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**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

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IN RE:

**MILK IN THE UPPER MIDWEST
AREA; HEARING ON PROPOSED
AMENDMENTS TO TENTATIVE
MARKETING AGREEMENT
AND ORDER**

DOCKET NO. A0-361-A39;DA-04-03

**COMMENTS AND EXCEPTIONS
TO RECOMMENDED DECISION**

SUBMITTED ON BEHALF OF

DEAN FOODS COMPANY

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April 24, 2006

**COMMENTS AND EXCEPTIONS TO RECOMMENDED DECISION
FILED ON BEHALF OF DEAN FOODS COMPANY**

These Comments and Exceptions to the Secretary's Recommended Decision (71 Fed. Reg. 9004-9015 (February 22, 2006)) regarding the issues of "de-pooling" and the definition of "temporary" producer status for the Upper Midwest Milk Marketing Order are filed on behalf of Dean Foods Company. Dean applauds the Secretary's reasoned decision-making in properly concluding that de-pooling of milk results in non-equitable treatment of producers and handlers; these actions by handlers constitute disorderly marketing conditions and should be corrected. Dean also concurs that action must be taken on an order by order basis rather than at a nationwide hearing. However, while Dean understands the Secretary's rationale for adopting the least restrictive corrective action in recommending adoption of Proposal 2, Dean respectfully disagrees with the conclusion that adoption of Proposal 2 will be sufficient to correct the problem. The Secretary's Congressional command is to maintain orderly marketing conditions. Thus Dean continues to advance its proposals that would more firmly assure long-term, continual and uninterrupted commitment to the market and the equalization fund. Finally, Dean concludes that adoption of Proposal 2 should contain a modification for the month of February (as discussed below).

In his Final Decision on this matter, the Secretary can and should reiterate strongly his correct conclusions based upon ample record evidence regarding de-pooling: (1) "it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform" (71 Fed. Reg. at 9011, c.3); (2) "when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, [Producer Price Differentials] were much more negative" (*id.* at 9012, c.1); "when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers" (*id.* at 9012, c.2); "the ability of manufacturing handlers and cooperative to not pool all of their eligible milk receipts gives rise to

disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling” (*id.*); and “disorderly marketing conditions are present when producers do not receive uniform prices” (*id.* at 9012, c.3).

The only thing Dean would add to the above analysis is that the statutory mandate is also violated when de-pooling occurs because handlers are not paying uniform prices. Dean recognizes that the Secretary historically has relied upon the uniform prices received by dairy farmers provision more than the uniform prices paid by handlers, but, respectfully, the handler uniformity provision has equal statutory justification and rationale. Thus, the Secretary could and should in the Final Decision further recognize record evidence that de-pooling also gives rise to disorderly marketing conditions because of the inherent lack of handler uniformity.

Having correctly concluded that the Record establishes that de-pooling results in “inequities” that are “contrary to the Federal order program’s reliance on marketwide pooling” (*id.*), the Secretary correctly concludes that the order should “contain pooling provisions intended to deter disorderly marketing conditions that arise when de-pooling occurs.” *Id.* With limited caveats, Dean certainly does not object to adoption of Proposal 2 as far as it goes. Dean simply concludes that Proposal 2 does not go far enough. Dean does not seek to burden the Record with a repeat of its arguments made in its Brief filed on October 15, 2004 in this proceeding; Dean incorporates by reference here that Brief. Instead Dean urges prompt adoption of Proposal 2 in order to achieve those limited protections from the predations of future de-pooling.¹ Nothing would be finer than to discover that adoption of Proposal 2 will suffice in protecting the industry from these accepted disorderly marketing conditions. However, in the event that adoption of Proposal 2 proves inadequate to staunch the losses that result from these now acknowledge disorderly marketing conditions, Dean reserves the right to return to the

¹ Since de-pooling opportunities exist when prices move rapidly upwards, the present situation with low milk prices leaves open the very real possibility that the industry could see higher prices by this summer and with those higher prices more de-pooling. The Secretary should act now to assure orderly marketing conditions later this year.

Secretary with the same or modified proposals in order to truly close the door on these activities. Dean thus respectfully disagrees with any conclusion by the Secretary that Proposals 3 through 5 are unnecessarily restrictive or would disrupt “prevailing marketing channels.” Proposals 3 through 5 would merely disrupt the continued ability to de-pool milk that Dean believes may well occur after adoption of Proposal 2. If we are wrong and Proposal 2 corrects the problem, we will be more than delighted; however, we fear that we will have to return to this issue in the near term.

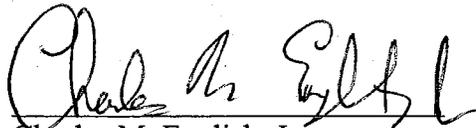
As to Proposal 2, Dean does have one additional lingering concern. For the month of March, Proposal 2 permits pooling of 135% of the prior month’s receipts presumably because the prior month of February will have only 28 or 29 days. However, no adjustment in the other direction is made for the month of February even though the prior month of January will always have at least 2 and usually 3 additional days. In a non-leap year, the 125% pooling limitation for February is really only a 138% limitation – not much of a limitation at all. If the Secretary’s limitation of 125% is to be the guideline then 115% would be more appropriate (still ending up at an effective 127% limitation). Alternatively, Dean has and continues to propose that the monthly limitation be adjusted for the number of days in the prior month and then apply the consistent 125%. If January(s) in the future turn out to be months with inverted pricing, significant additional and unjustified re-pooling would be permitted in February(s) if this additional loophole is not closed now. Dean urges the Secretary to remedy this problem in issuing the Final Decision.

Finally, Dean respectfully suggests that the Secretary has missed the point regarding Dean’s proposal (Proposal 6) to define the term “temporary” with respect to a dairy farmer’s loss of Grade A status. While the Market Administrator can and should have discretion to permit a dairy farmer to rejoin the pool when a temporary loss exceeds 21 days, the burden at some point should be on the producer to establish that the temporary loss is not a fig-leaf designed to

enhance de-pooling. Since the Secretary declines to accept this proposal at this time, Dean urges the market administrator to examine any future significant volume losses if one or more producers temporarily lose Grade A status during a month of inverted pricing - all of which would permit handlers to avoid the implications of Proposal 2 by not counting such producers' milk in re-pooling limitations the next month. We trust that the "anti-manipulation" portions of Proposal 2 (subparagraph 4) would be used to avoid such abuses in the future without the need to return to another rulemaking on this issue.

In conclusion, Dean acknowledges and appreciates the fact that the Secretary recognizes the disorderly nature of de-pooling and that he proposes to take significant action to restore and maintain orderly marketing conditions in this market. Recognizing the problem is often more than half the battle; fixing the problem is also important and Dean will await further future events before it concludes that this abuse has been eliminated (or at least sufficiently managed) in the Upper Midwest.

Respectfully submitted,



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