

# Proposed Rules

Federal Register

Vol. 69, No. 120

Wednesday, June 23, 2004

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 1030

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

#### Milk in the Upper Midwest 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 to amend the Upper Midwest Federal milk marketing order (Order 30). A proposal to limit the volume of distant milk pooled on Order 30 by changing the requirements for producer milk originating outside of the Upper Midwest will be heard. Another proposal would limit the pooling of producer milk normally associated with the market that was not pooled in a prior month(s) while also changing the pooling requirements for producer milk originating outside of the Upper Midwest. Other proposals would establish a *dairy farmer for other markets* provision and would amend the touch base requirements and the diversion limits for Order 30. Also, another proposal would change the maximum rate the market administrator may charge for the expense of administration of the order from 5 cents per hundredweight up to 8 cents.

**DATES:** The hearing will convene at 1 p.m. on Monday, July 19, 2004.

**ADDRESSES:** The hearing will be held at the Sofitel Minneapolis Hotel (I-494 and Highway 100), 5601 West 78th Street, Bloomington, Minnesota 55439; (952) 835-1900.

**FOR FURTHER INFORMATION CONTACT:** Jack Rower, Marketing Specialist, Order Formulation and Enforcement, USDA/AMS/Dairy Programs, Room 2971-Stop 0231, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-

3465, e-mail address:

*Jack.Rower@usda.gov*.

Persons requiring a sign language interpreter or other special accommodations should contact H. Paul Kyburz, Upper Midwest Market Administrator, at (952) 831-5292; e-mail *pkkyburz@fnma30.com* 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 Sofitel Minneapolis Hotel (I-494 and Highway 100), 5601 West 78th Street, Bloomington, Minnesota 55439; (952) 835-1900, beginning at 1 p.m., on Monday, July 19, 2004, with respect to proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Upper Midwest milk marketing areas.

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 that 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 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.

This public hearing is being conducted to collect evidence for the record concerning the effect on the orderly marketing of fluid milk due to pooling of milk from producers so distant from the market that they cannot be considered viable suppliers and to consider inequities among producers caused by provisions that allow reserve milk, which is used in cheese or butter and nonfat dry milk production, to share in the benefits of pooling, but do not require such milk to pool when there is a cost (when the Class III price or Class IV price is above the blend price). At the hearing, evidence will also be collected to consider giving the

market administrator the discretion to increase the Administrative Assessment to a maximum of 8 cents per hundredweight.

Interested parties who wish to introduce exhibits should provide the Presiding Officer at the hearing with (4) 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 1030**

Milk marketing orders.

The authority citation for 7 CFR Part 1030 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 Department.

*Proposed by Associated Milk Producers, Inc. (AMPI), Bongards' Creameries, Ellsworth Cooperative Creamery, and First District Association (AMPI, et. al.):*

**Proposal No. 1**

This proposal would limit the pooling of milk located long distances from the Upper Midwest marketing area.

1. Amend §§ 1030.7 and 1030.13 by adding a new paragraph § 1030.7(c)(1)(v), revising paragraph § 1030.7(c)(2), and revising § 1030.13(d) to read as follows:

**§ 1030.7 Pool plant.**

\* \* \* \* \*

- (c) \* \* \*
- (1) \* \* \*

(v) Qualifying shipments by plants located outside the States of Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin and the Upper Peninsula of Michigan may be made only to plants described in paragraphs (c)(1)(i) of this section.

(2) The operator of a supply plant located within the States of Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin and the Upper Peninsula of Michigan may include as qualifying shipments under this paragraph milk delivered directly from producers' farms pursuant to § 1000.9(c) or § 1030.13(c) to plants described in paragraphs (a), (b) and (e) of this section. Handlers may not use shipments pursuant to § 1000.9(c) or § 1030.13(c) to qualify plants located outside the marketing area.

