

BEFORE THE SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE

In the Matter of:)
) Docket Nos.
PROPOSED CHANGES TO) AO-368-A32
ARIZONA-LAS VEGAS AND) AO-271-A37
PACIFIC NORTHWEST MILK) DA-03-04
MARKETING ORDERS)
_____)

BRIEF OF PROPONENT
NORTHWEST DAIRY ASSOCIATION

This post-hearing brief is submitted following public hearings in the above captioned matter, held before the Hon. Marc Hillson in three phases: September 23-25, 2003 at Phoenix, Arizona; November 17-21, 2003 at SeaTac, Washington; and January 20-23, 2004 at Alexandria, Virginia.

1. Introduction to Parties and Issues. This post-hearing brief is submitted by Northwest Dairy Association (also known as “NDA”), a dairy marketing cooperative representing dairy producers with farms in Idaho, Oregon, Washington, and a handful in Northern California.

This rule making proceeding involves two unrelated concepts. One deals with a narrow issue under the Milk Market Order program pertaining to the pooling of milk (sometimes called “double dipping”) in the Arizona-Las Vegas Federal Milk Marketing Order (“Order 131”)¹. The Arizona-Las Vegas pooling issue was virtually ignored in the 11 days of hearing testimony, perhaps because it seems to have been unopposed. Proposal No. 4 would not directly impact producers in our region, but NDA certainly supports the principle behind the proposal. With that position stated, the remainder of this brief will focus entirely on the Producer Handler issue that dominated this hearing.

Proposals No. 1, 2, and 3 relate to Producer Handlers, and would redefine the conditions under which a producer who is also a handler may be exempt from

¹ 7 C.F.R. Section 1131.

marketwide pooling of two Federal Orders – Order 131 and also the Pacific Northwest Federal Milk Marketing Order (“Order 124”)². NDA supports adoption of all three proposals as modified at the hearing

NDA currently represents approximately 580 producers who participate in the Order 124 market. We represent no producers in Order 131. NDA is the principle proponent of Proposal No. 1 pertaining to Order 124, and was authorized to testify on the record to the support of three other cooperatives for Proposal No. 1: Farmers Cooperative Creamery, Northwest Independent Milk Producers, Tillamook Cooperative Creamery Association. A separate brief will be submitted by Dairy Farmers of America (“DFA”). Collectively, NDA estimates that our five cooperatives represent substantially more than two-thirds of the milk pooled on the Pacific Northwest Order.

The formal “Proponents” of the Producer Handler proposals were NDA, DFA, and United Dairymen of Arizona (“UDA”). These three cooperatives coordinated to present to the Department uniform language proposals for the two marketing orders. At the hearing, the proponent cooperatives were supported by several regulated handlers, including Dean Foods, Shamrock Foods, and the Kroger Co. from the Order 131 market; and from the Order 124 market: WestFarm Foods (which is controlled by NDA), Sunshine Dairy, Vitamilk Dairy, Inland Northwest Dairies, and the Kroger Co. These were collectively referred to as “Proponents”, even though they held somewhat separate views and presented separate testimony.

The “Opponents” at the hearing included four potentially impacted Producer Handlers: Sarah Farms from the Order 131 market, and three from the Order 124 market: Edaleen Dairy, Smith Brothers Farms, Inc., and Mallorie’s Dairy, Inc. These opponents presented separate testimony, but collectively retained two expert witnesses to testify on their behalf.

The fundamental issue in this proceeding is that under the current regulations, larger Producer Handler operations which bottle more than 3,000,000 lbs per month (all of the opponents’ operations) enjoy a substantial competitive advantage that is neither fair nor (as will be explained in the next section of this brief) legal. Many witnesses testified to the existence of this competitive advantage, including many of the Producer Handler witnesses as they tried to justify maintaining that advantage. Their arguments amount to a plea to retain their current subsidy (as further discussed in Section 8 of this brief).

² 7 C.F.R. Section 1124.

The approach used by NDA's witness to quantify what we called the "Producer Handler Advantage" was to assume that a plant of a Producer Handler operation pays its farm a transfer price equal to the regional pool blend price, and thereby benefits from the difference between that blend price and the Class I price paid by its regulated competitors (the Class I price minus the uniform blend price). The same advantage could be seen as having the plant of a Producer Handler cost its milk at the Class I price, thereby giving its farm a price that exceeds the blend price to pooled producers (again -- Class I minus the blend). Either way, it is clear that by escaping participation in the pool, the Producer Handler enterprise gains the difference between the Class I price that its plant would pay if it were regulated, and the uniform blend price that its farm would receive if it participated in the pool.

During the four and a half years from January of 2000 through June of 2004, this difference has calculated out to an average of \$1.84 per cwt in the Pacific Northwest order market, which (dividing by 11.62 gallons per cwt) has meant an average Producer Handler benefit of \$.16 per gallon during that period. Similar calculations were presented at the hearing, but never challenged -- even though 16 cents per gallon is a very significant number -- compare the testimony that a regulated bottler, Sunshine Dairy, lost a Starbucks' contract to a Producer Handler by \$.20 per gallon.³

Proposals No. 1, 2, and 3, collectively, would carefully restrict this "Producer Handler Advantage". The proponents, working together, recognized the basic point made by the opponents that there can be offsetting inefficiencies. We understood that a smaller Producer Handler is not a market threat because their small size leads to inefficiencies of scale that overcome the calculated "Producer Handler Advantage" that goes with their exemption. So we proponents engaged an expert (Mr. Carl Herbein) to determine at what volume levels such inefficiencies offset the regulatory advantage. He determined that this offset occurs when the operation is roughly in the range of 3,000,000 lbs per month. Similar data supplied by NDA⁴ and by Dr. Cryan supported that conclusion.

Proposals No. 1, 2, and 3, as modified at the hearing, will update the criteria for a Producer Handler's exemption, most notably to add the additional requirement that the volume of Class I processed through the plant must not exceed 3,000,000 lbs per month. The proponents recognized the potential political issues and possible administrative difficulties in regulating Producer Handler operations that are truly "small". We therefore have not proposed total elimination of this exemption. Instead, we have proposed a more targeted regulatory approach that will maintain

³ Testimony of Paul Arbuthnot, Transcript at Page 412, Line 20.

⁴ Testimony of Dan McBride, beginning at Transcript Page 1505, and the graph attached to Hearing Exhibit No. 37.

the exemption for the many Producer Handler operations whose small size and relative inefficiency offset the “Producer Handler Advantage” and which therefore can be expected to “level the playing field”. Doing so maintains an approach that is consistent with the statutory principles of uniform pricing and orderly markets. We urge their adoption.

The remaining sections of this brief deal with the following topics:

- Section 2: Interaction of Statutory Concepts
- Section 3: Considering Small Business Needs
- Section 4: Definition of a “Purchase”
- Section 5: Balancing Issues
- Section 6: Orderly Marketing Considerations
- Section 7: Rationale for 3,000,000 Pound Threshold
- Section 8: The Suggested Need to Subsidize Producer Handlers
- Section 9: Challenges to the Federal Order System
- Section 10: Proposed Findings of Fact and Conclusions of Law

2. Interaction of Statutory Concepts. The hearing record presents the Secretary and the Department with the challenge of reconciling two frames of reference, each of which is grounded in different concepts set forth by Congress within the Agricultural Marketing Agreements Act (“AMAA”):

- The proponents’ frame of reference is the specific, milk-related provisions of the Act that (1) authorize minimum pricing for different classifications of use, (2) require that those prices must be “uniform” to all handlers, and (3) authorize marketwide pooling for the distribution to pooled producers of a “uniform” producer price.⁵ Those three fundamental concepts of the milk order system are grounded in uniformity of pricing. Any exception to uniform pricing to either producers or handlers must be narrowly construed, and any exceptions must be justified by demonstrating that the exception does not frustrate the intent of Congress when it required uniform pricing in milk orders. The burden is on those seeking the exemption to demonstrate that the exemption would not frustrate the statutory requirement. We proponents urge the Secretary to narrow the exemption from minimum price regulation that currently is available to Producer Handlers so as to maintain the concept of uniform pricing to both producers and handlers.
- The opponents’ frame of reference is quite different. Their testimony virtually ignored uniformity of pricing, and focused instead on the separate

⁵ 7 U.S.C. 608c(5), Subsections (A) and (B).

statutory concept of preventing “disorderly marketing conditions”⁶. During the hearings, the opponents seemed to take the position that “disorderliness” is the only statutory criteria in the AMAA that matters, and from that point they focused on whether the exemption of Producer Handlers is causing disorderly markets (“the sky is not falling”).

In addition to those aspects of the AMAA, the opponents point to the Regulatory Flexibility Act⁷, the intent of which is to ensure that the nature and size of small businesses are considered when agencies promulgate rules. As further explained in Section 3 of this brief, NDA believes that Producer Handlers who would be impacted by Proposal No. 1 do not qualify under the definition of small business.

The three statutory concepts mentioned above each will be discussed in later sections of this brief, but as a foundation, NDA submits the following overview of the two AMAA provisions (orderly marketing, and uniform pricing and pooling).

The AMAA permits marketing orders to be established with respect to many agricultural commodities. A fundamental policy purpose of the Act is to establish and maintain orderly marketing of agricultural commodities. That purpose is set forth at the beginning of the Act, in Section 602, and is then repeated in granting the Secretary the specific authority to promulgate marketing orders (in Section 602(4)) and to retain them (Section 602(5)).

