UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
On review of Recommended Decisions by the Administrator,
Agricultural Marketing Service (Dairy Programs)

MILK DEPOOLING ISSUES
AND RECOMMENDATIONS
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In re: Milk in the Upper Midwest Marketing Area 71 Fed. Reg. 9004 *Material Issue No. 1a*	Docket No. AO-361-A39 DA-04-03B
In re: Milk in the Central Marketing Area, 71 Fed. Reg. 9015 *Material Issue No. 2*	Docket No. AO 313-A48 DA 04-06
In re: Milk in the Mideast Marketing Area 71 Fed. Reg. 9033 *Material Issue No. 1a*	Docket No. AO-166-A72 DA-05-01-B

CONSOLIDATED COMMENTS ON AND EXCEPTIONS TO RECOMMENDED DECISIONS ON MILK DEPOOLING

On behalf of: Associated Milk Producers, Inc., Bongards' Creameries, Ellsworth Cooperative Creamery, Family Dairies USA, First District Association, Davisco Foods, Valley Queen Cheese Company, and Wisconsin Cheese Makers Association ("AMPI Group")

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INTRODUCTION AND SUMMARY OF EXCEPTIONS

In a competitive market, milk distributors offer and pay more for beverage milk than manufactures pay for raw milk in other uses. Revenue pooling in federal milk orders evolved to provide "a fair division among producers of the *fluid milk market* and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack." *United States v. Rock Royal Co-op,* 307 U.S. 533, 550 (1939). Distortion of the natural competitive relationship between fluid use and manufactured milk prices has more recently evolved by federal regulatory mandate, causing regulated prices for Class I milk to be, on occasion, *lower* than milk for manufactured uses. On such occasions, there have been no higher revenues from the fluid milk market to share, and milk used in other dairy staples has been removed from the pool.

These hearings to "deter the practice of de-pooling"[1] were called because of distortions in milk's market value reflected in inverted *regulated* milk prices. In response to the problem, USDA entertained (and endorsed) only proposals that would create an additional layer of regulated market distortion, moving further away from reflecting the natural behavior of a competitive market. USDA expressly declined to consider, as part of the hearing agenda, alternative proposals that would address the problem with less impact and burden on many small business handlers and thousands of dairy farmers by eliminating (or reducing) the source of price inversion in the regulations instead of curtailing the response to regulated price distortions.

These comments, and our post-hearing briefs, demonstrate that the Administrator's proposed solution to depooling is misdirected because it does not attempt to cure the regulatory problem at it regulatory source nor consider the merits of less burdensome alternative rules. The recommendations fall short of compliance with several basic standards of administrative decision-making,

[1] 71 Fed. Reg. at 9013 (Upper Midwest), at 9028 (Central), and at 9041 (Mideast).

as prescribed by the Administrative Procedure Act, the Agricultural Marketing Agreement Act, and the Regulatory Flexibility Act, as follows:

(1) Failure to prepare a Regulatory Flexibility Analysis to describe, discuss and resolve "significant alternatives… which minimize any significant economic impact of the proposed rule on small entities," 5 U.S.C. §601(c), or provide a *fact-based* statement certifying that the proposed rule will not have a significant impact on a substantial number of small businesses. *Id.* §605(b).

(2) Failure to consider or explain the recommended choice made against less burdensome regulatory alternatives available to address the problem identified. *Id.; Motor Vehicle Manufacturers*, 463 U.S. at 54-56.

(3) Failure to address "*all* the material issues of fact, law or discretion presented on the record," with a statement of findings and conclusions, including "the reasons or basis therefor," on each material issue. 7 U.S.C. §557(c)(3)(A); 7 C.F.R. §§900.12(b) and 900.13a; *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 463 U.S. 28, 43 (1983)(an agency decision is arbitrary if it has failed to consider relevant factors or any "important aspect of the problem.").

(4) Failure to make rulings on each proposed finding and conclusion in the post-hearing brief submitted by AMPI Group. 5 U.S.C. §557(c)(3); 7 C.F.R. §900.12(b)(2).

The Rules of Practice, 7 C.F.R. §§ 900.12 – 900.14, provide for recommended decisions to be issued by the Administrator, subject to review and final decision by the Secretary, or his delegate.[2] On review by the Secretary of the Administrator's recommendations pursuant to 7 C.F.R. 900.13a, particular attention must be given to correction of the foregoing shortcomings.

[2] Referring to the recommendation functions of the Administrator and review functions of the Secretary expressed in these Rules of Practice, Counsel for USDA has explained that a recommended decision "represent[s] the views of the Administrator, not those of the Secretary. The regulations specify that the Administrator's recommended decision, after expiration of the period for comments, is submitted to the Secretary who then considers the record and renders his decision. 7 C.F.R. § 900.12-13a." Defendant Secretary of Agriculture's Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, at 41, *Dairymen, Inc., v. Madigan*, MD Tn, No. 3-92-0166 (1992). These rules conform to the process of "subordinate employee" recommendations and agency head final decision-making required by 5 U.S.C. §557(b) and (c). Some recent actions of USDA have departed from these requirements.

THE ADMINISTRATOR'S FAILURE TO ADDRESS SMALL BUSINESS IMPACT IN A REGULATORY FLEXIBILITY ANALYSIS

As explained in the recommended decision, the problem of regulated price inversion is significant. Depooled milk due to price inversion, likewise, is of significant economic consequence to all producers – those who benefit from depooling as well as those who do not. We do not, by these comments and exceptions, intend to assert otherwise.

The Administrator found, for example, that in April 2004, the producer price differential ("PPD), was -$4.11 per cwt. milk in the Upper Midwest, 71 Fed. Reg. 9012, and -$3.97 in the Central Market. *Id.* at 9027. This represented the gain to producers or handlers on depooled milk used to make cheese. *Id.* Over 9,000 Upper Midwest producers and 940 Central Market producers were depooled in April 2004.[3] For a depooled producer of average size,[4] this represented a one-month gain of $4,747 in the Upper Midwest, and $6,355 in the Central Market. On the other side of the scale, the 6,309 producers remaining in the pool would have received $2.97 per cwt. more in the Upper Midwest, and 5,329 Central Market producers would have received $0.87/cwt. more if all depooled milk had been pooled. *Id.* The proposed rules, if in effect during April 2004, would therefore have produced a potential gain of up to $3,430 to the average Upper Midwest producer remaining on the pool, and $1,553 to the average Central Market producer.

The Administrator concluded, not surprisingly, that the adverse "impacts on producer blend prices [from depooling] are *significant*." 71 Fed.

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[3] Based on reduction in producer numbers between January and April 2004, as reported in FMOMS 2004 Annual, T. 5, http://www.ams.usda.gov/dyfmos/mib/fmoms.htm. As shown in the record, many producers were pooled for some milk and depooled for much of their milk production.

[4] During 2004, the average producer produced 1,155 cwt per month in the Upper Midwest, and 1,600 cwt in the Central Market. FMOMS 2004 Annual, T. 7.

Reg. 9011 (Upper Midwest), 9036 (Central), and 9039 (Mideast) (emphasis added). Obviously, if the adverse impact of $2.97/cwt or $0.87/cwt. on pooled producers from the *absence* of the recommended rule in April 2004 is "significant," it follows that the greater adverse impact of up to $4.11 or $3.97/cwt on producers who are deterred from depooling by *adoption* of the proposed rule is even more significant. This was the intent of rule proponents, who explained that rule endorsed by the Administrator would "establish *significant consequences* for those who opt to de-pool large volumes of their producer milk supply." 71 Fed. Reg. at 9008.

The record and recommended decision reveal significant impacts from the rule other than milk prices. Wisconsin Cheese Makers Association is a trade association whose members include 62 cheese and butter manufacturers. Of 32 member manufacturers in the Upper Midwest, 91% (29 members) are small businesses cheese plants. WCMA testified: "if the proposals to limit the practice of de-pooling were adopted, these small businesses would face new and *significant costs to comply* with the proposed new standards without benefit to their dairy farmer suppliers." 71 Fed. Reg. at. 9010 (emphasis supplied); Hearing Tr. Aug. 19, 2004 at 767-70.[5]

Notwithstanding acknowledgement by the industry and the Administrator that the problem, the remedy, or both have significant economic consequences on thousands of small business producers and scores of handlers, the agency made no Regulatory Flexibility Analysis (RFA) as required by 5 U.S.C. §603. Instead, the Administrator declared that the agency "has considered the

[5] In addition to the impact of new price obligations and compliance costs, the Administrator's recommendation to curtail depooling in some markets without proposing any disincentives for others leaves affected producers and manufacturers at a serious disadvantage in competing for cheese sales and milk supplies with plants in markets unaffected by any depooling disincentives. Further, the re-pool restrictions in only a few markets will cause producers to associate disqualified milk with unaffected markets during the period of disqualification, depressing blend prices to producers in markets for which no "fix" has been proposed by the Administrator. See Leeman, Mideast Hearing Tr. Vol. 3, Mar. 9, 2005 at 685-86; Attachment A, p. 5 (Aug. 13, 2004, letter to Dana Coale).

