(2) The field is tilled at least once per year for a total of 5 years (the years need not be consecutive). After tilling, the field may be planted with a crop or left fallow. If the field is planted with a host crop, the crop must test negative, through the absence of bunted kernels, for Karnal bunt.

* * * * *

Done in Washington, DC, this 29th day of September 2005.

Elizabeth E. Gaston,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 05–19943 Filed 10–4–05; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1030

[Docket No. AO–361–A39; DA–04–03A]

Milk in the Upper Midwest Marketing Area; Final Partial Decision on Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes to adopt as a final rule, order language contained in the interim final rule published in the **Federal Register** on June 1, 2005, concerning pooling standards and transportation credit provisions of the Upper Midwest (UMW) milk marketing order. This document also sets forth the final decision of the Department and is subject to approval by producers. A separate decision will be issued that will address proposals concerning pooling and repooling of milk, temporary loss of Grade A status, and increasing the maximum administrative assessment.

FOR FURTHER INFORMATION CONTACT: Gino Tosi, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231-Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–3465, e-mail address: gino.tosi@usda.gov.

SUPPLEMENTARY INFORMATION: This final partial decision permanently adopts amendments to Pool plant provisions to ensure that producer milk originating outside the states that comprise the UMW order (Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan) is providing consistent service to the order's Class I market, and to Producer milk provisions to eliminate the ability to pool, as producer milk, diversions to nonpool plants outside of the states that comprise the UMW marketing area. Additionally, this final partial decision permanently adopts a proposal to limit the transportation credit received by handlers to the first 400 miles of applicable milk movements.

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 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 of 1937 (the Act), 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 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.

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 proposed 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 which the hearing occurred, there were 15,608 dairy producers pooled on, and 60 handlers regulated by, the UMW order. Approximately 15,082 producers, or 97 percent, were considered small businesses based on the above criteria. Of the 60 handlers regulated by the UMW order during August 2004, approximately 49 handlers, or 82 percent, were considered ''small businesses.''

The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk and plants that have a reasonable association with and are consistently serving the fluid needs of the UMW milk marketing area. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid milk needs of the market and by doing so, 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. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. The criteria established for transportation credits are also applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the proposed 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 proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would

remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This decision 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 forms are routinely used in most business transactions. 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 from 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 16, 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).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreement and 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. 601–674), and the applicable rules of practice (7 CFR part 900), at Bloomington, Minnesota, on August 16–19, 2004, pursuant to a notice of hearing issued June 16, 2004, published June 23, 2004 (69 FR 34963), and a notice of a hearing delay issued July 14, 2004, published July 21, 2004 (69 FR 43538).

The material issues, findings, conclusions and rulings of the tentative partial decision are hereby approved, adopted and are set forth herein. The material issues on the record of the hearing relate to:

1. Pooling Standards—Changing performance standards and diversion limits.

2. Transportation credits.

3. Determination of whether emergency marketing conditions existed that warranted the omission of a recommended decision and the opportunity to file written exceptions.

Findings and Conclusions

This final partial decision specifically addresses Proposals 1, 6 and features of Proposal 2 that are intended to better identify the milk of those producers who provide a reasonable and consistent service to the Class I needs of the UMW marketing area and thereby become eligible to pool on the UMW order. This decision also limits transportation credits received by handlers to the first 400 miles of applicable milk movements. Proposals 3, 4, 5, 7, a portion of Proposal 2 that addresses pooling and repooling, and a portion of Proposal 6 that addresses temporary loss of Grade A approval will be addressed in a separate decision. Hereinafter, any references to Proposal 2 will only pertain to the portions of the proposal that would limit the pooling of ''distant'' milk and amend transportation credit provisions, and references to Proposal 6 will only pertain to the ''touch-base'' standard portion of the proposal.

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Pooling Standards

Several proposed changes to the pooling standards of the UMW order, previously adopted on an interim basis, are adopted on a permanent basis by this final partial decision. Certain inadequacies of the current pooling provisions are resulting in large volumes of milk pooled on the UMW order which do not demonstrate a reasonable and consistent servicing of the UMW Class I market.

Specifically, the following amendments were adopted in the tentative partial decision and are adopted on a permanent basis in this final partial decision: (1) Only supply plants located in Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wisconsin, and the Upper Peninsula of Michigan (hereinafter referred to as the ''7-state milkshed'') may use milk delivered directly from producers' farms for qualification purposes; and (2) Of diversions to nonpool plants, only diversions to those plants located in the 7-state milkshed will be considered producer milk under the order. These amendments to the pooling standards were contained in Proposals 1 and 2, as published in the hearing notice and as modified at the hearing.