The Act provides the Secretary with several specific tools for accomplishing the objective of orderly marketing. These tools vary by commodity – for example, acreage limits limitations are a tool authorized in Section 608(2). Marketing orders are another tool, and are authorized by Section 608c for “any agricultural commodity”⁸.

Section 608c goes on to provide two very specific tools for the Secretary to use in the case of milk. Section 608c(5), which applies only to milk, provides in Subsection (A) the unique tool of allowing the Secretary to classify milk according to use and then establish minimum pricing for each such use classification. Congress did not provide this minimum pricing authority for any other type of marketing order, only for milk. Minimum pricing is an appropriate tool for orderliness in milk marketing, because of the unique nature of milk as a perishable product (once it is produced, the producer will be better off selling it for only \$1.00 per cwt, if his only alternative is to let it spoil).

⁶ 7 U.S.C. 602 (1) and 602 (4)

⁷ 5 U.S.C. 601 *et. seq.*

⁸ Section 608c(1).

However – and importantly for the issues in this proceeding – Congress also established (in the same Section 608c(5)(A)) a very specific restriction on the Secretary’s use of the classified pricing tool. Specifically, if the Secretary uses minimum prices:

“Such prices shall be uniform as to all handlers”, subject only to enumerated factors such as volume, location, quality, and the like.”
(*Emphasis supplied.*)

To emphasize this intent, Congress further provided that the Secretary must establish minimum prices “which all handlers shall pay”. (*Emphasis supplied.*)

There is no basis in that provision for exempting handlers because they are also producers, although the opponents argued (based solely upon Professor Knutson’s opinion) that these provisions apply only to “purchases” of milk, which leaves intra-company transfers within a Producer Handler operation exempt. NDA disagrees, as will be discussed further in Section 4 of this brief.

We note that the statutory provisions just quoted contain a specific authority for the Secretary to adjust pricing based on “volume”. In other words, the statutory basis for using volume is grounded in the statute requiring uniformity of pricing, which means volume may be considered in the context of price uniformity. In recent decisions, the Secretary has chosen to exempt all bottlers below a certain size (as is currently done below 150,000 lbs per month). But such an exemption must favor all bottlers below that size, not just producers who are also handlers.

That is why NDA has pointed out repeatedly during the hearing (and emphasizes now in this brief) that it is important to distinguish the issue of size from the quite separate issue of business form (being a producer who is also a handler). That, also, will be discussed later in this brief (Section 8).

Subsection 608c(5)(B) provides the Secretary the additional tool of pooling. Either handler pools or marketwide pools are permitted. With the process informally called “Reform”, the last handler pools were phased out⁹. In the case of marketwide pooling, the Secretary may provide in a marketing order . . .

for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;¹⁰ (*Emphasis supplied.*)

⁹ Testimony of William Van Dam, Transcript at Page 1434

¹⁰ 7 U.S.C. 608c(5)(B)(ii).

In addition, it is clear that the statute contemplates that Producer Handlers will be regulated. Section 608c(5)(C) provides that:

In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection. (*Emphasis supplied.*)

We reproduce the foregoing excerpts from the AMAA to demonstrate that there is no specific statutory exemption from uniform pricing for producers who are also handlers, and there is no exemption or distinction for such an operation made in the statutory procedures for the operation of the marketwide pool.

The opponents may argue that they are exempt because there is no “delivery” of their milk from their farms to their plants, in the nature contemplated by Section 608c(5)(B). NDA disagrees, as discussed in further in Section 4 of this brief.

NDA suggests that the principle behind the statutory concept of marketwide pooling is to foster orderly marketing by removing the need for “cutthroat competition” among dairy producers, as was once thought to be widespread as they competed with each other for contracts to deliver to the bottling plants with the best return. As Mr. Van Dam testified, however, the producer handler exemption is actually fostering those very conditions, as producers fight among each other for access to the Class I market for milk in bottled form. Such disorderliness is discussed in more detail, in Section 6 of this brief.

Returning, then, to the interaction between the statutory concept of uniform, minimum pricing and pooling just discussed (and emphasized by proponents) and the other statutory concept of disorderly marketing (emphasized by the opponents), NDA submits that the statutory scheme can be summarized as follows:

1. The overriding purpose of milk marketing orders is to prevent disorderly markets.
2. In pursuit of that goal, the Secretary may elect to implement (or may elect not to implement) uniform pricing and marketwide pooling.
3. If the Secretary utilizes the tools of uniform pricing and marketwide pooling, there is no consideration permitted as to whether uniformity of pricing to “all” handlers is needed in order to prevent disorderliness. Congress has already decided that uniformity is the rule.

It is not surprising that Congress has mandated that classified prices be “uniform as to all handlers” (*emphasis supplied*). That is because of the additional consideration, which would have been recognized by Congress to be inherent in price regulation, that it would be fair only if “all” handlers were able to compete on the same basis. NDA submits that Congress would never have wanted the Secretary to establish rules that favor one group of handlers over another group – the AMAA specifically contemplates the “level playing field” (to use a more modern term than “uniform pricing”).

- This interpretation raises the obvious question of how the current exemption has been permitted by Congress and upheld by the courts. NDA submits that the key to “uniformity” is that the Secretary may carve out an exemption as long as it does no real threat to the fundamental concept that minimum class prices must be “uniform as to all handlers”. That this has been done in the past can be seen from the following: As has been testified to¹¹ the original exemption for Producer Handlers back in the 1930s was in part one of administrative convenience. There were then a great many of them, something like 355 compared to only 14 regulated bottling plants (prior to World War II, 80% of bottled milk was sold door to door). They were small, and while their total share of the market was significant the impact of each was *de minimus*. That is no longer is the case, and that is precisely why the proponents have proposed that a maximum size be incorporated into the conditions for exemption.
- Another concept which has evolved from that approach (of exempting producer handlers if the impact is *de minimus*) was that producer handlers should handle their own surplus, rather than push that burden back on the regulated producers and regulated plants in the marketing area. This concept arose in the 1950’s and was first included in official findings in the June 10, 1957 decision in the New York area.
- In more recent years, in cases such as Pure Milk¹² an analysis was developed which balanced the impacts of other costs (including balancing costs) against the potential advantage of regulation. That is the approach suggested by the proponents in this proceeding.

In this hearing record, there is ample evidence for the Secretary to continue utilizing the above three concepts to exempt those PHs who continue to be *de minimus*, and

¹¹ Testimony of Dr. Roger Cryan, Transcript at Page 893, Line 19, and at Page 947, Line 22; and Testimony of William Van Dam, Transcript at page 2860.

¹² FR, Vol. 53. No 123. June 28, 1989, Proposed Rules.

by adopting Proposals No. 1, 2, and 3 withdraw the exemption for those whose impact by any measure is not “*de minimus*”.

We note that the opponents’ joint expert witness, Professor Ron Knutson, in his prepared testimony, did not even mention the concept of uniform pricing. He focused entirely on the “straw man” issue of whether or not the current exemption has led to disorderly marketing conditions. He then proceeded to opine that there was none, and ignored the main focus of the proponents’ position that regulated handlers are entitled to the level playing field that Congress mandated.

Prof. Knutson’s puzzling dismissal of disorderliness in the Order 131 market is for those from that market to address in their briefs, but we at NDA can not help but note that Hearing Exhibit 5 clearly indicates that Class I sales in the Order 131 market approximate 80 million lbs per month.¹³ Evidence also indicates there are three primary handlers in that market. Assuming they are all the same size, they would average about (one third of 80, or) 26 Million lbs/month. If any are larger than average (and they almost certainly are not all the same size), then the smallest of the three main regulated plants in that market likely is smaller in volume (or at best about the same size as) than Prof. Knutson’s client (which he identified as “approximately” 20 million lbs per month). Given the raw milk cost differences between the smallest regulated handler and Prof. Knutson’s Producer Handler client, there certainly is the potential for disorderliness in the market where the two compete for sales. That disorderliness is sufficient to invoke the statutory concepts, but in addition it likely would lead to disorderliness at the level of producer sales to the regulated handlers, who clearly have an incentive to try to defeat the regulatory structure in some fashion.

That said, NDA believes that Prof. Knutson’s argument (about whether there exists “disorderliness”) is beside the point. The fundamental fact is that the Secretary can not ignore the situation if the smallest regulated handler(s) in a market is (or are) not receiving the price protection that Congress intended when it established the requirement that classified pricing “shall be uniform as to all handlers” (the level playing field concept that was specifically discussed earlier in this brief). NDA’s witness documented that in the Order 124 market as well, there are regulated handlers operating plants that process smaller volumes of milk than do the largest Producer Handlers in each market. There is no rationale for continuing such a situation, and the proponents have offered a sound basis for an order structure that is consistent with Congressional intent.

¹³ Exhibit 6, Table 3.

By ignoring the uniformity issue, and focusing instead on disorderliness, Prof. Knutson conveniently ignored the Congressionally mandated concept of maintaining a level playing field – just as he chose to ignore the equally inconvenient findings (which clearly define what is meant by “purchase” from court cases that were presented to him in cross examination). It may be true, as he suggests, that public policy should be different than what Congress mandated and the courts have interpreted, but that is not a matter for consideration in this proceeding.

The proponents, of course, have not ignored the uniformity issue, but instead have proposed a regulatory concept that is consistent with it. We have demonstrated that, when a plant’s volume is less than the proposed 3,000,000 lb level, the higher costs of operation in such a plant will offset the regulatory advantage of exemption. Thus, uniformity of pricing (and the goal of a “level playing field”) is not jeopardized if the definition of Producer Handler is limited to those with fewer than 3,000,000 lbs.

