

Dean Foods Company FMMO #32 Amended Proposals

Proposal #4 – Eliminate supply plant provisions

Amend Sec. 1032.7 by removing paragraphs (c), (d), (f) and (g) and revise Sec. 1032.9 to read as follows:

§ 1032.9 Handler.

Handler means:

- (a) Any person who operates a pool plant or a nonpool plant.
- (b) Any person who receives packaged fluid milk products from a plant for resale and distribution to retail or wholesale outlets, any person who as a broker negotiates a purchase or sale of fluid milk products or fluid cream products from or to any pool or nonpool plant, and any person who by purchase or direction causes milk of producers to be picked up at the farm and/or moved to a plant. Persons who qualify as handlers only under this paragraph under any Federal milk order are not subject to the payment provisions of Sec. ----.70, ----.71, ----.72, ----.73, ----.76, and ----.85 of that order.
- (c) Any organization with respect to milk that it receives for its account from the farm of a producer and delivers to pool plants or diverts to nonpool plants pursuant to Sec. ----.13 of the order. The operator of a pool plant receiving milk from such organization may be the handler for such milk if both parties notify the market administrator of this agreement prior to the time that the milk is delivered to the pool plant and the plant operator purchases the milk on the basis of farm bulk tank weights and samples.

Proposal #5 – Improved performance standards provision

1. Amend Sec. 1032.7 by revising paragraph (c) introductory text to read as follows:

Sec. 1032.7 Pool plant.

* * * * *

- (c) A supply plant from which the quantity of bulk fluid milk products shipped to (and physically unloaded into) plants described in paragraph (c)(1) of this section is not less than 35 percent during the months of July through January and 25percent in all other months of the Grade A milk received from dairy farmers (except dairy farmers described in § 1032.12(b)) and from handlers described in § 1000.9(c), including milk diverted pursuant to § 1032.13, subject to the following conditions:

2. Amend Sec. 1032.13 by redesignating paragraphs (d)(3) through (6) as paragraphs (d)(5) through (8), revising paragraphs (d)(1) and (2), and adding paragraphs (d)(3) and (4) to read as follows:

Appendix VI

Sec. 1032.13 Producer milk.

(d)*****

- (1) Milk of a dairy farmer shall not be eligible for diversion unless¹ milk of such dairy farmer has been physically received as producer milk at a pool plant and the dairy farmer has continuously retained producer status since that time. If a dairy farmer loses producer status under the order in this part (except as a result of a loss of Grade A approval not to exceed 21 days in a calendar year, unless it is determined by the market administrator to be unavoidable circumstances beyond the control of the dairy farmer such as a natural disaster (ice storm, windstorm, flood) or fire in which case the market administrator may determine the time extension granted to the effected farm or farms²), the dairy farmer's milk shall not be eligible for diversion unless³ milk of the dairy farmer has been physically received as producer milk at a pool plant;
- (2) The equivalent of at least four days' milk production is caused by the handler to be physically received at a pool plant in each of the months of July through November and January⁴;
- (3) The equivalent of at least four days' milk production is caused by the handler to be physically received at a pool plant in each of the months of February⁵ through June if the requirement of paragraph (d)(2) of this section (Sec. 1032.13) in each of the prior months of July through November and⁶ January are not met, except in the case of a dairy farmer who did not market any Grade A milk during each of the prior months of July through November and⁷ January.
- (4) Of the quantity of producer milk received during the month (including diversions, but excluding the quantity of producer milk received from a handler described in Sec. 1000.9(c)) the handler diverts to nonpool plants not more than 65 percent during the months of July through January, and not more than 75 percent during the months of February through June, provided that not less than 35 percent of such receipts in the months of July through January and 25 percent of the remaining months' receipts are delivered to plants described in Sec. 1032.7(a) and (b);

Deleted: until

Deleted: not to exceed 10 days

Deleted: until

Deleted: December

¹ Change TR Page 658 Line 8 – 25. Reasoning – In requesting a touch-base requirement of four days, it seems unfair to force handlers to touch-base with the first four days' milk production in order to pool the producer for the month. This change would allow the four days to be spread over the month and still allow the producer to be pooled for the entire month. In the event the Secretary does not choose a touch-base greater than one day, Dean believes the regulation should continue to use the term "until." TR 723.

² Change TR Page 670 Line 2 – Page 671 Line 9. Reasoning – To be consistent with the requested conforming change made with Proposal number 6. See Footnote #10.

³ Change TR 659 Line 1 – 6. Reasoning – See Footnote #1.

⁴ Change TR 659 Line 9 – 11. Reasoning – In studying the original proposal submitted by DFA and Dean Foods, Dean felt that this is a reasonable compromise between the two original positions. December is a challenge for milk movement, because it is almost two months in one, it has high fluid demand in the first half (schools in session, stores ramping for the holidays, etc.) and very weak demand in the second half (no school, stores using down seasonal volume, etc.).

