UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
(Dairy Programs)

Milk in the Mideast	)	Dkt AO 166-A72
Marketing Area	)	DA 05-01
7 C.F.R Part 1033	)	

OPPONENTS' BRIEF ON 'POOLING STANDARD' PROPOSALS

This post-hearing brief is submitted in opposition to Proposal No. 2 on behalf of a coalition we will refer to as "White Eagle, et al." The coalition consists of cooperative associations who market and pool milk in Order 33 (White Eagle Cooperative Federation and its constituent cooperative association members, Family Dairies USA), proprietary handlers fully regulated under Order 33 (Superior Dairy and United Dairy), handlers operating "nonpool" manufacturing plants that receive surplus Order 33 milk (Guggisberg Cheese and Brewster Dairy), and Dairy Support, Inc., a milk market service provider.

I. INTRODUCTION

Rulemaking proposals before the Secretary include "pooling standards" proposal 2 by DFA and MMPA designed to shrink the pool, limit the volume of milk that may be pooled, or restrict access milk that may seek to associated with the Mideast Market pool in the future, and proposal 3 by Dean Foods intended to further limit pool access. This brief is limited to Proposal 2 and to Proposal 3, as published in the Notice of Hearing.[1]

[1] Dean Proposal No. 3 was largely abandoned in the course of the hearing. Other proposals, including No. 1 (prohibiting simultaneous federal and state milk pooling), Nos. 5 – 8 (limiting voluntary depooling of diverted milk), and No. 9 (transportation credits) are not addressed in this brief.

II. FINDINGS OF FACT AND CONCLUSIONS.

White Eagle, et al., propose the following findings and conclusions, and request the Secretary make a ruling on each proposed finding as required by law. 5 U.S.C. §557(c); 7 C.F.R. §§900.12(b)(2) and .13a(b).

A. DFA, et al., Proposal 2 – Proponents' Objectives and Evidence

1. Proposal 2 would, if adopted, is intended to increase regulatory costs borne by handlers and by hundreds of small business dairy farmers, directly or through their cooperatives, by increasing handling, transportation and logistical burdens to market milk as pool producers under Order 33, including: (1) increasing by 25% the volume of milk that must be shipped to distributing plants by supply plants, whether such milk is needed or not; and (2) reducing by 25% - 33% the volume of milk that can be diverted to nonpool plants, whether such is needed or not by distributing plants.

2. One of proponents' reasons for advancing Proposal No 2 is the claim that too much "distant" milk is pooled on Order 33. Proponents defined "distant" milk to include milk originating in Illinois, Wisconsin, Iowa and Minnesota, but *not* to include milk from New Jersey, eastern New York or Vermont. Uther, Tr. 117-18, 125.

3. Milk from Upper Midwest dairy farms has, with some ebb and flow, been marketed and pooled in the Mideast for several decades. Ex. 30, Attach. 4; *Farmers Union Milk Marketing Cooperative v. Yeutter*, 930 F.2d 466 (6th Cir. 1991).

4. One regulatory cause of "distant" milk (as defined by Proponents) being attracted to federal markets is the structure of regulated producer blend prices in Order 33 and other markets – i.e., the absence of any zone-out of producer prices reflecting the lower value, to the pooling market, of milk

delivered to distant plants (Cotterill, Tr. 805-06). Since pricing provisions are not included for alternative consideration in USDA's Notice of Hearing,[2] although such proposals were advanced for hearing by Continental but rejected by USDA (Ex. 30, Attachment 5), Proposal No. 2 is advanced in part to limit "distant" milk from participating in the pool.

5. DFA also complained that the Order 33 blend price is lower than it should be, which is the result of too much milk pooled on the order:

> Current [pooling provisions] allow far more milk to be associated with the market than is appropriate to be carried as a reserve supply. **** Excess reserves depress the blend price for producers that serve the everyday needs of the market.

Gallagher, Tr. 215-16. DFA also complained that not enough *local* milk is shipped to distributing plants, and that reserve milk "is not always available to the market when needed." *Id*., Tr. 234.

6. DFA's witness was Ed Gallagher, a Dairylea employee, who was substituting for Elvin Hollon, of DFA's Kansas City office, due to tragic circumstances.

