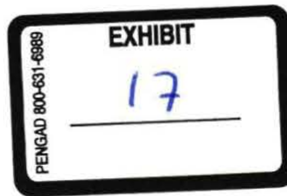

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August 17, 2015

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Ms. Dana Coale
Deputy Administrator
USDA/AMS/Dairy Programs
STOP 0231, Room 2971
1400 Independence Ave, S.W.
Washington, D.C. 20250-0225

Re: August 5 Letter Rejecting Dairy Institute of California Alternative Whey Formula

Dear Ms. Coale:

This letter responds to Mr. William Francis' letter of August 5, 2015 in which your office explained its refusal to include the Dairy Institute of California's May 27, 2015 alternative for pricing whey in the Class III formula for any California Federal Milk Marketing Order ("FMMO").

As a procedural matter, we ask that you reconsider this decision and issue a supplemental Notice of Hearing which includes that alternative proposal.

We do not believe that the standard for inclusion before a hearing is even noticed described in the August 5 letter (a reasonable alternative of the initial proposal) is correct. That is the standard at the hearing, but before the hearing notice has been drafted and signed, USDA can and should include in any hearing notice a proposal that goes to the initial submission and any section of a proposed FMMO that is opened by that initial proposal.

Even if it is the correct standard, we clearly meet it. The proceeding that USDA has now noticed for hearing is a promulgation hearing as there is not now any FMMO for California. The Dairy Institute's alternative for what would be section 50(q) of any such Order would be an appropriate modification even at the hearing as noticed as that paragraph, section, and indeed proposed Part of the CFR is open for consideration. For example, if any interested person were to appear at the hearing and propose elimination of the whey factors contribution to the Class III price entirely that would be in order given that this is a promulgation hearing.

Two cases are instructive. In 1988, USDA held a four week hearing to consider proposed amendments to then Orders 1, 2 and 4. Part of those proposals was to adopt a more uniform method and timing for twice a month payments made to dairy farmers. The National Farmers

Organization ("NFO") submitted a proposal in advance of the proceeding to consider the alternative of three times a month payments. USDA declined to hear that proposal. NFO successfully sought federal court intervention during the proceeding and the agency was obligated to issue a revised hearing notice permitting that issue to be heard. *National Farmers Org., Inc. v. Lyng*, 695 F. Supp. 1207 (D.D.C. 1988).

More recently, when the Department issued a Final Rule for Order 33 regarding pooling issues that adopted a USDA modification to proposals noticed for hearing, dairy farmers unsuccessfully sought to block the result by arguing that the specific proposal adopted had not been part of the Hearing Notice. Judge Posner, writing for a unanimous Seventh Circuit panel, soundly rejected this argument – upholding USDA's effort to adopt amendments that were not part of the Hearing Notice: "The purpose of a rulemaking proceeding is not merely to vote up or down the specific proposals advanced before the proceeding begins, but to refine, modify, and supplement the proposals in the light of the evidence and arguments presented in the course of the proceeding. If every modification is to require a further hearing at which that modification is to set forth in the notice, agencies will be loath to modify initial proposals, and the rulemaking process will be degraded." *Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003).

We are concerned that not only will "the rulemaking process be degraded," but that your office's refusal to hear this proposal, if it continues to be excluded even at the hearing, will result in unnecessary uncertainty regarding the outcome of the proceeding especially as handlers may have to await the final outcome before making any challenge to the result.

Respectfully,

Chip English

cc: Mr. William Francis