\* \* \* \* \*

**§ 1030.13 Producer milk.**

\* \* \* \* \*

(d) Diverted by the operator of a pool plant or a cooperative association described in § 1000.9(c) to a nonpool

plant located in the States of Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin and the Upper Peninsula of Michigan or a distributing plant fully regulated under another Federal order, subject to the following conditions:

\* \* \* \* \*

2. Amend § 1030.55 by revising paragraph (a)(2) to read as follows:

**§ 1030.55 Transportation credits and assembly credits.**

\* \* \* \* \*

(a) \* \* \*

(2) Multiply the hundredweight of milk eligible for the credit by .28 cents times the number of miles, not to exceed 400 miles, between the transferor plant and the transferee plant:

\* \* \* \* \*

*Proposed by Cass-Clay Creamery Inc., Dairy Farmers of America, Foremost Farms USA, Land O'Lakes, Mid-West Dairymen's Company, Milwaukee Cooperative Milk Producers, Manitowoc Milk Producers Cooperative, Swiss Valley Farms, and Woodstock Progressive Milk Producers (Mid-West, et. al.):*

**Proposal No. 2**

This proposal would limit the pooling of producer milk normally associated with the market that was not pooled in a prior month(s), would change the pooling requirements for producer milk originating outside of the States where the Upper Midwest marketing area is located, and would limit the transportation and assembly credits not to exceed 400 miles.

1. Amend § 1030.13 by adding new paragraphs (f) through (f)(4) to read as follows:

**§ 1030.13 Producer milk.**

\* \* \* \* \*

(f) Except in the month of August, the quantity of milk reported by a handler pursuant to § 1030.30(a)(1) and/or § 1030.30(c)(1) for September through February and for April through July 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 received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b)(3)(v). 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 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)(3), 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.

\* \* \* \* \*

2. Amend §§ 1030.7 and 1030.13 by adding a new paragraph § 1030.7(c)(1)(v), revising paragraph § 1030.7(c)(2), and revising § 1030.13(d) to read as follows:

**§ 1030.7 Pool plant.**

\* \* \* \* \*

- (c) \* \* \*
- (1) \* \* \*

(v) Qualifying shipments by plants located outside the States of Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin and the Upper Peninsula of Michigan may be made only to plants described in paragraphs (c)(1)(i) of this section.

(2) The operator of a supply plant located within the States of Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin and the Upper Peninsula of Michigan may include as qualifying shipments under this paragraph milk delivered directly from producers' farms pursuant to § 1000.9(c) or § 1030.13(c) to plants described in paragraphs (a), (b) and (e) of this section. The operator of a supply plant located outside the area described above cannot include such shipments as qualifying shipments. Cooperative associations may not use shipments pursuant to § 1000.9(c) to qualify plants located outside the marketing area.

\* \* \* \* \*

**§ 1030.13 Producer milk**

\* \* \* \* \*

(d) Diverted by the operator of a pool plant or a cooperative association described in § 1000.9(c) to a nonpool plant (except a distributing plant fully regulated under another Federal order),

located in the States of Illinois, Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin and the Upper Peninsula of Michigan, subject to the following conditions:

\* \* \* \* \*

3. Amend § 1030.55 by revising paragraph (a)(2) to read as follows:

**§ 1030.55 Transportation credits and assembly credits.**

\* \* \* \* \*

(a) \* \* \*

(2) Multiply the hundredweight of milk eligible for the credit by .28 cents times the number of miles, not to exceed 400 miles, between the transferor plant and the transferee plant:

\* \* \* \* \*

*Proposed by Dean Foods Company:*

**Proposal No. 3**

This proposal to establish a *dairy farmer for other markets* provision would require a year round commitment in order for milk to be pooled.

1. Amend § 1030.12 by adding a new paragraph (b)(5) to read as follows:

**§ 1030.12 Producer.**

\* \* \* \* \*

(b) \* \* \*

(5) For any month, any dairy farmer whose milk is received at a pool plant or by a cooperative association handler described in § 1000.9(c) if the pool plant operator or the cooperative association caused milk from the same farm to be delivered to any plant as other than producer milk, as defined under the order in this part or any other Federal milk order, during the same month or any of the preceding 11 months, unless the equivalent of at least ten days' milk production has been physically received otherwise as producer milk at a pool plant during the month.

