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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1124

[Docket No. AO–368–A29; DA–01–06]

Milk in the Pacific Northwest Marketing Area; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This tentative decision adopts, on an interim final and emergency basis, provisions that amend certain features of the pooling standards of the Pacific Northwest Federal milk order. Specifically, this tentative decision establishes a cooperative manufacturing plant provision and ‘‘system pooling’’ for cooperative manufacturing plants. Additionally, this decision establishes a standard for the number of days during the month that the milk of a producer would need to be delivered to a pool plant in order for the rest of the milk of that producer to be eligible to be diverted to nonpool plants. A year-round diversion limit of 80 percent of total receipts for pool plants also is established. Public comments on the amendments adopted in this tentative decision are requested. Additionally, this decision requires determining if producers approve the issuance of the amended order on an interim basis.

DATES: Comments must be submitted on or before November 5, 2002.

ADDRESSES: Comments (6 copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250. Reference should be made to the title of action and docket number.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, Stop 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–1366, e-mail address: *gino.tosi@usda.gov.*

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (Department) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ‘‘small business’’ if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ‘‘small business’’ if it has fewer than 500 employees. For the purposes of determining which dairy farms are ‘‘small businesses,’’ the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ‘‘small’’ dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During May 2002, there were 972 producers pooled on, and 86 handlers regulated by, the Pacific Northwest order. Based on these criteria, 596 producers and 49 handlers would be considered small businesses. The adoption of the proposed pooling standards service to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and are consistently serving the fluid needs of, the Pacific Northwest milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the Class I fluid needs of the market and that determine those that are eligible to share in the revenue which arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an equal fashion to both large and small businesses. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, record keeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This tentative decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information, which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports from all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. The rulemaking proceeding does not duplicate, overlap, or conflict with any existing Federal rules.

Prior document in this proceeding: *Notice of Hearing:* Issued November 14, 2001; published November 19, 2001 (66 FR 57889).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this tentative final decision with respect to proposed amendments to the tentative marketing agreement and the order regulating the handling of milk in the Pacific Northwest marketing area. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, November 5, 2002. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendments set forth below are based on the record of a public hearing held at Seattle, Washington, on December 4, 2001, pursuant to a notice of hearing issued November 14, 2001 (66 FR 57889).

The material issues on the record of hearing relate to:

1. Establishing a touch-base provision and year-round diversion limits for producer milk.

2. Establishing a cooperative pool manufacturing plant provision and ''system'' pooling for cooperative manufacturing plants.

3. Determining if emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Standards for Producer Milk—the Touch Base Standard

A proposal seeking to change certain standards and features of the *Producer milk* provision of the order should be adopted immediately. The changes include: (1) Establishing a year-round standard for the number of days in each month that a dairy farmer's milk production needs to be delivered to a pool plant in order for the rest of the milk of that dairy farmer to be eligible for diversion to nonpool plants. This standard is often referred to as a ''touch-base'' provision. A 3-day touch-base standard is adopted in this decision. (2) Setting a limit on the amount of milk that can be diverted from pool plants to nonpool plants in each month of the year. Currently, a diversion limit of 99 percent is applicable in each of the months of March through August, while a diversion limit of 80 percent is applicable for each of the months of September through February. The adopted year-round diversion limit is 80 percent of all milk receipts, including diversions, and continues the current diversion limits that were adjusted by the Market Administrator. (3) Providing authority to the Market Administrator to adjust the touch-base standard.

Proposal 2, offered by Northwest Milk Marketing Federation (NMMF), Northwest Dairy Association (NDA), and the Tillamook County Creamery Association (TCCA), seeks to modify the order's pooling standards by establishing a 6-day touch-base standard during the month in order for the rest of the milk of a dairy farmer to be eligible to be diverted to nonpool plants and by establishing an 80 percent year-round limit on the amount of milk received by a pool plant that can be diverted to nonpool plants. NMMF, NDA, and TCCA are organizations owned by dairy-farmer members that supply a significant portion of the milk needs of the Pacific Northwest marketing area and whose milk is pooled on the Pacific Northwest order.

NDA, a proponent of Proposal 2, testified that pooling standards must be changed in order to prevent what they described as ''artificial'' pooling or ''pool loading'' that has been occurring in the Pacific Northwest order since the implementation of Federal order reform. The NDA witness noted that when milk is pooled on the order but never physically received, service to the Class I market is not demonstrated. To allow the pooling of milk which does not provide service to the Class I needs of the market only lowers returns to dairy farmers whose milk is actually supplying the local Class I market. The witness asserted that this occurs because the order's pooling standards are inadequate.