3. Considering Small Business Needs. The issues in this hearing are not about “small business”, they are about competitive equity and the statutory principle of uniform pricing. The issues do relate to “business form”, but not size of business.

NDA submits that use of the term “small business” as defined by RFA and the Small Business Act (SBA) is simply not a helpful approach to these proceedings. Consider the following:

- Washington State University milk plant is a very small plant and dairy farm but is not considered a “small business” because it is owned by Washington State University -- which is not a “small business” because it has over 500 employees.¹⁴ This plant is exempt from pooling because of its very small size (under 150,000 lbs per month), a consideration that is unrelated to its status per SBA.
- The very smallest of producer-handlers, if acquired by Microsoft would not be any different in its nature, yet it would be classified as a “large business” because it is owned by a “large business”.¹⁵
- The handler we judge to be the very smallest regulated handler in Order 124, Valley of the Rogue Dairy, clearly meets all definitions to qualify as a “small business”, yet is fully regulated. Again a finding that is unrelated to its status per SBA.

¹⁴ Mykrantz testimony, page 2483

¹⁵ Van Dam testimony, page 1365

- Most importantly, if it were judged that RFA and SBA definitions did apply, it is clear that none of the four producer-handlers that would potentially be negatively impacted would qualify for “small business” status.

The term “small business” cannot, as defined by RFA, be applied to any producer-handler who would be impacted by the proposed rules, because to be impacted an operation must process more than 3,000,000 lbs per month. The provisions of RFA apply only to the extent the Federal regulations impact the defined “small business”.¹⁶ Footnote number 1 of Exhibit 51, (second table) notes that a producer is a “small business” if his production is 500,000 lbs of milk a month or less (based on an assumed milk value of \$12.50/cwt, and calculated from the statutory threshold for agricultural enterprises of \$750,000 in annual sales). Therefore, the smallest potentially regulated producer-handler at 3,000,000 lbs per month is by definition at least 6 times bigger than the largest “small business” producer.

Counsel for opponents, perhaps inadvertently, accept the practice of using the entire business to define each business segment in a question as follows; “So if you have a plant in the state of Washington that’s – a 7A plant that’s 5 million pounds, you would – *unless it’s associated with some other larger enterprise*, it would probably be a small business; right?”¹⁷ (*Emphasis supplied*)

This same point was further clarified in the response of the representative of the Federal Order staff to one of the counsel for proponents, as follows:

- Q. In that case, then, any producer-handler whose dollar volume, production, was over 750,000 per year, or who marketed more than 500,000 pounds per month, would not be a small business, would it?
- A. No, it would not.¹⁸

Section 3(a)(1) of the Small Business Act as amended Dec 21, 2001 contains a specific definition of a “small business concern”, the last portion of which reads:

“Provided, That notwithstanding any other provision of law, an agricultural enterprise shall be deemed to be a small business concern if it (including its affiliates) has annual receipts not in excess of \$750,000.”

By comparison, the dairy farm part of an impacted 3,000,000 lb per month Producer Handler will generate at least 36,000,000 lbs or more each year. That quantity, even at a low price of \$10 per cwt, would represent \$3.6 Million per year in sales. Compared in a different way, unless the prevailing hundredweight price averages

¹⁶ Van Dam testimony, page 2866

¹⁷ Transcript at Page 2467.

¹⁸ Testimony of John Mykrantz, Transcript at Page 2483

out to less than \$2.08/cwt, the affected Producer Handler will never have annual sales less than \$750,000.

If evaluating the impact of a proposal on “small business entities” is judged to be required in the present hearing, the Secretary must consider whether there are any small business entities that would be negatively impacted (of which there are none). But surely, at the same time, the Secretary also must consider those “small business entities” who are negatively impacted by the current regulations in ways that the proposals would alleviate. NDA submits that the record in this case demonstrates that the proposed modification of the current Producer Handler exemption language would positively impact the 574 pooled producers in the PNW that are small business entities and the 11 regulated handlers who have been identified in the record as small businesses.¹⁹ These latter individuals and companies are the only “small business” entities that can be accorded the consideration offered under the terms of the RFA. Based on the hearing record, we calculate that adoption of the proposals would increase the Order 124 pool price by approximately 3.7 cents per cwt.²⁰ For a “small business” producing 500,000 lbs per month, this means more than \$2,000 per year in lost pool revenue.

Accordingly, the “small business” considerations support adoption of Proposals No. 1, 2, and 3.

¹⁹ Exhibit 51, Second Table.

²⁰ NDA derives that calculation as follows. The historic quantities of Class I sales for all Producer Handlers during 2002 were 219,175,100 lbs; and for the first seven months of 2003 were 122,951,063, per Table 2 of Exhibit 7. In addition, Table 6 of Hearing Exhibit No. 7 shows that sales by all Producer Handlers to pool and nonpool bottling plants were 25,177,050 during 2002 and 9,974,035 during the first seven months of 2003. The total Class I sales lost to the pool by the activities of Producer Handlers was 244,352,150 during 2002, and 132,925,098 during January-July of 2003.

The percentage of Producer Handler milk represented by the largest three Producer Handler operations (the three who potentially would be regulated) during May of 2003 was 71.2%, per Exhibit 8, Table 2. Multiplying out the above numbers, we estimate that the Class I sales lost to the Order 124 pool because of the exemption of the three potentially regulated Producer Handlers were as follows: for 2002 was 173,978,731 lbs, and for the first seven months of 2003 was 94,642,670 lbs.

During 2002, the total Class I sales in the Order 124 pool were 1,941,400,168, so the 173,978,731 lbs above represented a loss of 8.9% of the potential Class I sales from pool sources to their traditional customers. For the first seven months of 2003, Class I sales were 1,115,955,283, so the 94,642,670 represents a loss of 8.5% of Class I sales.

A complete recalculation of the pool values could be performed using Table 6 of Exhibit 7 and the Market Administrator’s published monthly pool calculations. However for these purposes, we have simply worked from Table 3 of Exhibit 5 the Class I utilization of 27.02% during 2002 and 28.06 for the first six months of 2003. We then assumed that current Class I utilization is 27.5% (based on a rough average of the 2002 and 2003 numbers), and further assumed that the pool losses are 8.7% (also based on the 2002 and 2003 numbers) and calculated that if the three Producer Handlers were regulated, Class I utilization would be $(27.5\% * 1.087 = 29.9\%) / (100\% + (29.9 - 27.5)) = 29.2\%$. If that increase from 27.5% to 29.2% is worth the Class I differential to the pool, the producer would see (1.7% of \$1.90) 3.7 cents per cwt more on the blend price.

4. Definition of “Purchase”. The opponents argued at the hearing that when a handler plant which is owned by a producer receives milk from the co-owned farm, there is not a “purchase” of milk that can be regulated. In fact a witness for Edaleen Dairy seemed to indicate that was the *only* rationale for his current exemption.²¹

NDA respectfully suggests that this argument is not well founded. The legal issues involved will be handled in the briefs of others, which we join in and endorse.

The most important point NDA can add, given our perspective on the Pacific Northwest market, is that such an interpretation would jeopardize the current regulation of milk supplied by any farm which is owned by a plant operator.

The crux of opponents’ argument is that a transfer between a farmer and a plant is not a “sale” because it is instead an internal transfer. The owner of at least one regulated bottler (Andersen Dairy in Battleground, WA) supplies a substantial portion of that plant’s milk.²² Shamrock Foods in the Order 131 market appears to have a similar situation, owning a large dairy farm.²³ In the past, other owners of regulated plants have produced a portion of their milk supply. In these situations, the very logic advanced by the opponents would inescapably lead to the conclusion that milk from farms owned by regulated bottlers also is not “sold” to the plant and therefore also must be *totally* exempt from price regulation under the order.

Worse, it would allow a current Producer Handler to draw upon pool supplies to balance its needs. Initially, doing so (purchasing milk from outside sources) would forfeit the Producer Handler exemption, but then (if the sale from its own farm to its plant were not a regulatable sale as opponents’ suggest) the no-longer-exempt operation would effectively retain its exemption for milk produced on its own farm. The effect would be to render meaningless the current limitations in the definition of producer handler, which require that such an operation join the pool when it relies on the market for more than 150,000 lbs of its monthly supply.

The current limitations are intended to prevent unfair reliance on the pool for balancing the needs of the Producer Handler. That is one of the issues in this hearing, even with the current language (as discussed in the section of this brief which follows). There is no policy justification for the opponents’ interpretation.

²¹ Testimony of Duane Brandsma, Transcript beginning at Page 2534, Line 13.

²² Testimony of Paul Arbuthnot, Page 418, Line 1.

²³ Testimony of Hein Hettinga, Transcript at Page 2629, Line 16.

In addition to making poor public policy, their interpretation would require a non-sensical interpretation of the statutory language. When pressed, the opponents offered no additional explanation of why that might have been the intent, and were unable to discuss the court cases that were cited to the opposite conclusion. Accordingly, we respectfully suggest that this argument should not be seriously considered by the Secretary.

