

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Part 1033**

[Docket No. AO-166-A72; DA-05-01-B]

**Milk in the Mideast Marketing Area;  
Order Amending the Order****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

**SUMMARY:** This final rule amends regulations pertaining to the Mideast Federal milk order. More than the required number of producers for the Mideast marketing area approved the issuance of the final order amendments.

**DATES:** *Effective Date:* December 1, 2006.

**FOR FURTHER INFORMATION CONTACT:**

Gino Tosi, Associate Deputy Administrator, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231—Room 2968, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail: [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This document amends the pooling provisions of the Mideast Federal milk order. Specifically, this final rule permanently adopts provisions that: (1) Establish a limit on the volume of milk a handler may pool during the months of April through February to 115 percent of the volume of milk pooled in the prior month; and (2) Establish a limit on the volume of milk a handler may pool during the month of March to 120 percent of the volume of milk pooled in the prior month.

This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866. This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is

not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

### Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final rule will not have a significant economic impact on a substantial number of small entities.

For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During March 2005, the month the hearing occurred, there were 9,767 dairy producers pooled on, and 36 handlers regulated by, the Mideast order. Approximately 9,212 producers, or 94.3 percent, were considered small businesses based on the above criteria. Of the 36 handlers regulated by the Mideast during March 2005, 26 handlers, or 72.2 percent, were considered small businesses.

The adopted amendments regarding the pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the Mideast milk marketing area. Criteria for pooling milk are established on the basis of performance standards that are considered adequate to meet the

Class I fluid needs of the market and, by doing so, to determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk.

Criteria for pooling are established without regard to the size of any dairy industry organization or entity. Therefore, the amendments will not have a significant economic impact on a substantial number of small entities.

The Agricultural Marketing Service is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

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

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

### Prior Documents in This Proceeding

*Notice of Hearing:* Issued February 14, 2005; published February 17, 2005 (70 FR 8043).

*Amended Notice of Hearing:* Issued March 1, 2005; published March 3, 2005 (70 FR 10337).

*Tentative Partial Decision:* Issued July 21, 2005; published July 27, 2005 (70 FR 43335).

*Interim Final Rule:* Issued September 20, 2005; published September 26, 2005 (70 FR 56111).

*Final Partial Decision:* Issued January 17, 2006; published January 23, 2006 (71 FR 3435).

*Recommended Decision:* Issued February 15, 2006; published February 22, 2006 (71 FR 9033).

*Final Partial Rule:* Issued April 17, 2006; published April 20, 2006 (71 FR 20335).

*Final Decision:* Issued September 1, 2006; published September 13, 2006 (71 FR 54172).

### Findings and Determinations

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

The following findings are hereby made with respect to the Mideast order:

(a) *Findings upon the basis of the hearing record:* A public hearing was held upon certain proposed amendment to the tentative marketing agreement and to the order regulating the handling of milk in the Mideast marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement act of 1937, as amended (7 U.S.C. 601–604), the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, will tend to effectuate the declared policy of the Act;

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

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

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

(b) *Additional Findings:* It is necessary and in the public interest to make these amendments to the Mideast order effective December 1, 2006. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing area.

The amendments to the Mideast order are known to handlers. The final decision containing the proposed amendments to the order was issued on September 1, 2006.

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found

and determined that good cause exists for making these order amendments effective December 1, 2006.

(c) *Determinations*: It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of more than 50 percent of the milk that is marketed within the specified marketing area to sign a proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order amending the Mideast order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined by the order as hereby amended;

(3) The issuance of the order amending the Mideast order is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the marketing area.

#### List of Subjects in 7 CFR Part 1033

Milk marketing orders.

#### Order Relative to Handling

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

#### PART 1033—MILK IN THE MIDEAST MARKETING AREA

■ 1. The authority citation for 7 CFR part 1033 is amended to read as follows:

**Authority:** 7 U.S.C. 601–674, and 7253.

■ 2. Section 1033.13 is amended by adding a new paragraph (f), to read as follows:

#### § 1033.13 Producer milk.

\* \* \* \* \*

(f) Producer milk of a handler shall not exceed the limits as established in § 1033.13(f)(1) through § 1033.13(f)(3).

(1) Producer milk for the months of April through February may not exceed 115 percent of the producer milk receipts of the prior month. Producer milk for March may not exceed 120 percent of producer receipts of the prior month; plus

(2) Milk shipped to and physically received at pool distributing plants and allocated to Class I use in excess of the volume allocated to Class I in the prior month; plus

(3) If a producer did not have any milk delivered to any plant as other than producer milk as defined under the order in this part or any other Federal

milk order for the preceding three months; and the producer had milk qualified as producer milk on any other Federal order in the previous month, add the lesser of the following:

(i) Any positive difference of the volume of milk qualified as producer milk on any other Federal order in the previous month, less the volume of milk qualified as producer milk on any other Federal order in the current month, or

(ii) Any positive difference of the volume of milk qualified as producer milk under the order in this part in the current month, less the volume of milk qualified as producer milk under the order in this part in the previous month.

(4) Milk received at pool plants in excess of these limits shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b). Milk diverted to nonpool plants reported in excess of this limit shall not be producer milk. The handler must designate, by producer pick-up, which milk shall not be producer milk. If the handler fails to provide this information the provisions of § 1033.13(d)(6) shall apply.

(5) The market administrator may waive these limitations:

(i) For a new handler on the order, subject to the provisions of § 1033.13(f)(6), or

(ii) For an existing handler with significantly changed milk supply conditions due to unusual circumstances;

(6) Milk may not be considered producer milk if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

Dated: October 25, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

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**BILLING CODE 3410–02–P**