According to the NDA witness, pooling provisions that were once applicable in Federal orders more accurately identified the milk of producers serving the Class I market. These provisions included a touch-base standard that specified the minimum number of days during the month that a dairy farmer's milk needed to be received at a pool plant in order to be eligible to divert to nonpool plants the rest of the milk of that dairy farmer. In addition, the witness noted that the ''dairy farmers for other markets'' provision, that was applicable prior to order reform, provided that a dairy farmer would not be considered a producer on the order unless all of the farmer's milk was pooled on the order during the month. Also, the witness noted, milk was valued and priced by its relative location to the market prior to order reform. Milk farther from plants in the marketing area would have a lower value than milk located nearer to plants located in the marketing area, stressed the witness.

The NDA witness testified that provisions prior to Federal order reform deterred milk that did not serve the Order's Class I market from being pooled on the Pacific Northwest order. The witness explained that milk located outside of the marketing area and pooled on the order received the Pacific Northwest blend price minus the applicable location adjustment specified in the order. This measure, the witness said, made it unprofitable for milk located far from the marketing area to be pooled on the Pacific Northwest order. However, the witness emphasized that Federal order reform adopted a Class I price surface that does not provide for location adjustments in determining a relative value for milk to the market. According to the witness, the newly adopted Class I price surface establishes fixed values for milk regardless of its use for fluid or manufactured products. The witness characterized that this change effectively created a ''backward incentive'' to move milk from one order's bottling plant to a manufacturing plant located farther away in another marketing order.

The NDA witness referred to a Cornell University economic model that was used in formulating the current Class I price surface. The model, according to the witness, produced a price surface map that valued milk in the east higher than milk in the west, inferring that milk should move from west to east. The witness asserted that when establishing the new Class I price surface, the Department did not take into account the variable price surface used by the model for manufactured products. The witness noted that while the Class I differential at Salt Lake City, Utah, is the same as in Seattle, Washington ($1.90 per hundredweight), the Pacific Northwest order blend price is often higher than the Western order blend price. According to the witness, the combined effect of fixed Class I differential values and blend price differences causes milk from Utah to move west to the Pacific Northwest, instead of moving east as predicted in the Cornell model.

The witness concluded that this movement of milk has resulted in disorderly market conditions in the Pacific Northwest and Western orders because the price surface provides an inappropriate incentive to move milk to manufacturing plants in the Pacific Northwest order where a higher Class I value prevails, rather than to bottling plants in the Western order where a lower Class I value prevails. The witness testified that the pooling provisions of the Pacific Northwest order need revision to correct disorderly market conditions.

NMMF's witness, testifying in support of Proposal 2, stated that the proposal is designed to correct unintended consequences generated by Federal order reform regarding the manner in which the producer location value of milk is determined. The witness testified that prior to order reform, location adjustments also acted as an effective means of identifying the producers who consistently served the Class I needs of the market. The witness testified that Federal order reform also established a new Class I price structure that reflected supply and demand conditions for fluid milk in every county of the United States. The witness asserted that this new structure uses the same Class I pricing locations to adjust pool draws on all milk regardless of how that milk is utilized.

According to the NMMF witness, under the new pricing system, milk that is diverted from plants in the marketing area and delivered hundreds of miles away can be valued at the same price as milk at the plant from which the milk was diverted. Value is then adjusted, the witness said, by differences in the level of the Class I differentials where the milk is actually delivered. According to the witness, this demonstrates a lack of economic consistency.

The NMMF witness also testified that millions of dollars have been transferred from dairy farmers who actually supply the fluid needs of the Pacific Northwest order to dairy farmers located in Southern Idaho and Utah who do not supply the local Class I market. Also, data was presented by the witness to demonstrate that when the milk of producers distant to the market is pooled on the Pacific Northwest order but never physically received at a Pacific Northwest pool plant, the milk of those distant producers receives a share of the Class I proceeds without the producers ever actually supplying milk to meet the Class I needs of the market.

According to the NMMF witness, the 80 percent diversion limit recommended in Proposal 2 would permanently continue the Market Administrator's February 2001 temporary revision to the marketing order. According to the witness, the 80 percent diversion limit has been operating well and should become the order's adopted standard for producer milk.

The NMMF witness also spoke on the merits of instituting a 6-day touch-base standard. The witness was of the opinion that producer milk standards should be linked to the order's supply plant performance standard of 20 percent. According to the witness, 6 days of a dairy farmer's milk production per month is equal to 20 percent of monthly production and is consistent with the 20 percent performance standard applicable for pool supply plants.

Dairy Farmers of America (DFA), a supporter of Proposal 2, testified about changes in the marketplace resulting from the new Class I price surface implemented under Federal order reform. It was DFA's opinion that the pooling of milk not serving the Class I market is inconsistent with Federal order policy. Returns to producers who regularly supply the Class I market are unnecessarily reduced when milk that does not service the Class I market is pooled, said the witness.