11. When asked to support arguments in favor of Proposal No. 2 with some hard facts, the witness for DFA, et al., could not so do. While testifying that "DFA has had supplemental suppliers refuse to make deliveries when faced with the opportunity to receive a negative PPD," the witness admitted he had no knowledge of facts and relied only on

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[2] Consideration of zoned-out producer pricing for Order 33 as an alternative remedy for possible distant milk attraction is precisely the kind of alternative that should be considered under the RFA to minimize burdens on small businesses. Zone-out producer pricing, expressly authorized by the AMAA, would (if necessary) strike with target precision at distant milk supplies. Proposal No. 2 would instead directly burden *all* local small business farmers with the hope of incidentally discouraging some distant milk from pooling in Order 33.

"intuition." Gallagher, Tr. 322-324. There is, in fact, hard evidence proving that distributing plants in Order 33 have not had any significant difficulty obtaining adequate supplies of fluid milk during the past five years. Ex. 11, Part 2 Requests (last page)(stating that the Market Administrator has no documentation of a complaint or notice by any person "that milk supplies to any individual pool distributing plant, or to a group of distributing plants within any state or part of a state in the Marketing Area, were not adequate or would not be adequate to meet plant needs during any period from January 2000 through January 2005….").

7. DFA's regional Mideast Council Offices are located in Fairlawn, Ohio, not far from the location of the hearing in Wooster. Ex. 30, Attachment 3; Gallagher, 318, 321. Notwithstanding the burden of proof imposed by the APA, during the four-day hearing DFA did not call any witness from the Fairlawn office to testify as to specific facts relating to DFA's operations in the Mideast or to support DFA's assertions of marketing disorder due to existing pooling standards.

8. DFA's desire to gerrymander the blend price by booting milk off the pool through restrictive performance provisions is contrary to long-term USDA policy. As explained by the Secretary after the previous national hearing review and reform process in 1990:

> Producers make their production and marketing adjustments on the basis of changes in blend prices and differences in blend prices among orders. It is not uncommon for supply areas of individual orders to expand or contract in response to blend price changes over time. Also, because milk is free to move to handlers regulated under different orders, it is not uncommon for milk to shift from one order to another in response to blend price differences that result from changes in supply and demand conditions under different orders.

59 Fed. Reg. 42422, 42426 (August 17, 1994). In his Second Amplified Decision, the Secretary reemphasized:

> Blend price changes (and differences in blend prices among orders) provide the economic signal for producers to make production decisions and for making marketing adjustments.

61 Fed Reg. 49081, 49086 (Sept. 18, 1996). DFA's vision of the system would stop many a producer in his marketing tracks even if blend prices alone signaled a market shift would be desirable. As described further below, provisions such as proposed by DFA would make the alternative market unattainable to many small business dairy farmers and their cooperative representatives.

B. DFA Arguments for Emergency Rulemaking on Proposal 2.

10. DFA advocated "emergency" procedures, dispensing with the benefit of feedback following a recommended decision, should apply for Proposal 1, 2, and the depooling proposals. After making its argument for emergency ruling on depooling issues, DFA stated as to Proposal 2: "Concerns with performance standards also have a very short-term time horizon. The fall shipping season will be here soon and it would be helpful to have a decision prior to that time so that Order provisions will not be an unknown factor in any planning." Gallagher, Tr. 294-95. DFA did not cite any judicial or administrative precedent permitting emergency ruling, and omission of a recommended decision, on grounds of "helpfulness."

C. About the Interested Parties and Marketing on Order 33.

12. DFA is the nations' largest milk cooperative. In 2003, DFA marketed 56.5 billion pounds of milk – a third of the nation's 170.3 billion pounds of milk production, and 4.2 billion pounds of milk per year from members in DFA's Mideast Council Area. Ex. 30, Attachment 3 (Facts

About DFA Mideast Area); NASS, Milk Production Disposition & Income, (Apr. 2004)("NASS-MPDI").

