

April 10, 2015

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Deputy Administrator  
USDA/AMS/Dairy Programs  
STOP 0231, Room 2971  
1400 Independence Avenue, S.W.  
Washington, DC 20250-0225

Dear Deputy Administrator:

**Introduction.** These comments and this proposal are submitted on behalf of Ponderosa Dairy in response to the petition filed by California Dairies, Dairy Farmers of America, and Land O Lakes to replace the current California state milk marketing order with a Federal Milk Marketing Order (Cooperative Proposal) while maintaining hand-selected aspects of the California quota system as an overlay.

Ponderosa Dairy is a dairy farm located on the border with California in Amargosa Valley, Nevada. The dairy was established in 1994 to supply fluid milk to California. When Ponderosa Dairy was established, California producers establishing dairies were eligible to purchase or otherwise obtain quota. Out-of-state producers were not. Instead, out-of-state producers were permitted to receive the plant blend for their milk (*i.e.*, average class price based on the plant's utilization). The plant blend has been important to out-of-state farms that were denied the ability to own quota and the concomitant benefit of its asset value as well as the guarantee of the higher of the two blend prices, and denied the benefits of transportation subsidies. In essence, the plant blend for out-of-state raw milk shippers has served as the alternative to being permitted to own quota.

The Cooperative Proposal would fundamentally alter the pricing that has been available to Nevada raw milk shippers such as Ponderosa during most of the life of the California pooling and pricing program. The proposed alterations pertaining to Nevada raw milk shipped to a California fluid plant would not only frustrate Ponderosa's investment in Nevada, which was made against the backdrop of the California system, but it would both offend 7 U.S.C. 608c(5)(G) and run counter to the spirit of the Farm Bill provision providing for authority of USDA to take steps to recognize quota value. Ignoring the long-standing plant blend status of out-of-state milk by relegating out of area milk to non-quota status would run counter to the

Farm Bill provision and would certainly amount to discrimination based on the out of area status of shippers like Ponderosa.

**No Basis for Promulgating a FMMO:** The Cooperatives have not presented sufficient evidence of a need to promulgate a federal milk marketing order. Before an extensive hearing is commenced that will involve great expense to the industry and uncertainty over an extended period of time, the Department is urged to investigate whether conditions are sufficient to demonstrate a need for a federal order. In order to issue an order the Secretary must adduce evidence that an order would tend to effectuate the purpose of the Agricultural Marketing Agreement Act (AMAA or the Act). 7 USC § 608c(4).

The purpose of a federal milk marketing order is to ameliorate cutthroat competition geared toward fluid milk sales, which tend to depress prices and destabilize markets. *Zuber v. Allen*, 396 US 168, 172-174 (1969). The discussion to date does not suggest that these problems exist. Moreover, there is no indication that the current treatment of out of area milk is causing any of these marketing conditions. Handlers buying Nevada milk, for instance, pay the plant blend price – *i.e.*, the average of class utilization for the plant. Thus, handlers buying out of area milk face the same regulated prices as they must when purchasing from California producers. There are in fact instances within existing federal milk marketing orders in which USDA has determined that producer milk need not be included in a marketwide pool when the handler can show that they are paying comparable regulated prices. *See e.g.*, 7 C.F.R. 1001.76.

Accordingly, Nevada raw milk does not cause disorderly marketing. More importantly, with respect to the proposed treatment of Nevada milk that has been historically marketed in California as fluid milk, the Cooperatives do not point to price-cutting by Nevada farmers or other common concerns FMMOs are intended to address. *See e.g.*, *Zuber v. Allen*, 396 U.S. 168 (1969) (noting that among the issues FMMOs are designed to address are ruinous competition among producers). Instead, proposing that Nevada milk receives the lowest of two blend prices is apparently proposed to capture that revenue for the *California* pool. Cooperative Letter dated February 3, 2015 p. 14. But, enhancement of the pool price, especially when there is no evidence that there would be a material impact, has not historically served as a basis for making an amendment to or issuing a federal milk marketing order. *Lehigh Valley Farmers v. Block*, 829 F.2d 409, 415 (3d Cir. 1987) (quoting the Secretary that “extension of regulation to this area would not result in any perceptible improvement in returns to [the nonregulated] dairy farmers and would not materially affect prices under the orders.”).

**The Cooperative Proposal Erects A Trade Barrier.** The Cooperative Proposal as it relates to Nevada milk historically marketed into California as a Class I milk discriminates against out of area milk in violation of section 608c(5)(G).

Relegating out of state milk to a the lower of the two blend prices being proposed (hereafter, lower blend) necessarily implicates 7 U.S.C. 608c(5)(G), which prescribes “No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in

any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.”

