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

In the Matter of

Milk In The Upper Midwest

Marketing Area

:
: Docket Nos.:
: AO-361-A35 et al;
: DA-01-03
:

**COMMENTS AND EXCEPTIONS OF DAIRY FARMERS OF AMERICA
(DFA) UPON THE TENTATIVE DECISION**

Date: April 15, 2002

**Marvin Beshore, Esquire
130 State Street
P.O. Box 946
Harrisburg, PA 17108-0946
Attorney for DFA**

I. INTRODUCTION AND BACKGROUND

This is the first hearing and the first decision of several considering proposals to modify the pooling provisions of the post-reform federal orders. As DFA's testimony at this hearing, and at the subsequent hearings has made clear, we consider the principles for pooling which the Department applies in these hearings to be of utmost importance to the federal order system. We believe that well thought out policies should be adopted and consistently applied to each order. We recognize, of course, that the local marketing conditions in each order, and the record of each hearing, will determine the specific provisions adopted in each area.

In this proceeding, DFA's post-hearing brief stated that: "The question presented for the Secretary is whether to amend Order 30 to require a performance relationship with the fluid market for producer milk both within and outside of the procurement area of the Order or, alternatively, to adopt a proposal which would disqualify milk from California only while continuing the regulatory loophole[s] which allows pooling without performance from other distant areas including Idaho." We continue to believe that this is the core question presented in this hearing and, while we are willing to accept the wisdom of the Tentative Decision which adopts the Proposal 1's "double dipping" prohibition, we are not satisfied with the Tentative Decision's rejection of portions of Proposal 4, or with the reasoning stated in support of that rejection. We therefore file these comments and exceptions to certain portions of the Tentative Decision.

In addition, DFA takes exception to the recommendation that Proposal 5, which would amend the partial payment provisions of the Order, not be adopted.

II. THE TERMS OF POOLING IN FEDERAL ORDER 30 SHOULD BE ESTABLISHED ON THE BASIS OF MARKET PRINCIPLES REQUIRING PERFORMANCE IN SUPPLYING THE FLUID MARKETPLACE.

DFA advocated in testimony at the hearing and in its post-hearing brief that the Secretary should apply the principles of market definition and performance to the issues in this hearing which were articulated and applied in consolidating and revising the orders as of January 1, 2000. This would mean that all milk sharing in the marketwide pool will be required to perform by serving the Class 1 needs of the order. We support the Tentative Decision which adopted this principle, stating:

Pooling standards of milk orders, including Order 30, are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying those who are reasonably associated with the market for sharing in the Class I proceeds. Pooling standards of the order are represented in the Pool plant, Producer, and the Producer milk definitions of the order. Taken as a whole, these definitions set forth the criteria for pooling. Pooling standards should continue to be performance based in Order 30. This is the only basis viable for determining those eligible to share in the pool. It is primarily the additional revenue from the Class I use of milk that adds additional revenue, and it is reasonable to expect that **only those producers who consistently supply the market's fluid needs should be the ones to share in the distribution of pool proceeds.**

67 Fed. Reg. 7050 (February 14, 2002)(emphasis supplied). Unfortunately, and inexplicably, in rejecting Proposal 4, this principle was not implemented.

As the hearing record establishes, without dispute, the pooling provisions approved in the Tentative Decision allow distant milk from locations such as Idaho to be pooled without any actual commitment to the Order 30 fluid market and certainly without "consistently supply[ing]

the market's fluid needs," as the Tentative Decision now states must be required. DFA takes exception to this inconsistency and failure in the Tentative Decision.

Adoption of proposal 4 is necessary to implement the pooling principle which the Secretary has enunciated. Without Proposal 4, distant milk with no commitment to the fluid needs of the market will be pooled in consistently greater quantities,¹ with almost no limit.² The pooling provisions in Order 30 (and all orders) have evolved over the years to allow the most efficient assembly (and pooling) of milk which is so situated as to be ready, willing, and able to supply the fluid needs of the market, and which has demonstrated that ability. All such milk is pooled so long as a proportionate amount of that volume is delivered to the fluid marketplace to meet the needs of the market. The necessary proportion of each marketing block (or "unit") of milk pooled is established in the supply plant and producer milk performance provisions of the order, 7 C.F.R. §1030.7 and 1030.13. The regulations have fostered efficiency by allowing handlers to deliver-- from sources in the marketing area which have demonstrated actual availability to serve the market-- the most advantageous milk supplies in quantities sufficient to meet the market's needs. But Order 30, pre-Reform, was carefully crafted to make certain that

¹ Exhibit 1 attached is official correspondence from the Market Administrator's office which "updates" the pooling information in the record in Exhibits 7 and 8. It shows that by the end of 2001 pooling of milk from Idaho had increased to 120 million lbs per month. Official notice of this statistical update is requested.

