

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

Docket No. AO-166-A68; DA-01-04

Milk in the Mideast Marketing Area; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreement and Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; Notice of public hearing on proposed rulemaking.

SUMMARY: A public hearing is being held to consider proposals that would amend certain pooling and related provisions of the Mideast order. Proposals include increasing the minimum route disposition requirements for distributing plants; amending the automatic pool plant qualification provision; decreasing the amount of producer milk that can be diverted to nonpool plants for varying months of the year; and increasing the minimum amount of milk that a producer needs to deliver to pool plants in order to qualify as a producer and to be eligible to be pooled on the order.

Additionally, other proposals which call for eliminating a provision that currently permits a pool plant to have both a pool and a nonpool portion; establishing a "net shipment" provision for milk received at pool plants for determining pooling eligibility; and establishing the criteria for requiring a waiting period for a supply plant to regain pool status if it fails to meet the pooling requirements, will also be considered. A proposal that would change the rate of partial payments to producers will also be heard.

DATES: The hearing will convene at 8:30 a.m. on Tuesday, October 23, 2001.

ADDRESSES: The hearing will be held at the Holiday Inn Express Hotel and Suites/Galaxy Banquet Center, 231 Park Centre Dr., Wadsworth, OH 44281, (330) 334-7666.

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Marketing Specialist, Order Formulation Branch, USDA/AMS/Dairy Programs, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202)690-1366, e-mail address Gino.Tosi@usda.gov.

Persons requiring a sign language interpreter or other special accommodations should contact David Z. Walker at 440-826-3220; email David.Walker@usda.gov before the hearing begins.

SUPPLEMENTARY INFORMATION: 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.

Notice is hereby given of a public hearing to be held at the Holiday Inn Express Hotel and Suites/Galaxy Banquet Center, 231 Park Centre Drive, Wadsworth, OH 44281, (330) 334-7666, beginning at 8:30 a.m., on Tuesday,

October 23, 2001, with respect to proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Mideast marketing area.

The hearing is called 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 governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The purpose of the hearing is to receive evidence with respect to the economic and marketing conditions which relate to the proposed amendments, hereinafter set forth, and any appropriate modifications thereof, to the tentative marketing agreement and to the order.

Evidence also will be taken to determine whether emergency marketing conditions exist that would warrant omission of a recommended decision under the rules of practice and procedure (7 CFR 900.12(d)) with respect to any proposed amendments.

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This Act seeks to ensure that, within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. For the purpose of the Act, a dairy farm is 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. Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

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 provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(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 Secretary'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.

Interested parties who wish to introduce exhibits should provide the Presiding Officer at the hearing with three (3) copies of such exhibits for

the Official Record. Also, it would be helpful if additional copies are available for the use of other participants at the hearing.

List of Subjects in 7 CFR Part

Milk marketing orders.

PART 1033 - [Amended]

The authority citation for 7 CFR Part 1033 continues to read as follows:

Authority: 7 U.S.C. 601-674.

The proposed amendments, as set forth below, have not received the approval of the Secretary of Agriculture.

Submitted by: Dairy Farmers of America:

Proposal No. 1:

1. Amend §1033.7 by revising paragraph (a), to read as follows:

§ 1033.7 Pool Plant.

(a) A distributing plant, other than a plant qualified as a pool plant pursuant to paragraph (b) of this section or § 1000.7(b) of any other Federal milk order, from which during the months of August through April are not less than forty percent, and during the months of May through July are not less than thirty-five percent or more of the total quantity of fluid milk products physically received at the plant (excluding concentrated milk received from another plant by agreement for other than Class I use) are disposed of as route disposition or are transferred in the form of packaged fluid milk products to other distributing plants. At least twenty-five percent of such route disposition and transfers must be to outlets in the marketing area.

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Proposal No. 2:

1. Amend § 1033.7 by removing paragraph (c)(1)(iv) and revising paragraph (c)(4) to read as follows:

§ 1033.7 Pool Plant.

* * * * *

(c) * * *

(4) Shipments used in determining qualifying percentages shall be milk transferred or diverted and physically received by distributing pool plants, less any transfers or diversions of bulk fluid milk products from such distributing pool plants.

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Proposal No. 3:

1. Amend § 1033.13 by redesignating paragraphs (d)(3) through (d)(6) as paragraphs (d)(4) through (d)(7), revising paragraphs (d)(2) and (d)(4), and adding a new paragraph (d)(3) to read as follows:

§ 1033.13 Producer Milk.

* * * * *

(d) * * *

(2) The equivalent of at least two day's production is caused by the handler to be physically received at a pool plant in each of the months of August through November;

(3) The equivalent of at least two day's production is caused by the handler to be physically received at a pool plant in each of the months of December through July if the requirement of § 1033.13(d)(2) for the prior August through November period are not met, except in the case of a dairy farmer who marketed no grade A milk during the prior August-November period.

(4) Of the total quantity of producer milk received during the month (including diversions but excluding the quantity of producer milk received from a handler described in §1000.9(c)), the handler diverted to nonpool plants not more than sixty percent during the months of August through February, and seventy percent during the months of March through July.