5. Balancing Issues. During the hearings, the opponents seemed to be attempting (in testimony and in questions of other witnesses) to lay the foundation for an argument on brief that somehow their balancing costs are greater than for other handlers, and for arguing that this somehow provides support for the policy positions they advocate. In so doing, they seem to accept that their exemption is (or should be) contingent on their not shifting balancing costs to the pool.²⁴

There are four potential policy issues that must be understood in evaluating in an argument that balancing costs justify the exemption:

- In the first place, it should be noted that the Federal Milk Order system simply does not attempt to consider all costs, nor to address profitability. So the relevance of any arguments by the opponent parties about their balancing or other costs must be very carefully scrutinized.
- Second, substantial balancing costs are typically borne by regulated handlers over and above the cost structure of the order (as is discussed later in this brief). The opponents talked about their own balancing costs, but ignored those balancing costs regularly incurred by regulated bottlers. There is insufficient quantitative evidence to conclude that the balancing costs faced by Producer Handlers are greater than those faced by the other handlers who are regulated.
- In addition, there may also be some balancing costs absorbed (or intended in theory to be absorbed) by the market within the marketwide pool through the mechanism of Class III and IV pricing, which the Producer Handler (by definition, being unregulated) does not incur. This would arise incidentally, through the cost of production surveys that have led to the Class formulas. To

²⁴ Testimony of Hein Hettinga, Transcript beginning at Page 2621, Line 22: ``Also, during the history of producer-handler exemption from full regulation, there has been no demonstration that such entities have an advantage as either producers or handlers so long as they are responsible for balancing their fluid milk needs and cannot transfer balancing costs, including the costs of disposing of reserve milk supplies to other market participants. 64 Fed. Reg. 16135 (April 2,1999).'' ``

some extent, inefficiencies from balancing are reflected in the production costs utilized in determining conversion costs in the Class III and IV formulas. To whatever extent market balancing costs are part of the regulatory structure, they would never be shared by the unregulated Producer Handlers.

- Finally, even if (hypothetically) the balancing costs of a Producer Handler could be shown to be higher than those of a regulated handler, for some reason that is unique to their producer handler status, then one must question whether those higher costs are a good thing. If the organizational structures for a Producer Handler are impacted by current order language, and if that structure necessarily incurs greater balancing costs as a result, then the regulations are creating economic inefficiency (which would be poor public policy). In fact the testimony of several of the opponent witnesses indicated that is precisely the case²⁵, suggesting that the Producer Handler exemption may indeed promote economic inefficiency.

This last point about economic inefficiency was addressed at the hearing by Dr. Cryan, who recognized the foregoing and testified that in his opinion eliminating the exemption for large producer handlers, as proposed, would “remove deadweight losses” that come from such an artificial organization structure that would not exist except “for purposes of exploiting this gap in price”.²⁶ Dr. Cryan also explained that those extra costs are effectively shifted to those who participate in the pool.

The record shows that in the Order 124 market, the three opponent Producer Handlers sell to stores who can balance the producer handler supply by other purchases from regulated bottlers. The opponents also sell their surplus bulk milk to regulated bottlers.²⁷ In fact, Paul Arbuthnot testified how Albertson’s consciously used a pool handler (Echo Spring Dairy) to balance one of the opponent Producer Handlers.²⁸

In addition, both Smith Bros. Dairy and Edaleen testified that they also sell some of their “surplus” to an unregulated bottling plant (Matanuska Maid Dairy in

²⁵ See Testimony of Hein Hettinga, beginning at Page 2618, Line 25: “In fact, the evidence establishes that in exchange for regulation as a producer-handler, Sarah Farms bears costs that are not usually borne by other market participants.” See also, Testimony of Alexis Smith Koester, Transcript at Page 1844, Lines 17-23. See also, Testimony of David Beene, Page 1691, Line 7: “that the producer/handler benefit was a good one, except for it being so difficult to balance your supply”.

²⁶ Testimony of Dr. Roger Cryan, Transcript at Page 917, Lines 12-16.

²⁷ Testimony of Charles Flannagan, Transcript at Page 2387, Line 16.

²⁸ Testimony of Paul Arbuthnot, Transcript at Page 419, Line 13, and also at Page 430, Line 17.

Anchorage, Alaska).²⁹ As NDA testified, these sales to Matanuska Maid are in direct competition with regulated handlers.³⁰ Nothing in the AMAA or Federal Order theory would discourage such competition IF the competing sellers were on the same “level playing field”. Indeed, that is the purpose of the statutory language requiring that if minimum pricing is to be used in milk orders, the pricing must be “uniform as to all Handlers”.

It is important to note that in the unique circumstance of Matanuska Maid, the playing field is decidedly not level. Because Alaska is outside of any Federal Order marketing area, the Matanuska Maid bottling plant is unregulated. If it buys milk from a pool source, such as NDA, the pool source must account for the milk as Class I (with perhaps a small amount of Class II). As a result, it would make no sense for NDA to sell milk to Matanuska Maid below the Class I price. For a Producer Handler, however, any price they can receive from Matanuska Maid that is greater than their alternative disposition value is a profitable way for a Producer Handler to “balance” their milk supply -- and a more profitable way for Matanuska Maid to acquire milk than purchasing from pool sources.

It is not surprising that NDA has lost most of this business – the Producer Handlers have a competitive advantage whenever they have “surplus” milk to sell. When invited at the hearing to offer any policy justification for this competitive advantage, the President of Smith Bros. Dairy could not do so.³¹ NDA submits that the key policy consideration should be to promote pool sales by bringing Edaleen and Smith Brothers onto the same regulatory footing as the Order 124 pool sources.

The combined quantity of sales to Matanuska Maid and regulated handlers is significant. From the hearing record, we estimate sales to Matanuska Maid at roughly 1.6 million lbs per month.³² The testimony indicates these sales are from Edaleen and Smith Brothers³³, whose total production NDA estimated at

²⁹ Testimony of Alexis Smith Koester, Transcript at Page 1786, Line 9; Testimony of Duane Brandsma, Transcript at Page 2551, Line 22.

³⁰ Testimony of Dan McBride, Transcript beginning at Page 1512, Line 12.

³¹ Specifically, see the Testimony of Alexis Smith Koester at Transcript Page 1835, Line 15; but the entire discussion of a rationale runs from Page 1833, Line 21 through Page 1836, Line 6.

³² Table 6 of Hearing Exhibit No. 7 was prepared at NDA’s request by the Market Administrator. It shows that the total Class I by Producer Handlers to plants with bottling operations were 25,177,050 lbs during 2002, and 9,974,035 for January through July of 2003.

In explaining this Table, Mr. Mykrantz advised that over 90% of these sales were to non-pool plants, which would be Matanuska Maid. That would represent during the 2002-03 period, then, roughly 90% the 35,151,085 lbs shown, or 31,635,976 lbs over the 19 months (average: 1,665,051 lbs per month).

³³ Both testified to such sales (see footnote 29), and as Mrs. Koester testified, Transcript at Page 1834, Line 11 the pickup point for Matanuska Maid is at a dock in Tacoma making it difficult for other Producer Handlers to supply them.

approximately 13.5 million lbs per month. This indicates that on average, Edaleen and Smith combined sell about 12% of their farm production to Matanuska Maid.

Clearly, this Matanuska Maid activity represents a very significant part of the balancing for those two Producer Handlers. Yet, those were sales traditionally associated with the pool handlers, and they still are when those Producer Handlers cannot supply them³⁴. So what has happened is: the balancing needs of Edaleen and Smith, coupled with their regulatory freedom that enabled them to charge Matanuska Maid less than the regulated handlers in Washington, have caused the pool handlers to be pushed in and out of the Matanuska Maid in response to Edaleen and Smith's balancing needs. The effect is that those two Producer Handlers have shifted their balancing costs to the regulated handlers and the producers associated with the Order 124 pool.

That the cost of balancing is shifted to the pool can also be seen in a different way. Table 3 of Exhibit 7 shows that the total Producer Handler production during 2002 was 283,679,816 lbs. Table 6 of Exhibit 7 shows that during 2002 the total sales by Producer Handlers to outside plants in all classes of use were 60,863,285. This indicates more than 20% of the Producer Handler production is pushed back on outside plants associated with the pool.

In a way, the sales by Producer Handlers to Matanuska Maid is similar to another manner in which Producer Handlers balance their supply – by selling to regulated plants in the Order 124 market.³⁵ The record is clear that such a sale backs milk sales from pooled producers out of the regulated bottler plants, and into the region's surplus balancing plants.³⁶ That, in turn, results in fewer dollars in the marketwide pool. Additionally, in a case where the regular supplier to that handler needs sales to a pool plant in order to qualify all of its producer milk for the pool, it could potentially disadvantage the producers being removed from the pool – a type of disorderly market condition long recognized by the Secretary.

The unregulated Producer Handler operations also take advantage of the regulated handlers when they sell their “surplus” directly to balancing plants. The region's balancing plants then must deal with the additional balancing requirement created

³⁴ Testimony of Dan McBride, Transcript beginning at Page 1512, Line 12.

³⁵ The difference, however, is that a regulated plant still accounts to the pool, and the “down classification” provisions of the order reduce the Producer Handler milk to the lower class prices. Because of that, the regulated handler is not charged a compensatory payment (unless there are so few Class II, III and IV sales that some is Class I). If the compensatory payment applies, there is little incentive for the regulated handler to offer the Producer Handler more than the blend price.

³⁶ Testimony of Dan McBride, beginning at Transcript Page 1512, Line 10. See also William Van Dam, Transcript at Page 1354, beginning at Line 8.

by the Producer Handler “surplus”, but at least in that situation the balancing plant is in a position to charge for that balancing service.

