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

In the Matter of :
Milk In The Upper Midwest : **Docket Nos.:**
Marketing Area : **AO-361-A39;**
: **DA-04-03**
:

Comments Upon the Recommended Decision

on behalf of

**Cass-Clay Creamery, Inc., Dairy Farmers of America, Inc., Land O' Lakes, Inc.,
Manitowoc Milk Producers Cooperative, Mid-West Dairymen's Company,
Milwaukee Cooperative Milk Producers, Plainview Milk Products Cooperative, Swiss
Valley Farms Company, Westby Cooperative Creamery,
and Woodstock Progressive Milk Producers Association**

**Marvin Beshore, Esquire
130 State Street
P.O. Box 946
Harrisburg, PA 17108-0946**

Date: April 24, 2006

I. INTRODUCTION

These comments are filed on behalf of the proponents of Proposal 2 at the hearing. These ten (10) dairy farmer cooperative associations all market the milk of their members and in some cases, other dairy farmers and cooperatives, in Order 30. The holding of this hearing and its results are of great importance to these organizations. These organizations appreciate the Department's prior action implementing on an emergency, and now final, basis portions of Proposal 2. We now welcome the opportunity to comment upon the Secretary's recommended action upon the remainder of Proposal 2 advanced at the hearing held August 16-19, 2004. We trust that final action upon these important amendments to the Order to address depooling issues will be forthcoming at the earliest possible date.

II. THE RECOMMENDED AMENDMENTS TO LIMIT REPOOLING OF MILK SHOULD BE ADOPTED AS PROPOSED.

A. The Findings of Disorderly Marketing Conditions in Order 30 Are Appropriate and Important.

These cooperatives wish to commend the Secretary for the findings made concerning the basis for and nature of the disorderly marketing conditions created by open depooling of milk in Order 30. We believe these findings reflect important insights into the functioning of the order program and at the same time reject the contentions of those who suggest that the order program is nothing more than a mechanism for transfer payments from Class I handlers (and their suppliers) to all other producers. The Recommended Decision made the following findings and analysis:

The record reveals that when manufacturing handlers and

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

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

It is a fundamental purpose of milk marketing orders to provide a mechanism for establishing minimum uniform prices among all producers in a common milkshed and supplying a common marketplace. The recognition that order provisions which generate non-uniformity of prices among farmers need to be reviewed, revised and reformed to eliminate the disorder reflected in such nonuniform prices is an extremely important finding and decision for the order program. Many have commented in many different contexts -- both in this record and elsewhere -- that free and open depooling of milk, which has been such a prominent aspect of the federal

order landscape since January 1, 2000, in many ways makes a mockery of the system. This Recommended Decision, along with those for Order 32 and Order 33 which accompanied it, shows that the Department will move forward with tailored amendments to the orders to remedy this disorderly market condition. We commend and support the Department's efforts in this respect.

B. The Determination That Provisions Concerning Depooling and Repooling of Milk Should Be Addressed on an Order by Order Basis Is Correct and Appropriate.

A major issue was made at the hearing by those who sought to frustrate revisions to Order 30 to correct the depooling disorder that depooling was a national issue which could only be addressed, or should only be addressed, by changes to national pricing formulas or other order revisions made on a national basis. The cooperatives submitting these comments strongly support the conclusion of the Secretary and the Recommended Decision that depooling and repooling provisions in orders need to be addressed on an order by order basis because they are the function of marketing conditions unique in each area. We urge the Secretary to hold fast to this finding and adopt the proposed revisions to Order 30 as recommended.

The proposed amendments to Order 30 which provide for the ability to repool 125% (135% in the month of March) of the prior month's milk volume appropriately fit this market. These allowances are reasonable for the Order 30 market to the extent that they would accommodate substantial depooling and repooling over a period of several months. Nevertheless, the amended pooling provisions will materially change the status quo in this cheese-manufacturing-dominated region by requiring all handlers to factor into their depooling decisions the economic consequences of the required staged repooling. The provisions in Order 30 are appropriately different from those proposed for adoption in Orders 32 and 33 because the

marketing conditions and the demands of the marketplace in these areas are different.

