

**UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE  
AGRICULTURAL MARKETING SERVICE**

**In re: Milk in the Northeast and Other )  
Marketing Areas )**

**) Docket No. 23-J-0067;  
) AMS-DA-23-0031**

**POST HEARING BRIEF  
MAINE DAIRY INDUSTRY ASSOCIATION**

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REC'D- USDA/OALJ/HCO  
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## Table of Contents

### I. Procedural Posture, Party Standing and Summary of Argument

- . Notice and Substance of the Hearing.....4
- . MDIA’s Party Interest, Standing and Participation.....4
- C. Summary of Argument..... 5

### II. Legal Argument, Proposed Findings and Conclusions of Law

DAIRY PROGRAM’S DECLARED PURPOSE, THAT FMMOS ARE “TO MAINTAIN STABLE MARKETING RELATIONSHIPS FOR ALL HANDLERS AND PRODUCERS SUPPLYING MARKETING AREAS”, DIRECTS THE SECRETARY TO ENSURE THIS HEARING’S DECISION DOES NOT REDUCE REGULATED MINIMUM PRODUCER PRICES.....7

- . The Secretary’s Obligation to Ensure This Hearing Does Not Reduce Regulated Minimum Producer Pay Prices Is Legally Grounded In USDA Dairy Program’s Declared Statement of Purpose For FMMOs.....
- B. The Loss of Farms and Accompanying Regional Milkshed Contraction and Upheaval Evident in the Record Epitomize Non-stable “Marketing Relationships”, Disorderly Marketing and Threat to the Milk Supply for Marketing Areas.....9
- C. The Record Further Establishes That Chronically Inadequate Producer Pay Prices Are the Clear Cause of the Loss of Farms and Accompanying Milkshed Upheaval.....13
  - 1. *Proposed Finding 1. Widespread Farm Exit Is Occurring Throughout Milksheds Under FMMO Regulation*.....15
  - 2. *Proposed Finding 2. Inadequate Producer Pay Prices Are Causing Widespread Farm Exit and Accompanying Milkshed Upheaval*.....15
  - 3. *Propose Finding 3. The Loss of Farms And Accompanying Upheaval Threatens the Capability of the Milksheds to Continue to Provide Reliable Supplies of Milk for Their Marketing Areas*.....15
- . Proposed Conclusion 1: The Secretary Must Therefore Ensure the Hearing’s Decision Does Not Reduce Producer Pay Prices In Order to

Avoid A Further Loss of Dairy Farms and Accompanying Milkshed  
Upheaval.....15

. Proposed Conclusion 2. A Decision That Does Not Reduce Producer  
Pay Prices Is Legally Required to Comply With Dairy Program’s  
Stated Purpose to “Maintain Stable Marketing Relationships” and  
Thereby to Prevent Further Disorderly Marketing.....17

**IV. Conclusory Statement.....17**

## **I. Procedural Posture, MDIA’S Party Standing and Summary of Argument**

### . Notice and Substance of the Hearing.

This hearing was originally noticed on July 24, 2023 for consideration of 21 proposals of amendment to the FMMO pricing series covering all eleven Federal Orders.<sup>1</sup> A series of intermittent hearing sessions was conducted, commencing on August 23, 2023 and concluding on January 30, 2024.

### . MDIA’s Party Interest, Standing and Participation

MDIA is an “interested” party within the meaning of 7 C.F.R. § 900.9(b). MDIA is an association of producers representing all operating Maine dairy farmers. The Association is partially funded by voluntary member dues and partially funded by a mandatory, statutory producer assessment. Among its many in-state organizational functions on behalf of its member dairy farmers, MDIA appears in formal representation before the state Milk Control Board, serves as a source of education about the dairy industry for the state legislature. MDIA also participates in the development of federal Farm Bill Legislation before Congress, and has appeared in prior FMMO regulatory matters.<sup>2</sup>

MDIA formally appeared and participated in this hearing, including the submission of comment by the Association’s Treasurer, Heath Miller, on January 17,

4. <sup>3</sup> The Maine Dairy Industry Association, (MDIA) submits this post-hearing brief, consistent with 7 CFR §900.9(b).