⁵ Change TR 659 Line 12 – 14. Reasoning – See Footnote #4.

⁶ Change TR 659 Line 14 – 21. Reasoning – See Footnote #4.

⁷ Change TR 659 Line 22 – 660 Line 3. Reasoning – See Footnote #4.

Appendix VI

Proposal #6 – Dairy Farmer for other market provision (Full Year version)

Amend § 1032.12 by adding a new paragraph (b)(5) to read as follows:

§ 1032.12 Producer.

(b) * * *

(5) For any month, any dairy farmer whose milk is received at a pool plant or by a cooperative association handler described in § 1000.9(c), if any⁸ pool plant operator or any⁹ cooperative association caused milk from the same farm to be delivered to any plant as other than producer milk, as defined under the order in this part or any other Federal milk order, during the same month or any of the preceding 11 months, unless the equivalent of at least ten days' milk production has been physically received otherwise as producer milk at a pool distributing plant during the month.

Deleted: the

Deleted: the

And a conforming change in Sec. 1032.13 (d)(1):¹⁰

...if a dairy farmer loses producer status under the order in this part (except as a result of a loss of Grade A approval not to exceed 21 days in a calendar year, unless it is determined by the market administrator to be unavoidable circumstances beyond the control of the dairy farmer such as a natural disaster (ice storm, windstorm, flood) or fire in which case the market administrator may determine the time extension granted to the effected farm or farms), the dairy farmer's milk shall not be eligible for diversion until milk of the dairy farmer has been physically received as producer milk at a pool plant.

Proposal #7 – Dairy Farmer for other market provision (Seasonal version)

Amend § 1032.12 by adding new paragraphs (b)(5) and (6) as to read as follows:

§ 1032.12 Producer.

(b) * * *

(5) For any month of February through June, any dairy farmer whose milk is received at a pool plant or by a cooperative association handler

⁸ Change TR Page 644 Line 16 – 21. Reasoning – Allowing “the” to stay might open the door for handlers to shuffle producers back and forth between reports to assist each other in depooling and repooling without implications. The language needs to be as tight as possible because handlers are good at finding the holes.

⁹ Change TR Page 644 Line 22 – Page 645 Line 3. Reasoning – See footnote #8.

¹⁰ Change TR Page 645 Line 4 – Page 646 Line 9. Reasoning – Current regulation would allow a producer to be pooled for only 2 days out of two months and continue to be pooled. The proposal needs this conforming change to be highly effective. It is simply another attempt to close the loopholes referred to in Footnote #8. This is not designed to be a hardship on a producer. TR Page 646 Line 10 – 17.

Appendix VI

described in § 1000.9(c) if any¹¹ pool plant operator or any¹² cooperative association caused milk from the same farm to be delivered to any plant as other than producer milk, as defined under the order in this part or any other Federal milk order, during the same¹³ month, any of the 3 preceding months, or during any of the preceding months of July through January, unless the equivalent of at least ten days' milk production has been physically received otherwise as producer milk at a pool distributing plant during the month; and

Deleted: the

Deleted: the

(6) For any month of July through January, any dairy farmer whose milk is received at any¹⁴ pool plant or by any¹⁵ cooperative association handler described in § 1000.9(c) if any pool plant operator or any cooperative association caused milk from the same farm to be delivered to any plant as other than producer milk, as defined under the order in this part or any other Federal milk order, during the month or the preceding month, unless the equivalent of at least ten days' milk production has been physically received otherwise as producer milk at a pool distributing plant during the month.

Deleted: the

Deleted: the

And a conforming change in Sec. 1032.13 (d)(1):¹⁶

...if a dairy farmer loses producer status under the order in this part (except as a result of a loss of Grade A approval not to exceed 21 days in a calendar year, unless it is determined by the market administrator to be unavoidable circumstances beyond the control of the dairy farmer such as a natural disaster (ice storm, windstorm, flood) or fire in which case the market administrator may determine the time extension granted to the effected farm or farms), the dairy farmer's milk shall not be eligible for diversion until milk of the dairy farmer has been physically received as producer milk at a pool plant.

Proposal #8 – Gradual repooling provision

Amend Section 1032.13 by adding a new paragraph (f) to read as follows:

§ 1032.13. Producer milk.

* * *

(f) The quantity of milk reported by a handler pursuant to § 1032.32(a)(1) and/or § 1032.30(c)(1) may not exceed 115¹⁷ percent of the producer milk receipts

¹¹ Change TR Page 650 Line 18 – Line 22. Reasoning – See Footnote #8.

¹² Change TR Page 650 Line 23 – Page 651 Line 2. Reasoning – See Footnote #8.

¹³ Stated in Exhibit 34 page 17, but this change was inadvertently not noted in the oral testimony as a change. Reasoning – clarifies the three distinct time periods being talked about.

¹⁴ Change TR Page 651 Line 3 – Line 10. Reasoning – See Footnote #8.