As acknowledged in the Cooperative Proposal, the intended effect is to capture more revenue for the California pool. Cooperative Letter p. 14. But that revenue will be subsidizing a pool price – quota - that is only available to California producers. At its heart, this amounts to discrimination based on the outside-of-California status of out of area milk producers.

Indeed, similar treatment that at least attempted to approximate the benefits of quota was struck down as a discriminatory trade barrier under the negative aspect of the Commerce Clause in *Hillside Dairy, Inc., et al v. Kawamura*, 317 F. Supp. 2d 1194, 1198 (E.D. Cal. 2004). In *Hillside*, California processors purchasing out-of-state milk were required to pay into the pool the difference between the “gross pool obligation” and the lesser of plant blend or modified quota. *Id.* 1197. In effect, this meant that out-of-state producers were subsidizing California’s quota program and as a practical matter receiving at best the modified quota price, which the court found did not encompass all of the benefits of quota. Thus, the Court concluded that “[s]ince the 1997 amendment to section 900 requires out-of-state raw milk producers to pay for benefits received exclusively by California dairy businesses, it is similar to the milk pricing order in *West Lynn*” and concluded that the regulation was discriminatory. *Id.* 1198. Notably, the regulation at issue in *Hillside* was less burdensome than the current proposal.

This discrimination is not permitted simply because the Cooperative Proposal is seeking to impose such treatment under the guise of a federal milk marketing order. That was settled in *Lehigh Valley Dairies v. U.S.*, 370 U.S. 76 (1962). In that case, the Supreme Court studied the legislative history of section 608c(5)G and determined that it “was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products.” *Id.* 97. In that case, a compensatory payment was ran afoul of section 608c(5)(G) because it involved a payment by out of area milk through the handler that effectively neutralized the ability of out of area milk to compete. *Id.* 89-90. There can be no doubt that discrimination based on geographic location outside of the marketing area, that subsidizes better pool prices for those inside the marketing area while denying the same benefits, is necessarily a trade barrier, consistent with the analysis in *Hillside Dairy* and *Lehigh*. Accordingly, discrimination of the sort in the Cooperative Proposal based on milk’s out of area status thus offends the Agricultural Marketing Agreement Act.

The differential treatment is exacerbated by the Cooperative Proposal’s reliance on the Farm Bill to essentially preserve the status quo with respect to how milk revenue is distributed, except as to minority participants like Ponderosa Dairy. If the status quo is going to be preserved, all aspects should be preserved. However, the Cooperative Proposal has hand-selected the aspects of the California quota program they wish to retain. In failing to recognize that Nevada producers never had the chance to own quota, they have specifically and permanently relegated them to second-class status, not by choice, but by virtue of their location outside of California.

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**A Wichita Option Is Proposed For Plants Handling Out Of Area Milk.** For the numerous reasons discussed herein, Ponderosa Dairy urges the Department to seriously consider whether there is sufficient indication that the kind of disorderly marketing that lies at the heart of federal orders is present to justify a federal order in California. If a hearing is held, however, the Department is urged to consider a proposal such as the one being presented herein by Ponderosa Dairy (subject to refinement or revision) that seeks to both ameliorate the trade barrier created by the current Cooperative Proposal with respect to out of area milk and retain the plant blend status historically afforded to Nevada milk. It is offered so that out of area producers are not subsidizing quota for California producers.

A new provision could be added to a California order as follows:

Any handler may elect partially regulated distributing plant status for any plant located in the California marketing area with respect to receipts of raw milk for fluid use from outside the California marketing area. Such plant shall account to the producer-settlement fund in accordance with subsections (a) or (b) of section 1000.76 with respect to receipts of raw milk for fluid use from outside the California marketing area.

Milk Marketing Orders may utilize individual handler pools and they are presently used in some cases. *See e.g., Lehigh Valley Farmers v. Block*, 829 F.2d 409 n.1 (3d Cir. 1987). The proposal being submitted herewith is intended to provide for handlers receiving out of area milk to establish a partial individual handler pool for the out of area milk and to account to the pool using what is commonly referred to as the Wichita Option. This proposal is intended to ensure that regulated prices are enforced. The risk of out of area milk pricing undercutting regulated prices for California produced milk is thus ameliorated. This proposal would have the additional benefit of ensuring that out of area milk is not subsidizing benefits available only to producers located within the California marketing area.

Thank you for the opportunity to provide comments and a proposal for consideration and discussion. Due to serious time constraints related to when counsel was retained, on behalf of Ponderosa Dairy, I am hopeful that there will be an opportunity to refine these comments and this proposal based on further analysis, the information sessions and further discussion and research.

Respectfully submitted,

/s/ Wendy Yoviene

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