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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

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

Milk in the Mideast Marketing Area; Final Partial Decision on Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes to adopt as a final rule order language contained in the interim final rule published in the *Federal Register* on September 26, 2005, concerning pooling standards of the Mideast milk marketing order. This document also sets forth the final decision of the Department and is subject to approval by producers. A separate decision will be issued that will address proposals to deter the de-pooling of milk, transportation credits and clarification of the *Producer* definition.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: This final partial decision permanently adopts amendments that prohibit the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide pool administered by another government entity. Additionally, this decision permanently adopts amendments that increase supply plant performance standards and lower diversion limit standards.

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

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

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

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it

should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During March 2005, the month during which the hearing occurred, there were 9,767 dairy producers pooled, 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 order during March 2005, 26 handlers, or 72.2 percent, were considered small businesses.

The permanent adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk and plants that have a reasonable association with and are consistently serving the fluid needs of the Mideast milk marketing area. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, 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. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the adopted amendments will not have a significant economic impact on a substantial number of small entities.

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

This decision does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond

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

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. 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).

Amendment to Public Hearing on Proposed Rulemaking: 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).

Preliminary Statement

The proposed amendments set forth below are based on the record of a public hearing held in Wooster, Ohio, on March 7–10, 2005, pursuant to a notice of hearing issued February 14, 2005, published February 17, 2005 (70 FR 8043), and an amendment to the hearing notice issued March 1, 2005, published March 3, 2005 (70 FR 10337).

The material issues, findings, conclusions and rulings of the tentative partial decision are hereby approved, adopted and are set forth herein. The material issues on the record of the hearing relate to:

1. Pooling Standards
 - A. Standards for *Producer Milk*.
 - a. Simultaneous pooling of milk on the order and on a marketwide pool administered by another government entity.
 - b. Diversion limit standards.
 - B. Supply Plant performance standards.
2. Determination that emergency marketing conditions exist that warranted the omission of a recommended decision.

Findings and Conclusions

This partial final decision specifically addresses proposals, published in the

hearing notice as Proposals 1 and 2, along with a portion of Proposal 3, seeking to change the performance standards and producer milk provisions of the order. The portion of Proposal 3, seeking to clarify the definition of “temporary loss of Grade A approval”, Proposals 4–8, seeking to establish provisions to deter the “de-pooling” of milk, and Proposal 9, seeking to establish transportation credits, will be addressed in a separate decision. The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pooling Standards

A. Standards for Producer Milk

Three proposals were presented at the hearing that would amend certain features of the *Producer milk* provision of the Mideast order. A proposal, published in the hearing notice as Proposal 1, seeking to eliminate the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide equalization pool administered by another government entity, commonly referred to as “double dipping,” previously adopted on an interim basis, is adopted on a permanent basis by this partial final decision. Additionally, a portion of a proposal published in the hearing notice as Proposal 2, seeking to seasonally adjust the percentage of total receipts a pool plant can divert to nonpool plants to 50 percent for the months of August through February and to 60 percent for the months of March through July, previously adopted on an interim basis, is adopted on a permanent basis by this partial final decision. Proposal 3, which sought to adjust the number of days of the milk production of a producer that must be physically received at a Mideast order pool plant before being eligible for diversion to a nonpool plant, commonly referred to as “touching base”, was abandoned at the hearing and will no longer be referenced.

Proponents contend that milk has been simultaneously pooled on the Mideast order and on a marketwide pool administered by another government entity since January of 2000, and although no milk is currently simultaneously pooled on the Mideast order and a marketwide pool administered by another government entity, the possibility exists and provisions should be adopted to eliminate its occurrence. Additionally, proponents contend that inadequate limits on the amount of milk that pool plants can divert to non-pool plants is allowing large volumes of milk to be

pooled on the Mideast order that does not demonstrate a reliable and consistent service to the fluid milk needs of the order.

The Mideast order currently does not prohibit the simultaneous pooling of the same milk on the order and on a marketwide equalization pool operated by another government entity. Although no milk is currently simultaneously pooled on the Mideast order and a marketwide equalization pool operated by another government entity, the situation has occurred in the past and should be prevented from occurring in the future.