13. Milk marketed by DFA includes not only DFA member milk, but also milk of federations and marketing agencies under DFA's management or control. From its Fairlawn, Ohio, office, DFA is also managing partner of the Dairy Marketing Services (DMS) federation office in the Central Market. Gallagher, Tr. 318-320. Through DMS, DFA is responsible for marketing and pooling milk of 15 entities in the Mideast, including DFA, Dairylea, Foremost Farms, NFO, Land O'Lakes, Michigan Milk, Continental Dairy, Upstate, Prairie Farms, and over 1,000 'non-member' producers shipping milk to Dean Foods, National Dairy Holdings, Brewster Cheese, Pearl Valley Cheese, Guggisberg Cheese, Holmes Cheese and Minerva Cheese. Gallagher, Tr. 547-549; *See also* Ex. 15 Tables 5-6.

14. Based on best available information of record, as summarized by Dr. Cotterill, agencies or federations in control of DFA or MMPA account for 82% of 1.3 billion pounds of milk pooled monthly in the Mideast Marketing Area. Cotterill, Tr. 776. Proponents, though given plenty of opportunity, did not rebut this testimony.

15. White Eagle Milk Marketing Federation pools approximately 150 million pounds of member and independent producer milk monthly in the Mideast Market. Leeman, Tr. 671, 930.

16. Over the past 10 years, the Mideast Market has experienced significant reduction in the number plants and handlers to which producers may market their milk.[3] Between1995 and 2004, handler numbers dropped

[3] The discussion in paragraphs 16 –24 of these proposed findings fall within factors of changes in "market structure and accessibility," concerning which the Secretary has taken

from 78 to 33, distributing plants from 64 to 42, and supply plants from 10 to 3. Ex. 30, Attach. 1.

17. Since USDA's last pool-tightening decision effective August 2002, Section 7(c) supply plants have ceased to be a significant supply factor in Order 33. There are no remaining traditional supply plants within the marketing area. Gallagher, Tr. 347; Ex. 6, Table 1. Proponents claim that proposal 2 amendments to Section 7(c) "will make more milk available to Class I market" (Tr. 237) is, therefore, an exercise in hypothetical rather than actual supply practices. And the exercise is devoid of facts supporting a need for more milk to be shipped for Class I use. *See* ¶ 6, *supra*.

18. Only Section 7(d) cooperative plants remain, when they are not voluntarily depooled for economic reasons. Ex. 37. In any event, 7(d) plants need not make qualifying shipments on their own merit, nor do they have diversions counted against plant receipts. Rather, they provide a means to "touch base" and qualify milk for the market's largest cooperatives at a "pool" manufacturing plant, while milk of smaller cooperatives delivered for similar manufacturing use is limited both by diversion and the need to 'touch base' elsewhere. Rasch, Tr. 579-80.

19. The Mideast Market has also experienced significant reduction in the number of cooperatives serving as marketing options for producers. USDA's April 1999 federal order reform decision observed that 20 cooperatives marketed milk in the Mideast as of 1997; today there are fewer than 9 cooperatives reporting milk as the pooling handler. Ex. 30, pp 2-3; Uther, Tr. 614-615.

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a very hard look, with detailed analyses, in prior proceedings. E.g., 41 Fed. Reg. 12436, 12439-43 (March 25, 1976).

20. Producers' marketing opportunities to plants, however, are further constrained by handler acquisition and consolidation of plants and plant systems. Dean Foods, for example, operates the largest system of distributing plants in the Mideast, accounting for 12 of the market's distributing plants, about half of which process more than 25 million pounds per month, and half in the range of 15-25 million. Kinser, Tr. 979-80. Other handlers, therefore, operate only eight of the market's other larger (15 million lbs./mo. or more) plants. See. Ex. 11, Table 1 (Dec. 2004 distributing plants by size). The market's larger plants, in turn, account for 83% of the market's total receipts of milk at distributing plants. *Id.*

21. There are a total of 22 handlers operating distributing plants in Order 33, as of December 2004. Ex. 11, Table 2. Of these, seven handlers have monthly receipts in excess of 25 million pounds per month. In aggregate, these seven handlers received 597.3 million pounds of milk during December 2004 – an average of 85 million pounds per handler. *Id.*

22. Most of the market's large handlers are supplied by DFA/DMS, except in Michigan where MMPA still has a significant (though shrinking) share of milk marketed to distributors. Plants supplied by DFA/DMS were identified by DFA's witness, Mr. Gallagher, at Tr. 543-546. Additional information on Michigan plants supplied by MMPA was revealed by Mr. Rasch at Tr. 566-67, 575-78. Dean's acquisition and consolidation of plants has caused even MMPA to struggle for pooling base adequate to keep its member milk supply pooled. As Mr. Rasch testified (Tr. 566-67): "The fluid milk processing industry in Michigan has experienced a great deal of consolidation in recent years. As a result, access to fluid sales for qualification purposes is becoming more limited. Access is also limited due to supply relationships that have a lot of history behind them."