*Proposed by Dean Foods Company:*

**Proposal No. 4**

This proposal to establish a *dairy farmer for other markets* provision would require a 2 to 4 month commitment in order for milk to be pooled.

1. Amend § 1030.12 by adding new paragraphs (b)(5) and (b)(6) to read as follows:

**§ 1030.12 Producer.**

\* \* \* \* \*

(b) \* \* \*

(5) For any month of December through June, any dairy farmer whose milk is received at a pool plant or by a cooperative association handler described in § 1000.9(c) if the pool plant operator or the cooperative association caused milk from the same farm to be

delivered to any plant as other than producer milk, as defined under the order in this part or any other Federal milk order, during the same month, any of the 3 preceding months, or during any of the preceding months of July through November, unless the equivalent of at least ten days' milk production has been physically received otherwise as producer milk at a pool plant during the month; and

(6) For any month of July through November, any dairy farmer whose milk is received at a pool plant or by a cooperative association handler described in § 1000.9(c) if the pool plant operator or the cooperative association caused milk from the same farm to be delivered to any plant as other than producer milk, as defined under the order in this part or any other Federal milk order, during the same or the preceding month, unless the equivalent of at least ten days' milk production has been physically received otherwise as producer milk at a pool plant during the month.

*Proposed by Dean Foods Company:*

**Proposal No. 5**

This proposal to establish a *dairy farmer for other markets* provision would require that only 115% of a prior month's milk could be pooled in a subsequent month and be considered pool milk.

1. Amend § 1030.13 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 § 1030.30(a)(1) and/or § 1030.30(c)(1) for July through November may not exceed 115 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 by the market administrator. Milk received at pool plants, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(3)(v) and § 1000.44(b)(3)(v). 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 shall not be subject to the 115 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 115 percent limitation;

(3) The market administrator may waive the 115 percent limitation utilizing;

(i) For a new handler on the order, subject to the provisions of § 1030.13(f)(3), or

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

(4) The market administrator may increase or decrease the applicable limitation for a month consistent with the procedures in § 1030.7(g); and

(5) 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.

*Proposed by Dean Foods Company:*

**Proposal No. 6**

This proposal would establish a two day touch base requirement during the shorter months and diversion limitations of 65 and 75 percent.

1. Amend § 1030.13 by adding new paragraphs (d)(1) through (4), and redesignating paragraph (d)(4) as paragraph (d)(5), to read as follows:

\* \* \* \* \*

(d) \* \* \*

(1) Milk of a dairy farmer shall not be eligible for diversion until milk of such dairy farmer has been physically received as producer milk at a pool plant and the dairy farmer has continuously retained producer status since that time. If a dairy farmer loses producer status under the order in this part (except as a result of a temporary loss of Grade A approval), the dairy farmer's milk shall not be eligible for diversion until milk of the dairy farmer has been physically received as producer milk at a pool plant;

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

(3) The equivalent of at least two days' milk production is caused by the handler to be physically received at a pool plant in each of the months of December through June if the requirement of paragraph (d)(2) of this section (§ 1030.13) in each of the prior months of July through November is not met, except in the case of dairy farmer who marketed no Grade A milk during each of the prior months of July through November.

(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) of this chapter or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 65 percent in each of the months of July through November and 75 percent in each of the months of December through June.

\* \* \* \* \*

*Proposed by the Upper Midwest Market Administrator:*

**Proposal No. 7**

This proposal would increase the maximum administrative assessment rate for the Upper Midwest order from 5 cents to 8 cents per hundredweight.

1. Revise § 1030.85 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).

*Proposed by Dairy Programs, Agricultural Marketing Service:*

**Proposal No. 8**

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 orders may be procured from the Market Administrator of the aforesaid marketing area, or from the Hearing Clerk, United States Department of

Agriculture, Room 1083—STOP 9200, 1400 Independence Avenue, SW., Washington, DC 20250-9200, 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 Offices of all Market Administrators.

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

Dated: June 16, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 04-14059 Filed 6-22-04; 8:45 am]

**BILLING CODE 3410-02-P**