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." 71 Fed. Reg. at 9004 (Upper Midwest), at 9016 (Central), and at 9033 (Mideast).[6] The Administrator went on to provide a one-size-fits all rationale for this certification. The proposed rules "are established without regard to the size of any dairy industry organization or entity… Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities." *Id.*

The Administrator's certification is irreconcilable with his findings elsewhere in the decision (and with industry consensus) that the proposed rules will, if adopted and as intended, have a "significant" impact on producers and handlers – those who stand to benefit by the rule, and those that would be subject to new milk price and regulatory compliance burdens.[7]

The Administrator's apparent conclusion that a "one size fits all" rule is exempt from RFA analysis, for reasons of its one size, is totally incompatible with the RFA. *See* AMPI *et al*'s February 18, 2005, post-hearing Pooling Standards Brief, in the Central Market proceeding, at 5-6. This rule of law under the RFA was made more persuasively in a March 8, 2002, letter to USDA from the Small Business Administration on two similar, but "invalid," certifications to avoid making an RFA. The SBA letter is published at

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[6] The Administrator's certification was in apparent reliance on 5 U.S.C. §605(b), which allows an agency to avoid an RFA, as unnecessary, "if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, [and the agency's published decision includes] a statement providing the factual basis for such certification."

[7] The rules proposed by the Administrator and subject to the RFA are not merely a few amendments to three milk orders, but rather three complete amended orders which, in turn, are part of a coordinated system of regulation having a significant economic impact on a substantial number of small entities. See 64 Fed. Reg. 16026, 16034-16042 (Apr. 2, 1999) (final RFA analysis). The economic impact of these rules should be measured with the aggregate impact of the proposals added to prior regulatory burdens. The RFA does not authorize an agency to avoid RFA analysis by building significant economic burdens on small entities brick-by-brick.

http://www.sba.gov/advo/laws/comments/, and reproduced in Attachment "B" to these Exceptions. We direct the Secretary's attention to the SBA's discussion on page 2, under the heading: "'*All Entities Affected Equally' is an Invalid Basis for Certification.*" Other than the Administrator's invalid one-size-fits-all conclusion, the certification is not accompanied by the requisite "statement providing the factual basis for such certification." 5 U.S.C. §605(b).[8]

It might be inferred that the Administrator was motivated to certify a lack of significant economic impact, notwithstanding his contrary findings of significant impact elsewhere in the decision, because some sort of cost-benefit equilibrium would be achieved between those who would benefit and those who would be burdened by the rule. This, too, would be an "invalid" basis for certification. As elsewhere described in SBA's 2002 letter to USDA (page 3): "While a cost-benefit analysis might help an agency determine the degree of impact on small entities, the mere fact that the benefits outs weigh the cost is not dispostive of impact. In other words, the test for certifications is whether a rule has an impact."

The proposed depooling rules undeniably have significant impact on a substantial number of small business entities.[9] These impacts are *in addition to* the economic impact of related pooling standards rules (briefed separately) that were part of each rulemaking proceeding and upon which the Administrator has also proposed recommended or final rules. The Administrator's mistake in avoiding an initial §603 Regulatory Flexibility Analysis will be compounded if

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[8] SBA's February 1, 2006, letter to the Department of Interior, Attachment C, and its prior June 4, 1999, letter to the Department of Interior (Attachment D), provide further guidance on the content of a "factual basis" statement that must accompany a §605(b) certification.

[9] The Administrator limited presentation of evidence of impact on small businesses to that produced at hearing locations distant from most small farms and plants that might be affected. *E.g.,* 69 Fed. Reg. 56726 (2004). This process of information gathering for RFA purposes is not user-friendly, or designed to "reduce the cost or complexity of participation in the rulemaking by small entities," as required by 5 U.S.C. §609.

the Secretary does not revise the recommended decision and include a final §604 Regulatory Flexibility Analysis with his final decision.

LESS BURDENSOME ALTERNATIVE RULES WERE NOT ADEQUATELY CONSIDERED

As observed in our introduction (p. 3), articulate consideration of less burdensome regulatory alternatives is required not only by the RFA, but also by the Administrative Procedure Act. U.S.C. §557(c)(3)(A); 7 C.F.R. §§900.12(b) and 900.13a; *Motor Vehicle Manufacturers*, 463 U.S. at 54-56. For the problem identified as de-pooled milk during periods of price inversion, the Administrator, to his credit, considered and rejected *some* more burdensome alternatives. He did not, however, consider and explain his choice against less burdensome alternatives available to him. There were (and are) several lesser-included alternatives, and permissible "logical outgrowths" of the proposals made. *Alto Dairy v. Veneman*, 336 F.3d 560 (7th Cir. 2003); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). Several less burdensome alternatives proposed (e.g., Attachment A) were kept off the hearing agenda by the Administrator in the Notices of Hearing. In other words, the Administrator tied his own hands by limiting the scope of the hearing and limiting alternative proposals to be considered. While such limitations may be within the agency's sound discretion and subject to judicial review for abuse of discretion (*National Farmers Organization v Lyng,* 695 F. Supp. 1207 (D.D.C. 1988)), if it appears that the least burdensome alternative may be one that is not within the scope of the original notice of proposed rulemaking, the remedy is to reopen the proceeding to receive additional evidence and comments on the alternative.

Among the most significant alternatives to deterrence of depooling were proposals to reestablish current marketplace conditions as the reference for all current regulated prices. As explained by the AMPI witness and acknowledged by the Administrator, the Class I price is announced and fixed six weeks before current market values for milk products are known, but Class III and IV prices are based on current marketplace conditions. *E.g.,* 71 Fed. Reg. 9005, 9010, 9012. It is this six-week lag that creates price inversions. *Id.*[10]

In response to USDA's invitations for proposals to address the depooling problem in formal rulemaking hearings, AMPI Group and other interested parties suggested to USDA that: (1) the system-wide problem described above should be considered in a national hearing for a system-wide solution, and (2)

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[10] The Administrator's decisions explain:
"The Class I price is usually the highest class price for milk. Historically, the Class I use of milk provides the additional revenue to a marketing area's total classified use value of milk.

The series of Class prices that are applicable for any given month are not announced simultaneously. The Class I price and the Class II skim milk price are announced prior to the beginning of the month for which they will be effective. Class prices for milk in all other uses are not determined until on or before the 5th day of the following month. The Class I price is determined by adding a differential value to the higher of either an advanced Class III or Class IV value. These values are calculated based on formula using the National Agricultural Statistics Service (NASS) survey prices of cheese, butter, and nonfat dried milk powder for the first two weeks of the prior month. For example, the Class I price for August is announced in late July and is based on the higher of the Class III or IV value computed using NASS commodity price surveys for the first two weeks of July.

The Class III and IV prices for the month are determined and announced after the end of the month based on the NASS survey prices for the selected dairy commodities during the month. For example, the Class III and IV prices for August are based on NASS survey commodity prices during August. A large increase in the NASS survey price for the selected dairy commodities from one month to the next can result in the Class III or IV price exceeding the Class I price. This occurrence is commonly referred to by the dairy industry as a ``Class price inversion." A producer price inversion generally refers to when the Class III or IV price exceeds the average classified use value, or blend price, of milk for the month. Price inversions have occurred with increasing frequency in Federal milk orders since the current pricing plan was implemented on January 1, 2000, despite efforts made during Federal Order Reform to reduce such occurrences. Price inversions can create an incentive for dairy farmers and manufacturing handlers who voluntarily participate in the marketwide pooling of milk to elect not to pool their milk on the order.

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The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Class I, II and IV milk pooled. *** While the PPD is usually positive, a negative PPD can occur when class prices rise rapidly during the six-week period between the time the Class I price is announced and the time the Class II butterfat and III and IV milk prices are announced. When manufacturing prices fall, this same lag in the announcement of class prices yields a positive PPD."

as a less-burdensome alternative to deterring depooling in response to the price inversion problem, USDA should consider correcting the source of the problem by fixing all classified prices on the basis of *current* market conditions. The Administrator refused to consider these alternative proposals as part of the rulemaking.[11] This refusal was based in part on the agency's desire to avoid a national hearing for all ten markets (preferring instead three separate hearings for regional markets), and an apparent desire not to upset fluid milk handler preferences for advance Class I pricing.[12]

On the merits of rules which bring Class I and Class III/IV in closer alignment to current marketplace values and with each other, the Secretary has previously opined, in the final milk order reform decision, 64 Fed Reg. 16026, 16102 (April 2, 1999), that: (1) "the Class I price must be related to the price of milk used for manufacturing," (2) "because handlers compete for the same milk for different uses, Class I prices should exceed Class III and Class IV prices," and (3) "reducing the time lag of the Class I pricing advance improves the functionality of the minimum Class I differential." AMPI and others in the depooling hearings at issue here merely asked the agency to *consider* eliminating the time lag altogether as an alternative remedy to depooling in response to the time lag. The agency refused to do so. This refusal was arbitrary under the standards of the RFA and the APA.