The DFA witness also testified that milk not actually supplying the Class I needs of the market but sharing in the revenue generated from fluid milk sales is an indicator of faulty pooling provisions. The witness asserted that if the current pooling standards are not amended, local dairy farmers who are actually supplying the local Class I market will continue to receive lower returns.

The DFA witness testified that the Pacific Northwest order's current diversion limit standard of 99 percent for certain months is inadequate because of the potential volume of milk that could be pooled on the order. According to the witness, it is this shortcoming of the current pooling provisions that has allowed milk which performs no reasonable service in meeting fluid milk demands to be pooled on the Pacific Northwest order. In this regard, DFA thought it was appropriate to set a limit on the amount of producer milk that pool plants can divert to nonpool plants consistent with the Market Administrator's temporary revision. The DFA witness indicated that a year-round diversion limit of 80 percent would be reasonable in light of the marketing area's Class I use of milk. The witness also supported the 6-day touch-base provision of Proposal 2 because it would better identify the milk of those producers that actually serve the Class I needs of the market.

Two Washington State dairy farmers also testified in support of Proposal 2. One dairy farmer asserted that Proposal 2 would correct what the witness described as a loophole in the Pacific Northwest pooling provisions that allows milk which does not serve the fluid market to be pooled on the Pacific Northwest order. The witness maintained that current provisions are contributing to the loss of millions of dollars to Washington State dairy farmers. The witness also stated that adopting Proposal 2 would provide for restoring the orderly marketing of milk in the Pacific Northwest and promote trust in the Federal milk order program. A second dairy farmer testified that disorderly marketing conditions are demonstrated when the blend price is reduced through what the witness described as manipulation of the order's pooling standards.

2. Standards for Pool Plants—Cooperative Pool Manufacturing Plant

Several amendments to the *Pool plant* provision of the Pacific Northwest order should be adopted immediately. Certain inadequacies and unneeded features of the current *Pool plant* provision are contributing to disorderly marketing conditions and unwarranted erosion of the blend price received by those producers who actually supply milk to satisfy the fluid demands of the Pacific Northwest marketing area. Specifically, the following changes to the *Pool plant* provision should be adopted immediately: (1) Eliminate a supply plant feature applicable to cooperative supply plants; (2) establish a ''cooperative manufacturing plant'' provision; and (3) provide for two or more cooperative manufacturing plants to operate as a ''system'' for the purpose of meeting applicable performance standards.

A cooperative manufacturing plant is a type of pool supply plant and will be defined as a manufacturing plant, owned and operated by a cooperative association or a wholly owned subsidiary, that delivers at least 20 percent of producer-member milk shipments either directly from farms or supply plants owned by the same cooperative association and is located within the marketing area. A cooperative manufacturing plant will have the same performance standards applicable to a supply plant specifying that 20 percent of total milk receipts must be supplied to a pool distributing plant in order to pool all other physical receipts and diversions of milk.

The Pacific Northwest marketing order *Pool plant* provision currently contains a feature applicable for supply plants operated by a cooperative association to include deliveries to distributing plants directly from the farms of their producer members as qualifying shipments for pooling.

Proposal 1, offered by NMMF, NDA, and TCCA seeks to establish a ''cooperative manufacturing plant'' provision as a type of pool supply plant, and also to provide that two or more cooperative manufacturing plants may operate as a ''system'' of supply plants for the purpose of meeting pooling performance standards. According to the witnesses, the proposal eliminates the need for the current provision for cooperative associations that operate supply plants.

A witness for NMMF testified that the adoption of a provision providing for a cooperative manufacturing plant as a type of supply plant is predicated on the adoption of a touch-base standard contained in Proposal 2. According to the witness, if a touch-base standard is adopted, certain accommodations for cooperative manufacturing plants should be provided to prevent the inefficient movement of milk. A provision for a ''system'' of cooperative manufacturing plants should be made, noted the witness, so that the system of plants could qualify to have their combined milk receipts pooled when a single plant of the system meets all of the performance standards for the system of plants. The witness noted that providing this flexibility in the movement of milk will enable cooperative manufacturing plants to minimize transportation costs while still meeting the established touch-base standard. The witness noted that a similar provision for cooperative manufacturing plants is currently a feature of the Arizona-Las Vegas and Western milk marketing orders and would be beneficial for the Pacific Northwest order.

The NMMF witness predicted that the adoption of a cooperative manufacturing plant provision would encourage all supply plants in the Pacific Northwest to change their pooling status to this new type of pool supply plant because all supply plants in the Pacific Northwest are owned by cooperative associations. According to the witness, the proposed changes contained in Proposals 1 and 2 would serve to deter supply plants located far from the Pacific Northwest marketing area from inappropriately pooling milk on the Pacific Northwest order because these changes eliminate the ability to pool milk that is not physically received at the plants which actually provide milk to satisfy the marketing area's Class I demands.