23. Limited access to fluid milk markets and to pooling base from fluid milk sales is the principal difficulty facing White Eagle, et al., under proposal No. 2. White Eagle Federation is the only cooperative identified on record as adversely affected by Proposal No. 2, and would have to disassociate milk from the pool if the proposal is adopted. Ex 30, pp. 6-7; Cotterill, Tr. 819-20.

24. The impact of significance from implementation of Proposal No. 2 in this case would be as follows: Small business cooperatives and producers who market through White Eagle will loose as much as $0.73/cwt on milk forced to exit the market if the proposals are adopted. Small business producers who have hitched their wagons to big business enterprises such as DFA and its big business customer base stand to gain, at most, $0.02 per hundredweight. Cotterill, Tr. 786, 819-20. The "benefit" to DFA, its members and allies from these proposals, therefore, lies not in the 2 cents gain on milk, but rather in the quantity of harm the proposals would cause to DFA competitors. Cotterill, Tr. 785-86.

25. Dairy farmers who produce high-solids milk face additional disadvantages from Proposal No. 2. About 450 producers in Order 33 and contiguous states are members of National All-Jersey, a breed association dedicated to the production of high solids milk from Jersey cattle. 90% of these producers are small businesses. Metzger, 911-912. DFA Proposal No. 2 would force high-solids milk from its optimal use in cheese, with optimal premiums for functional value, to be delivered to distributing plants for its least optimal use. This would reduce competitive premiums available to high-solids producer milk, reduce manufacturing efficiency, and compromise the Mideast's robust manufacturing sector. *Id.* Tr. 913-14. Since about 20% more milk would have to be delivered for manufacturing to

produce the same quantity of cheese with low-solids milk (*C.f.* Gallagher, Tr. 432-33), the proposal would not just inefficiently displace existing milk delivered to distributing plants, it could actually result in *less* milk available for fluid use.

26. DFA's solicitation of the Secretary's help in removing its competitors' milk from the market is essentially the same strategy advocated by DFA in published proposals for prior hearings in the Central and Upper Midwest markets.

27. DFA, et al., did not maintain that proposal 2 proponents would in any way be adversely affected by the pooling restrictions, nor rebut Dr. Cotterill's analysis of how the proposal could be exploited by DFA to disadvantage its few, remaining small competitors in the Mideast by "vertical foreclosure" similar to that which threatened Agri-Mark in July 2003 when it faced loss of its H P Hood pooling base to DFA. Ex. 31, sub-Exhibit 3; Cotterill, Tr. 770-71.

28. Dean Foods and DFA are bound by a national milk supply agreement, which provides for payment by Dean of liquidated damages up to $96 million in the event of a breach, and was sweetened by a lump sum payment by Dean to DFA of $28.5 million in the 4th quarter of 2001. Ex. 30 (p. 5); Ex. 34; Rasch, Tr. 567.

29. Although Dean Foods comes before the Secretary as a proponent of pool tightening rules, Dean did not present any witness to explain the operation of the DFA supply agreements to Dean plants in Order 33. The Dean witness steadfastly refused to disclose facts concerning its procurement, volume of receipts, Class I sales, sources of supply, or even to

rebut evidence presented by others as to Dean supply sources. Kinser, Tr. 989-90, 995.[4]

ARGUMENT

A. USDA's Pre-Hearing Obligations.

USDA milk order rules are the product of formal hearings in which facts may be offered for or against proposals based on issues and regulatory precedent disclosed in the Notice of Hearing and in prior rulings of the agency. Under the APA and the Due Process Clause, an interested party "is entitled to know the issues on which a decision will turn, and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. *Williston Basin Interstate Pipeline Co., v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999). Since the agency did not advise to the contrary in its Notice of Hearing, we have structured our hearing presentation and this brief in reliance upon administrative and judicial precedent.