[11] Requests for a system-wide hearing and price formula changes were rejected in advance of rulemaking. *See* Attachment "A" hereto. Renewed calls for consideration of these alternatives were made during the course of hearing testimony *(e.g.* 71 Fed. Reg. 9010), but disregarded in the Administrator's analysis and conclusions (*id*. at 9011-13).

[12] USDA's final milk order reform decision explained that advance pricing of Class I milk would continue because "marketers of Class I products support some degree of forward pricing…." 64 Fed. Reg. 16026, 16102 (Apr. 2, 1999).

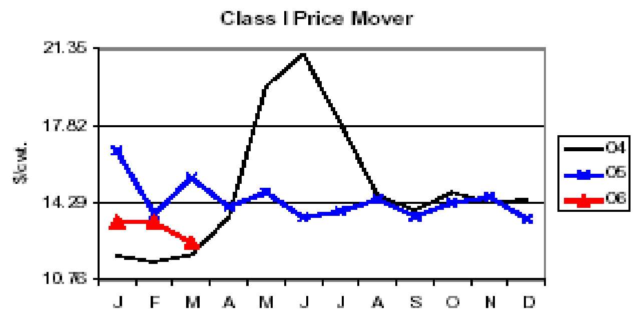
OTHER FACTORS NOT CONSIDERED BY THE ADMINISTRATOR

The post-hearing brief and proposed findings of AMPI Group specifically brought to the Administrator's attention a number of "material issues of fact, law or discretion presented on the record," in response to which the APA requires statement of findings, conclusions, reasons, and basis, 5 U.S.C. §557(c)(3)(A). AMPI Group's post hearing brief also addressed other relevant factors, including important aspects of the problem and of proposed solutions, which the Supreme Court has instructed must also be addressed to avoid "arbitrary and capricious" rulemaking. *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 463 U.S. 28, 43 (1983). The Administrator did not rule on AMPI *et al*'s proposed findings, nor even acknowledge the most significant aspects of the problem addressed in hearing testimony. Missing components of the recommended decisions include:

(1) The marketing disorder claimed to exist in 2004 may have been created or engineered by proponents.

Between the time of the Upper Midwest hearing and the briefing deadline on the related Central Market hearing on depooling, it came to the attention of the media and industry that the extreme price inversions of 2003-2004 may have been artificially engineered by DFA, as it boasted in statements to its members and affiliates. DFA was a principal proponent of rules to deter depooling in response to price inversions. AMPI and others brought this to the Administrator's attention in their February 18, 2005, post-hearing brief on the Central Market Hearing, and requested the agency to reopen the hearing and/or investigate these circumstances so that the Administrator would not reward market misconduct by rules imposing a greater burden on those not involved in misconduct. The Administrator did not address or acknowledge this motion and factors underlying the motion in his recommended decision.

To his credit, however, the Administrator denied DFA's request for "emergency" consideration of the depooling proposals. AMPI and others pointed out in testimony and post-hearing briefs, as the Secretary has previously acknowledged (64 Fed. Reg. at 26101-26103), that depooling in response to price inversions has a long history in federal milk order regulation. AMPI also maintained that the unusual inversions of 2004 (possibly due to DFA's conduct) were not likely to occur in the near future, and a return to pre-existing patterns of volatility and inversion would occur. This has proved to be the case, as illustrated by the moderation in Class I price changes since mid-2004 in the table to the right.



(2) Regulations to Deter Depooling Will Create Unnecessary Economic Burdens if Adopted Piecemeal Rather than System-Wide.

The Administrator's recommended decisions at issue, and the Secretary's federal milk order reform decision (*id.*), describe price inversion and depooling as a system-wide problem. But before the hearing was even noticed, the Administrator refused to consider a system wide hearing and system-wide solutions. Attachment A.[13] Although a national hearing was not on the agenda, the Administrator nevertheless claimed that "consideration was given to whether de-pooling should be considered at a national hearing," and he purported to find "that it would be unreasonable to address… de-pooling on a national basis." 71 Fed. Reg. at 9013 (Upper Midwest), at 9028 (Central), and at 9040 (Mideast). Apart from this conclusory *ipse dixit*, the Administrator's recommended decision does not contain findings, conclusions, reasons and

[13] As previously observed, fn. 5, rules deterring depooling in a few markets will place manufacturers adversely affected at a disadvantage in competition from unaffected manufacturers, and is likely to burden producers in unaffected markets with an influx of milk temporarily disqualified from participation in the affected markets.

factual basis for this opinion as required by the APA and *Motor Vehicle Manufacturers*. Nor could it, since the issue was not on the table.

(3) Regulation to Require Class III and IV Revenue to be Pooled is Inconsistent with Demonstrable Losses Incurred by Manufacturers Under the Current, Outdated Class III and IV Pricing Formula.

The Administrator's recommended decision opines that contributions to the pool from Class III and IV milk when prices are inverted is functionally identical to Class I pool contributions when price relationships are normal. 71 Fed. Reg. at 9012, 9028. When prices are inverted, producers and manufacturing handlers who depool "do not share the higher classified use-value of their milk receipts with all other producers who a re pooled." *Id*. As a result, according to the Administrator, "prices received by dairy farmers were not equitable or uniform." *Id*. at 9011, 9012; 9026, 9028. This is not, however, a case of 'all other things being equal.'[14]

As explained in testimony by a witness for Northwest Dairy Association, the current Class III and IV price structure does not allow dairy manufacturers to recover their costs in regulated "make allowances." *Id*. at 9008. Unlike Class I milk, Class III and IV make allowance regulation not only fixes minimum Class prices, but also prevents commodity dairy product manufacturers from increasing margins of return because all commodity price increases are, penny for penny, converted into higher regulated milk prices. Class I processors, and the producers that supply them, are not similarly straight-jacketed by milk price regulation. Unless the record is re-opened to receive evidence on manufacturing losses incurred by virtue of regulation that

[14] Supporters of depooling deterrents contend that depooling creates disorderly marketing because they can't pay a competitive price to their producers in months when producer price inversion occurs. Federal orders never have nor should they profess to guarantee a competitive price to all dairy farmers. They should only pay a uniform price to producers on milk that is pooled. Handlers are naturally involved in varying sectors of the dairy industry, with varying percentages of their milk supply providing different returns to producers. Federal orders were not meant to equalize these differences through mandated pooling. There is still room, hopefully, for some vestiges of a competitive marketplace to function.

are not experienced by fluid milk processors, the Secretary cannot reasonably conclude that he has examined both sides of the producer equity ledger and support a finding that producers selling milk for manufacturing uses have non-uniform higher revenues.[15]

COMMENTS ON THE ADMINISTRATOR'S RECOMMENDATIONS

While the hearing, the options, and regulatory alternatives were unduly constrained, we now comment on the proposed rules within these constraints.

Although the same depooling issue was involved in each of the three hearings, the rules recommended by the Administrator to deter depooling differ from market to market. The Administrator apparently intended to address these differences by observing that "each marketing area has unique marketing conditions and characteristics…." 71 Fed. Reg. at 9013 (Upper Midwest), at 9028 (Central), and at 9040 (Mideast). However, nowhere in his findings and conclusions did he identify or analyze relevant facts demonstrating these differences for purposes of depooling deterrence regulations, nor how any factual difference should lead to a different regulation.

With respect to specific provisions….

Proposed section 1032.13(f), unlike proposed 1030(f), makes no accommodation for the fact that the production volume in March will be 11% greater than February simply because March has three more days. Additionally, production per producer is ordinarily increasing during March as the full flush approaches. To accommodate these factors, proposed section 1032.13(f) and (f)(2) should be the same as section 1030(f) and (f)(2), allowing pooling of 135% of the volume of milk pooled during the prior month.[16]

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[15] A hearing on the manufacturing allowance issue for Class III and IV milk was concluded in January 2006. 71 Fed. Reg. 545 (January 5, 2006).

[16] These comments also apply to proposed rules for the Mideast Market, 1033.13(e), for which the Administrator inexplicably proposed greater limitations.

Proposed sections 1030.13(f)(2) and 1032.13(f)(2) would exclude from the percentage limitations milk "continuously pooled in any Federal Order for the previous…" six months in Order 30, and the previous month (or possibly three months) in Order 32. Again, the differences in result are not supported in the Administrator's findings by reference to factual differences in the markets. This subsection should not require the Market Administrator to look back more than one month, consistent with "the prior month" reference in the main portion of section 13(f). To require more would unnecessarily complicate handlers' burdens of record keeping and marketing decisions, create risks of inadvertent and innocent disqualification, and add to the Market Administrator's auditing burdens. Further, the term "continuously pooled" is not defined, as it should be. Does it mean the producer, all of the producer's milk production, or something else?