Another practice for balancing Producer Handlers is to do it on the grocery shelf. Store often have multiple suppliers, so they can adjust their total offerings to accommodate fluctuations in the quantities available from a Producer Handler. Paul Arbuthnot testified about this practice, some years ago, when Albertson’s asked a regulated bottler (Echo Spring Dairy) to balance the needs of Mallorie’s Dairy.³⁷

Because many of the costs of balancing are borne through the market (both to a limited extent through the order’s Class IV pricing and, primarily, through service charges outside the order structure), the regulated plant structure bears the costs of balancing the Producer Handler operations.³⁸ Daryl Vander Pol of Vitamilk Dairy provided extensive testimony on this, citing the difficulties of balancing Vitamilk’s supply sources (all pooled) from independent producers and outside purchases.³⁹ Paul Arbuthnot made a similar point from his experience at Sunshine Dairy.⁴⁰

NDA’s witness explained in detail the rationale for our balancing cost structure, as it applies in our arrangement with the Wilcox Dairy plant which is supplied by Dairy Farmers of America. As was explained in NDA’s testimony, balancing plants attempt to capture the costs of balancing when other plants, including Producer Handler plants, sell their “surplus”⁴¹.

However, the Producer Handlers see that as “unfair”. In her prepared testimony, the President of Smith Bros. Dairy noted that they sometimes sell “a small fraction”⁴² surplus milk for “the class three price, less \$1.50 per hundredweight” plus the cost of transporting the milk to the manufacturing plant.⁴³ Upon cross-examination, she could not quantify the impact on Smith Bros.⁴⁴ But interestingly, the Opponents’ principal witness, Prof. Knutson, argued that parties with balancing assets should not charge a balancing fee, rather they should if anything pay premiums.

³⁷ Testimony of Paul Arbuthnot, beginning at Transcript Page 418, Line 24.

³⁸ Testimony of Elvin Hollon, beginning at Transcript Page 1039, Line 25 and again beginning at Transcript Page 1064, Line 22, through Page 1066, Line 9. See also Testimony of William Van Dam, Transcript beginning at Page 2874, Line 9; and also Testimony of William Van Dam at Transcript at Page 1385.

³⁹ Testimony of Daryl Vander Pol, Transcript from Page 506, Line 15, through Page 507, Line 25.

⁴⁰ Testimony of Paul Arbuthnot, Transcript at Page 455, Line 2.

⁴¹ Testimony of William Van Dam, Transcript at Page 1353, beginning at Line 1; and a more in-depth discussion beginning at Transcript Page 2874, Line 9.

⁴² Testimony of Alexis Smith Koester, Transcript at Page 1840, Line 15.

⁴³ Testimony of Alexis Smith Koester, Transcript at Page 1785, Line 8.

⁴⁴ Testimony of Alexis Smith Koester, Transcript at Page 1842, Lines 3 through 8.

As Dr. Cryan testified, a Producer Handler can balance through wholesalers and retail customers, so “*no Producer Handler can truly balance its own supply*”.⁴⁵ NDA also testified to that effect⁴⁶, and respectfully suggests to the Secretary that the evidence shows that larger Producer Handlers are in fact shifting balancing costs to the pool. NDA respectfully suggests that the only way to correct this “imbalance in balancing” is to bring large Producer Handlers under the same regulation as the bottlers with whom they compete.

In Federal Order theory regarding orderly marketing, the costs of balancing the market should be shared among all producers in the market – for if they are not, then one producer group obtains an advantage over another group that is thereby disadvantaged. That has been recognized in the past, when new order mechanisms have been proposed to deal with the disorderliness that advantages and disadvantages in balancing costs can create:

- One clear example is the transportation credits that are available in the Southeast market to those who bear the costs of bringing distant milk to the market when milk is seasonally short. The need for market wide service payments, and sharing of the costs of such services, was recognized by Congress in the 1985 Farm Bill, which provided authority for this sharing of transportation costs through the marketwide pool.
- Another example was the original proceedings on Class III-A pricing, during the early 1990s. That proceeding evolved after the support price had been reduced to create an unsupported market environment. The market value of butter and powder (today’s Class IV) was substantially lower than the Class III price that then applied to butter and powder (as well as cheese and whey). The 1991 Class III-A decision recognized that powder plants were hemorrhaging cash as a result, and took action to create a new class price for skim milk used to produce powder. Importantly, the Secretary did so because within those markets the red ink in the powder plants led to actual or potential disorderly market conditions, as producers sought other markets in order to avoid the consequences of that red ink. Also noteworthy is that the original decision applied only in the few Federal Order markets that had sufficient volumes of powder production to create disorderliness within those markets. It was not seen as a national pricing issue at that point -- it was initially intended to deal with disorderly market conditions on an order by order basis. (Later, after a court case, Class III-A was applied to all of the nation’s milk marketing orders.)

⁴⁵ Transcript, beginning at Page 897, Line 18 through Page 898, Line 12. See also similar testimony from William Van Dam, beginning at Transcript Page 1353, Line 19.

⁴⁶ Testimony of William Van Dam, Beginning at Transcript Page 1352, Line 7, through Page 1355, Line 15.

The unfair sharing of balancing costs in the two examples above led the Secretary to take corrective action, based on the recognition that a disparity in how balancing costs fall between groups of producers can lead to disorderly marketing conditions (which the statute requires the Secretary to prevent).

The present proceedings represent, in part, a similar request to the Secretary to address an unfair sharing of balancing costs – this time, the unfair sharing of the balancing costs which Producer Handler operations shift to the pool producers and to the balancing plants which those producers and the regulated bottlers help support through balancing charges.

6. Orderly Marketing Considerations. In addition to the disorderliness indicated in the balancing discussion (just concluded), there is a much more damaging sort of disorderliness that is created at times when there is “cutthroat competition” among producers for a market. We are told that in the early days before the order program, such competition occurred as producers fought each other for a chance to ship to bottlers – what would be called today a fight for a share of the Class I market. Orders addressed that through classified pricing and pooling, which resulted in a uniform price to all producers.

The Producer Handler exemption is a loophole in that structure. It is clear that the producers who are also handlers seek to utilize that loophole, by exiting the pool and competing against the pooled producers for a share of the Class I market by bottling the milk before it is sold. The danger, of course, is that if more and more producers determine to do their own bottling and marketing, the pool structure itself is left with less Class I revenue. That would be wrong, as a matter of Federal Order theory and policy, because it would be a return to the very conditions milk orders were implemented to prevent. The only difference is that the competition would have shifted from the market for wholesale sales of raw milk, to wholesale sales of bottled milk. We note that the AMAA is not, in any of its language, restricted to addressing disorderliness to unprocessed commodities – ANY disorderliness in sales by producers is to be corrected.

Whether dealing with the potential for disorderliness by producers competing for sales of bottled milk, or dealing with the potential for disorderliness that such sales of bottled milk could have on the market for unprocessed milk being sold from farms to plants, the purpose of the AMAA is the same.⁴⁷ In addition, the potential effect of competition at the bottled level upon competition at the unprocessed level requires a consistent, unified regulatory scheme. That is the policy conclusion

⁴⁷ Testimony of William Van Dam, Transcript at Pages 1369, beginning at Line 11.

which we urge the Secretary to draw, but it is also essential to meeting the statutory mandate to maintain orderly markets.

The recent Western Order decision specifically identified the lack of uniform pricing in that market as “disorderly”⁴⁸. That conclusion follows from the fact that the primary purpose of the Act is to prevent disorderly markets, and then in so doing defines uniform pricing as a requirement for milk orders. Uniformity implements the goal of preventing disorder in markets. Thus, a market condition can be disorderly if non-uniform pricing is found, as it was in the Western Order proceedings, even if other aspects of disorderliness are not present (i.e., “cutthroat competition” by the bottlers who were benefiting from under-order pricing). It is enough that there is a price disparity which could lead to cutthroat competition or other indicators of disorderliness. The fact that no less than six (and perhaps more) regulated handlers in Order 124 have plants smaller than the two largest producer handlers means that this order does not have uniform pricing among handlers and that, accordingly, this Order 124 market is “disorderly”.

Dr. Knutson provided a definition of orderliness that was prepared by The Milk Pricing Advisory Committee (March 1972)⁴⁹. Of the 6 or 7 items listed NDA finds that only 3 relate to the issues before this hearing.

- One is protection from “unwarranted movement of supplies”. NDA submits that the movement of bulk milk from Edaleen Dairy (within 10 miles of NDA’s Lynden WA plant) all the way to the Tacoma dock for delivery to Matanuska Maid in Alaska (a distance of nearly 150 miles) is not a warranted movement of supplies. This movement occurs only because Edaleen as a producer handler is not regulated while NDA is regulated and must pay the Class I price to the pool. Except for the chance for the producer handler to get a “near Class I price” this unwarranted movement of milk would never occur.
- Another is an “implied adjustment of supply to least cost sources”. If the testimony of several of the opponents is correct, one is forced to conclude that producer handlers have costs much higher than other producers and can exist only with the “Producer Handler Advantage”. In this case the exemption would serve to keep other than the “least cost source” in business. Even though NDA does not believe this to be the case at the moment, it is clear that the producer handler exemption can and someday will serve to keep high cost production units in business.

⁴⁸ FR Vol 68, No. 159, Monday, August 18, 2003, Page 49383 (middle column)

⁴⁹ Testimony of Prof. Ron Knutson, Transcript at Page 2130

- A third is to “facilitate fair, but not disruptive, competition among producers and handlers”. There is nothing “fair” about the advantage given to the larger producer-handlers. As a producer their income stream is higher than other producers and as a handler their costs are lower than competing regulated handlers.