Three proposals (Proposals 1, 2, and 6) seeking to limit the pooling of ''distant'' milk were considered in this proceeding. The proponents of these proposals are of the opinion that the current pooling provisions of the order enable milk to become pooled on the order that does not service the Class I needs of the UMW market. According to the proponents, such milk currently need only make an initial qualifying delivery to a pool plant to become pooled on the order. The witnesses assert that this is causing the unwarranted lowering of the order's blend price.

Proposal 1 was offered by Associated Milk Producers, Inc. (AMPI), Bongards' Creameries, Ellsworth Cooperative Creameries, and First District Association. Hereinafter, this decision will refer to these proponents as ''AMPI, et al.'' All are cooperative associations whose members' milk is pooled on the UMW order.

Proposal 2 was offered by Mid-West Dairymen's Company on behalf of Cass-Clay Creamery, Inc. (Cass-Clay), Dairy Farmers of America, Inc. (DFA), Foremost Farms USA Cooperative (Foremost Farms), Land O'Lakes, Inc. (LOL), Manitowoc Milk Producers Cooperative (MMPC), Mid-West Dairymen's Company, Milwaukee Cooperative Milk Producers (MCMP), Swiss Valley Farms Company (Swiss Valley), and Woodstock Progressive Milk Producers Association. Hereinafter, this decision will refer to these proponents as ''Mid-West, et al.'' Although Foremost Farms was a proponent of Proposal 2, no testimony was offered on their behalf. At the hearing, Plainview Milk Products Cooperative and Westby Cooperative Creamery also supported the testimony of Mid-West, et al. The proponents of Proposal 2 are qualified cooperatives representing producers whose milk supplies the milk needs of the marketing area and is pooled on the UMW order.

Proposal 6, offered by Dean Foods Company (Dean), which also addresses the pooling of distant milk, is not adopted. Proposal 6 sought to increase the number of days that a dairy farmer's milk production would need to be delivered to a UMW pool plant from the current 1 day to 2 days before the milk of the dairy farmer would be eligible for diversion to a nonpool plant and have such diverted milk pooled on the order. This is commonly referred to by the industry as a ''touch-base'' standard. If this standard was not met for each of the months of July through November, Proposal 6 would have required that the touch-base standard be increased to 2

days for each of the months of December though June. If the July through November touch-base standard of Proposal 6 was met, there would be no touch-base standard applicable for the months of December through June. Additionally, Proposal 6 would also specify that if a producer lost association with the UMW order, except as caused by a loss in Grade A status, the producer would need to meet the 2-day touch-base standard in the intended month for qualifying as a producer on the order and for pooling eligibility.

During the hearing, Dean's witnesses made many modifications to their proposals which were further clarified in a post-hearing brief. In their brief, Dean explained that Proposal 6, as modified, intended that a dairy farmer's qualifying shipment could be made anytime during the month.

Currently, the UMW order provides that a supply plant can qualify as a pool plant of the order by delivering 10 percent of its total monthly milk receipts to a pool distributing plant, a producer-handler, a partially regulated distributing plant, or a distributing plant regulated by another Federal order. A supply plant may meet this requirement by shipping milk directly from dairy farms regardless of their location. Additionally, producer milk can be diverted to any nonpool plant, without regard to location, as long as the producer met the touch-base standard during the first qualifying month.

A witness appearing on behalf of AMPI, et al., testified in support of Proposal 1. The witness stated that since Federal order reform, and as a result of other Federal order hearings over the last several years, the UMW pooling provisions have allowed milk to be pooled on the order from as far as California, Idaho, Utah, Oregon, Colorado, Montana, Nebraska, Ohio, Indiana, and Georgia. The witness explained that a previous UMW decision, which became effective May 1, 2002, only resulted in prohibiting the ability to simultaneously pool the same milk on the UMW order and on a State-operated milk order that had marketwide pooling. The witness noted that during the same time period, however, amendments to the pooling standards of the Central and Mideast milk marketing orders resulted in a tightening of their pooling standards, moving milk formerly pooled on those two orders onto the UMW marketwide pool which reduced the blend price and producer price differential (PPD) received by UMW dairy farmers.

