns  
Secretary of Agriculture  
200-A Whitten Building  
U.S. Department of Agriculture  
12<sup>th</sup> St. and Jefferson Dr., SW  
Washington, DC 20250

Re: Pending Decisions before the Secretary of Agriculture, on Review of the Recommended Decisions of the Administrator, AMS, for amendments to Federal Milk Marketing Orders for the Upper Midwest Market, the Central Market and the Mideast Market, OALJ-Hearing Clerk Docket Nos. AO-361-A39, AO 313-A48, and AO-166-A72. Request for final decision procedures to neutralize conflict of pecuniary interest by agency personnel involved in the decision-making process.

Dear Secretary Johanns:

Final decisions are currently pending for review before the Secretary or his delegate pursuant to 5 U.S.C. §557 and 7 C.F.R. §§900.13 and 900.13a following: (1) milk order hearings during 2004 – 2005 in Minneapolis, Kansas City, Ohio, and (2) subordinate employee recommended decisions prepared by AMS Dairy Programs and signed by the Administrator. This letter-request, pursuant to 7 C.F.R. §900.7, urges the Secretary to exercise, independently and thoroughly, his Final Decision review functions, and to implement measures for the conclusion of these proceedings to neutralize prior participation in the decision-making process by employees who have a vested and significant pecuniary interest in the outcome of the proceedings.

#### **I. The Secretary's Final Decision functions under the Administrative Procedure Act.**

The Secretary of Agriculture, as agency head, has a critical responsibility, vested by 5 U.S.C. §557 and 7 C.F.R. §900.13a, to review and make final decisions on regulations recommended by subordinate officials in the Agricultural Marketing Service after formal hearings on commodity marketing orders, including milk orders. The Attorney General's Manual on the APA (at p 81) states that this section of law "provides for intermediate and final decisions, prescribes who shall make them, and defines the decisional relationship between the agency heads and presiding officers." The decisional relationship between the Administrator and the Secretary in formal rulemaking is similar to the relationship between administrative law judges and the Judicial Officer in adjudication, which is likewise governed by 5 U.S.C. §557. The Secretary's final milk order decision functions have traditionally been exercised by the Under Secretary or Assistant Secretary for Marketing and Regulatory Programs. *E.g.* 61 Fed. Reg. 60639 (Nov. 29, 1996); 61 Fed. Reg. 37628 (July 18, 1996). USDA has not, unfortunately, followed these procedures in federal milk order rulemaking during the past five years.

We ask that the Secretary's office assume and exercise its decision making responsibilities in substance as well as form, not simply because the APA requires it. The AMS decision now before the Secretary, like some others in the recent past, also implicate regulatory policies and competitive practices broader than mere milk order rule amendment, and threaten to undermine the integrity of, and public confidence in, the milk order program. These issues are addressed in greater detail in my clients' Exceptions, Post-hearing Briefs, and testimony in the hearings, which are part of the records on file with USDA's Hearing Clerk, OALJ.

## **II. The Secretary's Obligations to Avoid and Cure Conflict of Interest in Decision-Making.**

The federal milk order program exists only at the pleasure and with the consent of dairy farmers who benefit from the program. If more than one-third of producers in any market disapprove of amended rules proposed by USDA, the program must be terminated for that market. If a majority of producers so request, even in the absence of a hearing or agency recommendations, a milk order must also be terminated. 7 U.S.C. §608c(16)(B). If more than one-third of producers request a hearing on lawful proposals, USDA must hold a hearing, with limited exceptions. 7 U.S.C. §608c(17). This unique influence of the majority of beneficiaries of regulation on the continued existence of a regulatory bureaucracy brings with it a danger that rulemaking decisions could be influenced by the wishes of dominant producer groups, upon whose continued favor the professional future of career civil servants, who participate in decision-making, depends.

The concern for milk order decisions being influenced by the personal, pecuniary interests of decision-makers is heightened by recent consolidation of cooperatives and federation alliances in most markets. Due to their size and market share, these associations are now in a position to exercise influence over decision-makers with power and breadth not available to them prior to Federal Milk Order Reform. This was illustrated by DFA's shot-across-the-bow vote to terminate the Western Order in 2003 when the Administrator's decision was not to its liking. This industry evolution aggravates pre-existing advantages of larger companies in the marketing order amendment process – i.e., “that small businesses [are generally] disadvantaged by larger businesses' ability to influence final decisions on regulations,” and that even in the 1990's “many of the entities dominating the marketing order process are truly big businesses in the form of large coops.” (SBA, *Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act*, for calendar years 1996 and 2004). In light of this new reality, there is even greater need for the Secretary or his delegate to review the record and make final decisions, after subordinate AMS officials and employees have made recommendations. This will help to assure that (1) the interests of minority producers, small businesses, consumers, and the general public are not overlooked, and (2) the integrity of the decision-making procedure, as well as public perception of it, is protected.

