

April 24, 2006

Mike Johanns, Secretary of Agriculture
C/o Joyce Dawson, Hearing Clerk
STOP 9200-Room 1031, South Bldg.
United States Department of Agriculture,
1400 Independence Avenue, S.W.
Washington, D.C. 20250-9200

RE: Comments with respect to Proposed Amendments to 7 CFR Part 1032
[Docket No. AO-313-A48; DA-04-06].

Dear Secretary Johanns,

I am writing on behalf of Central Equity Milk Cooperative, Inc., in response to the United States Department of Agriculture's invitation to "comment" on the "Recommended Decision" with respect to "Proposed Amendments to Tentative Marketing Agreement and Order" for the Central Marketing Area, published at 35 Fed. Reg. 9015 (February 15, 2006).

These comments focus on arbitrary burdens on local producers created by the recommended “touch base” provision, and on the Administrator’s erroneous conclusion, as follows, that the recommendation does not have a significant and unique adverse effect on a substantial number of small businesses (35 Fed. Reg. at 9016): “Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities”.

The record is replete with evidence that larger entities in the market will be able to conform to the proposed rule at much less cost than hundreds of small entities unaffiliated with large dairy businesses, and that less burdensome alternatives are available to avoid unique burdens on small businesses.

Central Equity Milk Cooperative (CEMC) is a Missouri based dairy farmer cooperative, with headquarters in Mountain Grove, Missouri. CEMC markets approximately 20,000,000 pounds of Grade A milk produced locally by 159 dairy farms geographically located in N.W. Arkansas, N.E. Oklahoma, and S.W. Missouri. All but two of our member farms qualify as “small businesses”, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Our Cooperative began operating in Federal Order 32, in March 2004, to provide our members, an alternative to Dairy Farmers of America (DFA). It is the belief of our members that their membership and marketing choice, which should be protected by USDA under the Agricultural Fair Practices Act, is essential for their survival.

Central Equity Milk Cooperative strongly supports the order program and its goals. We are not opposed to amendments to the Federal Order that will enhance producer pay prices by identifying those dairy farmers that are willing and able to service the fluid market. We do however; **strongly oppose** the use of the order amendment process as a means of eliminating fair competition within the industry.

Central Equity Milk Cooperative finds the “touch- base” requirement to be particularly onerous. Due to the existence of exclusive supply contracts between DFA

(including supply federations managed by DFA) and most Order 32 distributing plants in the geographic area in which our member farms are located, our marketing access to fluid milk plants is very limited. If the amended pooling rules are adopted, our local cooperative will need to incur significant transportation and handling costs to maintain the pool status of our membership; even though our available milk is not needed by independent fluid milk plants and cannot be sold to DFA-supplied plants.

Department verbiage in the ‘Findings and Conclusions’, concerning the recommended “touch-base” provision, states, “Amending the ‘touch-base’ standard SHOULD reduce the ability of milk not performing a consistent and reliable service to the Class I market from being pooled.” 71 Fed. Reg. at 9022. This followed a discussion on the undesirability of allowing easy pooling for milk from farms located at a great distance from the Central Marketing Area.

With this “should” statement, the Department acknowledges that there is **no guarantee** that the “touch-base” provision (as stated in the Recommended Decision) will effectively keep out milk supplies from beyond the traditional Order 32 milk shed. In fact, the proposed language serves only to insure that producers located close to the areas of consumption will be shut out of the very market in which they live, support and pay taxes; unless they are affiliated with the predominate handler (DFA) of the area. Central Equity believes the intent of Capper-Volstead is to allow cooperatives to “obtain monopolistic power in a given market so long as it is achieved through **natural growth, voluntary confederation** without resort to predatory or anti-competitive practices.” (United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151, 155 (D.D.C. 1956); **NOT** to circumvent anti-trust and restraint-of-trade limitations though the exploitation of political influence to secure market exclusion devices masquerading as federal order rule amendments.