The added language in 1032.13(f)(2) – "provided that the producers comprising the milk supply have been continuously pooled on any Federal Order for the entirety of the most recent three consecutive months" – provides additional ambiguity, complication, and burdens. What is meant by "producers comprising the milk supply? Does this addition effectively negate the "previous month" reference in the preceding sentence? How does the milk supply or producer subject to the term "previous month" differ from the supply subject to "three consecutive months"? These complications are best resolved by deleting the second clause (after the semicolon) of proposed 1032.13(f)(2), and making the rule for 1030.13(f)(2) identical.

Subsection 13(f)(3)(i) in both recommended provisions contains a typographical error, and should probably be corrected to read: "(i) For a new handler on the order, subject to the provisions of paragraph (f)(4) of this section".

Of more substantive concern is the §§1030.13(f)(1) and 1032.13(f)(1) exclusion of milk "shipped to and physically received at pool distributing plants" from disqualification under the new section 13 limits. This provision discriminates among handlers and producers based on access to and supply contracts with distributing plants,[17] and is inconsistent with the AMAA's proscription against consideration of Class I use of producer milk as a condition of blend price eligibility. 7 U.S.C. §608c(5)(B)(ii); *Zuber v Allen*, 396 U.S. 168 (1969).[18]

The recommendation for all markets to exempt handlers "with significantly changed milk supply conditions due to unusual circumstances" may be well intentioned, but requires far more specific guidelines. Significant changes in milk supply can occur simply because of milk supply growth, without any connection to depooled milk in a prior month. On a percentage basis, a small business cooperative or milk handler simply adding members or milk supplies to meet the needs of a new customer could easily exceed the 125% limit whereas a large handler or cooperative competing for business with the same customer would not be affected at all. Milk supply or membership growth may not be an "unusual circumstance," but should not for that reason be subject to pooling penalties designed to deter de-pooling. Indeed, the proposed rules will apply year-round, without regard to whether milk prices were inverted during the prior month or whether the handler depooled milk or not. A deterrence that serves to punish simple growth in milk supply or other marketing decisions having nothing to do with the problem identified, like a

[17] Limited market access to distributing plants, and market domination by a few organizations of the supply to distributing plants, are discussed in greater detail in post-hearing briefs and exceptions on "pooling standards" issues filed on behalf of AMPI and others in the Upper Midwest, by AMPI and Central Equity and others in the Central Market hearings, and on behalf of White Eagle and others in the Mideast Market hearings.

[18] Recommended section 1033.13(e)(2) for the Mideast Order appears to provide a similar result, but we are not sure. Its content, intent, and impact are largely incomprehensible, and are unexplained in the decision.

policeman's bullet striking an innocent bystander, should be avoided if at all possible. One way to do this is to activate or trigger these rules *only* when milk price inversion occurs, or is reasonably expected to occur.

CONCLUSIONS

Inverted milk pricing due to the structure of federal milk order regulations, and the market response to inverted pricing in the form of depooling, create problems for the dairy industry. The solution lies in fixing the regulatory cause of price inversion, not deterring the marketplace response to rules that do not work. Before any kind of regulatory fix is mandated, in any event, all aspects of the problem should be considered, all new burdens on small business should be measured by a Regulatory Flexibility Analysis, and the remedy selected should be carefully designed to minimize burdens. The problem of price inversion is, perhaps, recurrent, but it is not constant. The record does not support any new burden imposed every month of the year, with no end in sight, to cure a problem that occurs only occasionally.

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Respectfully submitted,

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ATTACHMENT A

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EXHIBIT
38
KEH 08-18-04

August 11 2004

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

Re: Invitation to Submit Proposals for a Public Hearing to Amend the Pooling Provisions of the Central Marketing Order, dated July 12, 2004.

Dear Ms Coale:

I am writing in response to USDA's July 12th announcement inviting comment on possible proposals for a hearing regarding the pooling provisions in the Central Order.

The purpose of this letter is to urge USDA not to consider a hearing for the purpose of dealing with market attachment (depooling) on a market by market basis, but instead to do so as part of a national hearing which puts that issue into a proper context with other issues related to the Class III and IV price formulas.

- As you know, there are a number of justifications for a national hearing to update the 2000-2003 process, which reviewed and modified the Class III and IV formulas. Those formulas were based on data heard at a hearing in May of 2000, at which the principal evidence on manufacturing costs dated from 1998 and 1999. (See Dr. Ling's 1998 study, Hearing Exhibit #9.)
- During the past five years since the hearing, labor costs (which represented roughly 1/3 the cost of manufacturing in Dr. Ling's exhibit) have risen about 20% (per the national index of wages in manufacturing published by the Bureau of Labor Statistics, Department of Labor).

- Even more alarming has been the increase in energy costs, particularly natural gas. Our research indicates a roughly a 250% increase in natural gas costs (from the $2 per btu range, to over $6). Dr. Ling's exhibit indicated that fuels other than electricity represented 13.6% of the costs of drying powder, and of course the department recognized in the decisions that whey requires more energy to dry than powder (more water).
- We are not optimistic about any relief in energy prices in the near or mid-term. As you may know, Chairman Greenspan has warned of an impending natural gas crisis, and the potential effect on the U.S. economy. Today's record world prices for oil also suggest that energy cost adjustments are of paramount importance as the Federal Order system moves forward. The experience of 2000-03 indicates that those adjustments should be a priority for your Order Formulation group.

The purpose of this letter is not to request such a hearing at this time. Mike Brown of our staff is working with you and others in the Dairy Division to develop such a proposal. We are optimistic that this can be delivered to you in the near future.

However, the purpose of this letter is to suggest that depooling should be – and must be – part of the larger discussions about conversion costs and make allowances. As you well know, one primary purpose of the Class III and IV formulas is to "fairly" allocate the money from the commodity market between processors and the producers in the pool. Depooling impacts that allocation, by shifting revenue at times from the marketwide producer pool to plants or their suppliers.

One goal of the Class III and IV formulas is to ensure that plants can be profitable, so that producers will have a market. That goal requires considering <u>all</u> aspects of overall plant profitability, including plant revenue opportunities like depooling. It's all linked.

Limiting depooling without reconsideration of today's make allowances and the rest of the Class IIII and IV formulas could represent a dramatic change in the terms of profitability of plant operations. It could easily lead to closure of marginal operations in some regions, which in turn could lead to disorderly market conditions in those regions.

We recognize that a hearing will be held soon in the Upper Midwest region to consider depooling and other aspects of market attachment. We recognize that those proposals will be heard, and may generate some useful approaches that could be followed in a national hearing. We are not commenting in this letter on the merits of that proposal for the Upper Midwest market. We will participate in that hearing and put our comments on the record, as is proper for that proceeding.

With respect to the Central Order, and perhaps other orders where the "depooling" issue is raised, I respectfully suggest that the need to revisit the Class III and IV formulas is a much more urgent issue, and a much better priority for the scarce resources of the Order Formulation branch.

Thank you for your consideration of our views.

Sincerely,

Douglas C. Marshall
Sr. Vice President
Northwest Dairy Association

cc: Clifford M. Carmen
Chief, Order Formulation
USDA/AMS/Dairy Programs
Washington, DC
(Via email)

Jack Rower, Marketing Specialist
USDA/AMS/Dairy Programs
Order Formulation and Enforcement Branch
Washington, DC
(Via email)

Donald R. Nicholson, Ph.D.
Central Market Administrator
USDA/AMS/Dairy
P.O. Box 14650
Shawnee Mission, Kansas 66285-4650

USDA

United States Department of Agriculture

Agricultural Marketing Service

1400 Independence Ave., SW
Washington, DC
20250-0231

SEP 17 2004

Mr. Douglas C. Marshall
Senior Vice President
Northwest Dairy Association
Post Office Box 79007-7907
Seattle, Washington 98119

Dear Mr. Marshall:

Thank you for the comments and proposals for a national hearing on Class III and IV pricing issues that you submitted on August 11, 2004. Your proposals on behalf of Northwest Dairy Association were in response to the invitation for additional proposals for consideration of a public hearing for the Central Order.

The public hearing will be limited to considering proposals for changing the Order's pooling standards and payments from the Producer Settlement Fund of the Central Order. Evidence will be taken at the hearing to determine if emergency conditions prevail in the marketing area that would warrant the omission of a recommended decision.

Your recommendations for a national hearing were carefully considered during our review of all proposals received. While we understand the concerns you have expressed regarding the view that pooling standards should be considered or reconsidered in a national context with manufacturing milk price formula issues, the Department of Agriculture is committed to limiting proposals to the Central Order at this hearing. Accordingly, proposals seeking to revisit Class III and IV price issues are being held in abeyance until a national hearing is scheduled.

Again, thank you for submitting your proposals for consideration. We look forward to your participation in the upcoming hearing. A copy of the hearing notice is enclosed for your convenience.