Pecuniary interest of decision-makers in the outcome of a decision violates the governing directive of 5 U.S.C. §556(b) that “the functions of employees... participating in decisions... shall be conducted in an impartial manner.” The continued use of such procedures also violates a rule fundamental due process – that persons having a substantial pecuniary interest in the outcome of decisions are presumptively disqualified from decision-making, even if no actual bias or prejudgment is shown. *Gibson v. Berryhill*, 411 U.S. 564 (1973), *United Church of Medical Center v. Medical Center Commission*, 689 F.2d 693 (7th Cir. 1982).

Current procedures of AMS-Dairy Programs provide for milk order decisions to be written by a Dairy Programs marketing specialist in collaboration with Market Administrators and their employees, all of whom are identified in hearing notices as "involved in the decision-making process."

The market administrator's expenses for regulatory administration, including employee salaries and benefits, are paid from fees charged to handlers and producers subject to the marketing order pursuant to 7 C.F.R. §§ 1000.85 and 1000.86. "These non-Federal funds are collected locally, deposited in local banks, and disbursed directly by the market administrator." (Federal Budget 2006) Market Administrator employees, though ultimately supervised by AMS, are not protected by the federal General Service (GS-) classification system, but are independently employed under MA Instruction No. 203, "Salary and Wage Plan for Milk Market Administrators and Their Employees." In FY 2005, the Market Administrators paid out \$38 million in salaries and benefits to 422 employees. Without approval by producers for the regulations administered by them, and promulgated with their input, these employees would have to seek other employment.

The jobs of Marketing Specialists within AMS Dairy Programs are also fully dependent upon the continued existence of milk marketing orders, and thereby upon the approval of dominant producer cooperatives for the terms contained within such orders. *See* USDA/AMS position description for Dairy Products Marketing Specialist (Agreements and Orders), vacancy announcement No. 939-2006-0005.

### III. Relief Requested.

The agency has not yet disregarded the 5 U.S.C. §557 decisional relationship between the agency head and subordinate employees responsible for making recommended decisions. This rule of law can yet be honored in a final decision. Persons with a pecuniary interest in the outcome have, however, already participated in and written the *recommended* decisions. It is too late to unring the bell; but it need not continue to ring. Their participation might not be fatal to a final decision if the Secretary, in making final decisions, can neutralize that participation. To this end, we request the following procedures be employed for the final decision:

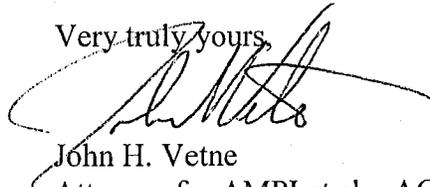
1. That the record to be certified and transmitted for review by the Secretary, pursuant to 7 C.F.R. §§900.13 and 900.13a, be in fact so transmitted to the Office of the Secretary.
2. That employees with a personal pecuniary interest in the outcome of the final decision be disqualified from further participation in decision-making.
3. That review of the record, briefs, exceptions and recommendations of the Administrator be conducted independently for purposes of advising the Secretary or his delegate in making a final decision. We suggest that the Office of the Chief Economist has the expertise, experience and neutrality required for this function, though there are undoubtedly many other resources available to the Secretary.

4. That all prior extra-record recommendations and communications to and from persons having a pecuniary interest in the outcome of the recommended decision be filed with the Hearing Clerk, and made part of the public record, so that interested parties with a regulatory and pecuniary interest in the outcome may examine such communications and respond as necessary.
5. That the Secretary take such other action as may be necessary or prudent to neutralize the effect of prior participation in decision-making by persons having a pecuniary interest in the outcome.

Additionally, the Rules of Practice and Procedure for Promulgation of Marketing Orders, 7 C.F.R. Part 900, which are very outdated in any event, should be amended to provide greater transparency and greater efficiency in the marketing order amendment process. Proposals for amendment may be submitted in the near future.

In accordance with 5 U.S.C. §556(b) and 28 U.S.C. §1746, I declare, under penalty of perjury, that facts stated within the foregoing letter-request are true and correct. Thank you for your consideration of these requests.

Very truly yours,



John H. Vetne  
Attorney for AMPI et al., AO-361-A39;  
Central Equity/AMPI et al., AO 313-A48;  
and White Eagle, et al., AO-166-A72.

CC/EC  
Hearing Clerk, OALJ  
Joyce.Dawson@usda.gov