If indeed the items listed above define an orderly market, their absence must define a disorderly market. The producer-handler exemption has been in existence for a long time and the market has long ago adjusted to that fact -- giving thereby the impression of a market not in chaos. We concur that that the disorderliness may fall short of chaos, but we emphasize that the factors listed above indicate there is indeed disorderliness.

Dr. Knutson attempted to argue that there must be actual evidence of disorderliness, rather than just the potential for it. Yet the record contains substantial specific evidence of disorderly market conditions as indicated by Paul Arbuthnot of Sunshine Dairy, Daryl Vander Pol of Vitamilk, Dan McBride of NDA and Mike Kruger of Shamrock Dairy. Mr. Vander Pol testified that “cutthroat competition” from Producer Handlers as one of the reasons for Vitamilk Dairy’s recent failure⁵⁰. Dr. Knutson feels that competition which drives “a lot of” handlers out of business would indicate disorderly markets.⁵¹ When he was asked whether Vitamilk’s failure was evidence of disorderliness, he opined that it may not be because “he may have gone out of business because he was a poor business man”, and when then asked how many handlers would have to be driven out of business to demonstrate disorderly market conditions, he ducked the question.⁵²

NDA submits that the competitive situation is clear evidence that Producer Handler Competition is a “serious competitive factor in the market” here in the Pacific Northwest, which has led to disorderly conditions in the marketing of packaged milk products. Whatever the causes of Vitamilk’s failure, there is clear evidence of the competitive pressure it faced from Producer Handlers competing for a major share of Vitamilk’s business in supplying dairy distributors in Northwest Washington (also testified to by NDA and WestFarm Foods).⁵³ Moreover, one of current market factors that is very apparent from the hearing record is the very substantial inroads which larger Producer Handlers have made into the all-important market segment of supplying grocery store chains, which traditionally were served by regulated bottlers rather than Producer Handlers. It is noteworthy that in the

⁵⁰ Testimony of Daryl Vander Pol, Transcript from Pages 504, Line 24 through Page 505, Line 16.

⁵¹ Testimony of Prof. Ron Knutson, Transcript at Page 2246, Line 22.

⁵² Testimony of Prof. Ron Knutson, Transcript at Page 2247. Lines 1-17.

⁵³ Testimony of Dan McBride, Transcript beginning at Page 1507, Line 15.

Phoenix market Sarah Farms supplies two of the nation's most rapidly growing food retailers, Costco and the Sam's Club division of Wal-Mart.⁵⁴

This change in market patterns has provided a new opportunity for such a Producer Handler to utilize the rest of the pooled producers and handlers who supply grocery chains to "balance" fluctuations in the Producer Handler's business (as discussed in the previous section of this brief, regarding balancing costs).

It is clear that Producer Handlers are competing for the traditional Class I markets, without having to pay the same Class I price as a regulated handler. We are witnessing the classic case of disorderly market conditions – cutthroat competition between producer groups for the Class I market – but in the form of bottled milk, rather than raw milk.

NDA urges the Secretary to recognize, and address, the interrelated issues of balancing and disorderly marketing that occur when producers become handlers and obtain a competitive advantage for doing so. We do not propose the complete elimination of the Producer Handler exemption, because we do not feel that the small Producer Handler operations have a competitive advantage. Our proposal for a 3,000,000 lb per month limit was drafted with that in mind.

7. Rationale for 3,000,000 Pound Threshold. The proponents presented substantial hearing evidence supporting the 3,000,000 lb threshold for qualification as a producer handler, based on accounting evidence and practical (political) judgment. Proponents provided witnesses (including Mr. Herbein, Mr. Cryan, Mr. McBride and Mr. Van Dam) who demonstrated from available data that at as bottling plant volumes grow to about 3,000,000 lbs of Class I and then higher, they experience a dramatic dip in costs. Below that level the unit costs are so high that they effectively erase the benefits of not having to settle with the pool at classified prices. After that point these plants no longer need the advantage of the exemption to be able to compete with regulated handlers.

The methodology used by these witnesses was an elementary application of a fundamental principal of microeconomics: the declining cost curve. Average costs of an enterprise decline as volume increases. Their research was directed towards determining just what the shape of that expected cost curve would be, and then determining at what volume the average processing cost would equate to the "Producer Handler Advantage" discussed earlier in this brief. That volume turned out to be approximately 3,000,000 lbs. The diseconomies of scale at lesser

⁵⁴ Testimony of Hein Hettinga, Transcript at Page 2619, Line 15.

volumes can be expected to offset the regulatory advantage conferred upon exempt plants. For that reason, proponents have proposed that the Secretary limit the Producer Handler exemption at that 3,000,000 lb volume level.

We note that no evidence was introduced to challenge the cost curves introduced by proponent witnesses, nor was any other threshold indicated as more appropriate for any reason.

The 3,000,000 lbs observations from the work done by the proponents were, perhaps coincidentally, similar to the decision made by Congress to exempt handlers who processed less than 3,000,000 lbs from the milk promotion program for handlers. While this decision was not made based on cost accounting, at least to our knowledge, it is useful to note that in the rough and tumble world of politics this same number was “settled on” as a demarcation between those who would be subject to the fee and those who were not.

Dr. Cryan suggested that there may be a rationale for linking the purposes of the Milk Order program with those of the Promotion program⁵⁵, but the more important point is that in both the Proponents’ work and in the judgment made by Congress, a determination was made that a plant which bottles less than 3,000,000 lbs per month is “small” enough to be exempted from a regulatory hardship.

Representatives of the Department inquired at the hearing of NDA’s witness whether thresholds other than 3,000,000 lbs would be appropriate.⁵⁶ NDA sees no theory for doing so that is grounded in available economic data. In time, evidence might suggest that the “Producer Handler Advantage” is offset in plants with volumes below a different threshold, but at this point in time all the evidence is that the offset occurs at around that level.

Moreover, there is a practical problem in that at higher thresholds, more and more regulated bottling plants in the Pacific Northwest market would find themselves competing against Producer Handlers who are larger than they and yet who are exempt for some unfathomable reason.⁵⁷ This is further “real world” evidence that

⁵⁵ Testimony of Dr. Roger Cryan, Transcript beginning at Page 911, Line 11; and again beginning at Page 974, Line 22.

⁵⁶ Cross examination of William Van Dam, Transcript beginning at Page 2934, Line 16.

⁵⁷ NDA’s witness demonstrated that there are three producer handlers in the Pacific Northwest market bottling from 3-7.5 million lbs per month, Testimony of William Van Dam, Exhibit 35, Pages 14-15. There are only two regulated handlers (Eberhard and Valley of the Rouge Dairy) under the 3 million per month threshold. Both of these dairies are geographically isolated which explains how they have been able to survive as regulated handlers. There is a significant group of 8 regulated plants between 3 and 8 million lbs per month. NDA notes that except for the geographically isolated plants, there are no surviving regulated plants with production of less than 3 million lbs per month.

the 3,000,000 lb level is an appropriate threshold for regulation. NDA suggests that any number other than the 3,000,000 lbs per month (or a number very close to that) would be inappropriate and although it would not change the competitive situation for those eight plants it certainly would lead to serious questions about the unfair competitive situation.

8. The Suggested Need to Subsidize Producer Handlers. Underlying many different points of view put forward at the hearing by the Opponents is the notion that the “Producer Handler Advantage” (as we have styled it) is justified by public policy considerations that warrant continuing the current language (and the current regulatory advantage that it provides for the Opponents). A need for subsidy is behind the suggestions by some of the Opponents that they might go out of business if they were to lose that advantage.

These policy arguments on behalf of subsidy brought up at the hearing include: encouraging small businesses, fostering innovation, encouraging more competition for regulated bottlers, and facilitating for producers an alternative market to the normal pool channels. Interestingly, this line of argument is tied solely to the form of the enterprise (being a producer who is also a handler), even though other forms of a dairy enterprise might make the same arguments based on their smaller sizes, innovative approaches, or competitive postures. For example:

- The Producer Handler opponents from our Pacific Northwest region are larger, and presumably more efficient, than most of the pooled producers against whom they compete, and they are also larger than some of the regulated bottlers against whom they compete.⁵⁸
- Other bottlers use some of the same “innovative approaches” to marketing, such as home delivery⁵⁹ and “no artificial hormones”⁶⁰.
- When Opponents discuss the policy merits of promoting competition⁶¹, they forget that Congress has established a different public policy -- requiring that milk regulation should provide “prices uniform as to all handlers” and *not* confer a competitive advantage for one type of handler over another. And that policy is consistent with how *fair* competition works in the anti-trust law (as price discrimination is defined by Congress the Robinson-Patman Act and as interpreted under the Federal Trade Commission Act). However, to

⁵⁸ Prepared Testimony of William Van Dam, Exhibit 35, especially at Pages 14-15.

⁵⁹ Testimony of Alexis Smith Koester, Transcript at Page 1796, Lines 15-19, acknowledging that others use home delivery.

⁶⁰ Testimony of Daryl Vander Pol, Transcript beginning at Page 486, Line 12, stating how the (regulated) operation of Vitamilk Dairy was based around that same “no rBST” concept.