¹⁵ Change TR Page 651 Line 6 – Line 10. Reasoning – See Footnote #8.

¹⁶ Change TR Page 645 Line 4 – Page 646 Line 9. Reasoning – See Footnote #10.

Appendix VI

pooled by the handler during the prior month. Milk diverted to nonpool plants reported in excess of this limit shall be removed from the pool by the market administrator. Milk received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b). The handler must designate, by producer pick-up, which milk is to be removed from the pool. If the handler fails to provide this information, the market administrator will make the determination. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants shall not be subject to the 115 percent limitation;

(2) Producer milk qualified pursuant to § _____.13 of any other Federal order and continuously pooled in any Federal order for the previous six months shall not be included in the computation of the 115 percent limitation;

(3) The market administrator may waive the 115 percent limitation utilizing:

(i) For a new handler on the order,¹⁸ or

Deleted: , subject to the provisions of § 1032.13(f)(3)

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(4) The market administrator may increase or decrease the applicable limitation for a month consistent with the procedures in § 1032.7(g); and

(5) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

Proposal #9 – Eliminate split plant provision

Amend Sec. 1032.7 by removing paragraph (h)(7).

Proposal #10 – 12 lock for a nonpool plant provision

Amend Sec. 1032.7 by revising paragraph (h)(7) to read as follows:

Sec. 1032.7 Pool plant.

* * * * *

(h) * * *

¹⁷ Dean Foods would be ok with this being on a daily average, recognizing the difference in days in a month. TR Page 672 Line 6 – Line 20.

¹⁸ Change TR Page 655 Line 18 – Line 23. Reasoning – It is almost a circular reference and is unnecessary.

Appendix VI

(7) That portion of a regulated plant designated as a nonpool plant that is physically separate and operated separately from the pool portion of such plant. The designation of a portion of a plant must be requested in advance and in writing by the handler and must be received by the market administrator. Such nonpool status shall be effective on the first day of the month following receipt of the request by the market administrator and thereafter for the longer of twelve (12) consecutive months or until notification of the desire to requalify as a pool plant, in writing, is received by the market administrator. Requalification will require deliveries to a pool distributing plant(s) as provided for in Sec. 1032.7(c). For requalification, handlers may not use milk delivered directly from producer's farms pursuant to Sec. 1000.9(c) or Sec. 1032.13(c) for the first month.

Proposal #11 – Eliminate supply plant system provision

Amend Sec. 1032.7 by removing paragraph (f), redesignating paragraphs (g) and (h) as paragraphs (f) and (g)¹⁹:

20

Proposal #12 – Eliminate multi-handler supply plant system provision

Amend Sec. 1032.7 by revising the introductory text of paragraph (f) to read as follows:

Sec. 1032.7 Pool Plant²¹.

(f) A system of supply plants may qualify for pooling if 2 or more plants operated by one handler meet the applicable percentage requirements of paragraph (c) of this section in the same manner as a single plant, subject to the following additional requirements:

Deleted: , and revising paragraph (c)(2) to read as follows

Deleted: Sec. 1032.7 Pool plant.¶

¶
*****¶
(c) *****¶

(2) The operator of a pool plant under paragraph (c) located in the marketing area may not include as qualifying shipments milk delivered directly from producer's farms pursuant to § 1000.9(c) or § 1032.13(c). Handlers may not use shipments pursuant to § 1000.9(c) or § 1032.13(c) to qualify plants located outside the marketing area.¶

Deleted: ¶

Deleted: Producer milk

Proposal #13 – Require shipments from all plants in a supply plant system

Amend Sec. 1032.7 by revising paragraph (c)(2) and adding a new paragraph (f)(5) and to read as follows:

Sec. 1032.7 Pool plant.

¹⁹ Change TR Page 662 Line 11 – 17. Reasoning – This language was inadvertently included in two proposals when initially requested by Dean Foods. It was only intended to be in one proposal. Dean Foods feels it is more reasonable to have it connected with proposal 13 than with proposal 11.

²⁰ Clarification (TR Page 726 Line 11 – Page 726 Line 15). The strike through only represents the language in relation to the hearing notice published in the Federal Register. Dean Foods is not proposing or advocating this language be deleted from the regulation. Dean Foods in this proposal is proposing to leave this section (1032.7 (c)(2)) unchanged.

²¹ Stated in Exhibit 34 page 25, was inadvertently not noted as a change. Reasoning – It incorrectly represented the regulation title.

Appendix VI

(c) ***

- (2) The operator of a pool plant located in the marketing area may not include as qualifying shipments milk delivered directly from producer's farms pursuant to § 1000.9(c) or § 1032.13(c). Handlers may not use shipments pursuant to § 1000.9(c) or § 1032.13(c) to qualify plants located outside the marketing area;

(f) ***

- (5) Provided no single plant ships less than 40 percent of the applicable percentage requirement of paragraph (c) of this section.