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<sup>1</sup> 88 FR 47396; July 24, 2023 et seq.

<sup>2</sup> Transcript, October 11, 2023; Pages 8040.

<sup>3</sup> Ibid; Page 8044-46

### C. Summary of Argument

The Secretary must ensure this hearing does not result in reduced regulated producer pay prices.

This directive is legally grounded in the declared statement of purpose for FMMOs set forth on USDA Dairy Program’s website. This statement declares that Federal Milk Marketing Orders (FMMOs) “serve to maintain stable marketing relationships for all handlers and producers supplying marketing areas...<sup>4</sup> This stated purpose is consistent with the policy statement in the controlling legislation for federal Milk Market Orders 7 U.S.C. § 602(4), which directs the Secretary “to establish and maintain...orderly marketing conditions”.

The record for this hearing identifies the significant destabilization “of marketing relationships for all handlers and producers supplying marketing areas”, and thereby the disorderly marketing, which has resulted from the long-standing and unmet need to update many technical factors of the Program’s product price formulas. More fundamentally, however, the record presents evidence of destabilization and disorderly marketing far greater than that demonstrated by the evidence of outdated product pricing formulas, alone.

This record evidence identifies the substantial contraction and upheaval in the milksheds that provide the supply for marketing areas across the country. Primarily, this milkshed contraction and destabilization reflects, and has been caused, by the tremendous loss of farms over the past quarter century, also documented in the record.

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<sup>4</sup> <https://www.ams.usda.gov/rules-regulations/moa/dairy>

The record also convincingly documents that this destructive loss of farms is directly traceable to chronically low and inadequate producer pay prices. This profoundly destabilizing market dynamic is summarized by Professor Wolf at the conclusion of his testimony:

In summary, the farm milk price received is the primary determinant of farm profitability and farm financial resilience. Even the best-managed dairy farms struggle financially in years of low milk prices. Financial stress from low milk prices can cause dairy farm managers to exit the dairy industry, whether undertaking other ag enterprises or leaving farming entirely.<sup>5</sup>

The record also includes evidence of the significant possibility that the hearing could result in a net reduction in producer prices, depending on the decisions the Secretary makes with regard to the twenty-one varied proposals of amendment presented. Dr. Scott Brown's testimony, analyzing the impact of the various proposals, and in aggregate, provides clear evidence of this possibility.

To prevent further loss of farms and additional, accompanying milkshed upheaval, the Secretary must ensure this hearing's outcome does not result in a reduction of producer prices. Such a decision is directed by USDA's stated purpose of maintaining "stable marketing relationships" and "orderly" milk supplies for marketing areas, across the FMMO program.

As set forth in the Conclusion, the Secretary will also promote the greater public interest involved in his capacity as "cabinet minister of the nation's agriculture."

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<sup>5</sup> Transcript September 11, 2023; page 3029.

<sup>6</sup> Transcript December 6, 2023; Page 9784 et seq.

<sup>7</sup> *Report to the Secretary of Agriculture by the Federal Milk Order Study Committee* (USDA, 1962); <http://dairy.wisc.edu/pubPod/pubs/Nourse.pdf>; see also [https://www.fb.org/files/2019FMMO/Report to the Secretary of Agriculture by the Federal Milk Order Study Committee-1962.pdf](https://www.fb.org/files/2019FMMO/Report%20to%20the%20Secretary%20of%20Agriculture%20by%20the%20Federal%20Milk%20Order%20Study%20Committee-1962.pdf); Page I-16.

