

**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

In the Matter of:

Milk in the Northeast	)	DOCKET No. AO-14-73
and Other Marketing Areas	)	DA-03-10

Fluid Milk Product Definition	)
Recommended Decision and	)
Opportunity to File Written	)
Exceptions on Proposed	)
Amendments to Marketing	)
Agreements and Orders	)

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COMMENTS

SUBMITTED BY

THE NATIONAL YOGURT ASSOCIATION

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Introduction

The National Yogurt Association (“NYA”) is the national nonprofit trade association representing the producers of live and active culture (“LAC”) yogurt products as well as suppliers to the yogurt industry. NYA’s member companies are among the largest yogurt manufacturers in the United States. NYA sponsors scientific research regarding the health benefits associated with the consumption of yogurt with LAC and serves as an information resource to the American public about these attributes.

NYA is pleased to submit this comment on the recommended decision and proposed rule regarding the fluid milk product definition published in the Federal Register on May 17, 2006¹ by the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS). As explained below, NYA strongly supports the exclusion from the fluid milk product definition of drinkable yogurts that contain 20 percent or more yogurt that meets the standard of identity for yogurt (hereinafter “drinkable yogurt”).

The Exclusion of Drinkable Yogurts Is Supported by Substantial Evidence and Consistent With The Form and Use of Drinkable Yogurts

The Agricultural Marketing Agreement Act (“AMAA”) requires that milk be classified “in accordance with the form in which or the purpose for which it is used.”² In assessing whether a product is a fluid milk product, AMS has historically evaluated a variety of factors such as: storability; shelf life; serving sizes; percentage of nonfat milk solids; packaging; and the location at which products are processed and the area over which they are distributed. More fundamentally, AMS has been repeatedly guided by the underlying concept that products that “compete with, or substitute for” fluid milk should be Class I and included in the fluid milk product definition.³

AMS decisions must be supported by “substantial evidence,” which is “more than a mere scintilla, and must do more than create a suspicion of the fact to be established.”⁴ AMS decisions must be based on “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...”⁵ Importantly, the “conceptual, theoretical, and/or hypothetical does not constitute substantial evidence.”⁶ Moreover, in order to justify a

¹ 71 Fed. Reg. 28590

² 7 U.S.C. § 608c (5)(a).

³ 58 Fed. Reg. 12634, 12658 (March 5, 1993). There are a variety of AMS decisions that reflect the same underlying concept, such as the AMS decisions located at 10 Fed. Reg. 13315, 13321 (October 26, 1945), 34 Fed. Reg. 11811 (July 15, 1969), and 39 Fed. Reg. 9012, 9014-9015 (March 7, 1974).

⁴ *Leonards v. Glickman*, 199 F.R.D. 48 (2001), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 359, 366-67 (1998).

⁵ *Sundex Dairy v. Block*, 666 F.2d 158, 162 (1982).

⁶ *Lehigh Valley Farmers v. Block*, 640 F.Supp. 1497, 1512 (1986).

departure from long-standing interpretations of laws and regulations, AMS is required to provide adequate data and a reasoned analysis.⁷

NYA strongly believes that the recommended decision correctly applies these criteria and standards and properly classifies drinkable yogurts as Class II products.

The hearing record (“record”) overwhelmingly reflects that drinkable yogurt products are different in form and use from fluid milk and should be classified as Class II, like other yogurt products.⁸ A wide variety of evidence, including marketing data and consumer surveys, was introduced that firmly establishes that drinkable yogurts are produced as food products, marketed as food products, and used by consumers as food products, not as beverages.⁹

The evidence in the record conclusively demonstrates that drinkable yogurt neither competes with nor substitutes for fluid milk. They are not used for the same purposes as fluid milk, nor are they competing for the same consumers with fluid milk. Rather, they compete with other food products, and should be classified as such.¹⁰

In addition to this fundamental difference in form and use, the record also establishes that there are a wide range of differences between drinkable yogurts and fluid milk, including such things as having a significantly longer shelf life, a fundamentally different consistency, and a variety of different packaging and package sizes than fluid milk.¹¹ The record also demonstrates that yogurt-containing products contain unique live and active cultures, the addition of fruit and other flavors or ingredients targeted at particular consumer markets.¹²

In form and use, drinkable yogurts are a yogurt product, and it is the yogurt that is the principal or characterizing ingredient in drinkable yogurts.¹³ As such, they are appropriately classified as a Class II yogurt product.

⁷ *Natural Resources Defense Council v. U.S. EPA*, 790 F.2d 289 (3d Cir. 1986).

⁸ See Generally Transcript (TR) at 647-690, 732-758.

⁹ *Id.*

¹⁰ TR at 682-686, 739-748.

¹¹ TR at 672-679.

¹² *Id.*

¹³ TR at 678, 824, 828-829.