B. Proponents' Burden of Proof Under the APA

Section 7(c) of the Administrative Procedure Act says that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). This law is similar to Rule 301, Federal Rules of Evidence. For several decades after passage of the APA, courts and agencies believed "burden of proof" to mean only the burden of production or "going forward" with evidence. *See NLRB v. Transportation Mgmt. Corp*., 462 U.S. 393, 404 n.7 (1983). However, only a decade ago, in *Greenwich Collieries* the Court concluded that the "burden of proof" in §

[4] Hearing participants have the option to withhold relevant proprietary evidence, or to disclose it to meet their burden of proof and to help the Secretary make an informed on-the-record decision. However, when a proponent places adequacy of supply at issue, a claim of proprietary privilege is not persuasive as a matter of law where the proponent witness is examined as to facts relevant to supply failure or supply performance.

7(c) was more demanding, and additionally meant "the burden of persuasion." *Director, Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267, 276 (1994). It is now understood that combination of "burden of proof" and "substantial record evidence" standards in formal "on the record" hearings under the APA – as is the case for this hearing -- impose a traditional "preponderance of evidence" burden on the party or agency proposing a rule or order. Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise §10.7 (3d ed. 1994). In other words, if DFA/MMPA proposal No. 2 is to be adopted and promulgated as law by the Secretary, proponents must first provide the Secretary with essential facts proving their case, *Fairmont Foods v. Hardin*, 442 F.2d 762 (D.C. Cir. 1971); *Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872, 879-81 (D.C. Cir. 1972). Alternatively, the agency may come forward in the hearing with its own evidence to support the rule. *Abbotts Dairies Div. v. Butz*, 389 F. Supp. 1, 8-9 (E.D. Pa. 1975); *Hess & Clark v. FDA*, 495 F.2d 975 (D.C. Cir. 1974),

Proponents of pooling standard proposals fail to meet this burden on the merits of the proposals because (1) proponents rely on largely on policy arguments rather than facts to support their claims, (2) proponents admitted on cross-examination that they did not know of specific facts to buttress their bald conclusions, (3) proponents refused to disclose relevant evidence of their own activities in the regulated market, (4) the essential 'facts' they rely upon are not facts at all, but rather speculation about what might happen in the future[5], and (5) their objectives run contrary to legislative policy.

[5] Speculation based on conclusory assertions of a similar nature was fatal to the pricing rule reviewed by the 7th Circuit in *Borden, Inc., v. Butz*, 544 F 2d 312 (1976).

C. **USDA's Decision-Making Responsibilities**.

Even under ordinary circumstances, standards for reasoned administrative action are "strict and demanding." *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 463 U.S. 28, 48 (1983). An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it - for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43; *Rhode Island Higher Educ. Assistance Auth. v. Secretary of Educ*., 929 F.2d 844, 855 (1st Cir. 1991). Milk Marketing Order rulemaking standards are further constrained because the Secretary "does not have 'broad dispensing power'." *Zuber v. Allen,* 396 U.S. 168, 183 (1969).

The pooling proposals in this case, were made without heed to the legislative prohibition against rules that would punish or reward producers in their pool participation based upon the use to which milk is put by handlers. 7 U.S.C. Sec. 608c(5)(B)(ii); *Blair v. Freeman,* 370 F.2nd 229, 237 (D.C. Cir. 1966); 41 Fed. Reg. 12436, 12453 (March 25, 1976). Whatever exemption there may be from *Blair* where market conditions require high performance rules to attract adequate milk for fluid use, no exemption applies in the absence of evidence of need to attract milk for fluid use. Under the standards of *Blair* and its progeny, it is clear that small business producers may not be excluded from the pool simply because they do not have enough sales to Class I milk plants, particularly where the big business proponents have near monopoly control of access to fluid milk markets.

D. USDA's Special Responsibility to Small Businesses.

As explained in the Notice of Hearing, 70 Fed. Reg. 8043, 8044 (February 17, 2005), USDA has a special responsibility to consider the impact of proposed rules on small businesses. Dairy farmers are considered small businesses if their gross revenue is less than $750,000 per year. Farms with less than 500,000 pounds of milk production per month are generally expected to meet this small business standard. *Id*. Most of the 10,000 farms pooled in Order 33 are small businesses by this standard. *See* Exhibit 6, Table 17.