Central Equity is sensitive to the fact that in the Central Market, as in many others, approval of an amended order by DFA and its supply federations is necessary for continuation of the milk order program, and that DFA has already terminated one milk order when USDA recommended compromise pooling rules that DFA felt did not go far

enough to exclude its competitors' milk supplies. Notwithstanding these risks, USDA continues to have an obligation "to be as evenhanded as possible and make decisions that *** [do] not unduly or arbitrarily favor any particular market segment, firm, region or other group." Novakovic, A., and Mark Stephenson, *Procedures for Developing, Issuing and Amending a Federal Milk Marketing Order* (Cornell University, Feb. 1995), at page 3; See Publications, Leaflets, at <http://www.cpdmp.cornell.edu/>.

We offer for consideration an alternative that is less burdensome to small, local, independent dairy farmers:

Federal Order 1 addresses the same problem (of distant milk) in a different, and we believe more equitable manner, by requiring pooling handlers to segregate their distant producers into state "units." These units must then individually meet the same shipping standards as a pool supply plant. When these units demonstrate the necessary performance standards they are permitted into the pool, but they cannot depend upon the performance of producers in other states. The language also takes into account other states/areas that are essential to the marketing areas milk shed, but are not located within the geographical boundaries of the Federal Order 1 marketing area (i.e. Maine and West Virginia). Combined with the dairy farmer for other markets language, Order 1 has a far more efficient program, and one that doesn't discriminate against small, independent local cooperatives.

Alternatively, USDA could zone-out producer blend prices at locations distant from the market and thereby create a natural and economically justified disincentive to pool distant milk in the Central Order. This type of less burdensome alternative has been proposed, but – contrary to the Regulatory Flexibility Act, we believe – was not included in the notice of hearing.

Nationally, milk processor and supplier consolidation accompanied by stricter federal order regulations, have created fewer marketing choices for small cooperatives and independent dairy farmers. In some areas, dairy farmers have been left with no choice or only coerced choices – **contrary to the Agricultural Fair Practices Act.**

Fortunately, in Arkansas, Oklahoma, and Missouri, dairy farmers have some market options, although the options have become greatly reduced, since the 1996 Farm Bill mandated USDA's reform of the federal milk marketing program.

During the past 10 years, the dairy industry in S.W. Missouri has also experienced extreme consolidation of processors and cooperatives; hence, marketing options. Specifically, the majority of 'pool' distributing plants (located in the marketing area) which are now operated and/or supplied by 3 entities:

(1) **Dean Foods** ("who described themselves as the largest processor and distributor of fluid milk in the United States, owning and operating nine distributing plants regulated by the Central Order"), of which Deans/Borden-Tulsa, OK is located near our milk shed (98.9 miles).

(2) **Prairie Farms** who owns and operates (through joint ventures with DFA) 4 of 6 distributing plants in our immediate milk shed ({Plant/Distance from Central Equity Milk Shed} Chandler, OK, 159.2 miles; Kansas City, MO, 184.4 miles; Saint Louis, MO, 308.3 miles; Omaha, NE, 375.3 miles); and,

(3) **Dairy Farmers of America** (DFA), the nation's largest cooperative-marketing approximately one-third of the nations milk supply from its own members' and from milk produced by marketing federations it controls. DFA is Dean's/Borden-Tulsa (98.9 miles) exclusive supplier through the use of an 'Exclusive Supply Contract', DFA also supplies proprietary handler- Midstates/Schnucks, located in Hazelwood, Missouri (311.5 miles).

Much of the milk used to supply these 'pool' distributing facilities travels from great distances such as Kansas, New Mexico and Texas. Milk supplies from these states would still qualify for pooling under the "Order 1" alternative without displacing milk traditionally associated with the market.

