



PAUL R. LEPAGE
GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
OFFICE OF THE COMMISSIONER
22 STATE HOUSE STATION
AUGUSTA, MAINE 04333

USDA
OALJ/OHC

2016 MAR 31 PM 3:03

RECEIVED
WALTER WHITCOMB
COMMISSIONER

Brenda Seegars, Acting Hearing Clerk
Office of the Hearing Clerk
United States Department of Agriculture
1400 Independence Ave., SW
Stop 9203, Room 1031, South Building
Washington, DC 20250-9203

Additional E-MAIL TO: oaljhearingclerks@ocio.usda.gov

Re: Post Hearing Brief In re: Milk in California; (AO) Docket No. 15-0071

Dear Ms. Seegars:

Enclosed please find the original and three copies of the post hearing brief in the above-captioned case.

Thank you.

Sincerely,

Walter Whitcomb, Commissioner

cc: Service List (via email)

HARLOW BUILDING
18 ELKINS LANE,



PHONE: (207) 287-3200
FAX (207) 287-2400
WEB WWW.MAINE.GOV/DACF

2016 MAR 31 PM 3:03

Before the United States Department of Agriculture

RECEIVED

In re:)
Milk in California) [AO] Docket No. 15-0071
AMS-DA-14-0095

Post Hearing Brief

This Brief is filed based on the hearing record developed by the Department to consider the four proposals to adopt a California Milk Market Order. The hearing record includes my testimony, where I expressed my support for the Cooperatives' effort to establish an Order to promote the interests of their producer members, but where I also stated that the Order should be adopted only if the Department is assured that it would not cause harm to producers in other regions of the country.

My testimony also included recommendations for how the Department may include provisions in the Order, if it is adopted, to minimize the harm that might occur. My recommendations were that the Department include provisions that would allow it to act quickly, using notice and comment rulemaking instead of the contested case format.

- 1) If the Department is to adopt the Cooperatives' proposal, it must first ensure that the result will not depress producer prices and production in other regions. If the results of the Department's Preliminary Report are correct that prices and production are negatively impacted in other regions, then the Department should reject the proposed Order.**

The Department must make Findings of Fact and Conclusions of Law establishing that the evidence presented in the Preliminary Report, indicating these likely adverse outcomes, has been successfully overcome by contrary

evidentiary representations, particularly with regard to the likelihood of increased milk production in California.

The Department's "Preliminary Regulatory Impact Analysis of Proposals to Establish a California Federal Milk Marketing Order" ("Preliminary Report")¹ contains a number of tables and accompanying analysis indicating that the Cooperatives' proposal would cause reduced producer prices in other regions of the country and a corresponding reduction or flattening of milk production in other regions of the country. Witnesses from the Southeast region as well as myself from the Northeast region provided testimony about the substantial harm this would cause for producers in our states, and for the programs our states have adopted to sustain and promote our in-state fluid milk supplies.²

I incorporate the analysis on these points presented in the Brief submitted by the Maine Dairy Industry Association, Kentucky Dairy Development Council, Georgia Milk Producers, Inc. and the Tennessee Dairy Producers' Association.

Counsel for the Cooperatives cross examined me about the contrary evidence he believed exists in the record with regard to the errors in the Preliminary Report's production base line, indicating California milk production has leveled recently, and he further represented that the Cooperatives have adopted base plans aimed at ensuring milk production would remain under control. Despite Counsel's contentions, the situation is not as clear as he indicated. I stand, first, by what I said in reply to his question:

We, you know, I don't profess to have any, nearly as much knowledge probably as anybody in this room as far as price expectations. But we certainly wanted to register our worry, as you heard from producers and representatives from producer groups yesterday in those regions that still need additional milk

¹ Exhibit 5.