The current *Producer milk* provision of the Mideast order considers the milk of a dairy farmer to be producer milk when the milk has been delivered to a pool plant of the order. As a condition for pooling the milk of a producer diverted to a nonpool plant on the Mideast order, a dairy farmer must ship two days’ milk production to a pool plant during each of the months of December through July. This standard is applicable only if two days’ milk production was not shipped to a Mideast pool plant in each of the previous months of August through November. A producer must also deliver two days’ milk production to a pool plant during the months of August through November in order for the milk diverted to nonpool plants to be pooled. A pool handler may not divert more than 60 percent of its total receipts to a nonpool plant during the months of August through February and no more than 70 percent of its total receipts during the months of March through July.

Proposals 1 and 2 were submitted by Dairy Farmers of America (DFA), Michigan Milk Producers Association (MMPA), Dairylea Cooperative Inc. (Dairylea) and the National Farmers Organization (NFO). DFA is a member owned Capper-Volstead cooperative of 13,500 farms that produce milk in 49 states. MMPA is a member owned Capper-Volstead cooperative of 1,350 farms producing milk in four states. Dairylea is a member owned Capper-Volstead cooperative of 2,400 farms producing milk in seven states. NFO is a member owned Capper-Volstead cooperative with over 1,500 members in 18 states. Hereinafter, this decision will refer to DFA, MMPA, Dairylea and NFO collectively as the “Cooperatives.”

A witness appearing on behalf of the Cooperatives testified that adoption of Proposal 1 would eliminate the potential for the same milk to be simultaneously pooled on the Mideast Federal milk order and on a marketwide pool administered by another

government entity. The witness referred to this practice as "double dipping" and as a practice resulting in disorderly marketing conditions. The witness noted that regulatory action has been taken in the Northeast, Central, Upper Midwest, Pacific Northwest and Arizona-Las Vegas Federal milk marketing orders to prohibit the practice. The witness testified that little milk is currently associated with the Mideast marketing order that is simultaneously pooled by another government entity, but should be prohibited in the same manner as in other Federal milk marketing order areas. The Cooperatives noted in their post-hearing briefs that no opposition to adoption of Proposal 1 was received at the hearing.

A witness appearing on behalf of Dean Foods (Dean) testified in support of Proposal 1. Dean Foods owns and operates several distributing plants regulated by the Mideast order. The witness testified that double dipping should be prohibited in the Mideast order in the same manner as in other Federal orders. In their post-hearing brief, Dean added that if the ability to simultaneously pool milk is eliminated, the wording of the order language should be similar to the order language used to prohibit simultaneous pooling in the Central and Upper Midwest orders.

Continental Dairy Products (Continental) noted support for adoption of Proposal 1 in their post-hearing brief. Continental is a member owned Capper-Volstead cooperative that pools milk on the Mideast order. Continental was of the opinion that double dipping should be prohibited for the Mideast marketing area as it has been in other Federal milk marketing orders.

A witness appeared on behalf of the Cooperatives in support of the portion of Proposal 2 that would lower the diversion limit standards. The witness was of the opinion that current diversion limit standards are inadequate and have resulted in milk pooled on the order which does not demonstrate regular and consistent performance in supplying the Class I needs of the marketing area. The witness cited market administrator data showing that during the months of January through February and August through December of 2004, many pool distributing plants and cooperative handlers diverted more than 50 percent of their total milk receipts to nonpool plants. Adoption of the portion of Proposal 2 to limit diversions to no more than 50 percent of total milk receipts in August through February and 60 percent in March

through July for distributing plants and cooperative handlers would increase shipments to distributing plants and raise returns for Mideast producers, the witness noted.

A witness for MMPA appeared on behalf of the Cooperatives in support of the portion of Proposal 2 that would lower diversion limit standards. The witness was of the opinion that an adjustment to the diversion limit standards will serve to decrease market reserves and increase proceeds for producers servicing the needs of the fluid market on a regular and consistent basis.

Several independent and cooperative member dairy farmers whose milk is pooled in the Mideast order also testified in support of the portion of Proposal 2 that would adjust diversion limit standards. Most were of the opinion that adjusting diversion limit standards will serve to more adequately identify the milk that is serving the needs of the Mideast order fluid market.