The 'Recommended Decision' (as issued) would further hobble 'local' milk producer's access to the federal order market revenue pool by tightening so-called pool

performance requirements for milk diversions, supply plant shipments, and individual farm deliveries, that define what milk is “qualified” to participate in the market’s revenue pool. If the ‘touch-base requirement is enacted, ‘local’ Central Equity dairy farmers will be faced with 4 choices:

- (1) Incur greater expenses paid to dominant suppliers (such as DFA) for providing access to the market; or,
- (2) Be forced to market milk through dominant suppliers; or,
- (3) Incur enormous freight expenses to haul milk to available ‘distant’ markets’ solely for pooling purposes;¹ or,
- (4) Be excluded from the federal order system milk pools altogether.

Taken by itself, the ‘Recommended’ “touch-base” provision may seem innocuous. But when viewed in the context of relatively current dairy industry events, the picture is a very different one. By incorporating DFA’s proposal for an extensive “touch-base” requirement (as written in the Recommended Decision), the department is actively participating in the orchestrated plan by large businesses to eliminate competition through whatever means possible.

A 1977 report entitled “Milk Marketing,” prepared by the U.S. Department of Justice Antitrust Division (DOJ), described in great detail at pages 292-395 how federal milk order provisions can be exploited by dominant milk cooperatives to gain market share, exclude competing milk supplies from the market, and deny marketing choices for small cooperatives and independent producers. **The DOJ report specifically identified**

¹ Note: Central Equity will have to absorb the cost of hauling the production of 159 producers hundreds of miles, past distributing plants controlled by mega-cooperatives, and processors that have ‘exclusive’ supply agreements with mega-cooperatives, to a pool distributing plant willing to receive their milk, and then turn around and deliver the volume of milk displaced at the distributing plant hundreds of miles in the opposite direction to a manufacturing facility. This needless expense will be incurred, not because there are no pool distributing plants closer to the Central Equity supply, but rather because those plants are operated by large companies, who have seen fit to enter into full supply contracts with large dairy cooperatives. The economic cost of delivering one day’s production from each producer to a pool plant will be devastating to these “small businesses”

“diversion provisions” and “pool plant qualification provisions” as providing fertile ground for gaining market share and market control. The report also observed, that through the ability of dominant cooperatives to approve or disapprove USDA’s milk order regulation in referenda, and through better resources to advocate changes in rules, “a dominant cooperative [has] an additional advantage in directing [USDA’s] market order policy decisions over their less organized competitors.” DOJ report at 333. Summarizing the ability to exploit milk order rules and influence milk order policy to gain market power and isolate competition, DOJ observed (at 332):

“The many combinations of definitions and qualifying provisions can obviously be designed to be more or less favorable to a dominant cooperative seeking to protect or increase its market share, without regard to whether the provisions further the public interest as well, or they are the most efficient means of attaining the goals of the order system.”

The orders were designed to assure the consuming public of adequate supplies of milk, and benefiting dairy producers that are ready, willing, and able to contribute to the fluid milk market needs, by maintaining orderly marketing conditions. Post-“reform” actions continually tighten the requirements for inclusion in the federal order system, further excluding dairy farmers from participating in the market unless they pay a pooling fee to the large processors and/or cooperatives, above-and-beyond required federal order costs.

To reiterate: Central Equity Milk Cooperative is ready and willing to market its ‘local’ milk supply to local pool distributing plants. Central Equity has made several attempts to develop relationships with ‘local’ distributing plants to no avail. We understand (and support) the need to protect the markets of ‘local’ dairy farmers. The members of Central Equity Milk Cooperative are ‘local’ family dairy farmers. Our members contribute significantly to their local economies and desire to continue to contribute to the Federal Order 32 market area. Therefore, they should not be excluded from the benefits of the marketing area due to federal rule-making changes desired by large cooperatives and proprietaries so their monopolistic goals of can be achieved.

Enactment of the “touch-base” provision of the ‘Recommended Decision’, by USDA Dairy Programs, would further reduce the ability of ‘local’ small cooperatives and independent dairy farmers to obtain market access, to the benefit of mammoth fluid processors and dairy cooperatives. Therefore, it is our opinion that the “touch-base” standard, as recommended, NOT be included in the ‘Final Decision’; but a modification in line with Federal Order 1 language be considered.

Respectfully submitted,

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