

UNITED STATES DEPARTMENT OF AGRICULTURE
Agricultural Marketing Service
(Dairy Programs)

<u>Milk in the Upper Midwest</u>)	
<u>Marketing Area</u>)	
)	Dkt AO 361-A39
<u>Hearing on Proposals to Limit</u>)	DA 04-03
<u>Pooling of Distant Milk</u>)	7 C.F.R Part 1030

POST-HEARING BRIEF ON BEHALF OF:
Family Dairies USA

INTRODUCTION

Three groups of rulemaking proposals are before the Secretary in this proceeding dealing generally with (1) depooled milk and repooled milk, (2) pooling standards for milk supplies originating in the Upper Midwest area, and (3) how to exclude distant milk from the Order 30 pool. This brief on behalf of Family Dairies USA (“FDUSA” or “Family Dairies”) is limited to proposals designed to exclude distant milk by different and more burdensome pooling rules than apply to local milk – proposals 1, 2 (second part) and 6 (as amended by Dean at the hearing).

Family Dairies, with corporate offices are located in Madison, Wisconsin, is a Capper-Volstead cooperative association owned by Upper Midwest dairy farmers. Family Dairies is qualified to act as a cooperative handler under Order 30, and also operates an Order 30 pool supply plant located in Kewaskum, Wisconsin. Ex. 5, Table 1.

Family Dairies submits this brief out of a profound concern for the integrity of the Federal Milk Order Program and for the future of dairy farmers in the Upper Midwest. Although Family Dairies accommodates the pooling of milk from distant locations on the Order 30 Market, this brief is not submitted to argue that distant milk pooled in Order 30 is of general benefit to Upper Midwest Dairy Farmers.

Nor does Family Dairies argue that the pooling of milk in Order from farms located in Idaho, 800 miles or more from the Upper Midwest, promotes orderly marketing. The objectives of the Act would better be served if Idaho milk were pooled in a market local to Idaho. However, this is not currently possible because the Western Order was terminated upon disapproval of its terms by Dairy Farmers of America when the Secretary offered amendments for producer approval.¹

The pooling of milk from distant sources in many federal order markets has been facilitated or encouraged by the Federal Milk Marketing Order reform practice of pricing producer milk by location of plant receipt, at the same rate of adjustment for Class I milk prices, without regard to the location value of that producer milk to the market in which the milk is pooled. See 69 Fed. Reg. 19291, 19294 (April 12, 2004); 68 Fed. Reg. 37673, 37680-81 (June 24, 2003).

Prior to federal order reform, distant milk was frequently associated with the Upper Midwest market “from nearly all corners of the country.” 68 Fed. Reg. at

¹ The recommendations for amendment by the Secretary in the Western market was designed, for the first time in federal milk order history to our knowledge, to exclude from pool participation local producer milk, available but not needed for fluid use, that had previously been pooled in the order. The Secretary’s recommendation, however, would not have booted out of the pool as much non-DFA Idaho milk as DFA wanted. So the order was terminated at DFA’s insistence, and milk remaining in the Western Market is either part of unregulated individual handler pools, the unpooled supply of manufacturing plants, or has sought to be pooled in federal order markets distant from Idaho.

37684; Tonak, Tr. 371. Pre-reform pooling of distant milk was, however, somewhat constrained by price discrimination effected by producer location adjustments from the market center. The Secretary elected in Federal Order reform to eliminate such market-by-market adjustments in producer price at distant locations, although this result was *not* mandated by Congress. In the absence of open-minded agency consideration of a possible amendment to producer location adjustments (*see* note 3, *infra*), local producers intent on protecting their markets from the introduction of distant milk to the pool have repeatedly petitioned the Secretary to adopt discrimination against distant milk by means other than price. For the Upper Midwest Market, this hearing is “round two” of the post-reform quest by local producers to build a regulatory fence to keep distant milk out of the pool. Hahn, Tr. 125-126.

Discrimination designed to erect barriers to outside milk, as advocated by our sister cooperatives in the Upper Midwest, is undesirable as a practical matter because the two-edged sword of discrimination will cut most deeply against Upper Midwest producers seeking access other markets if discrimination is adopted as a desirable precedent for Order 30. The more fundamental problem with proposals to restrict distant milk by differential and discriminatory pooling standards, in Family Dairies’ opinion, is that such discrimination is not authorized by the Act. Rather, discrimination of this type is expressly prohibited by the Act.