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Proposal No. 4:

1. Amend § 1033.73 by revising paragraphs (a)(1), (b)(1), and (b)(2) to read as follows:

§ 1033.73 Payments to producers and to cooperative associations.

(a) * * *

(1) *Partial Payment.* For each producer who has not discontinued shipments as of the date of this partial payment, payment shall be made so that it is received by each producer on or before the 26th of the month (except as provided in § 1000.90) for milk received during the first 15 days of the month from the producer at not less than one hundred ten percent of the lowest announced class price for the preceding month, less proper deductions authorized in writing by the producer.

* * * * *

(b) * * *

(1) *Partial Payment to a cooperative association.* For bulk fluid milk/skimmed milk received during the first 15 days of the month from a cooperative association in any capacity, except as the operator of a pool plant, the partial payment shall be equal to the hundredweight of milk received multiplied by not less than one hundred and ten percent of the lowest announced price of the preceding month.

(2) *Partial payment to a cooperative association for milk transferred from its pool plant.* For bulk fluid milk/skimmed milk products received during the first 15 days of the month from a cooperative association in its capacity as the operator of a pool plant, the partial payment shall be at not less than one hundred and ten percent of the lowest announced price of the preceding month.

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Proposal No. 5:

1. Amend § 1033.7 by removing paragraph (h)(7).

Submitted by: Alto Dairy Cooperative:

Proposal No. 6:

1. Amend § 1033.13 by revising paragraph (d)(3) to read as follows:

§ 1033.13 Producer Milk.

* * * * *

(d) * * *

(3) Of the total quantity of producer milk received during the month (including diversions but excluding the quantity of producer milk received from a handler described in § 1000.9 (c)), the handler diverted to nonpool plants not more than sixty percent during the months of September through February. The handler diverted to nonpool plants no more than seventy percent during the months of March through August.

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Submitted by: Independent Dairy Producers of Akron:

Proposal No. 7:

1. Amend § 1033.13 by revising paragraphs (d)(2) and (d)(3) to read as follows:

§ 1033.13 Producer Milk.

* * * * *

(d) * * *

(2) The equivalent of at least four day's production is physically received at the pooling plant from August to March.

(3) Of the quantity of producer milk physically received during the month, the handler diverted to nonpool milk not more than sixty percent during the months of August through March.

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Submitted by: Dean Dairy Products Company, Schneider's Dairy, Inc., Turner Dairy Farms, Inc., Marburger Farm Dairy, Inc., Fike's Dairy, Inc., United Dairy, Inc., Carl Colteryahn Dairy, Inc., Smith Dairy Products Company, Superior Dairy, Goshen Dairy and Reiter Dairy:

Proposal No. 8:

Amend § 1033.7 by revising paragraph (c)(4) to read as follows:

§ 1033.7 Pool Plant.

* * * * *

(c) * * *

(4) A supply plant that meets the shipping requirements of this paragraph during each of the immediately preceding months of August through February shall be a pool plant during the following months of March through July unless the milk received at the plant fails to meet the requirements of a duly constituted regulatory agency, the plant fails to meet a shipping requirement instituted pursuant to paragraph (g) of this section, or the plant operator requests nonpool status for the plant. Such nonpool status shall be effective on the first day of the month following the receipt of such request and thereafter for six consecutive months, after which the plant must requalify as a pool plant on the basis of its deliveries to a pool distributing plant(s). The automatic pool qualification of a plant can be waived if the handler or cooperative requests in writing to the market administrator the nonpool status of such plant. The request must be made prior to the beginning of any month during the March through July period. To requalify as a pool plant, such plant must first have met the percentage shipping requirements of paragraph (c) of this section for six consecutive months.

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Proposal No. 9:

1. Amend § 1033.13 by revising paragraph (d)(3) to read as follows:

§ 1033.13 Producer Milk.

* * * * *
(d) * * *

(3) Of the quantity of producer milk physically received during the month, the handler diverted to nonpool plants not more than sixty percent during the months of August through February. Of the quantity of producer milk physically received during the month, the handler diverted to nonpool plants not more than eighty percent during the months of March through July.

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Submitted by: Proposed by Dairy Programs, Agricultural Marketing Service:

Proposal No. 10:

Make such changes as may be necessary to make the entire marketing agreement and the order conform with any amendments thereto that may result from this hearing.

Copies of this notice of hearing and the order may be procured from the Market Administrator of the Mideast Marketing Area or from the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250, or may be inspected there.

Copies of the transcript of testimony taken at the hearing will not be available for distribution through the Hearing Clerk's Office. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decision-making process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

- Office of the Secretary of Agriculture
- Office of the Administrator, Agricultural Marketing Service
- Office of the General Counsel
- Dairy Programs, Agricultural Marketing Service (Washington office) and the Office of the Market Administrator of the Mideast Market Area.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Dated: September 21, 2001

/s/ Kenneth C. Clayton
Acting Administrator