Sincerely,

A. J. Yates
Administrator
Agricultural Marketing Service

Enclosure

AMS:DAIRY:OF&EB:Jrower:jmm:720-2357:09/15/04
G:Vital Records/Order...Correspondence/FY04/Vetne-Marshal-ltr

John H. Vetne

Attorney at Law
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August 13, 2004

Dana Coale
Acting Deputy Administrator,
USDA/AMS/Dairy Programs,
STOP 0225BRoom 2968
1400 Independence Avenue, SW
Washington, DC 20250-0225,

Re: Response on behalf of AMPI, Bongards Creameries, Ellsworth Cooperative Creamery, Family Dairies USA, First District Association, and Wisconsin Cheese Makers Association to Invitation to Submit Proposals.

Dear Deputy Administrator Coale:

I write on behalf of Associated Milk Producers, and other cooperative associations and milk manufacturing representatives identified above, in response to the Department's invitation of July 12, 2004, for comments on the June 23, 2004, proposals of DFA and Prairie Farms ("DFA Proposal") to amend the Central Milk Marketing Order, 7 C.F.R. Part 1032. This letter addresses that part of the DFA proposal for amendments to limit depooling or repooling by amending Section 1032.13(f).

We respectfully urge USDA to consider these proposals, if at all, only at a national hearing for several reasons.

1. The proposals would severely change practices of cooperatives and other handlers of long historical duration. Depooling of milk to secure nothing more than the market value of milk for producers, when regulated prices do not reflect current value of milk, is a practice that has been exercised by cooperatives and other handlers for decades, as shown in footnotes to Tables 11-12 of annual Federal Milk Order Market Statistics ("FMOS") for the 1980's and 1990's, and in Tables 6, 21, and 26 of FMOS's for 2000 to date.
2. The practice of depooling when regulated prices are out-of-sync with current milk market value is, and has been, widespread. During last spring's unusual escalation of commodity cheese and Class III prices, cooperatives and other handlers depooled milk to maximize revenue for producers in *all* federal milk order markets except Arizona-Las Vegas. FMOS, 2004 annual, Table 21. During late 2000, depooling of Class IV milk was widespread for the same reasons, affecting six federal milk orders.
3. Failure to address depooling issues on a national basis will not only create inequities between orders, it will also invite marketing and pooling abuses between orders if Order 32 is amended along the DFA-proposed lines. For example, DFA is a significant supplier of milk to Order 33, Order 5 and Order 7, but has proposed no changes for these orders. Perhaps the explanation is simple: in some markets DFA can depool and benefit more than its competitors; in other markets (such as Order 32) the benefit of depooling goes primarily to other cooperatives and their members.
4. Because depooling of milk is historically both widespread and of long duration, DFA's characterization of depooling as a local problem shown by "recent experiences of depooling that have occurred in Order 32" is misleading both in its geographical and time reference. The primary regulatory source of depooling is regulation reflecting current values of milk for

Class III and IV uses, while Class I and II prices reflect market value of milk in the past. It may be true, as stated by DFA, that "existence of regulation… causes [depooling] to occur so the regulations need to be changed to better reflect economic reality." It does not follow that the regulations need to be changed to discourage a practice caused by class price misalignment with market prices. If a regulatory remedy is needed, it may be more rational to adjust the current Class I and II price formula to reflect economic reality.

5. There is, moreover, no rational basis to conduct hearings on an "emergency" basis to address the depooling issue raised by DFA. As observed, it is a practice that is neither recent, surprising, nor localized. It is also not likely to recur to the degree observed last spring in the near future. NMPF's July 2004 *Dairy Marketing Report* (published by Dairy Management, Inc.), observes that June's negative PPD in the Pacific Northwest "is likely to be the *last negative PPD for the foreseeable future*, and 'depooling' should be limited to milk not easily returned to pool status in the next few months."

Thank you for your careful consideration of our views on these issues.

Respectfully submitted,

John H Vetne

Ec: Clifford M. Carmen
Chief, Order Formulation

Jack Rower
Marketing Specialist

Donald R. Nicholson, Ph.D.
Market Administrator

USDA

United States Department of Agriculture

Agricultural Marketing Service

1400 Independence Ave., SW
Washington, DC
20250-0231

SEP 17 2004

Mr. John H. Vetne
Attorney at Law
103 State Street #6
Newburyport, Massachusetts 01950

Dear Mr. Vetne:

Thank you for the comments and proposals for a national hearing on pooling issues that you submitted on August 13, 2004. Your proposals on behalf of Associated Milk Producers Inc., Bongards Creameries, Ellsworth Cooperative Creamery, Family Dairies USA, First District Association, and Wisconsin Cheese Makers Association, were in response to the invitation for additional proposals for consideration at a public hearing for the Central Order.

The public hearing will be limited to considering proposals for changing the Order's pooling standards and payments from the Producer Settlement Fund of the Central Order. Evidence will be taken at the hearing to determine if emergency conditions prevail in the marketing area that would warrant the omission of a recommended decision.

Your recommendations for a national hearing were carefully considered during our review of all proposals received. The Department of Agriculture is committed to limiting proposals to the Central Order at this hearing.

Again, thank you for submitting your proposals for consideration. We look forward to your participation in the upcoming hearing. A copy of the hearing notice is enclosed for your convenience.

Sincerely,

A. J. Yates
Administrator
Agricultural Marketing Service

Enclosure

AMS:DAIRY:OF&EB:Jrower:jmm:720-2357:09/15/04
G:Vital Records/Order For...Correspondence/FY04/Vetne-Marshall-ltr

ATTACHMENT B

March 8, 2002

Charlie I. Harper, Jr., Chief
Rural Utilities Service
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Stop 1598
Washington, DC 20250-1598

Dear Mr. Harper:

As part of its statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[i] the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Rural Utilities Service's ("RUS") Regulatory Flexibility Act Certification for final rules in two recent proceedings[ii] and found that they do not satisfy the requirements of the RFA.

The RFA permits Federal agencies to certify that a final rule does not have a significant economic impact on a substantial number of small entities and avoid conducting a regulatory flexibility analysis. In the two actions referenced above, RUS certified the final rules pursuant to the RFA, but RUS relies on two invalid reasons for these certifications: (1) all entities are affected equally and (2) the benefit to small businesses outweighs the costs. These reasons contradict the language of the RFA and the intention of Congress. Therefore, RUS cannot base a certification on these reasons.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305[iii] to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.[iv] Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980 (RFA),[v] as amended by the Small Business Regulatory Flexibility Act, Subtitle II of the Contract with America Advancement Act.[vi]

2. "All Entities Affected Equally" is an Invalid Basis for Certification

In the System Construction Certification, RUS certifies the rule will not have a significant economic impact on a substantial number of small entities because "Small entities are not subject to any requirements which are not applied equally to large entities."[vii] The idea that compliance with the RFA means not adding additional requirements on small businesses is a common misconception about the requirements of the RFA. Congress specifically addresses this issue in its findings in the RFA:

> "[U]niform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources."[viii]

And:

> "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity."[ix]

And:

> "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation."[x]

These three findings show that Congress knew about tendency of agencies to impose "one-size-fits-all" regulations and specifically rejected it. As Congress states, one-size-fits-all regulations are unnecessary and disproportionately burdensome to small businesses. This has been born out by a recent economic study commissioned by Advocacy.[xi] This study showed that a firm with less than 20 employees shouldered regulatory costs 60 percent greater per employee than firms with more than 500 employees. Because of the disparity of the impact of governmental regulations, the agency cannot certify a rule on the basis that all entities have the small regulatory obligations.

3. "The Benefit to Small Businesses Outweighs the Costs" is an Invalid Basis for Certification

In both the System Construction Certification and the System Installation Certification, RUS certifies the rule will not have a significant economic impact on a substantial number of small entities because the benefit to the regulated entities outweighs the costs. This is an incorrect interpretation of the certification provisions of the RFA. While a cost-benefit analysis might help an agency determine the degree of impact on small entities, the mere fact that the benefits outs weigh the cost is not dispostive of impact. In other words, the test for certifications is whether a rule has an impact.

As Congress states in the findings of the RFA, "the process by which Federal regulations are developed and adopted to should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities…"[xii] Congress knew that agencies might not be aware of costs, have the wrong information, or might improperly estimate costs. Agencies cannot certify that the benefits are greater without giving small businesses a chance to comment and share information with the agency.

