

DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

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Milk in the Northeast Marketing Areas;)
Hearing on Proposed Amendments to)
Tentative Marketing Agreements and Orders)

Docket Nos.: AO-14-A-70; DA-02-01

**COMMENTS AND EXCEPTIONS TO
THE RECOMMENDED DECISION
FILED ON BEHALF OF NEW YORK STATE DAIRY FOODS ASSOCIATION, INC.**

INTRODUCTION

New York State Dairy Foods Association (“NYSDF”) files these Comments and Exceptions to the Recommended Decision published March 25, 2004 in the Federal Register. Overall, NYSDF’s reactions are overwhelmingly positive and, with some suggestions discussed below, NYSDF urges quick, final adoption of the needed amendments, especially the Reporting and Payment Dates and Pooling Provisions. NYSDF reiterates its opposition to the Marketwide Service Payments which USDA has concluded ought not to be adopted based upon this Hearing record. NYSDF certainly agrees. Should USDA reconsider this non-adoption position in any way, NYSDF repeats, and incorporates its opposition filed on January 31, 2003. In particular, NYSDF reasserts its legal argument that even serious consideration of that Proposal 7 would require a full-blown analysis under the Regulatory Flexibility Act.

COMMENTS AND EXCEPTIONS

A. Reporting and Payment Dates

The recommended changes to various reporting and payment deadlines should be adopted immediately. The amendments are wholly justified based upon the Record and NYSDF's Brief filed on January 31, 2003, incorporated herein by reference. Furthermore, the proposed amendments would create and maintain orderly marketing conditions and efficient administration of the Northeast Order. The rationales supporting the new deadlines are clearly sound. Finally, the proposed amendments meet industry criteria for timely reporting and equitable payment procedures.

B. Pooling Standards and Provisions

Overall the Recommended Decision with respect to Pooling Standards and Provisions should succeed in reducing and perhaps eliminating obvious "pool-riding" abuses resulting from loose pooling requirements presently in effect. The present Order certainly does need to be amended to require responsible limits on diversions, elimination of "split-plant" provisions enabling opportunistic pooling, improved performance standards, and extended "touch-base" rules to encourage actual milk shipments to fluid plants and discourage "paper-pooling" (unwarranted pooling, but not delivery, of distant milk supplies having little, and in many cases no, demonstrated association with the Northeast fluid milk market.

NYSDF contends, however, that the Decision to require a minimum 10 percent supply plant performance standard during the flush season (January through June), when milk is normally needed least by pool distributing plants, may pose marketing difficulties for some long-time suppliers to the fluid milk market. NYSDF continues to believe that any such requirement should be limited to plants located outside any of the states that have any counties in the marketing area. Adoption of such a provision is supported by the Department's Decision for the

Mideast Order as upheld by the Federal District Court in the *Alto Dairy* case. More importantly, the record demonstrates that some small cooperatives, who now pay “pool qualification fees” to other cooperatives with whom they are affiliated, will likely be charged such pooling fees by the parent cooperative year-round, under this Decision. The proposed year-round pooling requirement for Order 1 suppliers, may unfortunately become a “back-door” way for some larger cooperatives to achieve semblance of “market service” payments under a different guise. Again the better procedure, in NYSDF’s view, would have been to make the minimum 10 percent performance standard January through June, apply only to distant supply plants located outside a state with any counties located in the defined Northeast marketing area. Pool participants in distant areas should be required to demonstrate that their “reserves” are really needed and that they are regularly serving the market in a “reserve supply” capacity. Otherwise, “pool-riding” is encouraged. By limiting application to the more distant supply plants, as was recently done in amendment to the Mideast Order, any burden of meeting extra “reserve supply” performance standards during the flush season, is clearly placed on those who may want to become new, but real, market pool participants.

To require all suppliers to meet an arbitrary 10 percent shipping rule when the milk is not needed at pool distributing plants, will result in uneconomic milk movements on a “forced” basis. Or it may cause some to turn to those cooperatives willing to carry the “flush” season qualification for them through an affiliation agreement. This will then not ensure that milk is made available to the fluid market when it is truly needed.

With regard to denial of NYSDF Proposal No. 3 (proposed 5 percent increase in pool supply plant shipping performance standard in the present qualifying period (August – December)), NYSDF accepts and will rely on the premise carried in the Recommended

Decision, that full flexibility will be authorized the Market Administrator to adjust both the shipping and diversion standards, as needed from time to time, to assure adequacy of milk supplies for pool distributing plants. As demonstrated in the Record based upon a long history in the Northeast and its predecessor Orders, this procedure has not always worked well in the past to call forth the needed extra milk soon enough. However, the regulatory flexibility afforded by the Administrator “call” provision, is essential to assure that appropriate action can be taken to adjust the fixed performance standards, if critically needed. NYSDF does agree with the finding in the Decision which states “[p]ooling standards that are performance-based provide the only viable method for determining those eligible to share in the marketwide pool”.

Adoption of NYSDF and H P Hood proposal No. 14 in the Decision will make the “unit Pooling” provision in the current Order, more equitable among handlers. It will also benefit the market in terms of allowing Hood and others similarly situated, to assist in clearing excess market reserves in the “flush” season.

NYSDF supports the proposed amendments with regard to defining producer status. The present provisions fail to require a demonstrated regular association with the Northeast Order market and have led to ‘pool-riding’ abuses. The proposed monthly “touch-base” requirement together with equitable diversion limits to non-pool plants, will improve the current situation and provide a more orderly marketing procedure.

C. Marketwide Service Payments

NYSDF concurs with the findings and conclusions with respect to denying Proposal 7. The record is full of evidence that the proposal fails to justify the need for or the level of these proposed payments. Moreover, performance criteria and handler equity issues have not been

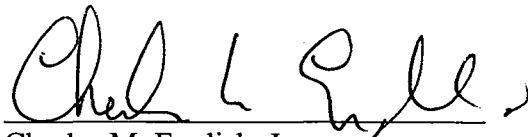
resolved. Finally, NYSDF respectfully submits that serious consideration of Proposal 7 requires a detailed and full blown Regulatory Flexibility Act analysis because of the significant detrimental impact adoption of Proposal 7 would have on a significant number of small businesses. While NYSDF understands both the importance and complexity of Proposal 7, NYSDF strongly urges immediate full implementation of the Recommended Decision as a Final Decision on the other important issues considered at the Hearing. There is no need to delay that implementation because of any economic or political complexity involving this issue.

CONCLUSION

For the foregoing reasons, NYSDF, subject to its exceptions noted above, urges immediate adoption and implementation of the amendments proposed by the Recommended Decision, in particular the Reporting and Payment date proposals. USDA should continue to reject Proposal 7. Any serious reconsideration of Proposal 7, furthermore, requires the Secretary to engage first in a full blown Regulatory Flexibility Act analysis since its adoption would have a substantial economic impact on a significant number of small entities.

May 24, 2004

Respectfully submitted,



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