² Calvin Covington, Transcript, October 20, 2015; Richard Sparrow, Transcript, November 12, 2015, p. 7360; Everett Williams, Transcript, November 12, 2015; p. 7337.

production, the pressure would be negative. I just think that with the discussion that goes on in so many places about the regional need and the obvious political importance of having production in every part of the country, that want to be very, very cautious, that, you know, we don't end up with even a small amount of pressure in areas that are very, very sensitive to price fluctuations.

....So we register our concern with this testimony. You know, I certainly appreciate USDA's challenge to try to understand crystal balls that are very clouded, as well as so many, so many factors.³

In the end, there remains the basic issue as to the actual state of the Record on these potential problems. The Record includes over 8100 pages and contains 194 Exhibits. The Department must go back through the Record and make sure that the serious difficulties raised by the Department's Preliminary Report are in fact addressed somewhere, as the Cooperatives' Counsel indicated they were.

If Counsel for the Cooperatives is correct, then the Department should be able to so find, and thereby proceed based on this finding to issue the Order, with the outcome we all desire. If as I contend, the findings are less conclusive than Counsel suggests, then the Department must act prudently on behalf of producers regulated under the remainder of the system, representing the other, 75% of the nation's milk supply, and reject the proposed Order.

- 2) If the Department issues an Order, the Order must include provisions that will allow the Department to take prompt action to address adverse impacts in other regions.**
 - a. Before any implementation of this proposed Order, the Department needs to develop a process of notice and comment rulemaking that may be rapidly employed by Market Administrators in other regions, to enable a quick response to adverse pricing and production impacts if these emerge.**

³ Id at 7629-30.

In my testimony, I proposed the Department must divert from its usual cumbersome regulatory approach, and instead institute a more modern rulemaking process that would allow it to intervene quickly if adverse impacts arise in other parts of the country.

I believe the Department should establish conditions allowing for the Order's adjustment by informal rule making. Clearly, the Department is bound by the law's requirement of a producer referendum...The referendum approval process, however, may itself be used to approve the conditions, and thereby allow for more flexible rule making, effectively to raise issues of concern and to begin to develop, with the Department, a formal record that could be used to initiate the more formal rule making procedure, if the process reveals that such a hearing is needed.

It does not serve the public or dairy interests for the USDA hearing process to take years to advance. The Department needs to respond to situations like the volatility in Class III pricing that has caused so much damage to our industry. The Department should take care to craft a California Order to enable it to be amended in a more dynamic fashion in response to profound changes that will inevitably result from the position of the California Order.⁴

By this Brief, I reiterate this recommendation. The Department well knows that informal rulemaking provides substantially more latitude than contested case rulemaking. This is not "out of the box" thinking by any means. If the Department is to impose an Order for 25% of the milk supply, it must take every measure it can to ensure that it can act to protect the other, broad majority of the nation's milk supply.

b. With increased milk production by California the key consideration, these provisions should establish a range of acceptable production increase, and provisions to ensure production stays in such range.

The Maine Dairy Industry Association (MDIA) has proposed that the Order, if adopted, include provisions that ensure that California milk production will not increase so

⁴ Transcript, November 13, 2015; pp. 7621-22.

as to cause the harm anticipated by the Department's Report. I affirm this approach, with the addition of a further procedural design suggestion.

As MDIA proposes, these provisions should be patterned on Exhibit 6, which describes Land O' Lakes' existing base plan. As with that plan, all producers should have an allowable base. The provisions should rely further on a strong enforcement mechanism along with an incentive, to ensure continued compliance by producers with their base allocations.

My further suggestion is that the provisions should include a range of possible ongoing regulatory oversight and review, and intervention if needed. Again, these provisions may be patterned on the Land O' Lakes plan. That plan includes the imposition of additional reductions and the establishment of a range of acceptable base allocations. As long as the producers have approved these ranges by referendum vote, the ranges will be allowable regulatory provisions of the Order.

Respectfully submitted,



Walter E. Whitcomb, Commissioner

Dated: March 31, 2016