The AMPI, et al., witness testified that in December 2003, 263 million pounds, or 12.3 percent of producer milk, pooled on the UMW order was located in Idaho. The witness also noted that for the same month, Jerome County, Idaho, had the most producer milk of any county pooled on the UMW order. The witness was of the opinion that milk seeks to be pooled on the UMW order when it cannot qualify for pooling in its own geographic area. The witness explained that milk located far from the UMW area seeks to be pooled on the UMW order because the pooling provisions of the UMW order are so liberal and because it is economically advantageous to do so.

The AMPI, *et al.*, witness stated that current order provisions allow any handler whose producers have touched base at a UMW pool plant, to pool 10 times the amount of milk shipped to a distributing plant and divert up to 90 percent of its milk supply to any nonpool plant. The witness stressed that this has resulted in Idaho producers pooling their milk on the UMW order by simply meeting the one-day touch-base standard and then diverting future milk production to a nonpool plant nearer to their farms in Idaho.

The AMPI, *et al.*, witness compared the actual PPD versus a scenario in which a PPD was computed without Idaho milk. The witness noted that in 2003 the actual PPD was a negative 5 cents while under their scenario the estimated PPD without Idaho milk would have been a positive $0.19, a $0.24 total difference. The witness testified that UMW dairy farmers in effect received $36.5 million less for their milk in 2003 due to the $0.24 average difference in the actual versus estimated PPD. The witness asserted that Idaho milk was not physically supplying the market and was never intended to supply the market. The witness also added that additional Idaho milk not previously pooled on the UMW order could be pooled on the UMW order because of the termination of the Western milk marketing order on April 1, 2004.

The AMPI, *et al.*, witness stressed that Proposal 1 is not intended to prohibit the pooling of milk based on its distance from the UMW marketing area. The witness explained that any supply plant, regardless of its location, that delivers 10 percent of its producer receipts to a UMW distributing plant in the order would qualify their total receipts for pooling. The witness also explained that Proposal 1 would lessen the incentive to pool milk that does not demonstrate a consistent servicing of the UMW market's Class I needs.

A post-hearing brief submitted by AMPI asserted that $3 million per month is being siphoned off of the UMW marketwide pool by producers located long distances from the UMW and whose milk demonstrates no service to the UMW's fluid market. Their brief also reiterated that the termination of the Western order has resulted in a further lowering of blend prices received by UMW dairy farmers as more unpooled milk seeks easy and profitable pooling opportunities. The brief explained that the loss of income to UMW dairy farmers merits the need for an emergency action.

A witness appearing on behalf of Mid-West, *et al.*, testified in support of Proposal 2. The witness stated that milk located within the 7-state milkshed is already more than adequate to serve the fluid needs of the market. The witness asserted that Idaho milk is located too far from the market, in excess of 1,000 miles, to serve as a reliable reserve supply. The witness concluded that such milk should not be considered a consistent supply for the UMW marketing area. The Mid-West, *et al.*, witness explained that often when Idaho milk makes a pool qualifying one-day touch-base delivery to a distributing plant, milk produced and located within the marketing area has to be diverted from the distributing plant to accommodate the one-time physical receipt. The witness was of the opinion that this is tantamount to the local milk supply balancing the Idaho milk supply, rather than Idaho milk balancing the local milk supplies of the UMW market. Furthermore, the witness was of the opinion that if not for inadequate pooling provisions, milk located far from the market would not seek to be pooled because the cost of servicing the market would be prohibitive.

The Mid-West, *et al.*, witness said that typically the milk in Idaho pays a fee to a UMW handler for pooling and that these fees have become a significant revenue stream for some UMW handlers who seek to offset lower PPDs and increase their financial returns to producer members. The witness stated that in this way, milk located in the UMW marketing area is essentially used to qualify milk located in Idaho as UMW milk. Because Idaho milk is reported as a receipt by UMW handlers, it receives the benefit of the UMW PPD although it is never actually delivered to the UMW market except for the initial association. The witness said that in December 2003, more milk was pooled on the UMW order from Jerome County, Idaho, than from any other county in the country. The witness was of the opinion that the Idaho milk would not seek to be pooled if it had to meet the order's performance standards on its own merit because the cost of transporting it to a

UMW distributing plant would exceed the monetary benefit of being pooled on the order. The witness insisted that the only way that milk located far from the market could be considered a reliable supplier to the UMW market is if it consistently provided service to the UMW fluid market on its own merit.

