

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE SECRETARY OF AGRICULTURE

IN RE: MILK IN THE NORTHEAST AND
OTHER MARKETING AREAS; NOTICE OF
HEARING ON PROPOSED AMENDMENTS
TO MARKETING AGREEMENTS AND
ORDERS

Doc. No. 23-J-0067, AMS-DA-23-0031

Objection To Exclusion Of Proposals Submitted By National All-Jersey
And Motion To Include The Proposals And Related Evidence In This Proceeding

By and through the undersigned, National All-Jersey objects to the Secretary's decision to exclude two of National All-Jersey's proposals and moves to have evidence concerning the proposals entered into the record of the above-referenced proceeding on the basis of the following.

After inviting proposals regarding "potential amendments to the current pricing provisions applicable to all FMMOs" and "proposed changes to pricing provisions effective in all eleven FMMOs"¹ the Secretary of Agriculture advised National All Jersey (NAJ) that their proposal to apply Multiple Component Pricing (MCP) in all eleven orders had been excluded from the pending proceeding because it "does not seek to amend the uniform FMMO pricing formulas."²

Before that determination by the Secretary, National Milk Producers Federation (NMPF) wrote a letter dated June 30, 2023³ seeking to exclude certain proposals from the hearing. With respect to NAJ proposals 2 and 3, which were presented in NAJ's revised proposal submission of June 20, 2023,⁴ NMPF said that "[p]roposals 2 and 3 address component pricing of milk for all classes. As the Department made clear in Federal Order Reform, this issue is to be considered on an order-by-order basis. Consequently, these proposals are not germane to this possible hearing."

NAJ responded to the NMPF June 30 letter with a letter dated July 13, 2023⁵ and explained that NMPF was wrong in its characterization of the NAJ proposals and noted that NAJ had offered sample language in its proposal submission dated June 20, 2023 to give notice of the planned change, but that NAJ planned to present MCP language at the hearing that would amend part 1000 stating:

¹ See Attachment A, USDA Action Plan and Request for Additional Proposals June 1, 2023.

² See Attachment B, Notification from Deputy Administrator dated July 24, 2023 regarding the exclusion of NAJ proposals 2 and 3.

³ See Attachment C, Letter from NMPF dated June 30, 2023 seeking to exclude proposals.

⁴ See National All-Jersey revised proposal submission dated June 20, 2023 available at <https://www.ams.usd.gov/sites/default/files/media/NationalAllJerseyRevised.pdf>

⁵ See Attachment D, Letter from NAJ dated July 13, 2023 responding to NMPF letter dated June 30, 2023.

With the proposal by NAJ to extend MCP to all FMMOs, this could be an opportunity to create uniformity, streamline orders, and implement MCP language in Part 1000, while still leaving order specific provisions such as SCC and some other unique redistribution provisions for individual order language. This would be similar to the universal accounting rules for partially regulated handlers in 7 CFR 1000.76. NAJ is prepared to present such language.

The Secretary did not respond to NAJ's letter or acknowledge it in the July 24, 2023 explanation of why NAJ proposals 2 and 3 were being excluded from the hearing. See Attachment B. The Secretary denied NAJ's proposal 2 stating the proposal "seeks a regional[1], not a national pricing change. As this change does not seek to amend the uniform FMMO pricing formulas, the proposal does not fall within the scope of this hearing and will not be heard at this time." However, NAJ's July 13 letter made clear that NAJ intended to amend the uniform provisions in order to extend MCP for Classes II, III, and IV across all orders. In NAJ's proposal submission and again in NAJ's July 13 response to NMPF, NAJ explained that the language that had been presented was merely sample language that had been readily available.

The Secretary failed to consider NAJ's representations in NAJ's July 13, 2023 communication to the Deputy Administrator that NAJ planned to present language to amend the uniform provisions to bring about MCP nationally. The Secretary expressed no other reasons for the exclusion of Proposal 2.

According to the *District Court in Nat'l Farmers Org., Inc. v. Lyng*, "the Secretary 'has the authority to determine the reasonable scope of a rulemaking proceeding and ... court[s] will not interfere unless that determination has been shown to be arbitrary and capricious.'" 695 F. Supp. 1207, 1210–11 (D.D.C. 1988). It has been held that "the Secretary must have legitimate reasons, based on facts, to support his decision" on which proposals to include in a hearing. *Id.*

The Secretary's reason for excluding NAJ proposal 2 is not supported in light of NAJ's July 13 letter, and no other reasons for the decision to exclude NAJ proposal 2 were offered, therefore, it follows based on the available record that the Secretary's decision to exclude proposal 2 was "not supported by legitimate reasons, based on facts" and thus was arbitrary and capricious. Instead, NAJ's proposal 2 must be part of the hearing.

Since NAJ proposal 3 (extending MCP to Class I pricing in all FMMOs) was excluded as being premature given that MCP for manufacturing classes was not in place nationally, the Secretary's decision to exclude NAJ proposal 2 is the reason for the exclusion of NAJ proposal 3, thus making the exclusion of NAJ proposal 3 improper to the same extent that the exclusion of NAJ proposal 2 is not proper.

Therefore, NAJ respectfully objects to the exclusion by the Secretary of NAJ proposals 2 and 3 as "lacking legitimate reasons based on facts" and therefore being arbitrary and capricious and requests that evidence with respect to NAJ proposals 2 and 3 be permitted as part of the current proceeding because the preliminary analysis presented in NAJ's revised proposal submission dated June 20, 2023 indicates that including the proposals will, consistent with the NFO case precedent, tend to effectuate the declared policy of the AMAA by bringing about better alignment of pricing

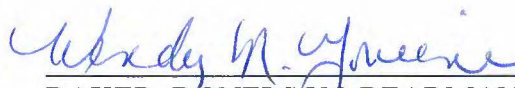
between classes and support uniform pricing among producers and handlers thereby reducing the incentives to move milk in ways that unnecessarily generate transportation costs among other things.

If the Secretary had included NAJ's proposals 2 and 3 in the hearing notice, NAJ would have been able to expand on the analysis and arguments set forth in NAJ's June 20 revised proposal submission. The arguments and data presented in support of NAJ proposals 2 and 3 in NAJ's June 20 revised proposal submission are offered as NAJ's offer of proof reflecting the kinds of evidence and arguments that would be presented if permitted.

NAJ is prepared to offer testimony and evidence in support of NAJ proposals 2 and 3 beyond that which has already been submitted, including uniform language to implement NAJ proposal 2. Including the proposals will afford the Secretary the opportunity to evaluate the best way to address lack of pricing uniformity and disorderly marketing conditions that are expected to be discussed by NMPF and NAJ witnesses in support of the Composition proposals that were included in this proceeding. While updating the skim factors applicable to Classes II, III, and IV in the skim fat orders and the skim factors applicable to Class I in all orders will improve the current disorder, evidence in support of NAJ proposals 2 and 3, if allowed, will show that MCP across all orders will be even more impactful in mitigating disorder.

Dated: August 23, 2023

Respectfully submitted,



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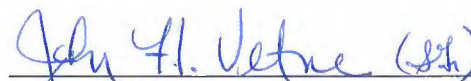
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