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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1030

[Docket No. AO-361-A39; DA-04-03-B]

Milk in the Upper Midwest Marketing Area; Order Amending the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends regulations pertaining to the Upper Midwest Federal milk order. More than the required number of producers for the Upper Midwest 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.

SUPPLEMENTARY INFORMATION: This document amends the pooling provisions of the Upper Midwest Federal milk order. Specifically, this final rule adopts provisions that: (1) Establish a limit on the volume of milk a handler may pool during the months of April through February to 125 percent of the volume of milk pooled in the prior month; (2) Establish a limit on the volume of milk a handler may pool during the month of March to 135 percent of the volume of milk pooled in the prior month; and (3) Allow the market administrator to increase the maximum administrative assessment rate up to 8 cents per hundredweight on all pooled milk if necessary to maintain the required fund reserves. 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 August 2004, the month during the hearing occurred, there were 15,802 dairy producers pooled on and 60 handlers regulated by the UMW order. Approximately 15,608 producers, or 97 percent, were considered small businesses based on the above criteria. Of the 60 handlers regulated by the UMW during August 2004, 49 handlers, or 82 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 Upper Midwest 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. Administrative assessments are similarly charged 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 June 15, 2004; published June 23, 2004 (69 FR 34963).

Notice of Hearing Delay: Issued July 14, 2004; published July 21, 2004 (69 FR 43538).

Tentative Partial Decision: Issued April 8, 2005; published April 14, 2005 (70 FR 19709).

Interim Final Rule: Issued May 26, 2005; published June 1, 2005 (70 FR 31321).

Final Partial Decision: Issued September 29, 2005; published October 5, 2005 (70 FR 58086).

Final Partial Rule: Issued December 5, 2005; published December 9, 2005 (70 FR 73126).

Recommended Decision: Issued February 15, 2006; published February 22, 2006 (71 FR 9004).

Final Decision: Issued September 1, 2006; published September 13, 2006 (71 FR 54136).

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:* 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 Upper Midwest 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 Upper Midwest 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 Upper Midwest 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 Upper Midwest 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 Upper Midwest 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 Upper Midwest 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 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 amended, as follows:

PART 1030—MILK IN THE UPPER MIDWEST MARKETING AREA

■ 1. The authority citation for 7 CFR part 1030 is amended to read as follows:

Authority: 7 U.S.C. 601–674, 7253.

■ 2. Section 1030.13 is amended by adding a new paragraph (f), to read as follows:

§ 1030.13 Producer milk.

* * * * *

(f) The quantity of milk reported by a handler pursuant to either § 1030.30(a)(1) or § 1030.30(c)(1) for April through February may not exceed 125 percent, and March may not exceed 135 percent of the producer milk receipts pooled by the handler during the prior month. Milk diverted to nonpool plants reported in excess of this limit shall be removed from the pool. Milk in excess of this limit received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b). The handler must designate, by producer pick-up, which milk is to be removed from the pool. If the handler fails to provide this information, the market administrator will make the determination. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants in excess of the previous month's pooled volume shall not be subject to the 125 or 135 percent limitation;

(2) Producer milk qualified pursuant to § _____.13 of any other Federal Order and continuously pooled in any Federal Order for the previous six months shall not be included in the computation of the 125 or 135 percent limitation;

(3) The market administrator may waive the 125 or 135 percent limitation:

(i) For a new handler on the order, subject to the provisions of § 1030.13(f)(4), or

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

(4) A bloc of milk may be considered ineligible for pooling if the market administrator determines that handlers altered the reporting of such milk for the purpose of evading the provisions of this paragraph.

■ 3. Section 1030.85 is revised, to read as follows:

§ 1030.85 Assessment for order administration.

On or before the payment receipt date specified under § 1030.71, each handler shall pay to the market administrator its pro rata share of the expense of administration of the order at a rate specified by the market administrator that is no more than 8 cents per hundredweight with respect to:

(a) Receipts of producer milk (including the handler's own production) other than such receipts by a handler described in § 1000.9(c) that were delivered to pool plants of other handlers;

(b) Receipts from a handler described in § 1000.9(c);

(c) Receipts of concentrated fluid milk products from unregulated supply plants and receipts of nonfluid milk products assigned to Class I use pursuant to § 1000.43(d) and other source milk allocated to Class I pursuant to § 1000.44(a)(3) and (8) and the corresponding steps of § 1000.44(b), except other source milk that is excluded from the computations pursuant to § 1030.60(h) and (i); and

(d) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the skim milk and butterfat subtracted pursuant to § 1000.76(a)(1)(i) and (ii).

Dated: October 25, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6-18174 Filed 10-27-06; 8:45 am]

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