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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1001

[Docket No. AO-14-A70; DA-02-01]

#### Milk in the Northeast Marketing Area; Order Amending the Order

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends regulations pertaining to the Northeast Federal milk order. More than the required number of producers for the Northeast marketing area approved the issuance of the final order amendments.

**DATES:** *Effective Date:* June 1, 2005.

**FOR FURTHER INFORMATION CONTACT:** Gino Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, STOP 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail: [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This document amends the pooling and related provisions of the Northeast Federal milk order. Specifically, this final rule permanently adopts provisions that will establish year-round supply plant performance standards, exclude milk received by supply plants from producers not eligible to be pooled on the Northeast order from supply plant performance standards, remove the “split-plant” provision, establish a one-day “touch base” standard, establish explicit diversion limits for pool plants, prohibit the ability to simultaneously pool the same milk on the order and a marketwide pool administered by another government entity, and grants authority to the Market Administrator to adjust the touch-base and diversion limit

standards as market conditions warrant. Additional amendments that amend reporting and payment date provisions are also adopted.

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 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 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.

#### Regulatory Flexibility Analysis 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 marketing 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.

In September 2002, the time of the hearing, there were 16,715 producers pooled on and 143 handlers regulated by the Northeast order. Of these, 97 percent of the producers and 71 percent of the handlers would be considered small businesses. The adoption of the proposed standards serve to revise and establish criteria that ensure the pooling of producers, producer milk, and plants that have a reasonable association with, and are consistently serving, the fluid milk needs of the Northeast 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 to determine those that 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 amendments to the reporting and payment date provisions serve to streamline and simplify handler payments to the market administrator. The criteria established in the amended pooling standards and reporting and payment date provisions are applied in an equal fashion to both large and small businesses. Therefore, the 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 will have no impact on reporting, recordkeeping, or other compliance requirements because they will remain identical to the current requirements. No new forms are proposed and no additional reporting requirements are necessary.

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.

*Prior documents in this proceeding:*

*Notice of Hearing:* Issued July 26, 2002; published August 1, 2002 (67 FR 49887).

*Supplemental Notice of Hearing:*

Issued August 14, 2002; published August 16, 2002 (67 FR 53522).

*Recommended Decision:* Issued

March 17, 2004; published March 25, 2004 (69 FR 15562).

*Final Decision:* Issued January 14, 2005; published January 31, 2005 (70 FR 4932).

### Findings and Determinations

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

(a) *Findings upon the basis of the hearing record.* 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 Northeast 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 Northeast 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 Northeast 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 in the public interest to make these amendments to the Northeast order effective June 1, 2005. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing area.

The amendments to the Northeast order are known to handlers. The final decision containing the proposed amendments to the order was issued on January 14, 2005.

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 June 1, 2005. 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) or 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 Northeast 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 Northeast 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 1001

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 Northeast 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, as follows:

### PART 1001—MILK IN THE NORTHEAST MARKETING AREA

■ 1. The authority citation for 7 CFR Part 1001 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Section 1001.7 is amended by:

■ a. Revising paragraphs (c)(1) and (c)(2).

■ b. Removing paragraph (c)(3).

■ c. Redesignating paragraphs (c)(4) and (c)(5) as paragraphs (c)(3) and (c)(4).

■ d. Revising paragraphs (e)(1) and (e)(2).

■ e. Adding “and” at the end of paragraph (h)(5).

■ f. Removing “; and” from the end of paragraph (h)(6) and adding a period in its place.

■ g. Removing paragraph (h)(7).

The revisions read as follows:

#### § 1001.7 Pool plant.

\* \* \* \* \*

(c) \* \* \*

(1) In each of the months of January through August and December, such shipments and transfers to distributing plants must not equal less than 10 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month;

(2) In each of the months of September through November, such shipments and transfers to distributing plants must equal not less than 20 percent of the total quantity of milk (except the milk of a producer described in § 1001.12(b)) that is received at the plant or diverted from it pursuant to § 1001.13 during the month;

\* \* \* \* \*

(e) \* \* \*

(1) At least one of the plants in the unit qualifies as a pool distributing plant pursuant to paragraph (a) of this section;

(2) Other plants in the unit must process at least 60 percent of monthly receipts of producer milk only as Class I or Class II products and must be located in the Northeast marketing area, as defined in § 1001.2, in a pricing zone providing the same or a lower Class I price than the price applicable at the distributing plant(s) included in the unit; and

\* \* \* \* \*

■ 3. Section 1001.13 is amended by:

■ a. Revising paragraph (d)(1).

■ b. Redesignating paragraph (d)(2) as paragraph (d)(3).

