

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

In the Matter of	: Docket Nos.:
	:
Milk In The	: AO-313-A48
	:
Central	: and
	:
Marketing Area	: DA-04-06

**Comments and Exceptions to Recommended Decision
on behalf of
Dairy Farmers of America, Inc. and Prairie Farms Dairy, Inc.**

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I. INTRODUCTION

Dairy Farmers of America, Inc. (DFA) and Prairie Farms Dairy, Inc. (Prairie Farms) are cooperative associations of dairy farmers which market milk of their members and, separately and jointly, own and operate pool plants on Order 32. They actively participated in this hearing, held in December 2004, and now wish to make these comments upon the Recommended Decision published February 22, 2006 at 71 Fed. Reg. 9015.

II. SUPPORT FOR THE ADOPTION OF PROPOSAL 1 REGARDING CHANGES IN POOLING PROVISIONS.

DFA and Prairie Farms support the proposed amendment to the pooling provisions of Order 32 which adopts much of Proposal 1 as presented at the hearing. We believe that the implementation of these provisions will assist the orderly marketing of milk in the Order.

III. SUPPORT FOR THE ADOPTION OF PROPOSAL 2 REGARDING DEPOOLING

DFA and Prairie Farms supported adoption of Proposal 2 to address the important matter of depooling. These cooperatives support the Recommended Decision's position and wish to make the following comments: (1) the findings of marketing disorder caused by this depooling are important findings for the order program; (2) the Secretary's determination to treat the depooling issue as part of the pooling provisions of the Order such that each Order's remedies for depooling are addressed on an order by order basis is appropriate; and (3) the Department's choice of Proposal 2 as the superior option for a depooling remedy is correct in our view.

These cooperatives wish to commend the Secretary for the findings made concerning the basis of and nature of the disorderly marketing conditions created by open depooling of milk in Order 32. We believe these findings reflect important insights into the functioning of the order program and at the same time reject the contentions of those who suggest that the order program

is nothing more than a mechanism for transfer payments from Class I handlers and their suppliers to all of the producers. The recommended decision made the following findings and analysis:

The record reveals that when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers. . . . The record of this proceeding reveals that the ability of manufacturing handlers and cooperatives to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling. Current pooling provisions do not require or prohibit handlers and cooperatives from pooling all eligible milk receipts. However, the record reveals that when handlers and cooperatives opt to not pool milk inequities arise among producers and handlers that are contrary to the intent of the Federal milk marketing order program— maintaining orderly marketing conditions.

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This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use-value of those milk receipts. They do not share the higher classified usevalue of their milk receipts with all other producers who are pooled on the order, primarily the producers who are pooled on the order are incurring the additional costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling— ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

It is a fundamental purpose of milk marketing orders to provide a mechanism for establishing minimum uniform prices among all producers in a common milkshed and supplying a common marketplace. The recognition that order provisions which generate non-uniformity of prices among farmers need to be reviewed, revised and reformed to eliminate the disorder

reflected in such nonuniform prices is an extremely important decision for the order program. Many have commented in many different contexts – both in this record and elsewhere – that free and open depooling of milk (which has been such a prominent aspect of the federal order landscape since January 1, 2000) in many ways makes a mockery of the system. This Recommended Decision along with those for Order 30 and Order 33 which were released at the same time, shows that the Department will move forward with amendments tailored to the individual Order to remedy this disorderly market condition. We commend and support the Department's efforts in this respect.

Secondly, we support the Department's determination that depooling and repooling should be addressed on an order by order basis in terms of fashioning the appropriate remedy since this is essentially a pooling provision issue.

A major contention was made at the hearing by those who sought to frustrate revisions to Order 32 that correcting any depooling behavior was a national issue which could only be addressed, or should only be addressed, by changes to national pricing formulae or other order revisions made on a national basis. These cooperatives strongly support the conclusion of the Secretary and the Recommended Decision that depooling and repooling provisions are an aspect of the pooling provisions of the orders which need to be addressed on an order by order basis because they are a function of marketing conditions unique in each area. We urge the Secretary to hold fast to this finding and adopt the revisions to Order 32 as proposed.

The proposed amendments to Order 32 which provide for the ability to repool 125% (135% in the month of March) of the prior month's milk volume appropriately fit this market. These allowances are reasonable to the extent that they would accommodate substantial depooling and repooling over a period of several months. Nevertheless, the amended pooling

provisions will materially change the status quo in this region by requiring all handlers to factor into their depooling decisions the economic consequences of the required staged repooling. The provisions in Order 32 are appropriately different from those proposed for adoption in Orders 30 and 33 because the marketing conditions and the demands of the marketplace in those areas are different.

We note and the Secretary will note that dairy commodity prices are currently at the support price level. The cycles of dairy markets being what they are, at some point in the future those prices will increase from the support level and this will create the possibility of price inversions and negative PPDs, which are the triggers for depooling. We trust that the Secretary will expeditiously move forward on these Recommended Decisions so that the orders are finally amended, ratified, and made effective prior to the next depooling cycle.