² DFA commends the Department for recommending a limitation of 90% for diversions from distributing plants, thus establishing *some* limitation where there was none previously. The ability to "pyramid" milk qualification under the regulations, without proposal 4, is very substantial. Each producer must only be delivered one-day-for-life under Section 1030.13(d); a distributing plant needs only 15% Class I utilization; and the handler can divert 90% of producer milk to nonpool plants. As the Kraft witness candidly testified, there is no economic basis to move milk from Idaho to the Order 30 market, but paying an order 30 handler to pool milk from Idaho works very well (for those involved in the deal). Tr. 514-515.

efficient delivery in the marketing area did not allow pooling of out-of-area milk which would never realistically serve the market.

It is troubling to us that in rejecting Proposal 4, the Tentative Decision does not appear to acknowledge that Proposal 4's distinguishing between "in area" and "out of area" sources of milk, and the pooling standards applicable to each, is neither new for Order 30 nor for the federal order system more generally. In fact, **Proposal 4's producer milk qualification does nothing more than mirror the existing order 30 provisions for supply plants.**³

Order 30 presently has two (2) pooling mechanisms for supply plants: First, § 1030.7(c), the basic supply plant qualification provision, requires supply plants to deliver not less than 10% of the grade A milk received from dairy farmers each month to Class 1 plants. Notably, none of the distant out of area milk involved in this hearing is qualified through this provision which requires monthly shipments of 10%. Secondly, supply plants may also qualify as a unit of plants pursuant to §1030.7(f). However, the unit system of qualification, which does not require minimum monthly shipments from each plant, mandates that each plant be "located within the marketing area." It goes on to underscore the required linkage between the location of the plant and its means of qualification by stipulating that: "Cooperative associations may not use shipments pursuant to § 1000.9(c) to qualify plants located outside the marketing area."⁴ This

³ There is nothing either novel or sinister about taking care to be sure that pooling provisions do not allow pooling-without-performance by distant milk. Both the predecessor Orders 30 and 68 distinguished pooling performance standards among in area and out of area plants and numerous other orders, including present Order 1 (and Order 2 before 2000, and other orders) have had in area and out of area geographical pooling distinctions for many, many years. See note 5, *infra*.

⁴ Section 1030.7(f) provides in pertinent part:

"(f) A system of 2 or more supply plants operated by one or more handlers may qualify

language makes it clear that the present order was intended to limit the ability of cooperatives or others to pool milk outside the marketing area without monthly deliveries to distributing plants.

The existing language in Order 30 with respect to in area and out of area supplies of milk was a continuation of longstanding distinctions in both predecessor orders 68 and 30. When Order 68 was first established as the Upper Midwest Order, a merger of four prior orders effective in 1976, new definitions for supply plant and reserve supply plants were established. Those definitions distinguished between performance required of plants located in the marketing area and plants located outside the marketing area. Plants located outside the marketing area were required to perform on a monthly basis; plants within the marketing area had the option to elect reserve supply plant status and be obligated to deliver milk only when called upon. When establishing the reserve supply plant system, the Secretary specifically refused to authorize reserve supply plant status for plants outside the marketing area, finding that there was no reason to believe that such plants would in actuality be the source of milk for the market's reserve needs. See 41 Fed Reg. 12436-12479 (March 25, 1976)(Final Decision)(Official notice of this decision is requested..) Likewise, in the predecessor Chicago Regional Order 30, the pool plant language distinguished between in area and out of area supply plants for many years. Similar to Order 68, Order 30 prohibited the association of out of area supply plants in a unit of plants which could perform (by making required deliveries to distributing plants) on an aggregate basis

for pooling by meeting the shipping requirements of paragraph (c) of this section in the same manner as a single plant subject to the following additional requirements:

(1) Each plant in the system is located within the marketing area or was a pool supply plant pursuant to § 1030.7(c) for each of the 3 months immediately preceding the applicability date of this paragraph so long as it continues to maintain pool status. Cooperative associations may not use shipments pursuant to § 1000.9(c) to qualify plants located outside the marketing area."

without shipments from each individual plant in the unit. Out of area supply plants were, nevertheless, always eligible for pooling on a monthly performance basis. These distinctions existed in Order 30 since at least 1977. See 42 Fed. Reg. 37388 (July 21, 1977)(Final Decision)(Official notice of this decision is again requested).