■ c. Adding paragraphs (d)(2), (d)(4), (d)(5) and (e).

The revision and additions read as follows:

**§ 1001.13 Producer milk.**

\* \* \* \* \*

(d) \* \* \*

(1) Milk of a dairy farmer shall not be eligible for diversion unless one day's milk production of such dairy farmer was physically received as producer milk 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 unless milk of the dairy farmer has been physically received as producer milk at a pool plant during the month;

(2) Of the total quantity of producer milk received during the month (including diversion but excluding the quantity of producer milk received from a handler described in § 1000.9(c) or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 80 percent during each of the months of September through November and 90 percent during each of the months of January through August and December. In the event that a handler causes the milk of a producer to be over diverted, a dairy farmer will not lose producer status;

\* \* \* \* \*

(4) Any milk diverted in excess of the limits set forth in paragraph (d)(2) of this section shall not be producer milk. The diverting handler shall designate the dairy farmer deliveries that shall not be producer milk. If the handler fails to designate the dairy farmer deliveries which are ineligible, producer milk status shall be forfeited with respect to all milk diverted to nonpool plants by such handler; and

(5) The delivery day requirement and the diversion percentages in paragraphs (d)(1) and (d)(2) of this section may be increased or decreased by the Market Administrator if the Market Administrator finds that such revision is necessary to assure orderly marketing and efficient handling of milk in the marketing area. Before making such a finding, the Market Administrator shall investigate the need for the revision either on the Market Administrator's own initiative or at the request of interested persons if the request is made in writing at least 15 days prior to the month for which the requested revision is desired to be effective. If the investigation shows that a revision might be appropriate, the Market

Administrator shall issue a notice stating that the revision is being considered and inviting written data, views, and arguments. Any decision to revise an applicable percentage or delivery day requirement must be issued in writing at least one day before the effective date.

(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 another government entity.

■ 4. In § 1001.30, the introductory text is revised to read as follows:

**§ 1001.30 Reports of receipts and utilization.**

Each handler shall report monthly so that the Market Administrator's office receives the report on or before the 10th day after the end of the month, in the detail and on prescribed forms, as follows:

\* \* \* \* \*

■ 5. In § 1001.62, the introductory text is revised and a new paragraph (h) is added to read as follows:

The revision and addition reads as follows:

**§ 1001.62 Announcement of producer prices.**

On or before the 14th day after the end of the month, the Market Administrator shall announce the following prices and information:

\* \* \* \* \*

(h) If the 14th falls on a Saturday, Sunday, or national holiday, the Market Administrator may have up to two additional business days to announce the producer price differential and the statistical uniform price.

\* \* \* \* \*

■ 6. In § 1001.71, the introductory text is revised to read as follows:

**§ 1001.71 Payments to the producer—settlement fund.**

Each handler shall make payment to the producer-settlement fund in a manner that provides receipt of the funds by the Market Administrator no later than two days after the announcement of the producer price differential and the statistical uniform price pursuant to § 1001.62 (except as provided for in § 1000.90). Payment shall be the amount, if any, by which the amount specified in paragraph (a) of this section exceeds the amount specified in paragraph (b) of this section:

\* \* \* \* \*

■ 7. Section 1001.72 is revised to read as follows:

**§ 1001.72 Payments from the producer—settlement fund.**

No later than the day after the due date required for payment to the Market Administrator pursuant to § 1001.71 (except as provided in § 1001.90), the Market Administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1001.71(b) exceeds the amount computed pursuant to § 1001.71(a). If, at such time, the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the Market Administrator shall reduce uniformly such payments and shall complete the payments as soon as the funds are available.

■ 8. In § 1001.73, paragraphs (a)(2) introductory text and (e) introductory text are revised to read as follows:

**§ 1001.73 Payments to producers and to cooperative associations.**

(a) \* \* \*

(2) *Final payment.* For milk received during the month, payment shall be made during the following month so it is received by each producer no later than the day after the required date of payment by the Market Administrator, pursuant to § 1001.72, in an amount computed as follows:

\* \* \* \* \*

(e) In making payments to producers pursuant to this section, each handler shall furnish each producer (except for a producer whose milk was received from a cooperative association handler described in § 1000.9(a) or 9(c)), a supporting statement in such form that it may be retained by the recipient which shall show:

\* \* \* \* \*

Dated: April 6, 2005.

**Kenneth C. Clayton,**  
*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 05-7273 Filed 4-11-05; 8:45 am]  
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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1124**

[Docket No. AO-368-A30; DA-01-08-PNW]

**Milk in the Pacific Northwest Marketing Area: Order Amending the Order**

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

**ACTION:** Final rule.

**SUMMARY:** This document adopts as a final rule, without change, an interim