There Is Not Substantial Evidence In The Record to Support A Decision That Results In Classifying Drinkable Yogurts As Class I

There is not a single piece of objective evidence in the record to contradict or challenge the conclusions outlined above regarding the form and use of drinkable yogurts as food products that do not compete with or substitute for fluid milk. Rather, the record contains merely a stated presumption that drinkable yogurts compete with flavored milk, which speculation is not supported by any evidence.¹⁴ This hypothetical assertion is insufficient to outweigh the overwhelming evidence in the record in support of classifying drinkable yogurts as Class II.

The National Milk Producers Federation (NMPF) post-hearing brief inaccurately characterizes the testimony of Mary Keough Ledman as testifying that drinkable yogurts “are a substitute for the milk her children normally drink with their cookies.”¹⁵ In fact, a review of Ms. Ledman’s testimony makes plain that her family’s consumption of drinkable yogurts is in addition to, not as a substitute for, their milk consumption.¹⁶

Moreover, a Dairy Farmers of America (DFA) witness affirmed that consumers use drinkable yogurts as food. When asked if he had any data regarding how consumers use drinkable yogurts, he replied, in reference to his family, that “[t]hey eat them.”¹⁷

Similarly, the NMPF statements in their post-hearing brief that drinkable yogurts are marketed as beverages and expanding into the beverage market are allegations without any underlying support in the record.¹⁸ In contrast, both General Mills and Dannon provided extensive factual testimony demonstrating that these products are marketed as food and compete with or substitute for other food products, particularly cup yogurt, not fluid milk.¹⁹

Simply put, there is no evidence in the record to contradict or rebut the testimony and evidence presented by NYA and its member companies regarding the form and use of drinkable yogurts. In addition, there is not substantial evidence in the record that would justify making more drinkable yogurts Class I.

¹⁴ TR at 301-303.

¹⁵ NMPF brief at page 7, citing TR at p. 542.

¹⁶ TR at 542-543. Mrs. Ledman testified that “[t]hese yogurt containing products are really in addition to the other milk products that I buy.” TR at 543

¹⁷ TR at 99.

¹⁸ NMPF brief at p. 7

¹⁹ TR at 682-686, 739-748.

In this regard, NYA believes that it is important to recognize that the adoption of the 2.25 percent true protein standard, in the absence of the drinkable yogurt exclusion, would result in at least one drinkable yogurt product, and possibly more, being moved from Class II to Class I.²⁰ Given the overwhelming evidence in support of classifying drinkable yogurts as Class II, it would be indefensible for AMS to adopt any changes to the fluid milk product definition that result in classifying more drinkable yogurt products as Class I. NYA firmly believes that such an outcome would not withstand judicial scrutiny.

Thus, NYA strongly supports the recommended decision's exclusion of drinkable yogurts from the fluid milk product definition and encourages AMS to maintain this exclusion in its final decision. If AMS chooses to reconsider this exclusion on the basis of comments it receives in response to the recommended decision, then NYA believes that AMS should refrain entirely from changing the current fluid milk product definition or the application thereof in any manner, provided that all market administrators should be required to apply the regulations fairly and consistently.

AMS Application of Form and Use Should Be Guided By Objective Data

In the recommended decision, AMS proposes to retain the 6.5 percent nonfat milk solids (NFMS) standard contained in the current definition, and to add a 2.25 percent true milk protein standard as well, so that a product would be Class I if it contained either 6.5 percent NFMS or 2.25 percent milk protein. These objective criteria, however, are not determinative of a product's classification. Rather, the recommended decision suggests that AMS can nevertheless classify a product as Class I even if the product meets neither the NFMS nor the protein standard, if AMS believes that the application of the form and use criteria shows that the product is comparable to products listed in the fluid milk product definition.

In making such determination, NYA believes that AMS should clarify that it would apply the concepts of form and use consistent with AMS' historical approach. In particular, NYA believes that only products that compete with or substitute for fluid milk should be in the fluid milk product definition. Thus, in considering whether to classify a product that does not meet the NFMS or protein standard as Class I, AMS should be guided by objective data and evidence that demonstrates whether or not a product actually competes with or substitutes for fluid milk, similar to the kinds of data produced in support of categorically excluding drinkable yogurts from the fluid milk product definition.

Conclusion

NYA strongly supports the recommended decision's exclusion of drinkable yogurts from the fluid milk product definition. The record is replete a variety of evidence demonstrating conclusively that drinkable yogurts are food products that neither compete with nor substitute for fluid milk, and the record provides no evidence that would suggest otherwise. Thus, in accordance with the substantial evidence standard as well as AMS'

²⁰ TR at 764.

longstanding interpretation and application of form and use, AMS must classify these products as Class II products. If AMS fails to exclude drinkable yogurts from the fluid milk product definition, then AMS should maintain the status quo, as there is not substantial evidence in the record to adopt any proposal that would result in more drinkable yogurts becoming Class I products.