A witness appearing on behalf of NDA, also a proponent of Proposal 1, agreed with the NMMF witness' conclusion that pooling provisions should ensure that only milk which actually performs in supplying the market's Class I needs would prevent the ''artificial'' pooling of milk. The witness stressed that NDA does not object to milk located outside of the order that regularly serves the fluid needs of the market from receiving the order's blend price.

The adoption of the proposed cooperative manufacturing plant provision, according to the NDA witness, also would provide producers who regularly serve the fluid needs of the market more flexibility in meeting the touch-base standard contained in Proposal 2. The witness was in agreement with NMMF that the proposal would prevent the inappropriate pooling of milk that is located at plants far from the marketing area that does not actually supply the fluid needs of the market. The NDA witness asserted that these changes to the order would ensure that only milk actually available to meet the market's fluid needs would be pooled.

A witness representing the TCCA also testified in support of Proposal 1. The witness presented an analysis on the loss of income to dairy farmers in Tillamook County, Oregon, due to the pooling of milk on the order that does not actually serve the Class I needs of the market. The impact of inappropriate pooling standards to Pacific Northwest dairy farmers, according to the witness' calculations, showed an average monthly decrease in revenue of $755 per farm. The witness testified that the adoption of Proposal 1 would correct the disorderly marketing conditions in the Pacific Northwest order by only allowing milk that actually serves the fluid needs of the market to receive the order's blend price.

The witness representing DFA testified in support of Proposal 1. According to the witness, two primary benefits of the Federal order program are allowing producers to benefit from the orderly marketing of milk and the marketwide distribution of revenue that results mostly from Class I milk sales. Orderly marketing influences milk to move to the highest value use when needed and to clear the market when not used in Class I, noted the witness. The witness testified that marketwide pooling allows qualified producers to equitably share in the returns from the market in a manner that provides incentives for supplying the market in the most efficient manner. The witness insisted that the pooling of milk which does not service the Class I market is inconsistent with Federal order policy.

The DFA witness asserted that Proposal 1 properly addresses the problem associated with what the witness described as the near ''open pooling'' of milk on the Pacific Northwest order. Specifically, the witness testified that the proposal would establish appropriate pooling performance standards for producer milk and handlers that are consistent with the objectives of the Federal milk order program.

Two members of the Washington State Dairy Federation also testified in support of Proposal 1. One witness indicated that when milk not serving the fluid needs of the Pacific Northwest market is pooled, returns that should be received by producers serving the Class I needs of the market are ''siphoned'' away. Another witness testified that dairy producers in Washington have lost millions of dollars in revenue as a result of the ''loopholes'' in the order's pooling provisions. The adoption of Proposal 1 would, according to the witness, make needed changes to the pooling standards and re-establish orderly marketing conditions for the Pacific Northwest marketing area.

All milk marketing orders, including the Pacific Northwest, provide standards for identifying producers and the milk of producers that supply the market's Class I needs. The pooling standards of an order serve to assure that an adequate supply of fluid milk is delivered to the market. Pooling standards also act to identify the milk of those producers that actually meets this need. Some milk orders have touch-base standards to determine which dairy farmers and the milk of those dairy farmers who perform in the market by delivering a certain amount of production to pool plants. When such standards are met, the milk not needed to meet fluid demands becomes eligible to be diverted to a nonpool plant and be pooled and priced by the order.

It is largely the revenue from Class I sales that provides additional returns to milk being pooled which is reflected in the order's blend price. Accordingly, the Federal order system consistently has stressed actual performance in meeting pooling standards designed to ensure an adequate supply of Class I milk for the market as a condition for receiving the order's blend price.

The pooling standards of an order are designed to identify those producers and the milk of those producers that demonstrate service to the Class I market. A touch-base standard serves to identify the producers and the milk of those producers who actually supply milk to the market in a specified minimum amount. Markets that exhibit a higher percentage of milk in fluid use typically have touch-base standards specifying more frequent physical milk deliveries to pool plants than in markets where Class I use is lower. When a touch-base standard is too low, the potential for disorderly marketing conditions arise on two fronts. First, pool plants are less assured of milk supplies. Second, and most germane to the Pacific Northwest marketing area, the lack of a touch-base standard provides a way for the milk of producers not serving the fluid needs of the market to be pooled on the order while not actually supplying milk to the market's pool plants. This reduces the blend price paid to producers who are actually incurring the costs of supplying the Class I needs of the market.

A significant portion of the testimony received at the hearing placed blame on the current Class I price structure as the root cause of the inappropriate pooling of milk on the Pacific Northwest order. The current price structure was faulted specifically as not providing location adjustments for milk as had been the case prior to the implementation of milk order reform.