4. Conclusion

By certifying these two rules, RUS is depriving itself of the opportunity to learn about the rules' impact actions on small businesses. The two listed reasons, (1) that rules affect all businesses equally, and (2) that the benefit outweighs the detriment, are invalid bases for certification as they go against the spirit of the RFA and are contrary to the intention of Congress.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Eric E. Menge
Assistant Chief Counsel for Telecommunications

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[i] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).
[ii] Telecommunications System Construction and Specifications, 66 Fed. Reg. 43,309 (2001) (to be codified at 7 CFR Part 1755)(System Construction Certification); RUS Standard for Service Installations at Customer Access Locations, 66 Fed. Reg. 43,314 (2001). (to be codified at 7 CFR Part 1755)(System Installation Certification).
[iii] Codified as amended at 15 U.S.C. §§ 634 (a)-(g), 637.
[iv] 15 U.S.C. § 634(c)(1)-(4).
[v] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (*codified at* 5 U.S.C. § 601 *et seq.*).
[vi] Pub. L. No. 104-121, 110 Stat. 857 (1996) (*codified at* 5 U.S.C. § 612(a)).
[vii] System Construction Certification, 66 Fed. Reg. at 43,309.
[viii] RFA, *supra* note 1, Findings (3).
[ix] RFA, *supra* note 1, Findings (4).
[x] RFA, *supra* note 1, Findings (6)
[xi] W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms* (2001).
[xii] RFA, *supra* note 1, Finding (8).

ATTACHMENT C

February 1, 2006

<u>Via Facsimile and Electronic Mail</u>

Julie MacDonald
Deputy Assistant Secretary for Fish,
Wildlife and Parks
U.S. Department of Interior
1849 C Street, N.W.
Room 3156
Washington, DC 20240

<u>Re: Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for the California Red-Legged Frog (Rana aurora draytonii) (70 *Fed. Reg*. 66,906).</u>

Dear Deputy Assistant Secretary MacDonald:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule, *Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for the California Red-Legged Frog (Rana aurora draytonii)*.[1] Advocacy believes that the Regulatory Flexibility Act (RFA) requires FWS to complete an initial and final regulatory flexibility analysis for this rulemaking, as the evidence indicates the rule will have a significant economic impact on a substantial number of small entities. Advocacy also recommends the consideration of regulatory alternatives to minimize unnecessary small business regulatory burdens. Further, Advocacy concludes that under the RFA, FWS should not deny the public an opportunity for meaningful participation by deferring its small business impact determinations until after publication of proposed rules, as it has done in this case.

Congress established Advocacy in 1976 under Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government.[2] Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the

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[1] *Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for the California Red-Legged Frog (Rana aurora draytonii)*, 70 *Fed. Reg*. 66906 (Nov. 3, 2005).
[2] Pub. L. No. 94-305, 90 Stat. 663, §§ 201 et seq. (codified at 15 U.S.C. §§ 634a-g).

Administration. Further, Advocacy has a statutory duty to monitor and report to Congress on FWS' compliance with the RFA.[3]

On August 14, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.[4] This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget.[5] It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule.

I. <u>The Economic Analysis Provided by FWS and the Makeup of the Home Building Industry Indicate the Rule Will Have a Significant Economic Impact on a Substantial Number of Small Entities, and the Rule Should be Accompanied by Regulatory Flexibility Analyses.</u>

FWS has concluded in its draft economic analysis that:

> Critical habitat is not expected to result in significant small business impacts since revenue losses are less than one percent of total small business revenues in affected areas. From permit data, it appears that large businesses greatly dominate Greenfield development. It is estimated that no more than a single small business will be affected annually as a consequence of designation.
> *Draft Economic Analysis*, at 3 (I.7 Small Business Impacts).

However, this conclusion does not appear to be based on a sufficient factual basis to support a decision to certify this rulemaking as not having a significant economic impact on a substantial number of small entities. After reviewing the agency's materials provided in support of this rulemaking, Advocacy concludes that: (1) FWS appears to have significantly underestimated the number of affected small entities, and (2) FWS has improperly found the rule's impacts to be insignificant.

The assumptions underlying FWS' certification of no significant economic impact on regulated small entities appear to be incorrect. Advocacy recommends that FWS complete an initial regulatory flexibility analysis for the proposed rule and provide this analysis to the public for comment.

A. The Rule is Likely to Have a Significant Economic Impact on a Substantial Number of Small Entities.

Contrary to FWS' apparent conclusion that the rule is not likely to impose significant economic impacts on a substantial number of small entities, the draft economic analysis provided by FWS indicates that the rule will have a significant economic impact on a

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3 5 U.S.C. § 612.
4 Exec. Order. No. 13272, at § 1, 67 Fed. Reg. 53,461 (2002).
5 *Id*. at § 2(c).

substantial number of small entities. Also, small entity representatives have contacted Advocacy and commented that the rule will impose significant economic impacts.

1. *Substantial number of small entities.*

The draft economic analysis conducted by FWS and input from small entities support the conclusion that this rule will impact a substantial number of small entities. Advocacy believes that any factual basis for certification under the RFA or estimate of the affected small entities in an initial regulatory flexibility analysis must contain, at the minimum, a clear explanation of what type and how many small entities will be affected, as well as basic information allowing the public to determine how the agency arrived at such conclusions. FWS's draft economic analysis does not include any information with respect to the delineation of small entities within the regulated industry.

Based on our discussions with small entity representatives, FWS appears to have underestimated greatly the number of small entities in the home building industry this rulemaking would impact. According to FWS' draft economic analysis, this rule will only affect one or less small entity builders in each of the six counties for which the rule is projected to impose the most impacts.[6] However, this conclusion appears to be based on an analysis of building permit data, which includes only the number of home *developers*, rather than *builders*.[7] If it is indeed the case that FWS is using builders and developers interchangeably, FWS needs to revise its analysis and ensure that the conclusions reached at the NPRM stage still hold. This is a significant problem, as any statistical information that FWS relies on using the incorrect NAICS code will lead to incorrect conclusions as to the makeup and impacts to small home builders.

Advocacy has discussed the home building market with the primary trade association representing small home builders in Northern California, the Home Builders Association of Northern California. They informed Advocacy that when a building permit is granted to a developer, that developer then subcontracts the building project to a number of

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6 FWS, *Economic Effects of Critical Habitat Designation for the Red-Legged Frog in 23 California Counties*, at 71 (Oct. 19, 2005) (*Draft Economic Analysis*) (available online at http://www.fws.gov/sacramento/ea/Documents/Red-Legged%20Frog%20DEA%2010-19-05.pdf).

7 FWS does not state anywhere in its analysis whether it is measuring impacts to home builders or developers, two distinctly different sets of businesses. However, the agency repeatedly references "developers," leaving Advocacy with the impression that its estimates do not pertain to home builders, but developers. Developers appear to be covered by NAICS code 237210, whereas new, single-family home builders are classified under NAICS code 236115. *See* U.S. Census Bureau, *North American Industry Classification System, Revisions for 2002* (available online at http://www.census.gov/epcd/naics02/). County level census business statistics report using these NAICS codes, meaning that substitution of these codes would be a fatal error to any small business impacts analysis. In what appears to be a related error, FWS also concluded in part that impacts would be insignificant because home builders would be able to substitute home remodeling for home building. Advocacy notes that residential home remodeling is not included within NAICS code 236115 (single-family home construction), but rather 236118 (residential remodelers).

builders who each build a handful of individual units.[8] For example, in the case of an average new home development, one permit may cover 30-40 small home builders. FWS, in its economic analysis, concluded that only 22% of projects involve small builders.[9] That percentage appears to be incredibly low considering the information in Note 8.

Based on FWS' analysis and discussions with the representatives of small home builders, Advocacy believes that the number of small home builders affected by this rule is many orders greater than indicated by FWS. Advocacy believes this to represent a substantial number of small entities.

2. *Significant economic impacts.*

The draft economic analysis provided by FWS for this critical habitat designation does not support the conclusion that the rule's economic impacts will not be significant to regulated small entities. FWS does not state in its draft economic analysis the actual costs it plans to impose per small business home builder; however, FWS does provide some estimate of the number of affected small developers (this number does not include home builders) and a total impact from the rule over 20 years.[10]

Absent impact data on small home builders, and given that FWS may have underestimated the total number of small home builders affected by the rule, the conclusion that the impact on small home builders is not significant needs to be substantiated further in the factual basis. Home builder trade representatives have unambiguously declared the impact significant. Advocacy suggests that FWS substantiate its conclusions through an initial regulatory flexibility analysis.[11]

Advocacy notes that FWS has apparently discounted the significance of these economic impacts using a test for a rule's significance under the RFA which has been previously held by a Federal court to be improper.[12] On page 3 of the draft economic analysis, the agency states that the rule "is not expected to result in significant small business impacts

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[8] Telephone Interview with Paul Campos, General Counsel and Vice President for Government Affairs, Home Builders Association of Northern California (Jan. 27, 2006). It is worth noting that about 99 percent of businesses engaged in residential building construction are small and they employ 77.1 percent of the workforce in the industry. (2002 data, Office of Advocacy, U.S. Small Business administration, from data provided by the U.S. Census Bureau, Statistics of U.S. Business).

[9] *Draft Economic Analysis*, at 67 ("Table VI-2: Small Business Impacts from Residential Construction").

[10] *Draft Economic Analysis*, at 4 (Table I-1: Summary of Economic Effects of Critical Habitat Designation).