In other orders, distinctions between in area and out of area plants have been present for even longer periods of time. In Order 2, the former New York- New Jersey marketing order, “regular pool plants” had to be “located in New York, New Jersey, or Pennsylvania.” since prior to 1960. See 7 C.F.R. § 1002.24(a)(2)(1999) Plants not meeting the geographic criteria could nevertheless qualify as “temporary pool plants” under Order 2 provided they met other standards which involved monthly association with the fluid milk needs of the market. See 7 C.F.R. §1004.28(1999). In the post-reform Order 1, which now regulates the marketing of milk in Northeastern United States, the successor to Orders 1, 2 and 4, the requirement that out of area milk sources associate with the market on a monthly basis in order to be pooled was set out in 7 C.F.R. §1001.13(b). Those provisions simply require that producers outside the states in the marketing area (as well as the states of Maine and West Virginia which have been traditional procurement areas for the Northeastern markets) deliver the same monthly percentage of their production to pool distributing plants as is required of in area plants.⁵

The common denominator in all of these prior federal order provisions with respect to in area and out of area plants, or producers, is this: Distant plants or producers may qualify and be

⁵ We have not made an exhaustive study of similar provisions in other pre and post reform orders, but are aware of these: 7 CFR § 1079.7 (1999) (performance varies by location of supply plant); 7 CFR § 1007.7(1999)(provisions applicable only to supply plants within the marketing area); 7 CFR § 1005.7(1999)(c)(cooperative balancing plant must be located in the states of North Carolina, South Carolina, or Virginia); 7 CFR § 1040.7(1999)(b)(3)(cooperative plant located in the State of Michigan).

pooled in a federal order market if that plant, or the producers, on their own, perform in accordance with the minimum performance standards of the order. There is nothing in the application of any such standards which creates in any way, shape, or form a trade barrier to the movement of milk such as is prohibited by 7 U.S.C. § 608c(5)(G).

In view of the deeply embedded historical distinctions between in area and out of area plants and supplies, we are puzzled by the Tentative Decision's comments, in agreement with opponents of Proposal 4, that:

Requiring each State unit to ship at least 10 percent of the quantity of milk to a distributing plant regulated under the order effectively sets a performance standard different from the States that comprise Order 30. For example, of the milk received from Idaho, the DFA proposal would establish a standard for at least 10 percent of such milk to be shipped to a distributing plant in order for this milk to be producer milk pooled on the order. However, the same would not be required, for example, that 10 percent of all Wisconsin milk be shipped to distributing plants regulated under the order.

67 Fed. Reg. 7050 (February 14, 2002). There are at least two basic problems with adopting this objection which as far as we can discern is the **only** expressed basis for rejecting proposal 4.

First, the implication that there is some defect in a regulation that sets a different standard for qualifying Idaho milk (versus Wisconsin milk) on Order 30 is incorrect. There is absolutely nothing wrong, sinister, or illegal with recognizing the realities of geographic location in setting performance standards: That is what this very same Tentative Decision and Order does with supply plants, as discussed above. It makes eminent sense that a supply plant located outside the marketing area should have to stand on its own in performing and not ride the performance of an in-area "unitized" plant, or be qualified by direct 9(c) shipments to in-area distributing plants. Setting the same standards is all that Proposal 4 would do for producer milk qualification.

Secondly, the implicit assertion that distant milk will have greater delivery requirements than in-

area milk completely ignores the reality of the obligations of milk supplies in the marketing area. The Class I utilization in Order 30 necessitates that more than 10% of the milk in the marketing area be delivered to distributing plants. With the utilization in the order running around 20%, **more than 20% of the milk in the area will always be delivered to distributing plants.**⁶ The contention of opponents that a disproportionate burden is placed on out-of-area milk is nonsense, if the actual day-to-day facts of marketing in the order are of any interest.

When all the rhetoric about discrimination and trade barriers is penetrated and the operation of the existing regulations and the terms of proposal 4 are weighed, the Proposal merely requests that the Secretary amend Order 30 to establish, in substance, for producer milk delivered to distant **nonpool** plants the same performance standard which would apply if the plant they were delivering to was a **pool** supply plant under the order! The bottom line is, however, not about equity, performance or serving the market: It is about a different economic equation, one in which the proponents of distant pooling want to be able to associate milk which has no performance intention, or possibility so that: the in area pooling handler will receive the going rate of "compensation" for this pooling "service"; the out of area non-performing producers will get the blend price; the out-of-area paper-pooling handler will have his producer pay price subsidized by the Order 30 in area producers; and the producers who service the market will pay. These practices are not consistent with the Secretary's adopted principles for pooling, with the existing provisions of Order 30, with historical policies and practices relating to the

⁶ Distributing plants will average no more than 90% class I utilization and may average less than that. So arithmetic requires that at least 10% more total volume of milk must be delivered to distributing plants to get to the 20% utilization for the order. When distant milk is factored out, the in area deliveries, whether from Wisconsin, Minnesota, or Illinois are going to be substantially higher than the required 10 % deliveries from distant states. Hardly a disproportionate burden.

terms for pooling distant milk, with sound federal order policy, or with orderly marketing⁷.

