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BY E-MAIL and 1st CLASS US MAIL

Ms. Dana Coale, Deputy Administrator
USDA – AMS – Dairy Programs
Stop 0225, Room 2968 – South
1400 Independence Avenue, SW
Washington, DC 20250-0225

Re: Southern Marketing Agency, Inc. Request for Suspension
Milk in the Appalachian, Florida and Southeast Marketing Areas
AMS-DA-07-0059 and AMS-DA-09-0001

Dear Ms. Coale:

Dean Foods submits this preliminary opposition to the Southern Marketing Agency ("SMA") April 26, 2013 request to suspend provisions of Orders 5 and 7 (7 C.F.R. Parts 1005 and 1007) concerning transportation credits.[1] Dean Foods respectfully requests that if this matter proceeds further that your office use Notice and Comment rulemaking, publishing in the Federal Register, with respect to any proposed suspension of all or significant portions of Parts 1005 and 1007 §§ 13(d)(3), 13(d)(4), 30(a)(5) – 30(a)(7), 32(a), and 80 – 83.

Dean Foods first learned of the April 26th request on May 2. SMA did not include Dean Foods in any advance notice or even as a copy on its submission even though it knows surely that Dean Foods is a significantly affected industry player with 11 fluid milk plants regulated on Orders 5 and 7. The timing is critical because these now long-standing transportation credit provisions require substantial advance planning and careful pooling decisions regarding individual dairy farmers' deliveries of producer milk to plants regulated by Orders 5 and 7. These decisions are made prior to March of each year and implemented during March through May of each year. SMA waited until the planning was complete and implementation two-thirds complete before making its request. Granting the suspension at this point in time would seriously and substantially harm Dean Foods' business decisions made in reliance on the existing transportation credit program.

[1] Although this submission discusses procedural issues and opposes the suspension merits only (and does not discuss merits regarding transportation credits), out of an abundance of caution, this letter is being filed with the Hearing Clerk's office in the open proceedings - AMS-DA-07-0059 and AMS-09-0001.

Without conceding that any suspension is appropriate, the time to have any discussion is prior to March of any year, with a suspension beginning March 1. That would provide everyone a level playing field, advance planning and protection from the financial consequences of that suspension. The proponents concede that Dean Foods and others have and are paying money into the transportation credit balancing funds under Parts 1005 and 1007 §§ 80 and 81. That money is intended to build up the fund for the purpose of partially compensating for movements of milk into deficit milk marketing areas beginning in July, 2013.

While the proponents apparently recognize the inherent unfairness of making handlers pay that money into the fund if the program is suspended, their reference to repayment of monies already paid in under the "General Provisions" lacks a citation to authority for the Market Administrator to act. Dean Foods concludes that that lack of citation is deliberate because nothing in the General Provisions obviously permits that result. The closest possibility is Part 1000 § 26(d)(2): providing for equitable distribution to producers and handlers of funds left-over when a market administrator's office closes and is liquidated. While the paragraphs reference "suspension," the language does not provide, on its face, for reimbursement of funds under a transportation credit fund of this type. Absent clear legal authority for reimbursement, handlers, such as Dean Foods, risk paying for moving milk twice – once for payments into the fund that are not reimbursable and a second time for the actual milk. Unless this issue can be conclusively and affirmatively determined in advance, Dean Foods submits that such a result would be an inequitable, unfair and improper use of the suspension process.

Even if the monies already paid in and still being paid in, could be refunded, suspension now would unfairly penalize handlers that have made significant pooling and delivery decisions implemented in March, April and now in May. Without knowing that suspension was possible, Dean Foods has naturally been making its annual decisions with respect to Parts 1005 and 1007 §§ 82(c)(2) – meeting the conditions for receiving credits later in the year with respect to the movement of bulk milk received directly from producers. Those decisions cannot be un-done and yet Dean Foods incurred both direct and indirect costs in implementing those decisions. As this letter is being drafted, the April pool reports are being completed and submitted virtually at the same time as this opposition letter. March pool reports, of course, have already been filed. Milk demands for the month of May are committed.