Testimony indicated that the lack of location adjustments effectively undermines the pooling standards of the order. The decision to pool milk was once based on the economics of transporting milk—comparing the costs of transporting milk to the benefit of receiving the order's blend price. Testimony indicates this factor is as important as the pooling standards of the order. Hearing participants were of the opinion that placing a relative value on milk based on its distance from the market provided appropriate pooling discipline and fostered orderly marketing conditions. Some participants indicated disappointment by asserting that the Department did not offer a recommended decision in order reform from which to provide comments on the Class I pricing structure.

The reform of milk orders, contained in the recommended decision (63 FR 4802) and final decision (64 FR 16026), made purposeful changes to the Class I pricing structure. In this regard, a fixed adjustment for Class I milk prices was provided for every county location in the 48 contiguous states to create a national Class I pricing surface for the system of milk marketing orders. Changing this characteristic of the pricing structure ensured handlers that regardless of the marketing order by which regulated, the applicable prices would be the same.

Such change made a more clear distinction between the value milk has at a location from the pooling standards of any individual marketing order. Location adjustments were never a part of the pooling standards of the Pacific Northwest order or any other milk marketing order. Instead, location adjustments were an integral part of the *pricing provisions* of the order. However, it should be noted that location adjustments tended to strengthen the effectiveness of the order's pooling standards. Location adjustments determined the relative value of milk to the market. The pooling standards established the criteria for pooling milk on the order. With the Class I price surface adopted by order reform, more direct reliance is placed on pooling standards to identify the milk that should be pooled on the order.

Pooling provisions of all orders, including the Pacific Northwest, are intended to define appropriate standards for the prevailing marketing conditions in assuring that the marketing area would be supplied with a sufficient supply of milk for fluid use and to identify those producers—and the milk of those producers—that actually service the Class I needs of the market. Taken as a whole, the pooling provisions of milk orders, including the Pacific Northwest order, are contained in the *Pool plant, Producer,* and *Producer milk* provisions. The intent of these pooling provisions prior to reform and after reform has not changed.

The issue before the Department is to consider amendments to standards of the order that currently allow milk to be pooled on the Pacific Northeast order *without* such milk being regularly and consistently supplied to pool plants within the marketing area in order to supply the market's Class I needs. On the basis of the record, the pooling standards of the order need to be reconsidered.

It is the pooling standards of the order that address those producers who are relied upon to supply the Class I needs of the marketing area. The record evidence indicates that milk is being pooled on the Pacific Northwest order which does not demonstrate any reasonable association with the market and which is not actually received at pool plants that supply the Class I demands of the market. Instead, the milk being pooled is physically retained at plant locations located in another marketing area for manufacturing lower valued Class III or Class IV dairy products. This is causing producers who actually supply the market to receive a lower blend price.

On the basis of the record evidence, together with analysis performed by the Department, this decision finds reason to support adopting a 3-day touch-base standard. Analysis was performed using officially noticed Market Administrator data from June 2001 through April 2002. This time period was selected because of the change in Commodity Credit Corporation (CCC) purchase prices for butter and nonfat dry milk that occurred on May 31, 2001, as part of the price support program. This change in the CCC support price purchases, or the ''butter-powder tilt,'' has caused the price gap between Class III and Class IV milk to be significantly reduced. This change in CCC purchase prices has had a noticeable effect on the total value of the marketwide pool for both the Pacific Northwest and Western orders.

A hypothetical blend price was computed for the Pacific Northwest order marketing area, absent the Class III and Class IV milk physically located in areas within the Western Order milk marketing area. Milk from this area had not historically been pooled on the Pacific Northwest. Additionally, a similar blend price was computed for the Western Order that assumed the Class III and Class IV milk pooled on the Pacific Northwest Order would instead be pooled on the Western order. The results indicated that the blend price received by dairy farmers pooled in the Pacific Northwest would increase, while the blend price received by dairy farmers pooled on the Western order would decrease.

Analysis of the newly derived blend price differences was performed to determine how many days of a dairy farmers' production could seek to be received at a pool plant in the Pacific Northwest so that the costs of shipping milk to the market would not exceed the benefits of being pooled. The results of this analysis ranged from a low of 1 day's milk production in the month of February 2002 to a high of 5 day's milk production in June 2001.

On average the milk of a dairy farmer could be received at a pool plant in the Pacific Northwest order 3 days per month to adequately demonstrate that the milk of a producer is actually providing a reasonable and consistent service in meeting the fluid needs of the marketing area.

Providing a higher touch-base standard requires milk located outside the marketing area to demonstrate its availability to service the Class I needs of the Pacific Northwest marketing area. While this standard should continue to assure an adequate supply of Class I milk, it also will serve as a safeguard against the unwarranted erosion of blend prices caused by the pooling of milk which could not reasonably be determined as bearing the cost associated with serving the fluid needs of the market.