### III. Legal Argument, Proposed Findings and Conclusions of Law

DAIRY PROGRAM'S DECLARED PURPOSE, THAT FMMOS ARE "TO MAINTAIN STABLE MARKETING RELATIONSHIPS FOR ALL HANDLERS AND PRODUCERS SUPPLYING MARKETING AREAS", DIRECTS THE SECRETARY TO ENSURE THIS HEARING'S DECISION DOES NOT REDUCE REGULATED MINIMUM PRODUCER PRICES.

- . The Secretary's Obligation to Ensure This Hearing Does Not Reduce Regulated Minimum Producer Pay Prices Is Legally Grounded In USDA Dairy Program's Declared Statement of Purpose For FMMOs.

USDA Dairy Program's website provides a succinct statement of purpose and function for FMMOs. By extension, this statement of purpose also applies to the conduct of a hearing and any resulting amendments of FMMOs that the Secretary might adopt as the result of such hearing.

USDA Dairy Program's website declares that

Federal Milk Marketing Orders (FMMOs) establish certain provisions under which dairy processors purchase fresh milk from dairy farmers supplying a marketing area...*Federal orders serve to maintain stable marketing relationships for all handlers and producers supplyin marketing areas, thus facilitating the complex process of marketing fresh milk.*

Emphasis added.

This declared statement is in turn consistent with the general Congressional statement of policy for marketing orders set forth in 7 USC § 6 (4). Section 602(4) asserts that "It is declared to be the policy of Congress —"

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

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Ibid

Dairy Program's declared purpose to "maintain stable marketing relationships" thus clearly equates to maintaining "such orderly marketing conditions...[for fluid milk] as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market".

There is further equation between these parallel statements of purpose and the respective dictionary definitions of "stability" and "orderly". "Stability" speaks to the maintenance of "equilibrium"; orderliness means "arranged or disposed in some order or pattern; regular".

Dairy Programs' declared purpose is also consistent with these parallel interpretations of "market stability" and "orderliness" provided by dairy economists over the decades. Dairy economists have of course written volumes about the phraseology, although their characterization is in terms of its negative connotation – "disorderly" – for the operation of dairy markets.

The definition of "disorderliness" provided by Doctors Erba and Novakovic is representative, and fills out the meaning for Dairy Programs' declared purpose. They describe "disorderly" as being a "lack of a predictable, sustainable, and efficient flow of a product to a specific market..."<sup>9</sup>

Accordingly, the Secretary must ensure that the adoption of any amendments resulting from the present hearing will serve to ensure the continued maintenance of "stable marketing relationships" in milk marketing areas. In the vernacular of dairy

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Eric M. Erba and Andrew M. Novakovic, *The Evolution of Milk Pricing and Government Intervention in Dairy Markets*, (Cornell Program on Dairy Markets and Policy, E.B. 95'05, Feb. 1995). Cited in <http://dairn.wisc.edu/publ'od/pubs/EB9505.pdf>.  
<https://www.ams.usda.gov/sites/default/files/media/Exhibit%2011%20-%20Statement%20of%20John%20H.%20Vetne.pdf> at 2



economics, this means the Secretary should only adopt such amendments as will serve to correct “disorderly” marketing, so as to ensure a continued “predictable, sustainable, and efficient flow” of raw milk supplies from milksheds to marketing areas.<sup>10</sup>

- . Widespread Loss of Farms and Accompanying Regional Milkshed Contraction and Upheaval Evident in the Record Epitomize Non-stable “Marketing Relationships”, Disorderly Marketing and Threat to the Milk Supply for Marketing Areas.

This hearing was prompted in the first instance by petition for technical update of many of the factors that comprise FMMO product price formulas. MDIA did not take a position with regard to the numerous proposals of technical amendment presented.

MDIA rightly expected the proponents and opponents would provide the extensive record required for USDA to determine whether the disorderly marketing that has resulted from the long-standing and unmet need might best be technically redressed, and the FMMO’s product price formulas properly updated.

