

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1030**

**Docket No. AO-361-A35; DA-01-03**

**Milk in the Upper Midwest Marketing Area; Interim Order Amending the Order.**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim Final Rule

**SUMMARY:** This order amends the pooling provisions of the Upper Midwest Federal milk order on an interim basis. Disorderly marketing conditions from the simultaneous pooling of milk on the Upper Midwest Federal order and the California State-operated order warrant these amendments. This interim order eliminates the ability to pool the same milk on a Federal and State-operated order that has marketwide pooling. It also establishes diversion limits for distributing plants regulated under the order. More than the required number of producers in Upper Midwest marketing area have approved the issuance of the interim amendments.

**EFFECTIVE DATE:** May 1, 2002

**FOR FURTHER INFORMATION CONTACT:** Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, 1400 Independence Avenue, S.W. Stop 0231, Washington, DC 20090-6456, (202) 690-1366, e-mail address Gino.Tosi@usda.gov.

**SUPPLEMENTARY INFORMATION:** This administrative rule 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 interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the 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 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.

**Small Business Consideration**

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 interim 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 \$500,000 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.

**Prior documents in this proceeding:**

Notice of Hearing: Issued June 5, 2001; published June 11, 2001 (66 FR 31185).

Tentative Final Decision: Issued February 8, 2002; published February 14, 2002 (67 FR 7040).

**Findings and Determinations**

The findings and determinations hereinafter set forth supplement those that were made when the Upper Midwest 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 Upper Midwest order:

(a) Findings upon the basis of the hearing record. 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), 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 Upper Midwest marketing area.

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

(1) The Upper Midwest order, as hereby amended on an interim basis, 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 order, as hereby amended on an interim basis, 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 Upper Midwest order, as hereby amended on an interim basis, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

(b) Additional Findings. It is necessary in the public interest to make these interim amendments to the Upper Midwest order effective May 1, 2002. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing area.

The interim amendments to these orders are known to handlers. The final decision containing the proposed amendments to these orders was issued on February 8, 2002.

The changes that result from these interim 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 interim order amendments effective May 1, 2002. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C. 551-559.)

(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, which 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 interim order amending the Upper Midwest order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order as hereby amended;

(3) The issuance of the interim order amending the Upper Midwest 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 1030**

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 Upper Midwest marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby further amended on an interim basis, as follows:

The authority citation for 7 CFR Part 1030 reads as follows:

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

**PART 1030 - MILK IN THE UPPER MIDWEST MARKETING AREA**

1. Section 1030.7(g) is amended by revising the first sentence to read as follows:

**§ 1030.7 Pool Plant**

\* \* \* \* \*

(g) The applicable shipping percentages of paragraphs (c) and (f) of this section and §1030.13(d)(2), and (d)(3) may be increased or decreased, for all or part of the marketing area, by the market administrator if the market administrator finds that such adjustment is necessary to encourage needed shipments or to prevent uneconomic shipments. \* \* \*

\* \* \* \* \*

2. Section 1030.13 is amended by revising the introductory text, redesignating paragraph (d)(3) as paragraph (d)(4), adding a new paragraph (d)(3), and adding a new paragraph (e) to read as follows:

**§ 1030.13 Producer milk**

Except as provided for in paragraph (e) of this section, Producer milk means the skim milk (or the skim equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

\* \* \* \* \*

(d) \* \* \*

(3) The quantity of milk diverted to nonpool plants by the operator of a pool plant described in §1030.7(a) or (b) may not exceed 90 percent of the Grade A milk received from dairy farmers (except dairy farmers described in §1030.12(b)) including milk diverted pursuant to §1030.13; and

\* \* \* \* \*

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

Dated: April 16, 2002

/s/ A.J. Yates  
Administrator  
Agricultural Marketing Service

Reproduced by:  
Upper Midwest Market  
Administrator's Office  
April 16, 2002