⁶¹ Testimony of Hein Hettinga, Transcript at Page 2625, Line 22.

the extent that promoting competition is an appropriate consideration in these proceedings, the Proposals would still allow a small Producer Handler to grow up to the 3,000,000 lb level, utilizing an exemption that will help offset higher processing costs from its dis-economies of small scale. Later, after establishing themselves, they may elect to grow beyond that point and compete on the “level playing field” of uniform prices that Congress has mandated. That is how two major regulated bottlers in the Pacific Northwest started: Andersen Dairy and Wilcox Dairy.⁶²

- The argument that the Producer Handler exemption offers an alternative market for producers goes to the heart of NDA’s concerns. The current loose exemption standards does encourage producers to drop out of the pool, draw sales out of the pool, and thereby jeopardize the viability of the marketwide pool. Indeed, producers have considered this in the past⁶³, and there are rumors of a new Producer handler operation being planned in the Pacific Northwest market.⁶⁴ It is to promote and protect the purposes of the Milk Order system that the Proposals should be adopted.

Prof. Knutson attempted promote the social value of Producer Handlers with examples where Producer Handlers allegedly competed more effectively by developing market niches. Under cross-examination, however, he indicated little familiarity with the Pacific Northwest Market, nor with the fact that these market niches were also being addressed by regulated handlers in that market.⁶⁵ Interestingly, he also opined that Producer Handlers deserve their special regulatory consideration because of their being “a more competitive factor in that marketplace”, while asserting that very small handlers do not have a barrier to market entry because they lack the same exemption.⁶⁶ He also stated, however, that plants under 20,000,000 lbs per month are likely to become “history”.⁶⁷ With all due respects, Prof. Knutson’s testimony seems more focused on protecting his clients’ unique exemption based on the form of their business, than in promoting competitiveness or niche marketing.

⁶² Testimony of Paul Arbuthnot, Transcript from Page 417, Line 10, through Page 418 Line 23.

⁶³ Testimony of William Van Dam, Transcript at Page 1359, Line 1.

⁶⁴ Testimony of Duane Brandsma, beginning at Transcript Page 2550, Line 18: “There has also been talk about a large producer- handler being created in western Oregon. Although we are always unhappy with the possibility of a new competitor coming into the marketplace and we worry about whose sales it will take, we see no reason to fear a producer-handler any more than we would any other entrant.”

⁶⁵ Testimony of Prof. Ron Knutson, Transcript beginning at Page 2247, Line 18.

⁶⁶ Testimony of Prof. Ron Knutson, Transcript beginning at Page 2255, Lines 9-.

⁶⁷ Testimony of Prof. Ron Knutson, Transcript beginning at Page 2259, Line 10.

In evaluating these arguments, NDA urges the Secretary to consider whether the business form of the enterprise (being a producer who is also a handler, to use the statutory term) really makes any difference from a policy perspective. The only distinction offered by the opponents was that a producer who is also a handler has higher operational costs than a pooled producer or a regulated bottler. Yet upon close examination, it can be seen that those costs all arise from attempts to stay within the language of the producer handler exemption, they are not unique to the structure of a handler who is also a producer”.

NDA notes, somewhat tongue in cheek, that each of the policy arguments for exempting Producer Handlers should logically also apply to producers who may decide (as NDA members did) to become handlers on a cooperative basis. What would be the difference between a single producer entity owning a plant, versus two producer entities who wish to be more innovative and to promote competition by acquiring and operating the same plant? The producers who are members of our cooperative own several bottling plants through their cooperative and balance the milk that is surplus to the needs of their bottling operation through their cooperative’s manufacturing plants. Is there any way in which they are different from a single producer’s similar enterprise, from a policy standpoint?

Dr. Cryan testified to the policy parallels between a handler pool (no longer favored under Federal Milk Marketing Orders) and a Producer Handler, which is really just a handler pool with one producer.⁶⁸ He also testified that both situations undercut the Federal Order philosophy behind a marketwide pool with a uniform blend price to all producers.⁶⁹

To support their position that the “Producer Handler Advantage” should be maintained, some of the Producer Handler opponents argued that they have higher costs than their competitors, especially balancing costs as discussed in Section 5 of this Brief. These higher costs are said to offset the “Producer Handler Advantage”.

Interestingly, however, their position was undercut by the witness for Edaleen Dairy, who acknowledged that “producer-handlers are no more or less efficient than other handlers”.⁷⁰ Similarly, the owner of Sarah Farms, Mr. Hettinga, testified that he believes his bottling operation is “less expensive than our competition”.⁷¹

⁶⁸ A Producer Handler is “essentially a subset of single handler pools because it’s a pooling of – it’s a pooling of revenue between a single plant and a single farm that happened to belong to the same people. And it has all the same problems with regard to the rest of the market as a single handler pool, as pooling individual handlers within a market.” Transcript at Page 966, Line 25.

⁶⁹ Testimony of Dr. Roger Cryan, Transcript at Page 967, Line 11.

⁷⁰ Testimony of Duane Brandsma, Transcript at Page 2534, Lines 13-24.

⁷¹ Testimony of Hein Hettinga, Transcript at Page 2701, Line 12.

Mr. Hettinga's testimony is particularly interesting. He testified that he does not sell below the Class I price plus cost of processing, packaging and transportation⁷², but that his farm production costs exceed the Order 131 blend price.⁷³ The clear implication is that he might go out of business⁷⁴ if he were a pooled producer receiving only the blend price and that his farm needs to receive the full Class I price (rather than the blend price) in order to make a go of it.

His statement is based on the historic Order 131 blend prices which reflect the removal of nearly 20% of Class I value from the pool by Sarah Farms – a decline in value suffered by all of the pooled producers. But even assuming that Mr. Hettinga's dairy farms would still be unprofitable at a higher, Sarah-less Order 131 blend price level, his argument suggests to other producers (both in that market and elsewhere across the country) that if they are in the same unfortunate situation, they should also leave the pool and join in the Producer Handler game.

Clearly, Mr. Hettinga's business strategy is to obtain a milk price for his farm that is better than the "uniform" price, at the expense of those very producers who receive the supposedly "uniform" price from the supposedly "marketwide" pool.

This points out how critically important it is that USDA maintain and protect the concept of "marketwide pooling" and the availability of a "uniform" blend price to producers that reflects the entire Class I value. We believe that any failure to take strong action in these proceedings will be seen as a "green light" for further Producer Handler expansion. Producers in our region have considered this in the past⁷⁵, and there are rumors of a new Producer handler operation being planned in the Pacific Northwest market.⁷⁶

The other Opponent witnesses who argued that they have higher costs because of the nature of their business were given every opportunity under cross examination by NDA to demonstrate how that was so, and to explain what differences exist, because of their form of ownership. They were largely unable to do so, or refused

⁷² Testimony of Hein Hettinga, Transcript at Page 2633, Line 3.

⁷³ Testimony of Hein Hettinga, Transcript at Page 2632, Line 22.

⁷⁴ Testimony of Hein Hettinga, Transcript at Page 2618, Line 22.

⁷⁵ Testimony of William Van Dam, Transcript at Page 1359, Line 1.

⁷⁶ Testimony of Duane Brandsma, beginning at Transcript Page 2550, Line 18: "There has also been talk about a large producer- handler being created in western Oregon. Although we are always unhappy with the possibility of a new competitor coming into the marketplace and we worry about whose sales it will take, we see no reason to fear a producer-handler any more than we would any other entrant."

to do so⁷⁷, or acknowledged they did not know (they were not well informed enough to have an opinion),

Our best of our reading of the transcript finds that the only truly distinctive feature of a producer handler operation that was advanced by the opponents at the hearing was that their enterprise has not only the investment in the producing farm, but also the investment in the bottling operation and the marketing and distribution network that goes along with a bottling operation. That greater investment was said to carry with it a greater risk. But those same investments (and return on investment considerations) apply to pooled producers and regulated bottlers.

NDA questions whether there really is a greater risk than is encountered by the many producers who have exited the business in recent years, or the Vitamilks or other bottlers who also have. As with any producer, any bottler, or any other business, there are economic advantages of scale, and seldom disadvantages. Moreover, a vertically integrated operation can enjoy stability during these cycles, by offsetting losses on the farm with profits in the bottling operation when prices are low, and vice versa when prices are high.⁷⁸ Note that the opportunities from vertical integration are not unique to exempt producer handlers. Andersen Dairy in Battleground, Washington, is a regulated handler that processes all of its own farm milk but buys a substantial amount from pooled sources. And until recent years, two other handlers in the Pacific Northwest market have also produced part of their milk supply (Wilcox and Alpenrose).

Several Opponent witnesses testified that their lost advantage, if they were to account to the pool, would be greater than their profits (Smith, Edaleen). In other words, they could not compete operating on the same basis as regulated bottling plants that are the same size (or smaller) than they are. NDA is not so callous as to simply respond, “too bad”. Instead we suggest the following:

⁷⁷ Testimony of Rob Heerspink, Transcript at Page 2067, Line 23.

⁷⁸ Economic and business theory teaches that vertical integration reduces overall risk for an enterprise because the supplier operation may do well at times when the customer operation does poorly. It is clear that this applies to Producer Handlers at times like the present, when the volatile cycle of dairy prices reaches record Class I price levels. Consider:

- The bottlers (regulated or exempt) all face market resistance from their customers (and ultimately from consumers) as their wholesale prices are pushed up to record levels. Bottlers’ profit margins are squeezed. Yet at the very same time, margins on the farm are improved as the higher Class I prices filter back to the pooled producers.
- Conversely, when commodity prices are at or below the intended supported levels (as they were just over a year ago), the Class I price is low by historical standards and this provides an opportunity for bottlers (and wholesalers and retailers) to increase margins by holding prices at historically normal levels. Yet at the very same time, margins on the farm were very depressed.