MDIA’s involvement is instead to raise the larger issue raised by the petition and proposals for amendment. This larger issue is raised by the hearing’s additional record of evidence identifying destabilization and disorderly marketing that is well beyond just the technical evidence of outdated product pricing formulas, alone.

This greater evidence identifies substantial contraction and upheaval in the milksheds, themselves, that provide the supply for marketing areas across the country,

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<sup>10</sup> 7 U.S.C. § 608(c)(18) is the controlling statute for the promulgation and amendment of FMMOS. It expressly provides that:

(18) Milk Prices.

...The Secretary shall fix such prices as he finds will...insure a sufficient quantity of pure and wholesome milk to meet current needs and further to *assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest...* (Emphasis added).

Along the policy objective of Section Section 602(4), consideration of the impact of pricing decisions upon “current” and “anticipated future needs” is thus at least also implicit in Dairy Program’s declared statement of purpose for FMMOs.

over the past twenty-five years. As also documented in the record, this milkshed contraction and destabilization primarily reflects, and has been caused by, the tremendous loss of farms over the past quarter century.

The record presents testimony specifically identifying this destabilization and disorderly marketing in the Southeast and Northeast regions. There is also evidence that this concern extends to the Upper Midwest milkshed, as well.

Calvin Covington, expert consultant for National Milk Producers Federation, testified about this pressing concern for the Florida market.

...milk production in Florida peaked around 2010, 2011. In fact, we had a pretty good balance back in those years between what we needed to serve the market and what was available, what the demand was and supply. Yeah, we had seasonal variations. We had to manage that. But dairy farm -- we had dairy farmers had expanded. We had some dairy farmers that relocated within the state. And things were better. But since then, the tide has turned.....

These guys look ahead 12, 24 months. So if they can see some potential improvement coming, that will keep them in business, make some decisions they need to do as far as upkeep of equipment and those type of things. If not, if they can't see the future's going to get any better, a year from now that 47 will be lower.

As we speak today, there are only 47 dairy farms in the state of Florida. 47 dairy farms regulated under the Federal Milk Marketing Order. Only 47. That's way down....And I can tell you, those 47 dairy farmers are looking very closely at the results of this hearing. They are looking very closely at the results of the hearing we had on the distributing plant delivery credit. And they are putting their hope on that, that this was going to give them some additional revenue to stay in business.

And I mean this with all sincerity, they are looking at it.<sup>11</sup>

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<sup>11</sup> Transcript, October 11, 2023; Pages 8056; 8058-59.

Heath Miller, Treasurer of the Maine Dairy Industry Association, testified about this same concern for the Northeast region. Mr. Miller first identified the astonishing loss of farms that has occurred since 2000:

In the Northeast, the number of pooled producers has declined by over half between 2000 and 2022. We have gone from 17,280 producers pooled on Order 1 in 2000 to 8,319 pooled producers in 2022. The number of New England pooled producers has declined even more during this period, by two-thirds, from 2,588 to 851.<sup>12</sup>

Mr. Miller then testified in detail about the upheaval and destabilizing impact this loss of farms has had on the region's milkshed, beginning with the impact on community life and the region's local economies:

The really unimaginable loss of dairy farms identified above have already significantly degraded the historic presence of dairy farms across New England and New York. This contraction and upheaval in the region's milk shed has caused tremendous social and economic costs for the Northeast rural communities.

He then spoke with specificity about the upheaval and destabilizing impact this loss of farms has had for both farm operation and also across the infrastructure for the region's milkshed:

More particularly for dairy farmers, this upheaval has first meant the loss of community's varied from farm operation, size, type, and management style, which is really the historic basis of our region's diverse and flourishing dairy industry.

Of equal and more recent concern, the contraction is eroding the infrastructural vital for -- infrastructure vital for the support and long-term sustainability of all farms, no matter the size. The infrastructure's upheaval, unpredictability, and unreliability for dairy farms cannot be overstated.<sup>13</sup>

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<sup>12</sup> Transcript, January 17, 2024; Page 10861.