[11] For illustrative purposes, consider San Luis Obispo County. FWS concludes that the county will incur approximately $4 million in annual revenue impacts due to the rule. *Id*. at 70 (Table VII-1). FWS also estimates that 1.1 small entities per year will incur these losses. *Id*. at 71 (Table VII-3). Advocacy believes that $4 million is a significant economic impact to a small entity. Also, even if Advocacy is correct in its conclusion that FWS has greatly underestimated the number of small entities likely to be affected by the rule, it is likely that the impacts could amount to hundreds of thousands of dollars per firm, an amount that Advocacy would also believe to be significant.

[12] *North Carolina Fisheries Ass'n. v. Daley*, 27 F. Supp. 2d 650, 659 (E.D. Va. 1998).

since revenue losses are less than one percent of total small business revenues in affected areas."[13] This indicates that FWS may have divided the rule's total impacts into the total revenues for all small business home builders for affected counties—whether those small entities were regulated or not—to conclude that the rule would reduce all small entities' revenues by less than one percent. However, this test does not measure the impact of the rule to those small entities that are regulated, as the RFA requires. As the court found in *North Carolina Fisheries Ass'n. v. Daley*, when an agency measures the significance of a rule under the RFA, it must measure the significance to regulated small entities—without diluting that measure of significance by dividing it among entities which are not being regulated.[14] In light of judicial precedent and the economic impact data reflected elsewhere in the economic analysis, Advocacy recommends that FWS remove this analysis and change its conclusion that the rule's impacts to regulated small entities will not be significant for purposes of RFA analysis.

B. The Rule Should Be Accompanied by an Initial Regulatory Flexibility Analysis.

Since the evidence indicates that the rule will impose significant economic impacts on a substantial number of small entities, Advocacy recommends that FWS complete an initial regulatory flexibility analysis. Whenever an agency finds that a rule required to be promulgated through notice and comment rulemaking will have significant economic impacts on a substantial number of small entities, that agency is required to complete an initial regulatory flexibility analysis.[15] The initial regulatory flexibility analysis must be published in the *Federal Register* for public comment, and must include an estimate of the number of small entities to which the rule will apply and "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[16] Advocacy recommends that FWS publish an initial regulatory flexibility analysis with at least 60 days for the public to comment, the amount of time the agency provided for non-economic comments.

II. <u>Recommended Small Business Alternatives.</u>

Advocacy recommends that FWS consider regulatory alternatives which could reduce this rule's impacts to small entities, including the exclusion of areas that FWS has identified as most likely to impose regulatory burdens to small home builders.

The ESA orders FWS to designate critical habitat, "after taking into consideration the economic impact" of such designation.[17] Advocacy believes that the ESA invests

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[13] Draft Economic Analysis, at 3.

[14] *North Carolina Fisheries Ass'n*, 27 F. Supp. at 658-660 (holding improper a test that divided the total economic impact into the total number of small entities, whether those small entities were being harmed by the rule or not).

[15] 5 U.S.C. §§ 605(b) (certification), 603 (initial regulatory flexibility analysis).

[16] 5 U.S.C. § 603.

[17] 16 U.S.C. § 1533(b)(2).

considerable discretion in FWS in designating critical habitat, as the statute states that:

> The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.
> 16 U.S.C. § 1533(b)(2).

The RFA requires agencies to publish with their final rules a final regulatory flexibility analysis, which includes, among other things:

> [A] description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.
> 5 U.S.C. § 604(a)(5).

Thus, Advocacy believes that FWS should analyze regulatory alternatives to reduce small entity burdens to satisfy both the ESA's requirement to consider economic costs of designating critical habitat and the RFA's requirement to consider regulatory alternatives which minimize unnecessary economic impacts to small entities.

In this rule, it appears there are a number of geographical areas which could be excluded, and that FWS has not yet presented an explanation of concrete species benefits or asserted that the exclusion of these areas from a final critical habitat designation would result in species extinction. According to FWS' draft economic analysis, approximately 91% of the rule's impacts will be felt in eight counties; San Luis Obispo, Contra Costa, Santa Barbara, Ventura, Alameda, Riverside, Los Angeles, and Monterey. These eight counties account for $10,457,818 of the $11,484,407 in annual costs FWS projects the rule will have to home construction.[18] FWS has conducted housing market analyses for these counties that identifies the geographic areas where home building may occur.[19] Advocacy recommends that FWS consider excluding these areas from its designation, and provide the public with either a certification statement providing a factual basis to how the areas' exclusion causes the rule to not have significant economic impacts on a substantial number of small entities, or complete the required regulatory flexibility analyses.

III. FWS May Not Defer its Responsibilities Under the RFA Until After Publication of Proposed Rules.

It has been a pattern at FWS to issue a proposed rule, delay the RFA analysis pending further study, then certify that the rule will have no significant economic impact on a substantial number of small entities when the analysis is completed. Advocacy believes that deferring the small business impact and alternatives analysis until late in the

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18 Id. at 70 (Table VII-1: Impact of CHD on New Home Construction Revenue).
19 Id. at 52-57.

rulemaking process does not give appropriate consideration to the requirements of the RFA. These delays in conducting the necessary RFA analysis thwart the ability of affected small entities to provide meaningful comment on the proposal's impact. Advocacy believes there are a number of small entities likely to face harm from this proposal, and they deserve an adequate opportunity to review the agency's RFA analysis.[20]

IV. Conclusion.

Advocacy believes that there is insufficient factual basis for the certification of this rulemaking as not having a significant economic impact on a substantial number of small entities; and accordingly, that the agency should conduct regulatory flexibility analyses required by the RFA. Advocacy recommends the consideration of exclusion of certain areas from the final rule to minimize small entity regulatory burdens. Also, Advocacy also urges FWS to provide for meaningful public participation in its rulemaking process by including with proposed rules the determinations and regulatory analysis required by the RFA. Thank you for your consideration and please do not hesitate to contact Michael See with any further questions at (202) 619-0312 or Michael.See@sba.gov.

Sincerely,

/s

Thomas M. Sullivan
Chief Counsel for Advocacy

/s

Michael R. See
Assistant Chief Counsel

cc: The Honorable Dale Hall, Director, U.S. Fish and Wildlife Service

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20 FWS has not based its delays on the RFA's emergency rulemaking provision in this case. As Advocacy commented previously in another rulemaking:

> The RFA requires agencies to publish a certification or [initial regulatory flexibility analysis] at the same time as the publication of their proposed rules. Should FWS find itself unable to comply with the RFA due to an emergency which would prevent the agency from timely compliance, the RFA provides for delayed compliance through specific mechanisms. However, FWS has not declared an emergency under the RFA. Advocacy believes that FWS is not entitled to delay its statutory obligations routinely, as such delays could deny the public an opportunity to participate in FWS rulemakings meaningfully.
> Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to the Honorable Craig Manson, Assistant Secretary for Fish, Wildlife, and Parks, U.S. Department of the Interior, at 6 (March 29, 2005) (citations omitted).

ATTACHMENT D

Office of Advocacy

Office of Interagency Affairs

June 4, 1999

VIA ELECTRONIC &
REGULAR MAIL

Mr. Tom Fry
Acting Director
Bureau of Land Management
Department of Interior
1849 C Street, NW
Room 5660
Washington, DC 20240
Facsimile (202) 208-5242

Re: Onshore Oil and Gas Leasing and Operations

Dear Mr. Fry:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to advocate the views of small business before federal agencies and Congress. Advocacy is also required by §612(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id. On March 28, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. 104-121, which made a number of significant changes to the RFA, the most significant being provisions to allow judicial review of agencies' compliance with the RFA. 5 U.S.C. § 611.

On December 3, 1998, the Bureau of Land Management (BLM) published a proposed rule on Onshore Oil and Gas Leasing Operations, Federal Register, Vol. 63, No. 232, p. 66840. The purpose of the proposed rule is to revise Federal oil and gas leasing and operations regulations. Among other things, the rule will increase the minimum bond amounts for individual and statewide operators; impose a fee for inactive wells; and change the procedure for imposing penalties for uncorrected violations.

Regulatory Flexibility Act Requirements

The RFA requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. §§ 601, et. seq.; Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9. When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. § 603(a); *Id.*.

Initial Regulatory Flexibility Analysis

If the proposed rule is expected to have a significant economic impact on a substantial number of small businesses, an initial regulatory flexibility analysis (IRFA) must be prepared and published with the proposed rule. The required IRFA is prepared in order to ensure that the agency has considered all reasonable regulatory alternatives that would meet the agency's policy objectives but minimize the rule' s economic impact on affected small entities. In accordance with Section 603(b) of the RFA, each IRFA must address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, record keeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap or conflict with the proposed rule.

Certification

Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed rulemaking for the rule along with a statement providing the factual basis for the certification. *Id.*

RFA Non-Compliance in Proposed Rulemakings

BLM's Certification Does Not Comply with the Requirements of the RFA

In the above referenced proposal, the BLM did not prepare an IRFA. Instead, it opted to certify the proposal. The certification states that the proposal will not have a significant economic impact on a substantial number of small entities. BLM asserts that the only provisions of the proposal that will have an impact on a substantial number of small entities are the bonding provisions. BLM contends, however, that that impact will not be significant.