Finally, we commend and support the Secretary's choice of remedy for depooling. We recognize that there are a number of options including Proposals 2, 6, 7 and 8 which were presented at the Hearing as alternative means for addressing the depooling issue in Order 32. These cooperative proponents who represent a substantial proportion of the milk pooled on the Order considered the various options available, the pros and cons, and reached a conclusion that a reasonable repooling limitation at the 125% level would be the most appropriate mechanism for Order 32. The repooling percentage constitutes a substantial limitation upon, but not an absolute lockout of, depooled milk. We appreciate the Secretary's recognition that this is the appropriate mechanism for this Order.

III. COMMENTS UPON THE INTENDED OPERATION OF THE REPOOLING LANGUAGE.

We would like to iterate our interpretation and intention as proponents with respect to

certain of the language proposed for adoption by the Secretary.

Our overriding intent was and is that the unbridled depooling and repooling of milk promotes disorderly marketing conditions and should be constrained. Indeed, the proponents of the various competing solutions at the hearing agreed that there should be limitations – the views differed on the best constraints. We commend and support the selection of our proposal – Proposal 2 – as the most appropriate solution. We chose the limit parameters of 125% and 135% because our study indicated that they were appropriate for the market’s demand and supply pattern. While no limit can anticipate every occurrence, these ranges seemed to provide a reasonable level of deterrent without causing normal milk supplies associated with the Order to be denied pool privileges.

At the same time, we wanted to make sure that milk shipments to pool distributing plants would be encouraged and pooled, and not inadvertently deterred. We did not want to set up a situation where a supplier would not want to deliver to fulfill a Class I order. If in a month following depooling, a supplier is near its maximum limit and has a Class I order, it might not want to ship if it would cause the supplying handler to be over its pooling limit. For this reason, we proposed the language included in the Recommended Decision as subpart (f)(1):

“Milk shipped to and physically received at pool distributing plans shall not be subject to the 125 percent limitation;”

It was, and is, our intention that for purposes of the 125% calculation we would expect that only the incremental amount over the prior month’s shipment to a pool distributing plant will be referenced in the “not subject to...” language of proposed (f)(1). The volume of deliveries equal to the prior month’s total shipments to distributing plant(s) should remain in the base amount against which the 125% is measured. So as not to discourage shipments to distributing

plants, any incremental volumes delivered to distributing plants should be “free” from any constraints of the 125 % repooling limitations.

Similarly in intention, in section (2) of section 1032.13 (f) we wanted to allow for milk to move between orders to respond to demand for milk, but not to abet depooling. Thus, this allowance accommodates continual pooling for a six-month period on any milk that moves between orders as it does not affect and is not included in the depooling calculations. This should be enough of a deterrent to prevent milk from being able to shift between pools while trying to take advantage of depooling situations.

Finally, we recognize that there will likely be situations that will call for interpretation but do not occur often enough, or are not sufficiently predictable, to be anticipated with specific language. Thus, we want the Market Administrator to have some discretion in interpreting and applying the regulations. The proposed language does not give the Market Administrator discretion in setting the re-pooling percentages from month to month, since that would result in a never-ending request to do so and render the provisions nugatory. However, we do want the Market Administrator to be able to look into specific situations such as a new handler (a merger of cooperatives or two handlers with independent milk supplies becoming a single entity) or a supplier acquiring a large volume of new supplies. We understand that the nuances of each situation will be different and the Market Administrator, on the basis of the facts at hand, should investigate each occurrence.¹ The burden of proof will rest on the entity requesting a relaxation of the rules. Finally, if there is a situation where the Market Administrator feels a bloc of milk has been reported in such a way as to evade the rules on depooling and re-pooling, the language

¹ One circumstance that may warrant investigation would be where a distributing plant which typically does not divert milk from the plant has extraordinary diversions at a time when substantial deliveries are being made to the plant for repooling purposes.

is intended to enable the Market Administrator to investigate the circumstances and deny the privileges of pooling to the bloc of milk, if appropriate.

IV. EXCEPTIONS TO THE RECOMMENDED DENIAL OF PROPOSAL 3 FOR TRANSPORTATION CREDITS

DFA and Prairie Farms take exception to the Recommended Decision's failure to recommend adoption of transportation credits in Order 32. We take exception to this decision for several reasons.