<sup>13</sup> Ibid; Page 10864.

The testimony speaks with great specificity about the degradation of the milkshed's infrastructure caused by the widespread loss of farms:

This upheaval and unreliability are the best -- are best demonstrated by the diminishment of feed and tractor dealers, milk haulers, seed and fertilizer dealers, let alone the milk equipment repair folks. As I can recall as a young man, there were many nearby small, mom-and-pop feed dealers available to me. Today, there are only two mills in our entire state owned by Upstate companies, plus a few others that haul in grain from mills in other New England states.

The same can be said for milk haulers. Many milk haulers who used to be available to haul milk for their neighbors to the plant, now drive hours just to get to their first farm, and then, after getting loaded, drive hundreds of miles to a receiving plant, many times also to wait in line to be unloaded at the plant.<sup>14</sup>

He concluded by noting that farm expansion, while providing replacement supply in the short-term, should not be viewed as resolving the long-term concern for long-term milkshed stability:

I understand, of course, there has been substantial expansion and consolidation of farming operations over the past few years and that milk production from bigger farms has offset the loss of volume associated with the widespread exit of smaller farms. But I don't think this really offers much assurance about milk shed stability for the long-term. I don't see how the infrastructure of the Northeast milk shed can support itself without critical [mass of] dairy farms, regardless of size.<sup>15</sup>

In summary, this testimony establishes that there is threat to the continued capability of the Northeast and Southeast milksheds to continue to provide raw milk supplies to their marketing areas. To restate Mr. Miller's summary of this concern:

I don't see how the infrastructure of the Northeast milk shed can support itself without critical [mass of] dairy farms, regardless of size.<sup>1</sup>

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<sup>14</sup> Ibid; Pages 1084-85.

<sup>15</sup> Ibid; Page 1085.

<sup>16</sup> Transcript, January 17, 2024; Page 10861.

C. The Record Further Establishes That Chronically Inadequate Producer Pay Prices Are the Clear Cause of the Loss of Farms and Accompanying Milkshed Upheaval.

Mr. Miller further testified about the cause of the loss of farms that is resulting in such disruption for the Northeast milkshed. He makes clear that, while there are many causes, “we producers know that the plain driving [cause] is inadequate pay pricing”:

Many factors have contributed to this decline, including labor difficulties and milk transportation challenges to name just a few. But we producers know that the plain driving cost is inadequate pay pricing. Without at least adequate pay, it is at bottom hard to rationalize keeping the farm going. Plus, if we had sufficient revenue, we could -- could hire, keep workers, and we could improve the efficiency of milk pickup and transport.

Inadequate pay price has become a chronic problem following the market consolidation. Constant confronting inadequate revenue and income over this long period of time has made it truly hard to rationalize keeping the cows milking and the land producing. This is why so many of

The testimony of Dr. Christopher Wolf, Cornell Dairy Economist, based on academic research and analysis, confirmed Mr. Miller’s producer-based assessment that low milk prices are the “primary determinant” of farm exit:

In summary, the farm milk price received is the primary determinant of farm profitability and farm financial resilience. Even the best-managed dairy farms struggle financially in years of low milk prices. Financial stress from low milk prices can cause dairy farm managers to exit the dairy industry, whether undertaking other ag enterprises or leaving farming entirely.<sup>17</sup>

Dr. Wolf also made clear that the problem does not depend on farm size:

...there is variation from farm to farm and from year to year, so certainly there are big farms that have bad years and small farms that have -- smaller herds that have good years.<sup>18</sup>

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<sup>17</sup> Transcript September 11, 2023; page 3029.

<sup>18</sup> Transcript September 11, 2023; page 3033.