A February 2005 report to Congress by the Chief Counsel for Advocacy, Small Business Administration, explains agency rulemaking obligations to small businesses under the 1980 Regulatory Flexibility Act (5. U.S.C. §601, et seq.), the 1996 Small Business Regulatory Enforcement Fairness Act (5 U.S.C. § 604), and Executive Order 13272,[6] as follows:

> Before Congress enacted the Regulatory Flexibility Act in 1980, federal agencies did not recognize the pivotal role of small business in an efficient marketplace, nor did they consider the possibility that agency regulations could put small businesses at a competitive disadvantage with large businesses or even constitute a complete barrier to small business market entry. Similarly, agencies did not appreciate that small businesses were restricted in their ability to spread costs over output because of their lower production levels. As a result, *when agencies implemented "one-size-fits-all" regulations, small businesses were placed at a competitive disadvantage with respect to their larger competitors. This problem was exacerbated by the fact that small businesses were also disadvantaged by larger businesses' ability to*

[6] Executive Order 13272, 67 Fed. Reg. 53461 (Aug. 16, 2002), is not mentioned in the Notice of Hearing. USDA's Office of Budget and Program Analysis' previously adopted specific *Regulatory Decisionmaking Requirements* (Mar. 1997) for USDA agencies' compliance with the RFA, http://www.ocio.usda.gov/directives/files/dr/DR1512-001.pdf.

influence final decisions on regulations. Large businesses have more resources and can afford to hire staff to monitor proposed regulations to ensure effective input in the regulatory process. As a result, consumers and competition were undercut while larger companies were rewarded.

* * * * *

The Small Business Regulatory Enforcement Fairness Act of 1996 amended the RFA in several critical respects. First, the SBREFA amendments to the RFA were specifically designed to ensure meaningful small business input during the earliest stages of the regulatory development process. ****

Most significantly, SBREFA authorized judicial review of agency compliance with the RFA, and strengthened the authority of the SBA's Chief Counsel for Advocacy to file *amicus curiae* briefs in regulatory appeals brought by small entities.

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In 2002, President George W. Bush signed Executive Order 13272, titled "Proper Consideration of Small Entities in Agency Rulemaking." The E.O. requires agencies to place emphasis on the consideration of potential impacts on small entities when promulgating regulations in compliance with the RFA.

The RFA requires each federal agency to review its proposed and final rules to determine if the rules will have a "significant economic impact on a substantial number of small entities." Section 601 of the RFA defines small entities to include small businesses, small organizations, and small governmental jurisdictions. Unless the head of the agency can certify that a proposed rule is not expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis (IRFA) must be prepared and published in the *Federal Register* for public comment. ****

When an agency issues a final rule, it must prepare a final regulatory flexibility analysis (FRFA) unless the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities and provides a statement containing the factual basis for the certification. The final regulatory flexibility analysis must:

- provide a succinct statement of the need for, and objectives of, the rule;

- summarize the issues raised by public comments on the IRFA and the agency's assessment of those issues;

- describe and estimate the number of small entities to which the rule will apply or explain why no such estimate is available;

- describe the compliance requirements of the rule, estimate the classes of entities subject to it and the type of professional skills essential for compliance;

- describe the steps followed by the agency to minimize the economic impact on small entities consistent with the stated objectives of the applicable statutes; and

- give the factual, policy, and legal reasons for selecting the alternative(s) adopted in the final rule, and explain why other alternatives were rejected.

http://www.sba.gov/advo/laws/flex/04regflx.html, Report on the Regulatory Flexibility Act (February 2005, footnotes omitted, italics supplied).

In this proceeding, the principal proponent for new regulatory burdens are DFA, the nation's largest milk cooperative with one-third of the nations' milk supply in its control, and DFA's largest customer, Dean Foods, which is also the nation's largest milk processor. To paraphrase the SBA's Chief Counsel for Advocacy, White Eagle, et al., are struggling to avoid proposed "one size fits all" rules that would benefit DFA and Dean but uniquely burden their small business competitors. White Eagle, et al., must also struggle in this case to offset DFA and Dean's superior "ability to influence final decisions on regulations."