The Secretary’s authority to promulgate milk order regulations under the Section 608c(5) of the AMAA is expressly constrained by three important statutory

limitations: (1) Uniformity is the norm. In classified prices for handlers, and blended uniform prices to producers, regulations must apply uniformly and equitably (7 U.S.C. §608c5(A) and (B)); (2) Discrimination or departure from uniformity is permitted, but only in expressly enumerated circumstances where exception to uniformity is preceded by the words “subject only to adjustments for...” (*Id*); and, (3) The Secretary may not erect trade barriers against outside milk. 7 U.S.C. §608c(18).

The proposals to limit pooling of distant milk contravene each of the foregoing principles. They create differential, non-uniform, and discriminatory burdens on distant milk. The discrimination proposed is not the type of discrimination (such as location-adjusted prices) authorized by the act. And they are designed to, and will have the effect of, creating trade barriers against milk from other production areas.

In round one of the Upper Midwest market barrier-building quest, the Secretary managed to avoid taking action in violation of trade-barrier restrictions by rejecting adoption of proposals similar to those now again under consideration by the agency. 68 Fed. Reg. 37673, 37684 (June 24, 2003)(Final Decision, Upper Midwest Marketing Order).² In that Decision, the Secretary nevertheless took careful and disapproving note of differential and discriminatory treatment of “distant” milk proposed by DFA and others in 1991:

This final decision finds basic agreement with some of the reasons offered in testimony and reiterated in briefs by opponents to DFA’s proposal for organizing “distant” milk into State units. Requiring

² In the decision on the last round, at 37684, the Secretary held that “the record does not support adopting the “state unit” or location-based performance standards for pooling milk on the order for the reasons articulated in the tentative decision.”

each State unit to ship at least 10 percent of the quantity of milk to a distributing plant regulated under the order effectively sets a performance standard different from the States that comprise Order 30. For example, of the milk received from Idaho, the DFA proposal would establish a standard for at least 10 percent of such milk to be shipped to a distributing plant in order for this milk to be producer milk pooled on the order. However, the same would not be required, for example, that 10 percent of all Wisconsin milk be shipped to distributing plants regulated under the order.

68 Fed. Reg. at 37684. The publication of the notice of hearing in this second round suggests that proponents have in some measure overcome agency reluctance to embrace trade barriers. It is therefore necessary again to review the relevant law and statutory policy.

ARGUMENT

A. THE “DISTANT MILK” PROPOSALS ARE INCONSISTENT WITH UNIFORM PRODUCER PRICE REQUIREMENTS OF THE AMAA.

A significant part of the statutory scheme for promoting orderly marketing is allowing producers of surplus milk and Class I milk alike to share in a uniform blend price, no matter how great the surplus. To achieve this result the act requires:

...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.

7 U.S.C. §608(c)(5)(b)(ii)(emphasis supplied). Such sharing of proceeds in the form of uniform producer prices is “the foundation of the statutory scheme.” *Zuber v. Allen*, 396 U.S. 168, 179 (1969).

Advocates of the distant milk proposals may observe that the proposals do not directly impose any discrimination based on price. The rule condemned in *Zuber v.*

Allen violated the Act’s uniform price requirement because it discriminated against distant producers in favor of nearby producers in the distribution of pool revenues. However, we do not believe that the mandate of uniform producer prices may be thwarted by a deliberate attack against its flank – in this case, a discriminatory transportation burden imposed on distant producers by government mandate rather than by the producer’s free marketing choices.

When Congress considered milk marketing orders and marketwide service payment authority in the 1985 Farm Bill – the Food Security Act of 1985 – the supporting Committee Report expressly recognized that producers who incur disproportionately large transportation costs to supply the fluid needs of the market results in those producers “not receiving uniform prices.” H.R. Rep. No. 271, Part I, 99th Cong., 1st Sess. 24-25 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 1103, *et seq*³. Proponents have come to essentially the same conclusion in their reasoning that the transportation costs associated with distant milk proposals result in an effective reduction of the pay price directly related to extra transportation costs. Such non-uniform prices resulting from a regulatory transportation mandate, especially one targeting specific groups of distant producers as proposed herein, must clearly be trumped by the superior mandate of the AMAA for “uniform prices” to producers under milk order rules.