A witness appearing on behalf of Prairie Farms Dairy (Prairie Farms) testified that they were not in support of, nor in opposition to, adoption of the portion of Proposal 2 that would adjust diversion limits. Prairie Farms is a member owned Capper-Volstead cooperative that pools milk on the Mideast order.

A witness appeared on behalf of White Eagle Cooperative Federation (White Eagle) and "constituent members" in opposition to the portion of Proposal 2 that would lower diversion limit standards. The members of White Eagle Cooperative Federation include White Eagle Cooperative Association, Alto Dairy Cooperative, Scioto Cooperative, and Erie Cooperative Association. White Eagle Cooperative Federation also identified Superior Dairy, United Dairy, Family Dairies USA, Dairy Support Inc., Guggisberg Cheese and Brewster Cheese as constituent members.

The White Eagle witness testified that lowering diversion limit standards will decrease the volume of milk that manufacturing plants can pool, and will remove milk located in Wisconsin, Illinois, Minnesota and Iowa from pooling on the Mideast order. The witness was of the opinion that when the volume of milk pooled in manufacturing uses is decreased, producer milk that supplies manufacturing plants can face decreased returns. In their post-hearing brief White Eagle reiterated that lowering diversion limit standards will decrease returns to producers whose milk is marketed through White Eagle.

A consultant witness provided additional testimony on behalf of White Eagle in opposition to lowering the diversion limit standards of the order. The witness testified that reducing the diversion limit standards would disadvantage small cooperatives that pool milk on the Mideast order. The witness was of the opinion that lowering the diversion limit standards would increase the market power of large cooperatives and milk processors over small cooperatives and milk processors.

The consultant White Eagle witness relied on Market Administrator data to demonstrate the effects of a 10 percent reduction in the diversion limit standards for the period of 2003–2004. The witness stated that if the proposed diversion limit standards had been effective for the month of October 2004, the total volume of milk pooled in the Mideast market would have been reduced by 4.1 percent. The witness predicted that the reduction in milk volume pooled would have increased the PPD by about 2 cents per hundredweight (cwt.) for milk remaining pooled, but would have decreased the relative PPD by about \$0.73 per cwt. on the milk that was not able to be pooled because of lowered diversion limit standards. The witness noted that the majority of the milk not pooled would have been milk usually pooled by small cooperatives. Accordingly, the witness was of the opinion that lowering the diversion limit standards of the Mideast order should not be adopted until additional analysis is done on the possible negative effects on small cooperatives and processors.

White Eagle reiterated opposition to the lowering of diversion limit standards in exceptions to the tentative partial decision. The White Eagle exceptions noted that changes to the diversion limit standards of the order are unnecessary since the fluid milk needs of the Mideast order are adequately met, and will pose difficulties to their members since access to distributing plants is limited.

Exceptions to the tentative partial decision submitted by National All Jersey (NAJ), an organization promoting the Jersey breed with member farms in the Mideast marketing area, also opposed the lowering of diversion limit standards. The exception noted that the lowering of diversion limit standards is unnecessary since the fluid milk needs of the order are adequately met. NAJ commented that access to distributing plants for pooling is limited, and that producer milk able to service the fluid milk needs of the market may not be

able to be pooled. NAJ was also of the opinion that supply plants seeking to be pooled may have to pay increased pooling fees in order to be pooled via plants or cooperatives that may have excess pooling capacity.

In their exceptions to the tentative partial decision, NAJ noted that decreasing diversion limit standards will force the higher solid milk typically produced by the Jersey breed away from its optimum use, cheese plants, to distributing plants. NAJ was of the opinion that the processing efficiencies afforded to cheese plants using high-component Jersey milk will decrease, and put cheese plants in the Mideast at a disadvantage to competitor plants in surrounding areas. NAJ predicted that decreased diversion limits will lower the marketing options for Mideast dairy farmers and subsequently decrease the prices received for their milk.