He further emphasized that the concern extends beyond the Northeast, to include also the Midwest:

...the second part that I talked about with the operating profit margin and asset turnover, that was for Wisconsin and Michigan dairy farms. And I have worked with the Farm Business Summary data from Michigan and Wisconsin and New York, and the patterns are very similar. I would say that the Wisconsin and Michigan averages were in the same ballpark but a little bit lower. But that partly reflected more small farms, particularly in Wisconsin over that period.<sup>19</sup>

Mr. Miller's testimony also served throughout both to emphasize the importance of producer milk checks in serving as essentially the sole source of producer income, and to highlight the tight interconnection between the FMMO regulated pricing and the producer milk check" that has emerged over time.<sup>20</sup> He provided this analysis primarily to describe how

the decision by the Secretary resulting in a reduction of the FMMO regulated minimum producer price will do more than simply be inconsistent with the historic function of the regulated minimum pricing. Of greater concern, this recent development means that a price reduction will likely translate directly into a reduction in producer milk checks.<sup>21</sup>

Mr. Miller also made this point to emphasize that hedging strategies cannot be relied upon to mitigate the pricing challenge for small-scale farms, which make up the broad majority of producers in the Northeast:

I would also like to note that MDIA's position reflects our awareness that risk management tools are increasingly being used to relieve cash flow pressures associated with reliance on milk-check-to-check payments....

Unfortunately, I can say with great confidence that very few MDIA members rely on hedging strategies to alter their basic

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<sup>19</sup> Transcript September 11, 2023; page 3035.

<sup>20</sup> Transcript, January 17, 2024; Page 10860.

<sup>21</sup> Ibid; Page 10861.

reliance on their milk checks. At most, I believe ten out of the 145 members employ these tools....

I also recognize that small-scale MDIA membership is less representative of the national experience. Nationally, and obviously in the West and Southwest regions, there are surely many more large-scale producers that employ hedging and risk management strategies. As I also said, however, we believe that all producers still share, to some measurable degree, a reliance on their milk checks. This means that minimum producer pricing continues to serve its historic function, at least to some degree, across all orders.<sup>22</sup>

In summary, the combined testimony presented by Mr. Covington, Mr. Miller and Professor Wolf establishes an evidentiary through line between chronically low regulated producer pay prices and the capability of the Northeast, Southeast and Midwest milksheds to continue to provide raw milk supplies to their marketing areas.

**elying upon the analysis and citations to the Record presented in Subsections B and C, the following Proposed Findings are presented:**

- 1. Proposed Finding 1. Widespread Farm Exit Is Occurring Throughout Milksheds Under FMMO Regulation.*
- 2. Proposed Finding 2. Inadequate Producer Pay Prices Are Causing Widespread Farm Exit and Accompanying Milkshed Upheaval.*
- 3. Proposed Finding 3. The Loss of Farms Is Accompanied By Upheaval That Threatens the Capability of the Milksheds to Continue to Provide Reliable Supplies of Milk for Their Marketing Areas.*

**D. Proposed Conclusion 1. The Secretary Must Therefore Ensure the Hearing's Decision Does Not Reduce Producer Pay Prices In Order to Avoid A Further Loss of Dairy Farms and Accompanying Milkshed Upheaval.**

This demonstrated evidentiary through line between inadequate producer pay prices and the continuing capability of regional milksheds to provide raw milk supplies is

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<sup>22</sup> Ibid; Pages 1068-69.

most significant for this hearing's outcome. It is most significant because the record also includes evidence presenting both the very real possibility of a negative impact on producer pricing, as well as a wide-open question as to its ultimate impact on producer prices.

The ultimate outcome obviously depends primarily on the decision the Secretary will make with regard to the proposal to increase manufactured product price make allowances. By all accounts, if adopted, standing alone, an increase to make allowances undoubtedly would result in a reduction in producer pay prices. Dr. Scott Brown's testimony documents and provides clear evidence of this most likely outcome.<sup>23</sup>

Dr. Brown, however, also testified about the variety of other outcomes for producer pricing that could occur depending on the decisions the Secretary makes with regard to the twenty other varied proposals of amendment presented along with the make allowance proposal.<sup>24</sup>

To repeat, then, the question of the outcome of the hearing's impact on producer pricing thus presents both the very real possibility of a negative impact on producer pricing, along with an open question as to its ultimate impact on producer pricing.