³ The 1985 Farm Bill, amending 7 U.S.C. §608c5(L), also expressly authorized USDA to adjust producer prices in a manner different from Class I prices: “adjustments in payments by handlers under paragraph (A) [i.e., Class I differentials] need not be the same as adjustments to producers under paragraph (B) [i.e., producer blend or PPD prices].” Accordingly, the Secretary may lawfully apply §608c5(L), by considering proposals in a new or reopened hearing as an alternative, and direct, response to the perceived problem of “distant” pooling.

B. THE DISTANT MILK PROPOSALS ARE INCONSISTENT WITH THE ACT'S TRADE BARRIER RESTRICTIONS.

The distant milk proposals are designed to create a virtually insuperable barrier, in the form of government-mandated transportation and handling costs, to participation in the market pool by distant farm milk. This aspect of the proposals also requires a careful examination of 7 U.S.C. § 608(c)(5)(G), as authoritatively construed in *Lehigh Valley Coop. v. United States*, 370 U.S. 76 (1962). Quoting this section, the court in *Polar Co. v. Andrews*, 375 U.S. 361, 379 (1964), noted:

...under the present Act authorizing federal marketing orders in the milk industry, such an order may not "prohibit or in any manner limit, in the case of the products of milk, the marketing . . . of any milk or product thereof produced in any production area in the United States." This provision, as the Court explained in *Lehigh Valley Coop. v. United States* . . . was intended to prevent the Secretary of Agriculture from setting up trade barriers to the importation of milk from other production areas in the United States.

Prohibited trade barriers are not in any way limited to the type of pricing provision at issue in *Lehigh*. The provision is broad. As construed by *Lehigh*, it clearly prohibits the type of barriers to distant milk proposed here, which proponents readily acknowledge are designed to bar Idaho milk from pool entry.⁴

⁴ See, e.g., Beitlich, Tr. 92-95, urging the Secretary to "close the loophole that permits distant milk from being apart of our marketing Order;" Hahn, Tr. 125 confirming that LOL is "in favor of limiting access to the Idaho milk to the Upper Midwest." We refer the Secretary to our separate brief joining AMPI, et al, on other proposals, at n. 6 and surrounding text, concerning the administrative and judicial criticism of costs and "great waste" that the pooling methods the proposals employ would uniquely visit on distant milk supplies.

C. THE DISTANT MILK PROPOSALS ARE INCONSISTENT WITH EQUAL PROTECTION GUARANTEES OF THE FEDERAL CONSTITUTION.

Government action, including rulemaking, which benefits or burdens affected persons in a disparate manner must pass muster under Equal Protection requirements of the U.S. Constitution. That is, there must be a “rational relationship between the disparity of treatment and some legitimate government purpose.” *Heller v. Doe by Doe*, 113 S.Ct. 2637, 2642 (1993); *Roper v. Evans*, 116 S.Ct. 1620, 1627 (1996). While this is an extremely deferential standard, *Lamers Dairy Incorporated v. United States Department of Agriculture*, 379 F.3d 466 (7th Cir. 2004), the economic burdens of a legitimate government purpose may not be disproportionately imposed on one group over another. *Metropolitan Life Ins.Co. v. Ward*, 470 U.S. 869 (1985)(government purpose of promoting the economic welfare of a local industry violated Equal Protection when the means used was to create an discriminatory economic obstacle for outside competitors.); *Tovar v. U.S. Postal Service*, 3 F.3d 1271 (9th Cir. 1993).

We urge the Secretary, therefore, to examine not only the authority under the AMAA for the type of discriminatory rules advanced in this case, but also to make a critical examination of the purported government interest served by such discrimination and of the reasonableness of such discrimination in achieving that government interest. On close examination, we believe the Secretary will find that the proposed rules fail even the deferential Equal Protection standard.

CONCLUSION

For the foregoing reasons, the Secretary should terminate this proceeding as to distant milk proposals or deny the proposals on their merits.

Respectfully submitted,
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