First, both these proponents and the Recommended Decision look to the Order 30 market wide service payments for guidance and direction in considering the proposals here. However, the Recommended Decision made several troubling and inaccurate references to the Order 30 provisions which may have misdirected the result. First, the Recommended Decision stated with respect to Order 30 that "transportation or order assembly credits are not applied to milk shipments to distributing plants directly from producer farms." (71 Fed. Reg. 9030) This is simply not correct. Since federal order reform, the 8 cent per hundredweight assembly credit pursuant to Section 1030.55(b) is paid to each handler operating a pool plant "that receives milk from dairy farmers" which is allocated to Class I. Order 30 provides this marketwide service credit/payment on direct shipped milk, just as was requested in the amended proposal 3 in this hearing. Furthermore, the Recommended Decision suggests that the "transportation and assembly credit provisions of the Chicago Regional Order apply to a geographically compact milkshed with the emphasis on encouraging milk movements to the single urban market of Chicago" (71 Fed. Reg. 9030). This observation is neither supported by the 1987 decision initially implementing the transportation credits in Order 30 nor by the Federal Order Reform decision which applied them to the entire very large geographic milkshed of Order 30.

In 1987, the Secretary made clear that the transportation credits for Class I milk were not exclusively, or perhaps even primarily, focused on enhancing movements of milk to Chicago because it was clear that the credit would “apply to all movements of milk for Class I uses from transferor to transferee regardless of the direction of the milk movements (i.e. the traditional north and south movement and movements from south to north and west to east). Therefore, movements of milk which presently go against the grain from a plant in a zone with a higher price than that of a distributing plant to which milk has been transferred and do not presently receive any price adjustment for location differences would be given a transportation credit at the full rate proposed.” 52 Fed. Reg. 38236 (October 15, 1987). The Order 30 credits then, and now, provide compensation to handlers for movements of milk for Class I use irrespective of whether the order price grid otherwise encourages such milk movements.

The current circumstances of milk supply in Order 32 as documented in the hearing support the adoption of transportation credits to assist handlers in moving milk for Class I uses. The Order 30 example which provides such credits on both direct shipped milk and plant to plant movements is a good example of a market in which these credits have facilitated orderly marketing of milk; and it should be followed in Order 32.

DFA and Prairie Farms also take exception to the Recommended Decision’s basing the rejection of transportation credits on the fact that the need to serve the St. Louis market was the major focus of supply issues at the hearing. The Recommended Decision asserted that it would not be appropriate to adopt transportation credits in the overall Order in order to address the problem which is most acute in only one geographic area of that larger order. DFA and Prairie Farms believe this logic is faulty in several respects.

First, the proposed transportation and assembly credits are designed to reward marketers

marketwide, not only in St. Louis, for services supplying the Class I needs of the market². As discussed further below, this is not only a supply issue but an equity issue among those serving the Class I market where costs of service are higher than for those producers and handlers pooling Class III and IV milk supplies. Thus, while supplies in the St. Louis market are of substantial concern for all suppliers in Order 32, the transportation and assembly credits are not only intended for Class I suppliers for St. Louis but throughout the marketplace.

The Recommended Decision's rejection of Proposal 3, as amended, on the basis of the St. Louis-only rationale also ignores the fact that the alternative strategies for addressing St. Louis supply problems would have marketwide impacts in the same fashion as would Proposal 3. For instance, if producers and handlers supplying the St. Louis market were to request that the Market Administrator increase the shipping provisions for the Order, or decrease the diversion allowances, these changes would apply to **all** producers and **all** handlers throughout the market. Any such changes would, consequently, increase the costs of serving **all** handlers in the market, even if only requested and needed for a localized problem. This is no different from this alleged or perceived defect in the transportation and assembly credits. Similarly, if the location value of milk in St. Louis were increased with the objective of attracting milk supplies to that location, the blend price throughout the entire order would be reduced via the pooling mechanism in that all producers would pay (subsidize) a higher location value for milk delivered to the St. Louis locations and classified as Class II, III, or IV. In other words, increasing location prices in St. Louis would cause all producers in the market to share a portion of the costs of supplying St.

² We note that previously requests for marketwide service payments in Order 1 were rejected in part on the basis of being too-narrowly tailored in terms of recipients. This proposal is intended to remunerate any and all participants who perform the service of transporting milk extraordinary distances *for Class I use* which benefits all market participants in the blend price.

Louis. This is no different from what would occur with transportation and assembly credits funded directly from the pool.

In summary, we are perplexed that the Secretary has properly found and concluded that differences in producer prices create a disorderly marketing condition which requires a remedy in the depooling scenario while finding that differences in producer prices resulting from uncompensated transportation and assembly services for the Class I market do not create a disorderly marketing condition which could, and should, be addressed by transportation and assembly credits proposed in Proposal 3.

IV. ___ CONCLUSION

These cooperatives again commend the Department for recommending what we believe to be the most appropriate solution for the disorderly marketing which currently results from the open depooling and repooling of milk on Order 32. We urge the Department to take the most expeditious possible action to make final the recommended implementation of Proposal 2. At the same time, we urge the Department to reconsider the denial of Proposal 3's transportation and assembly credits which would assist the supply of Class I markets in Order 32 just as do the similar credits in the neighboring, and overlapping Order 30.

RESPECTFULLY SUBMITTED,

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