We note, and the Secretary will note, that dairy commodity prices are currently at the support price level.¹ The cycles of dairy markets being what they are, at some point in the future, those prices will increase from the support level and this will create the possibility, perhaps the probability, of price inversions and negative PPDs, which are the triggers for depooling. We trust that the Secretary will expeditiously move forward on these Recommended Decisions so that a final decision is issued, any necessary referendum held, and the final order entered prior to the next depooling cycle.

C. Comments upon the Intended Operation of the Repooling Language.

We would like to iterate our interpretation and intentions, as proponents, with respect to certain of the language proposed for adoption by the Secretary.

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

At the same time, we wanted to make sure that milk shipments to pool distributing plants

¹ If necessary, official notice is requested of the Dairy Market News weekly publications during this comment period.

would be encouraged and pooled, and not inadvertently deterred. We did not want to set up a situation where a supplier would not want to deliver to fulfill a Class I order. If in a month following depooling, a supplier was near its maximum limit and had a Class I order, it may not want to ship if such deliveries would cause total poolings to be over the pooling limit. For this reason, we proposed the language included in the Recommended Decision as subpart (f)(1): “Milk shipped to and physically received at pool distributing plants shall not be subject to the 125 or 135 percent limitation;”.

It was, and is, our intention that for purposes of the 125% calculation we would expect that only the incremental amount over the prior month’s shipment to a pool distributing plant would be included in the “not subject to...” language of proposed (f)(1). The volume of deliveries equal to the prior month’s total shipments to distributing plant(s) should remain in the base amount to which the 125% or 135% is to be measured against. So as not to discourage shipments to distributing plants, however, any incremental volumes delivered to distributing plants should be “free” from any constraints of the 125% or 135 % repooling limitations. For this purpose, we propose to use shipments to distributing plants, rather than Class I deliveries, as the supplier has little or no control over the classification of milk at distributing plants and the supplier needs to know whether and how the delivery will be treated for pooling qualification purposes at the time of shipment.

Similarly in line with our overriding intention, in section (2) of section 1030.13 (f) we wanted to allow for milk to move between orders in line with any demands for milk but not to abet depooling. Thus, this allowance accommodates continual pooling for a six-month period on any milk that moves between orders as it affects and is included in depooling calculations. This should be enough of a deterrent to prevent milk from being able to shift between pools while trying to take advantage of depooling situations.

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

III. WE SUPPORT THE RECOMMENDED INCREASE IN THE MAXIMUM RATE OF ADMINISTRATIVE ASSESSMENT.

We support and approve the recommended increase in the maximum rate of administrative assessment under Order 30 to 8 cents per hundredweight. We would note, however, the following observations: adoption of the recommended revisions to the pooling provisions in Order 30, which will change the economic equation with respect to depooling and repooling milk volumes will materially impact the cash flow of the Market Administrator's administration fund in our view. The record in this hearing revealed that volumes pooled (which are the volumes upon which assessments are collected)

fluctuated from a low of 600 million pounds per month to a peak of 2.1 billion pounds per month, the instability of the Market Administrator's cash flow was evident and a remedy necessary. When the volumes pooled are more regularly at the 1.5 billion pounds per month level at which a 5 cent per hundredweight assessment provides sufficient funds for administration of the Order, the Market Administrator's need to increase the assessment beyond 5 cents per hundredweight should be quite limited. In the event that the assessment does need to be increased, however, we trust and expect that it will be done in a manner which attempts to equitably assess handlers so that there is not an extraordinary or excess burden upon regular milk serving the market in comparison with milk which is only available on an intermittent basis.

Again, we support the increase of the maximum rate of assessment so that the Market Administrator's operations may be on sound financial funding.

IV. CONCLUSION

These cooperatives again commend the Department for recommending what we believe to be the most appropriate solution for the disorderly marketing which currently results from the open depooling and repooling of milk on Order 30. We urge the Department to take the most expeditious possible action to make final the Recommended Decision.

RESPECTFULLY SUBMITTED,

Date: April 24, 2006

By: /s/ Marvin Beshore
Marvin Beshore, Esquire
PA ID #31979
130 State Street, P.O. Box 946
Harrisburg, PA 17108-0946
(717) 236-0871
Attorney for Cass-Clay Creamery, Inc., et al