B. Supply Plant Performance Standards

Several proposed changes to the supply plant pooling provisions of the Mideast order, contained in Proposal 2, are also adopted on a permanent basis by this partial final decision. The lack of adequate performance standards in the current supply plant pooling provisions allow large volumes of milk to be pooled on the order that do not demonstrate a regular service to the Class I needs of the market causing an unwarranted decrease in the order's blend price.

Specifically, the following amendments are permanently adopted: (1) Increasing supply plant performance standards for § 1033.7(c) by 10 percentage points, from 30 percent to 40 percent, for all months, (2) Increasing performance standards for supply plants operated by a cooperative association under § 1033.7(d) by five percentage points, from 30 percent to 35 percent, for the month of August, and by 10 percentage points, from 30 percent to 40 percent, for the months of September through November, and (3) Increasing performance standards for a supply plant with a marketing agreement with a cooperative under § 1033.7(e) by 10 percentage points, from 35 percent to 45 percent, for the months of August through November.

Currently, the Mideast order provides that a supply plant must ship 30 percent of its total monthly receipts to a pool distributing plant in order for the plant and all of the receipts of the plant to be pooled for the month. This same standard applies to supply plants owned and operated by a cooperative association. A supply plant operated under a marketing agreement with a cooperative, however, must ship 35

percent of total receipts to a pool distributing plant in every month of the year in order for the plant and all the receipts of the plant to be pooled.

A witness appeared on behalf of the Cooperatives in support of the portion of Proposal 2 that raises the performance standards for supply plants. The Cooperatives witness was of the opinion that supply plant performance standards are inadequate and in need of review and adjustment. Current supply plant performance standards, the witness testified, allow for more milk to be associated with the Mideast pool than is needed. Relying on market administrator data, the witness noted that the projected Class I utilization of the Mideast order of 58.9 percent, specified during Federal order reform, had only been achieved in one month since January 2000. The witness stressed that the Mideast order has ample reserve milk supplies located within the marketing area, but that milk located outside of the marketing area that is being pooled on the order is lowering the proceeds of producers who are consistently serving the fluid needs of the market.

The Cooperatives witness was of the opinion that increasing supply plant performance standards will provide greater incentive to deliver local milk supplies to the Class I market than the current standards. The witness was of the opinion that returns to producers are increased the shorter the distance milk must travel to distributing plants because transportation costs are lower.

The Cooperatives witness testified that the costs of transporting and procuring milk for Class I use is not being borne equally by all producers whose milk is pooled on the order even though Class I returns are shared by all. The witness added that increasing supply plant performance standards would prevent milk that does not service the fluid needs of the market from sharing in the additional proceeds generated from fluid sales in the marketing area.

The Cooperatives witness relied on market administrator data which showed an increase in the volume of milk pooled on the Mideast order from states outside the marketing area including Illinois, Iowa, Minnesota and Wisconsin. The witness testified that although the volume of milk pooled from states outside of the Mideast marketing area has increased, the volume of milk pooled from states within the marketing area has remained constant. The witness added that the increase in the volume of milk pooled from states outside of the marketing area has not resulted in increased volumes of

milk shipped to the order's pool distributing plants. When milk that does not service the needs of the Mideast fluid market is pooled from areas outside the states comprising the Mideast marketing area, the witness stressed, the blend price received by Mideast order producers who regularly demonstrate service to the fluid market is lowered.

The Cooperatives witness relied on market administrator data to illustrate that supply-demand relationships for milk in five different regions of the Mideast marketing area—Northern Ohio, Southern Ohio, Michigan, Indiana and Pennsylvania indicate that there is sufficient locally produced milk to meet the needs of the fluid market. According to the witness, only in the Southern Ohio/Southern Indiana region do total Class I sales exceed the total amount of milk locally supplied. The witness attributed the deficit local milk supply in Southern Ohio/Southern Indiana to local milk being shipped to the Appalachian milk marketing area.

The Cooperatives witness was also of the opinion that a "hard" 40 percent standard on cooperative owned supply plant shipments to distributing plants during the fall months is superior to using the "rolling annual average" method currently provided by the order. The witness added that if a cooperative owned supply plant shipped 40 percent of its total receipts to distributing plants during the fall months, the "rolling annual average" method could be used during the remainder of the year.