The Mid-West, *et al.*, witness stated that the impact on the PPD from the growing amount of Idaho milk pooled on the order has become significant. For example, the witness estimated that in September 2003, the PPD was reduced by $0.73. The witness stressed that while some entities were benefiting from the pooling of such milk by collecting pooling fees, all of the market's participants were being negatively affected because of the reduction in the PPD. The witness also noted that the termination of the Western order has only compounded the problem because milk once pooled and priced on the former Western order is seeking the price protection offered by another Federal milk order.

The Mid-West, *et al.*, witness maintained that it is the UMW's lenient performance standards that have enabled milk to participate and benefit from the UMW marketwide pool without demonstrating consistent and reliable service to the market. The witness also stressed that Proposal 2 does not treat in-area and out-of-area milk of a supply plant differently. The witness explained that both must ship 10 percent of their total milk receipts to a distributing plant to qualify as a pool plant for the order. Requiring this as a pooling standard for all supply plants, the witness said, will end the practice of using local milk supplies to qualify milk for pooling that has no physical tie to the marketing area.

A brief submitted by Mid-West, *et al.*, noted that less than one tenth of one percent of Idaho milk pooled on the UMW order was delivered to a pool distributing plant from April 2001 through May 2004 as evidence of such milk's lack of reasonable and consistent service to the UMW market. Furthermore, the brief noted that only 0.21 percent of the pooled Idaho milk pooled was delivered to a UMW pool plant of any type during the same time period. The brief contended that statistics prepared by the Market Administrator's office indicated that the UMW order's blend price had been reduced approximately 25 cents per hundredweight continuously since 2003 by pooling Idaho milk. The Mid-West, *et al.*, brief reiterated that Proposal 2 does not prevent milk located far from the marketing area from being pooled. Rather, explained the brief, it would establish an appropriate performance standard so that milk which does not consistently service the Class I needs of the UMW market could not be pooled on the order.

Exceptions to the tentative partial decision from Mid-West, *et al.*, commented that the adoption of standards to deter the pooling of out-of-area milk that does not provide a reliable and consistent service to the Class I market is appropriate.

A witness appearing on behalf of LOL testified in support of Proposal 2. The witness asserted that milk located in Idaho and pooled on the UMW market is lowering the UMW PPD, thereby negatively impacting LOL's local producers. However, as a supporter of performance-based pooling, the witness was of the opinion that Proposal 2 places additional standards on milk produced outside the 7-state milkshed. While the LOL witness was of the opinion that such pooling issues should be addressed at a national hearing, the witness nevertheless supported Proposal 2 because it addresses the low PPDs being received by UMW producers.

A witness appearing on behalf of MMPC testified in support of Proposal 2. The witness stated that MMPC has a small group of members located in Idaho that represent a significant amount of pooled milk on the UMW order. The witness explained that all members of MMPC pay a 2-cent per hundredweight checkoff on their milk for services provided by MMPC, and their Idaho members checkoff payment provides significant additional revenue to the cooperative. However, the witness said that all of the producer members of MMPC who pool their milk on the UMW order would be better off without pooling the milk from Idaho. According to the witness, the reduction in the PPD is greater than the 2-cent per hundredweight checkoff payment they receive for pooling Idaho milk.

A witness appearing on behalf of DFA also testified in support of Proposal 2. The DFA witness stated that the performance standards of the UMW order should limit the amount of milk pooled on the order to only that milk which can be reasonably considered a regular and consistent supply of the market.

The DFA witness offered various pooling scenarios to illustrate that milk located in Idaho would not seek to be pooled on the UMW order if such milk were expected to make regular and consistent deliveries to pool plants. For all the scenarios, the witness assumed a hauling rate of $2.10 per loaded mile, a $1.60 Class I differential, and a transportation credit of 400 miles. The witness said that under these assumptions, milk would likely not seek to be pooled on the UMW order because the costs incurred would exceed the revenue received by being pooled on the UMW order. Additionally, the witness said that if the pooling standards are not amended to establish an appropriate level of consistent service, more milk will seek to be pooled on the order and would result in a continued lowering of the order's blend price.

The DFA witness stressed that the order's performance standards must more clearly define what milk can reasonably be considered a consistent supply to the market. According to the witness, the underpinning logic of Federal order pricing is that milk supplies located closer to the market have a higher value than those farther away. Predecessor orders had location adjustments that were a mechanism for assigning differing values to milk depending on its distance to the market, explained the witness. Milk located farther from the marketing area was less valuable to the market, thus recognizing that more local milk supplies had a higher value because it cost much less to transport local milk supplies to the market, the witness said. The witness stated that location adjustments were once an important method of achieving pooling discipline. While there were no proposals regarding location adjustments under consideration, the witness explained, adoption of Proposal 2 would achieve a similar economic result—establishing a relationship between the value of milk and its distance from the market. The witness stressed that Proposal 2 would provide the framework to more accurately identify the milk of those producers which can reasonably be considered as reliable suppliers to the UMW fluid market.