What should not be open to question is the impact the Secretary's will have on milkshed stability and capability to provide reliable raw milk supplies, should the Secretary's decision result in reduced producer pricing. If the Secretary's decision has such a result, the record is clear that such decision will cause further milkshed destabilization and reduced capability to provide raw milk supplies to their marketing areas.

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<sup>23</sup> Transcript December 6, 2023; pages 9801 – 9803.

<sup>24</sup> Ibid; page 9784 et seq.



**E. Proposed Conclusion 2. A Decision That Does Not Reduce Producer Pay Prices Is Legal y Required to Comply With Dairy Program’s Stated Purpose to “Maintain Stable Marketing Relationships” and Thereby to Prevent Further Disorderly Marketing.**

In order to prevent further instability for the milkshed’s “marketing relationships”, therefore, and as directed by Dairy Program’s statement of purpose, the Secretary must ensure the decision does not reduce producer pricing. Within the parallel vernacular of Section , the Secretary must also so act in order to prevent further threat to the milksheds’ capability to provide “predictable, sustainable, and efficient flow” of raw milk supplies to their marketing areas, and so prevent further “disorderly marketing”.

**IV. Conclusory Statement**

The Nourse Report, the enduring benchmark for classic FMMO theory and practice, provides fitting context for the import of the Secretary’s decision in this hearing:

The Concept of Orderly Marketing...

The Secretary is empowered and entrusted to develop a system of fluid milk marketing orders, integrated as to their relations with each other and with all the uses into which milk goes, not merely orderly as to their internal housekeeping. *He is cabinet minister of the nation's agriculture, pledged to bring it, in the national interest, to the soundest onomic adjustment, private and public, that can be worked out.*<sup>25</sup>

Mr. Miller called upon the Secretary to so take heed:

In sum, my point for the Secretary is this: The industry cannot support more milk shed contraction and loss of infrastructure. A diversity of Northeast dairy producers is the infrastructure's anchor. The demise of a diverse dairy industry will be the beginning of the end for all small-scale agriculture that make up our rural communities in New England.<sup>26</sup>

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<sup>25</sup> *Report to the Secretary of Agriculture by the Federal Milk Order Study Committee* (USDA, 1962); <http://dairy.wisc.edu/pubPod/pubs/Nourse.pdf>; see also [https://www.fb.org/files/2019FMMO/Report to the Secretary of Agriculture by the Federal Milk Order Study Committee-1962.pdf](https://www.fb.org/files/2019FMMO/Report%20to%20the%20Secretary%20of%20Agriculture%20by%20the%20Federal%20Milk%20Order%20Study%20Committee-1962.pdf); I21-I22

<sup>26</sup> Transcript, January 17, 2024; Pages 10863-65

Dr. Wolf also concluded his statement with a call for the Secretary to consider the broad public interest at stake:

Large amounts of farm exits would have impacts on those families as well as their local communities. My hope would be for USDA to be cognizant of these aspects when considering the Federal Milk Marketing Order changes that might significantly impact farm milk price.<sup>27</sup>

Respectfully submitted,

s/ Daniel Smith  
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On behalf of Maine Dairy Industry Association

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<sup>27</sup> Transcript, September 11, 2023; Page 3029

## CERTIFICATE OF SERVICE

### Milk in the Northeast and Other Marketing Areas

Docket No.: 23-J-0067

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct, and this is to certify that a copy of the POST HEARING BRIEF MAINE DAIRY INDUSTRY ASSOCIATION has been furnished and was served by electronic mail upon the following parties on April 4, 2024 by the following:

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