The establishment of a touch-base standard also reinforces the integrity of the order's other performance standards. Together with providing for a cooperative manufacturing plant and their system pooling, reasonable assurance is provided that milk which does not regularly service the fluid needs of the market will not receive the Pacific Northwest order's blend price. Additionally, this decision provides authority for the Market Administrator to adjust the touch-base standard in the same way the order currently provides authority for the Market Administrator to adjust the performance standards for supply plants and diversion limits for all pool plants.

Providing for the diversion of milk is a desirable and needed feature of an order because it facilitates the orderly and efficient disposition of milk not needed for fluid use. When producer milk is not needed by the market for Class I use, some provision should be made for milk to be diverted to nonpool plants for use in manufactured products and to be pooled and priced under the order. However, it is just as necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

Milk diverted to nonpool plants is milk not physically received at a pool plant. However, it is included as a part of the total producer milk receipts of the diverting plant. While diverted milk is not physically received by the diverting plant, it is nevertheless an integral part of the milk supply of that plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not be associated with the diverting plant and should not be pooled.

A diversion limit establishes the amount of producer milk that may be associated with the integral milk supply of a pool plant. With regard to the pooling issues of the Pacific Northwest order, the record reveals that high diversion limits contributed to the pooling of large volumes of milk on the order that may not have serviced to the Class I market needs. Therefore, lowering the order's diversion limit standard would be appropriate.

Associating more milk than is actually part of the legitimate reserve supply of the diverting plant unnecessarily reduces the potential blend price paid to dairy farmers who service the market's Class I needs. Without reasonable diversion limits, the order's ability to provide for effective performance standards and orderly marketing is weakened.

Diversion limit standards that are too high can open the door for pooling more milk on the market, as seen with the 99 percent diversion limit that had been applicable for the months of March through August prior to the adjustments made by the Market Administrator in February 2001. With respect to the marketing conditions of the Pacific Northwest marketing area evidenced by the record, this decision finds good reason to continue with the diversion limits on producer milk set by the Market Administrator at 80 percent of total receipts as the order's appropriate diversion limit for every month of the year.

Therefore, an 80 percent diversion limit standard for producer milk in each month of the year should be adopted immediately. To the extent that this diversion limit standard may warrant future adjustments, the order already provides the Market Administrator authority to adjust these diversion standards as marketing conditions may warrant.

This decision finds that several changes to the pooling standards contained in the *Producer milk* definition of the order are needed to reinforce the integrity of the other changes made in this decision that affect supply plants. As indicated earlier, the record indicates that the pooling provisions of the Pacific Northwest order are inadequate. This decision finds that the absence of a touch-base standard results in the inability to adequately and properly identify the milk of those producers who should be pooled. The lack of a touch-base standard together with a 99 percent diversion limit applicable in the months of March through August results in the pooling of more milk than can reasonably be considered as actually serving the market's Class I needs. These inadequacies of the Pacific Northwest order have resulted in pooling milk which can not demonstrate actual service in supplying the Class I needs of the market. Such inadequacies only contribute to the unnecessary erosion of the order's blend price to those producers who do demonstrate such service.

This decision also finds agreement with the proponents of Proposal 1 that a cooperative manufacturing plant provision will provide flexibility in qualifying milk to be pooled. Allowing cooperative manufacturing plants the option to function as part of a pooling system will also assist producers and handlers in transporting milk in the most cost-efficient manner. This provision will give the cooperatives operating manufacturing plants the ability to supply milk to distributing plants from a plant of the system located nearer a distributing plant without causing disruption to the market. System pooling will allow cooperative manufacturing plants to make more cost-effective decisions in transporting milk while still satisfying the Class I demands of the order without disruption.

3. Emergency Marketing Conditions

Evidence presented at the hearing establishes that the pooling standards of the Pacific Northwest order are inadequate and are resulting in a significant present and ongoing erosion of the blend price received by producers who actually demonstrate performance by supplying the Class I needs of the market. This unwarranted erosion of blend prices stems from the lack of a reasonable and effective standard to ensure that the milk of the producer being pooled is actually being delivered to pool plants that supply milk to meet the Class I needs of the market. The erosion of the blend price received by producers is also compounded by an unnecessarily high diversion limit standard for the months of March through August. These shortcomings have allowed milk that has not provided a reasonable expectation of or demonstration of service in meeting the Class I needs of the marketing area to be pooled on the order. Consequently, it is determined that emergency marketing conditions exist in the Pacific

Northwest marketing area, and the issuance of a recommended decision is therefore being omitted. The record establishes a basis as noted above for amending the order on an interim basis. The opportunity to file written exceptions remains.