DFA takes exception to the rejection of Proposal 4 and requests that the Secretary reconsider and adopt proposal 4 consistent with a reasoned analysis of all of the evidence of record..

III. DFA'S PROPOSAL 5 TO AMEND THE ADVANCE PRICE REQUIREMENTS OF THE ORDER SHOULD BE ADOPTED

DFA also requests that the Secretary reconsider the tentative decision to reject Proposal 5 which would amend the partial payment provisions of Order 30 to assure that producers receive a reasonable partial payment for their milk deliveries each month.

Exhibit 37 demonstrated the erosion of producers' advance price payments under Order 30. For the period from January 1997 through May 2001, fifty-three (53) months, the monthly average spread between the Class 3 price and the blend price was \$0.85. However, for the first thirty-six (36) months it was \$0.73 and for the last seventeen (17) months it was \$1.08. Proposal 5 would essentially restore the pre-reform status quo in the rate of partial payment.

The objection that the proposal "may increase the likelihood of requiring handlers to pay out part or all of the PPD prior to receiving payments from the producer settlement fund" is misplaced. At the time that partial payment is made to producers, on the 26th of the month, the handler, has received 26 days' milk production, for which partial payment is required for only the

⁷ The Tentative Decision took DFA to task for contending that pooling distant milk without performance was "disorderly" while pooling milk which "double dipped" was not. Our point was mostly an academic one (what is the most consistent and principled way to eliminate the pooling of nonperforming distant milk) which at this point is completely academic since the double-dipping amendment has received the Secretary's endorsement and DFA does not object to it. However, the academic point remains that allowing distant milk to blatantly ride this or any other federal order pool without any possibility of performance is textbook disorderly marketing as that concept has evolved over the years of administration of the federal order program.

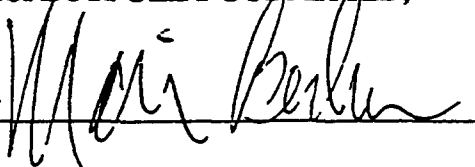
first 15 days' volume. Whether or not 103% of the lowest class price for the prior month is more than the current month's class III price should not be determinative. The final payment for the month will equalize it. Dairy farmers are financing the operations of handlers in a substantial way under the payment terms of the federal orders. 103% of the prior month's lowest price is a "windfall" payment rate for handlers when prices increase from month to month. The fact that this dynamic changes when prices decline only "equalizes" the account. In all cases, the amount of the partial payment proposed is considerably less than the value of the raw milk which the handler will have received and processed at the time of the payment.

Proposal 5 is a modest request that something closer to the pre-reform rate of partial payment be retained in Order 30. The proposal should be adopted.

IV. CONCLUSION

DFA respectfully requests that Proposals 4 and 5 be adopted in the Final Decision to be rendered from this proceeding.

RESPECTFULLY SUBMITTED,

By 

Marvin Beshore, Esquire,
PA ID #31979
130 State Street, P.O. Box 946
Harrisburg, PA 17108-0946
(717) 236-0871

Dated April 15, 2002

Attorney for Dairy Farmers of America (DFA)



UPPER MIDWEST MARKETING AREA
Federal Order No. 30
Agricultural Marketing Service
Dairy Programs

2150 Western Court, Suite 100
P.O. Box 4469
Lisle, IL 60532
Telephone: (630) 810-9999
Fax: (630) 810-1788

H. Paul Kyburz, Market Administrator
4570 W. 77th Street, Suite 210
Minneapolis, MN 55435-5037
Telephone: (952) 831-5292
Fax: (952) 831-8249

2701 International Lane, Suite 102
Madison, WI 53704
Telephone: (608) 242-1822
Fax: (608) 242-1846

March 8, 2002

Elvin Hollon
Dairy Farmers of America, Inc
P.O. Box 909800
Kansas City, MO 64153

Dear Mr. Hollon:

Per your request the following table contains the estimated pounds of milk pooled on the Upper Midwest Order during 2001 from California and Idaho.

Estimated California and Idaho Milk Pooled
on the Upper Midwest Order During 2001
(Mil. Lbs)

Month	Calif.	Idaho
Jan	153	
Feb	181	
Mar	271	
Apr	283	33
May	241	39
Jun	230	69
Jul	232	57
Aug	227	105
Sep	231	94
Oct	227	44
Nov	228	119
Dec	217	120

Sincerely,

H. Paul Kyburz
Market Administrator