1. In making that point, they are clearly acknowledging that there is an economic inefficiency in their operation, compared to pooled producers and regulated handlers. This inefficiency is being subsidized by producers and handlers in the marketwide pool, and that is not “fair”. Subsidy is not the answer -- the answer is for them to become more efficient in their operations and more reasonable in their pricing.
2. The hauling efficiencies that are inherent in the Edaleen and Mallorie’s operations, with farms located very near their plants give them plenty of opportunity to achieve a lower cost farm operation than their neighbors.⁷⁹
3. The Edaleen farm is the largest in Whatcom County (which is one of the largest production areas in the Pacific Northwest market), and the potential economies of scale are tremendous. Furthermore, their location at Lynden, about 100 miles⁸⁰ from the nearest competitor bottling plants in the Seattle area, gives Edaleen a natural competitive advantage in serving Northwestern Washington with a lower cost delivery system near in the North and similar delivery costs as distribution moves south.
4. Mr. Brandsma testified that Edaleen sometimes uses fixed or flat price contracts that do not rise or fall with the Class I price cycles.⁸¹ He indicated that in that situation and perhaps others, at times his pricing may reflect a milk value below the Class I level (“if it happens, it happens”).⁸² If he were subject to the Class I price, he would likely charge more.
5. Finally, we do not really believe that these operations would go out of business if forced to operate under the same rules as other producers and bottlers. Certainly the farms, which are very large and very efficient, will have continuing value and a bright future.⁸³

We close this discussion by noting that even the expert witness provided by the opponents recognized the longstanding principle that it makes no sense for the regulatory system to subsidize an inefficient producer.⁸⁴ Nor, NDA suggests, should the Federal Milk Order system establish rules which subsidize firms that could not exist without the advantages created by those rules, or which encourage artificial forms of business which would not have been used except to take advantage of those rules.

⁷⁹ Testimony of Rob Heerspink, Transcript at Page 2030, Line 3, to Page 2031, Line 6.

⁸⁰ Testimony of Rob Heerspink, Transcript at Page 2029, Line 25.

⁸¹ Testimony of Duane Brandsma, Transcript at Page 2544, Line 13, through Page 2545, Line 21

⁸² Testimony of Duane Brandsma, Transcript at Page 2537, Line 20.

⁸³ Testimony of William Van Dam, Transcript beginning at Page 1381, Line 9, and again at Page 2915.

⁸⁴ Testimony of Prof. Ron Knutson, Transcript at Pages 2277-2278.

9. Challenges to Federal Order System. In the earliest history of the Federal Order system it was judged that the problems associated with trying to regulate producer-distributors were so great that in order for there to be a Federal Order system it was necessary to exempt Producer Handlers from regulation as matter of administrative convenience. However, as the record in these proceedings clearly documents, the exemption fostered growth to the point that resolution of the Producer Handler exemption again rises to the level of being among several important issues that together threaten the very existence of the Federal Order system.

One fundamental purpose of milk orders is to share the returns of the Class I market on a uniform basis among all producers. The effect of the Producer Handler exemption has been to lose a substantial proportion of those returns from the marketwide pools in Orders 124 and 131. This “leakage” of Class I proceeds reduces the marketwide pool, and thereby weakens the Federal Order system itself.

Sarah Farms, as a relatively new Producer Handler, has in just a few years time grown to the extent that it now services a significant portion (estimated to be 15%-20%) of the Class I sales in Order 131. This reduces the Order 131 Class I premium dollars by at least \$2.5 million per year. Similarly, Producer Handlers in the Order 124 market take about 10% of the Class I sales from the marketwide pool.⁸⁵

In addition to the negative impact of those figures on pooled producers:

1. The ownership of Sarah Farms has found a second way to avoid regulation by building a plant in a Federal Order area but selling all its production in California. This reduces the Class I premium dollars available to producers pooled in the California statewide pool by approximately \$1,000,000 per month, if we assume the plant is running near its full capacity of 2 million lbs of milk per day. This raises the question of whether the California state order can survive, long term.
2. The U.S. Congress has further complicated the system by exempting any plant in Clark County, Nevada (Las Vegas) from regulation by a Federal Order. A major new plant is being built there.
3. The loss of the Western Order increases competitiveness. This increases the economic incentive to tie directly to the Class I market, and decreases the opportunity for over-order premiums.
4. Producer owned manufacturing plants (cooperatives) in Federal Order areas are required to pay make allowances that sometimes guarantee that plants will be operated at a loss.

⁸⁵ Data from Market Administrator, Exhibit 7, Table 1.

These four issues are not directly related to the Producer Handler issue, but the five issues together are causing some producers to question the “value” of the Federal Order. This is not the Federal Order system they grew up with. Even producers in the West who support the Federal Order system question whether it can survive given the issues listed above. Each of these issues must be fixed, one at a time.

The Producer Handler issues at this hearing are seen as a major test of the willingness of the Secretary to address a fundamental inequity to regulated producers and handlers. The Reform process did not address Producer Handlers exemption issues in any meaningful way. It now must be addressed and fixed. It directly impacts pooled producers in a negative way, and many producers are also rightfully concerned about the competitive disadvantage it poses for their handler, be it a cooperative or proprietary handler. Those disadvantages could, in turn, jeopardize the market for their milk.

Any failure to put effective limits in place as a result of this hearing will give a green light to other large producers to become Producer Handlers. More importantly, it will send a signal to the supporters of Federal Orders that at some point their order may no longer fulfill its intended purpose, of pooling the Class I returns to the market and sharing them equally.

We urge the Secretary to begin in this proceeding a second round of “reform”, which addresses not only this Producer Handler issue but then these other issues and restore the Federal Order system to its initial focus -- a system which provides competitive equity via uniform class prices to all handlers, and which avoids disorderly marketing through marketwide pooling of all the Class returns of the market for all producers.

10. Proposed Findings of Fact and Conclusions of Law. For all the reasons set forth in this brief, NDA urges the Secretary to make a decision in this proceeding that specifically focuses on the statutory requirement of uniform pricing, and which formally finds as fact that: (1) larger Producer Handler operations shift balancing costs to pooled producers and regulated handlers; (2) a Producer Handler whose volume exceeds 3,000,000 lbs per month does obtain an unwarranted advantage that is both contrary to the principle of uniform pricing among handlers and contrary to the principle that the marketwide proceeds should be distributed among all producers on a uniform basis; and that (3) the unchallenged data in this hearing record demonstrates a basis for an exemption below 3,000,000 lbs, given the efficiencies of plant operations at this point in the industry's development, because a plant with a lesser volume will have higher costs of production that offset the advantage of price regulation.

NDA further urges the Secretary to conclude as a matter of law that: (1) an exemption from price regulation for producers who are also handlers is not supported by the statute; (2) the shifting of balancing costs and the lack of uniformity in pricing create actual and potential disorderly market conditions; and that (3) the statutory requirement of uniformity of pricing must be honored in the decision resulting from these proceedings, therefore (3) Proposals No. 1, 2, and 3 should be adopted as modified at the hearing.

The opponent Producer Handlers have attempted to argue that they are somehow different from other producers and handlers because of their ownership structure, and that they deserve special treatment because of those perceived differences. But in the end they cannot overcome the fact that the statutes require price uniformity. Any exemption from the statutory requirement must be narrowly construed, if it can be justified at all. The burden is on the Opponents, and then upon the Secretary, to justify any such exemption from the clear language of the statute.

It is not sufficient to argue, as Opponents have, that they have previously had the benefit of the current language and for that reason alone they should be allowed to keep it. The same logic would have allowed a handler to prevent the first marketing order from being established. Any handler who feels negatively impacted by a rule change (for example, a decrease in a Class III or IV make allowance) could make the same argument Mr. Hettinga makes: He has relied on the old rules, therefore USDA shouldn't change the rules "in the middle of the game".⁸⁶ This argument cannot prevail, or the rules can never change – because most rule changes are unfavorable to someone who has relied on them in making past decisions. NDA

⁸⁶ Testimony of Hein Hettinga, Transcript at Page 2631, Line 23.

has long supported the Federal Order system, even in the face of some decisions that have had significant adverse impacts on our cooperative.

Milk order regulations change when needed, to reflect changes in marketing conditions. The record demonstrates that the nature of Producer Handlers has changed markedly from the days when such enterprises were exempted as a matter of administrative convenience. One of the changes documented in these proceedings has been the growth (and potential further growth) of Producer Handler operations, and the disorderly market conditions that have occurred already, and that can be expected to occur in the future, because the current regulations do not provide sufficient uniformity of pricing to ensure orderly markets.

The Secretary called this hearing to re-examine the Producer Handler regulations, and how they are working. The record has demonstrated changes in market conditions that are causing disorderly markets and non-uniform pricing in the Order 124 and Order 131 markets. The record supports the need to update the Producer Handler exemption by incorporating a 3,000,000 lb limitation. There was no testimony urging a different approach. The record is clear that the current Producer Handler exemption injures regulated bottlers (especially smaller ones of the same size of the Opponents) by depriving them of the “level playing field” which Congress mandated that the Secretary must observe, if the Secretary chooses to establish minimum class prices in milk orders. NDA respectfully suggests that the Secretary is left with little choice but to promulgate the proposed changes.

On behalf of the pooled producers whose milk we represent and whose bottling plants we operate, Northwest Dairy Association respectfully urges the Secretary to adopt the proposed adjustments to the Producer Handler exemption.

RESPECTFULLY SUBMITTED,

Douglas C. Marshall
Sr. Vice President,
Northwest Dairy Association