BLM Failed to Provide a Definition for Significant Impact

In its certification, BLM does not provide any information about the guidelines that it used in its threshold analysis for defining "significant". Without BLM's definition of significant, the public is unable to ascertain whether there is a true factual basis for BLM's conclusion of "no significant impact". The Office of Advocacy asserts that by not providing its definition of significant, BLM has compromised the public's ability to review the information, analyze BLM's findings, and provide meaningful comments.

Since BLM did not provide information on its definition of significant, the Office of Advocacy consulted with Advocacy's Office of Economic Research for guidance on determining a "significant impact" when reviewing profit data. According to the Office of Advocacy's Office of Economic Research, a 10% impact on a business's profits is indeed significant. The Office of Advocacy, therefore, will use a 10% threshold for the purpose of this comment.

The Impact of the Bonding Proposal May Be Significant

Under the proposal, individual bonds will be increased from $10,000 to $20,000; statewide bonds will increase from $25,000 to $75,000; and nationwide bonds will remain at $150,000. Federal Register at 66842. BLM contends that the increases in local and statewide bonds are necessary because small operators are less likely to meet their reclamation requirements. Furthermore, the bonds have not been increased since 1960. *Id.*

BLM estimates that the actual impact will be $43 per well per year; it asserts that such an impact is small. BLM provides an example of the overall impact of the regulation on small entities. In the example provided, BLM states that at a profit of $2 per barrel, the additional bonding cost would be covered by the profit from 3 weeks of production. Federal Register, at 66864. Simple arithmetic indicates that 3 weeks is 6% of a 52-week year. A proposal, therefore, that uses three weeks of a company's profit would amount to a minimum of approximately 6% of the business's annual profit, assuming that the wells are active for the entire year.

While 6% does not reach the threshold that Advocacy has established for determining significant economic impact, the impact is 6% only if the wells operate productively for every week out of the year. If the wells do not operate for the entire year, the impact on the small entities increases. As the weeks of operation decrease, the percentage of profits used will increase. For example, if the wells only operate for 30 weeks of the year, then the impact of the proposal would be 10% of the profits.

BLM Failed to Consider the Aggregate Impact of the Proposal

Furthermore, it is unclear to Advocacy whether BLM has considered the aggregate impact of this proposal. In addition to the bonding requirement, the producers will also have to pay a $100 fee for inactive wells. While the $100 per well fee may not be significant, the fee plus the bonding requirement may impose a significant burden on a small entity. Accordingly, the Office of Advocacy asserts that BLM should consider more information on the practices of the industry and the aggregate impact of the proposal before simply certifying the proposal and dismissing the impact as not significant. Failure to do so deprives the public of information that may be instrumental for facilitating meaningful public comments.

BLM’s Certification Is Not Supported By a Factual Basis as Required by the RFA

The Office of Advocacy has steadfastly maintained that an agency must conduct a threshold analysis prior to certifying that a rule has "no significant economic impact". The threshold analysis provides the agency with the type of information required for formulating a factual basis. From the information provided, the Office of Advocacy is unable to determine whether BLM performed a threshold analysis to assure that its certification of "no significant economic impact," is not arbitrary but is supported by factual knowledge of the industry that may be affected by the agency’s actions.

BLM’s failure to provide information on its definition of "significant economic impact", failure to provide crucial information on the nature of the industry (i.e. the number of weeks that the wells are in operation per year) and failure to publish an analysis of the aggregate impact of the proposal hinders the notice and comment process. Without this information, neither the Office of Advocacy nor the public can determine the factual basis for BLM’s certification of "no significant impact". The reason that a factual basis must be provided for comment is to assure that the agency has a basis for its regulation and that it will not effect competition.

Eliminating Major and Minor Classification of Violations and Simplifying Assessment Structure Promotes Bad Public Policy

Under the current regulations, violations are classified as major violations and minor violations. Major violations are actions that, if left uncorrected, could cause immediate, substantial, and adverse impacts to public health and safety, production accountability, or the environment. Minor violations are violations that do not rise to the level of major violations. Operators are liable for an assessment of up to $500 per day if the violation is not corrected within a time specified by BLM. Minor violations are subject to a one-time assessment of $250, if the violation is left uncorrected. Federal Register, at 66867.

Pursuant to the proposal, all violations, major and minor, will be treated the same; operators will be required to pay $250 per day for uncorrected violations. The proposal eliminates all caps on uncorrected violations. Id. Accordingly, under the proposal, if a minor violation is left uncorrected for a one week period, the operator will be liable for $1,750-- $1,250 more than the prior penalty of $250 per violation.

The information in the proposal states that in the last four years an average of 2,735 citations were issued per year for major violations and 13,752 citations were issued per year for minor violations. Accordingly, the vast majority of the violators were liable for a maximum penalty of $250. Of those citations, less than 7% of the major violations and less than 1% of the minor violations have resulted in assessments. Id.

BLM asserts that the potential for an assessment promotes compliance. Id. Moreover, BLM believes that the removal of the cap and the increased assessment will decrease the number of minor penalties. Id. at 66867-66868.

The Office of Advocacy commends BLM for publishing the proposed changes in the penalty procedure for public notice and comment. In that the changes may have a significant economic impact on a substantial number of small businesses, public comment is crucial to assure fair policymaking at all stages of the process, including the imposition of penalties. Such an implementation policy could be unduly burdensome on a small business with minor violations and deserves the public scrutiny that BLM has allowed.

Advocacy, however, questions whether the proposed policy will meet the stated objectives of BLM, i.e. to encourage compliance and reduce the potential for environmental problems. The data provided by BLM indicates that although 13, 752 citations were issued for minor violations, less than 1% of minor violations result in assessments. Did the minor violators have knowledge of regulations or basis of the violation prior to the citation? Moreover, is the low percentage of assessments an indication of a minor violator’s willingness to address the issue in an expeditious matter? If the violations were a result of a lack of knowledge, would educating the businesses about the requirements, prior to the occurrence of a violation, be a better mode of achieving compliance?

Furthermore, is the higher percentage of assessments to major violators an indication of a greater rate of recalcitrance among major violators? If so, does the proposal reward the major violators’ poor behavior by lowering the assessment rate for major violations? If a major violation is a greater risk to the public than a minor violation, will the proposal policy be perceived as rewarding the behavior of major violators while being unnecessarily punitive to minor violators? If the overall penalty amount for major violators is decreased, will the new penalty policy truly meet the stated objectives of BLM to encourage compliance and protect the public?

Moreover, the proposal appears to be contrary to the intent of the President’s Memorandum on Regulatory Reform. On April 21, 1995, President Clinton issued a memorandum that directed agencies to modify the penalties for small businesses in situations that do not involve a significant threat to health, safety or environment. (See attachment). Making allowances for small businesses that commit minor violations would not only comply with the President’s memorandum, it would also be good public policy.

BLM Should Consider Alternatives to the Proposal

As noted previously, it is quite possible that this rulemaking will have a significant economic impact on a substantial number of small entities. If so, then BLM must prepare an IRFA. A major component of an IRFA is the consideration of alternatives.

The industry has told Advocacy that the increase in the bond is not necessary because the additional reclamation costs will be covered by the $100 fee on inactive wells. The Office of Advocacy asserts that the alternative submitted by the industry should be considered. If the needs of the agency can be addressed through the inactive well fee, the imposition of the additional bonding requirement may be unduly burdensome. Consideration and publication of alternatives is necessary to assure the public that BLM has attempted to mitigate the consequences of this action

Conclusion

The Office of Advocacy recognizes the importance of protecting the environment and assuring reclamation of the drilled areas. As such, our comments should not be interpreted as attempting to discourage BLM from promulgating regulations or requesting that BLM change its proposal. Advocacy is simply requesting that the agency provide evidence that it has considered the economic impacts of the proposal and the interests of small businesses in drafting the proposal as well as the potential economic costs to the public if small oil well operators are put out of business.

The requirements of the RFA are not intended to prevent an agency from fulfilling its statutory mandate. Rather it is intended to assure that the economic impacts are fairly weighed in the regulatory decision making process. The public has an interest in knowing the potential economic impact of a particular proposed regulation. As the court stated when remanding a rule to the agency in Northwest Mining v. Babbitt, "While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the rights of parties which are affected by government regulation to be adequately informed when their interests are at stake and to participate in the regulatory process as directed by Congress."*Supra.* at 13.

If you would like to discuss this matter or if this office can be of any further assistance, please contact Jennifer A. Smith, Assistant Chief Counsel for Economic Regulation. She may be reached either by mail at the above address or by telephone at (202) 205-6943.

Thank you for your attention to this matter.

Sincerely,

Jere W. Glover
Chief Counsel
Office of Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation

CC: Bureau of Land Management
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