The Cooperatives witness testified that the performance standards for supply plants in the Mideast order were increased as a result of a previous Federal order hearing in 2001, but was of the opinion that the market is in need of further refinement. The witness emphasized that while there is a seasonal need for supplemental milk across certain regions of the Mideast market, the current standards allow far more milk to associate with the market than is reasonably warranted. The witness added that increasing supply plant performance standards will increase returns for Mideast dairy farmers who do regularly and consistently service the needs of the fluid market.

A witness appearing on behalf of Dean was also in support of increasing supply plant performance standards. Dean testified at the hearing, and reiterated in their post-hearing brief, that increasing supply plant performance standards will serve to better identify the milk that demonstrates a consistent ability to

service the fluid milk needs of the market.

In their post-hearing brief, Dean proposed a modification to Proposal 2 regarding cooperative owned supply plants. Specifically, Dean suggested that a cooperative owned supply plant should be located within the geographic boundaries of the Mideast marketing area and that qualifying shipments to distributing plants or nonpool plants must be classified as Class I.

A witness from MMPA appearing on behalf of the Cooperatives modified a portion of Proposal 2 at the hearing. The witness testified that Proposal 2 should increase the performance standards for a cooperative owned supply plant by 5 percentage points, from 30 to 35 percent of total receipts, for the month of August, and by 10 percentage points, from 30 to 40 percent of total receipts for the months of September through November. The witness was of the opinion that an increase in performance standards are needed in order to ensure that the proceeds generated from Class I sales are shared among those who regularly supply the needs of the fluid market.

The MMPA witness testified that their cooperative exceeded the current 30 percent performance standard (from 35 percent to 41 percent of total receipts) during the preceding months of August through November. The MMPA witness testified that they are in support of a "hard" performance standard during the August through November period, rather than the use of the annual rolling average provision currently provided for in all months by the order for cooperative owned supply plants. The witness also noted that if market conditions warrant a higher degree of performance, the Market Administrator has the authority to increase the performance standard.

Several independent and cooperative member dairy farmers whose milk is pooled in the Mideast order also testified in support of increasing supply plant performance standards. Most were of the opinion that increasing supply plant performance standards will more adequately identify what milk is consistently serving the needs of the Mideast fluid market.

A witness appeared on behalf of Smith Dairy in general support of any proposal that would serve to address the reduction of producer pay prices in the Mideast order and any proposals that will better identify milk that provides service to the Mideast fluid market. Smith Dairy operates two distributing plants regulated by the Mideast order that are primarily supplied by independent dairy farmers.

A witness appearing on behalf of White Eagle testified in opposition to increasing supply plant performance standards at the hearing and reiterated this position in their post-hearing brief. White Eagle is of the opinion that increasing supply plant shipping standards will displace milk from outside of the geographic boundaries of the Mideast marketing area that has historically supplied the milk needs of the Mideast market.

Discussion/Findings

The record of this proceeding supports finding that several amendments to the pooling standards of the Mideast order be permanently adopted. These amendments will better identify the milk of producers that should share in the order's blend price and establish more appropriate performance measures for providing regular and consistent service in meeting the market's fluid needs. Currently, milk located outside the Mideast marketing area that does not demonstrate regular and consistent performance in supplying the needs of the Class I market is able to qualify for pooling on the Mideast order and share in the increased revenues arising from Class I sales in the marketing area. The vast majority of this milk is pooled on the order at low classified use-values and in turn lowers the blend price to those producers who regularly and consistently supply the Class I needs of the Mideast market. Such milk is not demonstrating a reasonable level of performance in servicing the Class I market to receive the additional revenue arising from the Class I use of milk in the Mideast marketing area. Such milk should not be pooled.

The pooling standards of all Federal milk marketing orders, including the Mideast order, are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and to provide the criteria for identifying the milk of those producers who are reasonably associated with the market as a condition for receiving the order's blend price. The pooling standards of the Mideast order are represented in the *Pool Plant, Producer*, and the *Producer milk* provisions of the order and are performance based. Taken as a whole, these provisions are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and provide the criteria for determining the producer milk that has demonstrated reasonable measures of service to the Class I market and thereby should share in the marketwide distribution of pool proceeds.