As a handler not included in SMA's discussions, Dean has been handling milk at the lowest cost possible, while focusing on maintaining eligibility for transportation credits for which Dean has and is making payments to the transportation credit balancing fund. While agreeing with SMA that June 2013 should not be included as a transportation credit payment month this year, Dean has managed its milk supply with incremental higher expenses already incurred with the expectation that the transportation credits would offset those additional costs. For instance, Dean has used further distant milk at times this spring to serve plant demands, while re-directing closer milk. This action was necessary in order to maintain eligibility of the closer milk to receive the transportation credits later in 2013. Dean's decisions, already made and implemented, would have been entirely different had they had notice of this potential action. Thus the timing of the

proposal, if adopted, would change the market and deprive those like Dean from recouping expenses incurred without fair or adequate notice.

Moreover, adopting SMA's request now would disrupt the value of milk – lowering the value of some milk and raising the value of other milk. Any advantage would accrue to the SMA cooperatives who knew that they were going to seek the suspension. The late April submission with July implementation does not provide Dean Foods or other handlers "not in the know" with the advance ability to evaluate or change sourcing strategies which are now committed for 2013. Dean Foods has contracts for milk with notice periods that can no longer be met in order to alter arrangements; with sufficient warning and time, Dean Foods would have been in a position to adjust these contracts and schedules. This is another reason why March 1 (with advance notice) would be the only appropriate time to pursue suspension, if suspension is appropriate at all.

Dean Foods is also concerned about any possibility that the Market Administrator, without pursuing Notice and Comment rulemaking, might seek to achieve the proponents' result through use of his permissive powers. However, with respect to the transportation credit provisions of Parts 5 and 7, Dean Foods concludes that the Market Administrator possesses flexibility with respect to only two areas – including June as a credit payment month and adjusting producer milk conditions under § 82(c)(2)(iii). On the other hand, the mandatory word "shall" is used 18 times in Parts 1005 and 1007 § 80 – 83. Moreover, the Market Administrator, absent suspension, must collect the required payment from handlers and must pay without flexibility on milk received from the plant of another regulated hander (other than Orders 5 or 7) pursuant to §§ 80, 81 and 82(c)(1). The proponents effectively acknowledge this requirement for actual suspension (and thus Notice and Comment rulemaking) by requesting suspension of all or part of 10 sections in each Part 1005 and 1007.

In the end, this unprecedented suspension request (Dean Foods is aware that most, if not all, suspensions have dealt with one section or a part of a section, primarily involving shipping or pooling requirements on an Order) looks suspiciously like an Amendment to Orders 5 and 7 without going through the formal rulemaking process to achieve an amendment. Proponents readily admit that they don't want to risk a formal rulemaking process because of industry opposition to transportation credits. Thus, SMA's request would use an improper process. If SMA has changed its mind with respect to its view of the transportation credits rule and process (they were the proponents after all in the latest rounds of hearings), then they should petition the Secretary to re-open the hearing record. That would give both the Secretary and industry an opportunity to actually discuss the issues in a deliberate and legally appropriate manner. That would permit the Secretary to find the best solution for industry and provide handlers the necessary time to consider and implement changes in milk sourcing.

The proposal looks like an amendment, walks like and amendment and quacks like an amendment. It really appears to be precisely that. If suspension is granted, but later successfully challenged by any party in interest, the resulting chaos (not from the challenge, but from the improper suspension) would be far worse than proponents' concerns with the way they see the program working today.

The request should be denied.

Respectfully submitted,

s/ Chip English

Charles M. English, Jr.

cc: Office of the Hearing Clerk, USDA
Mr. Jeffrey Sims, Jr., Assistant Secretary, Southern Marketing Agency, Inc.
Mr. Harold H. Friedly, Jr., Market Administrator, Appalachian Order
Mr. Erik Rasmussen, Acting Market Administrator, Southeast Order