In view of this situation, an interim final rule amending the order will be issued as soon as the approval of producers is determined.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the Pacific Northwest order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Interim Marketing Agreement and Interim Order Amending the Order

Annexed hereto and made a part hereof are two documents; an Interim Marketing Agreement regulating the handling of milk, and an Interim Order amending the order regulating the handling of milk in the Pacific Northwest Marketing Area, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, that this entire tentative decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

Determination of Producer Approval and Representative Period

The month of May, 2002, is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Pacific Northwest marketing area is approved or favored by producers, as defined under the terms of the order as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1124

Milk marketing order.

Dated: August 30, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

Interim Order Amending the Order Regulating the Handling of Milk in the Pacific Northwest Marketing Area

This interim order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Pacific Northwest marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act:

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the aforesaid marketing area. The minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and by in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Pacific Northwest marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The authority citation for 7 CFR part 1124 continues to read as follows:

Authority: 7 U.S.C. 601–674.

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

1. Section 1124.7 is amended by:

a. Removing paragraph (c)(2) and (c)(3);

b. Redesignating paragraph (c)(4) as (c)(2);

c. Adding new paragraphs (d) and (f); and

d. Revising paragraph (g).

The revisions and additions read as follows:

§ 1124.7 Pool Plant.

* * * * *

(d) A manufacturing plant located within the marketing area and operated by a cooperative association, or its wholly owned subsidiary, if, during the month, or the immediately preceding 12-month period ending with the current month, 20 percent or more of the producer milk of members of the association (and any producer milk of nonmembers and members of another cooperative association which may be marketed by the cooperative association) is physically received in the form of bulk fluid milk products (excluding concentrated milk transferred to a distributing plant for an agreed-upon use other than Class I) at plants specified in paragraph (a) or (b) of this section either directly from farms or by transfer from supply plants operated by the cooperative association, or its wholly owned subsidiary, and from plants of the cooperative association, or its wholly owned subsidiary, for which pool plant status has been requested under this paragraph subject to the following conditions:

(1) The plant does not qualify as a pool plant under paragraph (a), (b), or (c) of this section or under comparable provisions of another Federal order; and

(2) The plant is approved by a duly constituted regulatory agency for the handling of milk approved for fluid consumption in the marketing area.

(3) A request is filed in writing with the market administrator before the first day of the month for which it is to be effective. The request will remain in effect until a cancellation request is filed in writing with the market administrator before the first day of the month for which the cancellation is to be effective.

* * * * *

(f) A system of two or more plants identified in § 1124.7(d) operated by one or more cooperative handlers may qualify for pooling by meeting the above shipping requirements subject to the following additional requirements:

(1) The cooperative handler(s) establishing the system submits a written request to the market administrator on or before the first day of the month for which the system is to be effective requesting that such plants qualify as a system. Such request will contain a list of the plants participating in the system in the order, beginning with the last plant, in which the plants will be dropped from the system if the system fails to qualify. Each plant that qualifies as a pool plant within a system shall continue each month as a plant in the system until the handler(s) establishing the system submits a written request before the first day of the month to the market administrator that the plant be deleted from the system or that the system be discontinued. Any plant that has been so deleted from a system, or that has failed to qualify in any month, will not be part of any system. In the event of an ownership change or the business failure of a handler that is a participant in the system, the system may be reorganized to reflect such a change if a written request to file a new marketing agreement is submitted to the market administrator; and

(2) If a system fails to qualify under the requirement of this paragraph, the handler responsible for qualifying the system shall notify the market administrator of which plant or plants will be deleted from the system so that the remaining plants may be pooled as a system. If the handler fails to do so, the market administrator shall exclude one or more plants, beginning at the bottom of the list of plants in the system and continue up the list as necessary until the deliveries are sufficient to qualify the remaining plants in the system.

(g) The applicable shipping percentage of paragraphs (c) and (d) of this section may be increased or decreased by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for adjustment either on the market administrator's own initiative or at the request of interested parties if the request is made in writing at least 15 days prior to the month for which the requested revision is desired to be effective. If the investigation shows that an adjustment of the shipping percentages might be appropriate, the market administrator shall issue a notice stating that an adjustment is being considered and invite data, views and arguments. Any decision to revise an applicable shipping percentage must be issued in writing at least one day before the effective date.

* * * * *

2. Section 1124.13 is amended by:

a. Redesignating paragraphs (e)(1) through (5) as paragraphs (e)(2) through (6);

b. Adding a new paragraph (e)(1); and

c. Revising redesignated paragraphs (e)(2), (e)(5), and (e)(6).

The revisions and additions read as follows:

§ 1124.13 Producer Milk.

* * * * *

(e) * * *

(1) Milk of a dairy farmer shall not be eligible for diversion unless at least 3 days' production of such dairy farmer's production is physically received at a pool plant during the month.