Pooling standards that are performance based provide the only viable method for determining those eligible to share in the marketwide pool. It is primarily the additional revenue generated from the higher-valued Class I use of milk that adds additional income, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the returns arising from higher-valued Class I sales.

Pooling standards are needed to identify the milk of those producers who are providing regular and consistent service in meeting the Class I needs of the market. If a pooling provision does not reasonably accomplish this end, the proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers. The result is the unwarranted lowering of returns to those producers who actually incur the costs of servicing the fluid needs of the market.

Pool plant standards, specifically standards that provide for the pooling of milk through supply plants, need to reflect the supply and demand conditions of the marketing area. This is important because producers whose milk is pooled, regardless of utilization, receives the order's blend price. When the pooling provisions of the order result in pooling milk that cannot reasonably be considered as regularly and consistently serving the fluid needs of the market, it is appropriate to re-examine those standards.

The geographic boundaries of the Mideast order are not intended to limit or define which producers, which milk of those producers, or which handlers should enjoy the benefits of being pooled on the order. What is important and fundamental to all Federal orders, including the Mideast order, is the proper identification of those producers, the milk of those producers, and handlers that should share in the proceeds arising from Class I sales in the marketing area. The Mideast order's current pooling standards, specifically supply plant performance standards and diversion limit standards for producer milk do not reasonably accomplish this fundamental objective.

Since the 1960's, the Federal milk order program has recognized the harm and disorder that results to both producers and handlers when the same milk of a producer is simultaneously pooled on more than one Federal order, commonly referred to as "double-dipping". In the past, this situation caused price differences between producers and gave rise to competitive

equity issues. The need to prevent "double-dipping" became critically important as distribution areas expanded and orders merged.

When the same milk can be simultaneously pooled on a marketwide equalization pool operated by a government entity and on a Federal milk marketing order, it has the same undesirable outcomes as pooling the same milk on two Federal orders which was corrected many years ago. The Mideast order recently has experienced "double-dipping" and it is clear that the Mideast order should be permanently amended to prevent the ability to pool the same milk on the order and on a marketwide equalization pool operated by another government entity. This action is consistent with other recent Federal order amendatory actions regarding the simultaneous pooling of the same milk on a Federal order and on other government operated programs.

The hearing record clearly indicates that the milk of producers that does not regularly and consistently service the needs of the fluid market is able to receive the Mideast order's blend price. Inadequate diversion limit standards are allowing large volumes of milk to be diverted to non-pool manufacturing plants located far from the marketing area. Additionally, inadequate supply plant performance standards also enable milk which has insufficient physical association with the market for demonstrating regular and consistent service to the Class I needs of the marketing area to receive the Mideast order's blend price.

The Federal milk order system has consistently recognized that there is a cost incurred by producers in servicing an order's Class I market, and the order's blend price is the compensation to producers for performing such services. The amended pooling provisions will ensure that milk seeking to be pooled and receive the order's blend price will regularly and consistently service the marketing area's Class I needs. Consequently, the adopted pooling provisions will ensure the more equitable sharing of revenue generated from Class I sales among the appropriate producers.

Accordingly, supply plant performance standards are permanently increased by 10 percentage points, from 30 percent to 40 percent of total receipts, for all months; cooperative owned supply plant performance standards should be increased by 10 percentage points, from 30 percent to 40 percent of total receipts, for the months of September through November.

Additionally, cooperative owned supply plant performance standards for

the month of August are permanently increased by five percentage points, from 30 percent to 35 percent of total receipts, as proposed in MMPA's modification of Proposal 2. These standards will be met using the "rolling annual average" standard during December through July and the "hard" standard during August through November as proposed in Proposal 2. Also, as suggested by Dean in their post-hearing brief, a cooperative owned supply plant must be located in the marketing area. Limiting a cooperative owned supply plant to only those that are located within the marketing area is consistent with other pooling conveniences afforded to other supply plants. For example, system pooling of supply plants that regularly and consistently perform in supplying the Class I needs of the marketing area are a legitimate reserve supply source of milk and are restricted to supply plants located within the marketing area. Qualifying shipments, as already specified in the order, may only include shipments of Class I milk to distributing plants or non-pool plants.