D. THE SIGNIFICANCE OF PROPONENTS' LACK OF INFORMATION AND CLAIMS OF PRIVILEGE.

DFA, et al., proponents of Proposal No. 2, and Dean Foods, in its companion proposals, have not met their statutory burden of proof under 5 U.S.C. §556(d) and *Greenwich Collieries, supra*. Compounding proponent's failure in this regard are (1) their cavalier reliance on "privilege" to avoid disclosure of allegedly proprietary facts, and (2) their related failure to offer, through a knowledgeable witness, relevant facts within their exclusive control.

As moving parties for a regulatory relief, like petitioning or complaining parties for judicial relief, DFA, et al may not, as a matter of law, shield relevant facts under a claim of privilege "if (i) assertion of the privilege is the result of some affirmative act, such as filing suit, by the asserting party, (ii) through the affirmative action, the asserting party has placed the protected information at issue by making it relevant to the case, and (iii) application of the privilege would deny the opposing party access to information vital to its defense." *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E. D. Wash. 1975). [7]

[7] Many jurisdictions, including administrative agencies, have adopted or followed the *Hearn* standard of privilege waiver. *E.g., Appeal of Superior Timber Co.*, 1997 WL 400983, IBCA No. 3459, 97-2 BCA P 29,112 (1997); *Matter of Georgia Power Co.*, 1993 WL 244907, 37 NRC 469 (NRC 1993); *Federal Deposit Insurance Corp. v. Wise*, 139 F.R.D. 168 (D. Colo. 1991). USDA's regulatory experience reveals that voluntary disclosure of arguably proprietary information at a hearing produces better results and often (as it should be) is essential to a conclusion that a proponent has met its burden of proof. See 41 Fed. Reg. 12436 (March 25, 1976) (relying on detailed evidence of supply arrangements, market share, and availability or loss of pooling base to create a remedy); 46 Fed. Reg. 21958 (April 14, 1981)(promulgating an Order for SW Idaho after previously denying relief due to inadequate facts offered in the earlier proceeding to demonstrate marketing disorder).

Regardless of privilege, it is also black letter law that adverse inferences against a party for failure to produce relevant evidence can be drawn where the party both has control over the evidence and intentionally refuses to provide it. *Brewer v. Quaker State Oil,* 72 F.3d 326, 335 (3d Cir. 1995). *McCormick on Evidence* 184-189 (John William Strong, ed., 4th ed. 1992). Proponents' evidence permits adverse inferences and conclusions under both of these evidentiary principles.

CONCLUSIONS

There is no reasoned basis for amendments that would remove from the pool, or create extraordinary new expense for, hundreds of small business dairy farmers who have historically been associated with the Mideast Milk Marketing Area. There is, however, compelling need for a competitive impact analysis if USDA is considering moving forward with DFA's proposed rule (an analysis that might be part of the agency's small business impact considerations). Cotterill, Tr. 771.

Avoidance of milk marketing rules that create "vertical foreclosure," such as described by Dr. Cotterill, has in fact been a practice of USDA in the past, although different names have been used to describe the problem. *See* discussion of "Market Structure and Accessibility" at 41 Fed Reg 12436, 12439-43 (March 25, 1976), and analysis of market disorder resulting from loss of "pooling base" due to handler consolidation in 52 Fed. Reg. 27372, 27374 (July 21, 1987). [8] It is interesting to observe that many regulatory or institutional factors deemed undesirable to orderly marketing,

[8] Dependence by producers traditionally supplying the Lake Mead market upon the dwindling number of Lake Mead pool distributing plants for a pooling base is likely to generate disorderly marketing conditions as producers struggle to assure that their milk will share in the marketwide pool. 52 Fed. Reg. at. 27374.

and remedied by USDA in those Decisions, are now espoused, expressly or implicitly, by DFA, as virtues; and regulatory remedies deemed desirable by the Secretary in those decisions are now disavowed by DFA as economic evils.

Over the course of several decades, the federal milk order program has consistently embraced policies of dairy farmer inclusion, and of marketing efficiency, in creating and adjusting pooling standards. Although compulsory inefficiency or farmer exclusion may have resulted from rules in a few markets where adequacy of supply for fluid use in danger, proponents have not made the case for milk exclusion or compulsory inefficiency in this case.

For the foregoing reasons, and those advanced in testimony on behalf of White Eagle, et al., and National All-Jersey, the Secretary should deny Proposal 2 and leave pool performance provisions as they are.

Respectfully submitted,

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