(2) Of the quantity of producer milk received during the month (including diversions, but excluding the quantity of producer milk received from a handler described in § 1000.9(c)) the handler diverts to nonpool plants not more than 80 percent.

* * * * *

(5) Any milk diverted in excess of the limits prescribed in paragraph (e)(2) of this section shall not be producer milk. If the diverting handler or cooperative association fails to designate the dairy farmers' deliveries that are not to be producer milk, no milk diverted by the handler or cooperative association during the month to a nonpool plant shall be producer milk. In the event some of the milk of any producer is determined not to be producer milk pursuant to this paragraph, other milk delivered by such producer as producer milk during the month will not be subject to § 1124.12(b)(5).

(6) The delivery day requirement in paragraph (e)(1) of this section and diversion percentage in paragraph (e)(2) of this section may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to assure the orderly marketing and efficient handling of milk in the marketing area. Before making such finding, the market administrator shall investigate the need for the revision either on the market administrator's own initiative or at the request of interested persons if the request is made in writing at least 15 days prior to the month for which the requested revision is desired to be effective. If the investigation shows that a revision might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise the delivery day requirement or the diversion percentage must be issued in writing at least one day before the effective date.

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1124.1 to 1124.86 all inclusive, of the order regulating the handling of milk in the Pacific Northwest marketing area (7 CFR part 1124) which is annexed hereto; and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of May 2002, ________ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with Section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature By (Name)

(Title) ________________________________

(Address) ________________________________

(Seal)

Attest

[FR Doc. 02–22686 Filed 9–5–02; 8:45 am]

BILLING CODE 3410–02–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN: 3245–AE99

Small Business Size Standards; Size Standards by 2002 North American Industry Classification System

AGENCY: Small Business Administration (SBA).

ACTION: Proposed rule; correction.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting the proposed rule it published in the **Federal Register** on August 13, 2002, that would amend its Small Business Size Regulations by incorporating the Office of Management and Budget's (OMB) 2002 modifications of the North American Industry Classification System (NAICS) into its table of small business size standards. The proposed rule published on August 13, 2002, contained a number of formatting errors that could make it difficult for some readers to distinguish between size standards defined in millions of dollars and those defined in number of employees. This correction contains a new table of size standards to clearly identify size standards by millions of dollars and by number of employees.

DATES: SBA must receive comments to the proposed rule on or before September 12, 2002.

ADDRESSES: Address all comments concerning the proposed rule to Gary M. Jackson, Assistant Administrator for Size Standards, Office of Size Standards, 409 Third Street, SW, Washington, DC 20416; via email to *sizestandards@sba.gov;* or via facsimile, (202) 205–6390. SBA will make all public comments available to any person or concern upon request.

FOR FURTHER INFORMATION CONTACT: Carl Jordan, Office of Size Standards, at (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA published a proposed rule in the **Federal Register** on August 13, 2002, (67 FR 52597) to amend its Small Business Size Regulations by incorporating the Office of Management and Budget's (OMB) 2002 modifications of the North American Industry Classification System (NAICS) into its table of small business size standards. These modifications are limited to industries in six (6) NAICS Sectors. The modifications result in a small number of size standard changes to certain NAICS activities. The proposed rule published in the **Federal Register** on August 13, 2002, did not include dollar signs for many of the monetary-based size standards. This correction revises the size standards table by listing size standards by millions of dollars and number of employees in separate columns.

In rule FR Doc. 02–20358 published on August 13, 2002 (67 FR 52633) make the following correction.

On page 52638, in the third column, correct amendatory instruction number 3 as follows:

3. Amend § 121.201 by revising the table of size standards to read as follows:

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Sector 11—Agriculture, Forestry, Fishing and Hunting		
	Subsector 111—Crop Production		
111110	Soybean Farming	$0.75	
111120	Oilseed (except Soybean) Farming	$0.75	
111130	Dry Pea and Bean Farming	$0.75	
111140	Wheat Farming	$0.75	
111150	Corn Farming	$0.75	
111160	Rice Farming	$0.75	
111191	Oilseed and Grain Combination Farming	$0.75	
111199	All Other Grain Farming	$0.75	
111211	Potato Farming	$0.75	
111219	Other Vegetable (except Potato) and Melon Farming	$0.75	
111310	Orange Groves	$0.75	
111320	Citrus (except Orange) Groves	$0.75	
111331	Apple Orchards	$0.75	
111332	Grape Vineyards	$0.75	
111333	Strawberry Farming	$0.75	
111334	Berry (except Strawberry) Farming	$0.75	
111335	Tree Nut Farming	$0.75	
111336	Fruit and Tree Nut Combination Farming	$0.75	
111339	Other Noncitrus Fruit Farming	$0.75	