Performance standards for a supply plant with a marketing agreement with a cooperative are permanently increased by 10 percentage points, from 35 percent to 45 percent of total receipts, for the months of August through November.

This final decision finds that permanent changes are necessary in the standards of the amount of milk that can be diverted from pool plants to nonpool plants to ensure that milk pooled on the order is part of the legitimate reserve supply of Class I handlers. The hearing record evidence clearly reveals that large volumes of milk not part of the legitimate reserve supply of the pooling handler can be reported as diverted milk by the pooling handler and receive the order's blend price.

Comments filed by the Cooperatives were in support of all changes to the order's pooling standards adopted in the tentative partial decision.

Exceptions to the tentative partial decision submitted by White Eagle and NAJ opposed the lowering of diversion limit standards on the basis that the fluid milk needs of the Mideast market are adequately met. Both entities also argued that the costs and difficulties in obtaining access to distributing plants for pooling will increase as a result of lowered diversion limit standards. NAJ predicted that decreased diversion limits will lower the marketing options for Mideast dairy farmers and subsequently decrease the prices received for their milk. These arguments are not persuasive.

Providing for the diversion of milk to nonpool facilities is a desirable and needed feature of an order because it facilitates the orderly and efficient disposition of milk when not needed for fluid use. Despite the comments by White Eagle and NAJ, this decision maintains that it is necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process. Associating more milk than is actually part of the legitimate reserve supply of the pooling handler unnecessarily reduces the potential blend price paid to dairy farmers who regularly and consistently service the market's Class I needs. Such milk should not be pooled. Without reasonable diversion limit provisions, the order's performance standards are weakened and give rise to disorderly marketing conditions. Accordingly, diversion limit standards for pool plants are permanently lowered by ten percentage points, from 60 percent to 50 percent for the months of August through February, and from 70 percent to 60 percent for the months of March through July.

3. Determination of Emergency Marketing Conditions

Record evidence established that pooling standards of the Mideast order were inadequate and were resulting in the erosion of the blend price received by producers who were serving the Class I needs of the market and were changed on an emergency basis. The unwarranted erosion of such producer blend prices stemmed from improper diversion limits and supply plant performance standards.

It was also appropriate to prohibit the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide pool administered by another government entity.

Consequently, it was determined that emergency marketing conditions existed in the Mideast marketing area and the issuance of a recommended decision was omitted. As stated in the tentative partial decision, a separate decision will be issued that will address proposals to deter the de-pooling of milk, establishing transportation credits and clarifying the Producer definition of the order.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the

extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the 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.

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

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

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

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof is one document: A Marketing Agreement regulating the handling of milk. An interim order amending the order regulating the handling of milk in the Mideast marketing area was approved by producers and published

in the **Federal Register** on September 26, 2005 (70 FR 56111), as an Interim Final Rule. Both of these documents have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire partial final decision and the Marketing Agreement annexed hereto be published in the **Federal Register**.

Determination of Producer Approval and Representative Period

March 2005 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended in the Interim Final Rule, published in the **Federal Register** on September 26, 2005 (70 FR 56111), regulating the handling of milk in the Mideast marketing area is approved or favored by producers, as defined under the terms of the order (as amended) and as hereby proposed to be amended) who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1033

Milk Marketing order.

Dated: January 17, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Milk in the Mideast Marketing Area

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

Findings and Determinations

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

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the 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. 601–674), and the applicable rules of practice and procedure (7 CFR part 900).

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

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

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

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

Order Relative To Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the 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:

The provisions of the order amending the order contained in the interim amendment of the order issued by the Administrator, Agricultural Marketing Service, on September 20, 2005, and published in the **Federal Register** on September 26, 2005 (70 FR 56111), are adopted without change and shall be and are the terms and provisions of this order. [This marketing agreement will not appear in the Code of Federal Regulations]

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

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

I. The findings and determinations, order relative to handling, and the provisions of §§ 1033.1 to 1033.86 all inclusive, of the order regulating the handling of milk in the Mideast marketing area (7 CFR part 1033) which is annexed hereto; and