A witness appearing on behalf of Cass-Clay testified in support of Proposal 2. Cass-Clay is a dairy farmer-owned cooperative located in the UMW marketing order that processes 45 percent of its total milk receipts into Class I products. The witness explained that Cass-Clay does pool distant milk for a fee which generates revenue to offset some of the negative PPDs received by UMW dairy farmers. According to the witness, the revenue generated from pooling fees has enabled Cass-Clay to support their members' mailbox price and retain membership in a highly competitive market. The witness also stated that Cass-Clay does not favor pooling Idaho milk and supports Proposal 2 because it would limit the

ability to pool milk that is located far from the UMW marketing area.

A witness appearing on behalf of MCMP testified in support of Proposal 2. The witness was of the opinion that if distant producers want to collect money from the UMW marketwide pool, they should be regularly and consistently serving the UMW market. It was MCMP's position that Proposal 2 is fair and right for the market as a whole.

A witness appearing on behalf of the Galloway Company testified in support of Proposal 2. Galloway Company owns and operates a Class II manufacturing plant regulated by the UMW order. The witness was of the opinion that Proposal 2 would reduce the amount of milk pooled on the UMW order that is not actually serving the fluid market.

A witness appearing on behalf of the Wisconsin, North Dakota, and Minnesota Farmers Unions (Farmers Unions) testified in support of limiting the ability of milk to pool on the UMW order that is located far from the marketing area. However, the witness did not express support for any particular proposal. The witness said that pooling milk from far outside the UMW marketing area has had an adverse economic effect on producers who do regularly supply the UMW market. The witness stated that pooling such milk was placing an undue hardship on UMW dairy producers who regularly and consistently serve the Class I needs of the UMW market by reducing their revenue.

A dairy farmer, who is a Director on the DFA Central Area Council, testified in support of Proposal 2. The witness testified that milk produced far from the marketing area, such as Idaho, cannot regularly service the UMW market while still returning a profit to those dairy farmers. The witness was of the opinion that the UMW order should be modified to ensure that producer milk receiving the UMW blend price is actually serving the UMW market.

A witness appearing on behalf of Dean testified in opposition to Proposals 1 and 2. Dean owns and operates distributing plants regulated by the UMW order as well as UMW nonpool plants. The witness explained that Dean opposed the proposals because of the limitation on the transportation credit to 400 miles. Dean's post-hearing brief maintained its opposition to Proposal 1 stating that the proponents only want to address the problem of distant milk, not the issue of depooling. Furthermore, Dean's brief stressed its opposition to Proposal 2, insisting that it is a compromise position among the proponents and does not go far enough to ensure that all milk pooled on the order is consistently servicing the order's Class I market.

A Dean witness also testified in support of Proposal 6. The witness said the proposal would increase the current one time 1-day touch-base provision to 2 days in each of the months of July through November and if that standard was not met, the producer must deliver 2 days milk production in each of the months of December through June. Furthermore, the witness said that Proposal 6 also would establish a 2-day touch-base provision for a dairy farmer who lost producer status with the UMW order, except as a result of loss of Grade A status for less than 21 days, or who became a dairy farmer for other markets. The Dean witness asserted that increasing the touch-base standard to 2 days would ensure that more milk would be consistently available at pool plants to serve the fluid market. A second Dean witness also testified in support of Proposal 6. The witness asserted that the intent of the Federal order system is to ensure a sufficient supply of milk for fluid use and provide for uniform payments to producers who stand ready, willing, and able to serve the fluid market, regardless of how the milk of any individual is utilized. While some entities are of the opinion that the order system should ensure a sufficient milk supply to all plants, the Dean witness was of the opinion that the order system addresses only the need for ensuring a milk supply to distributing plants. The witness elaborated on this opinion by citing examples of order language that stress providing for a regular supply of milk to distributing plants as a priority of the Federal milk order program.

The Dean witness testified that for the Federal milk order system to ensure orderly marketing, orders need to provide adequate economic incentives that will attract milk to fluid plants and need to properly define regulations to determine the milk of those producers who can participate in the marketwide pool. The witness further opined that features are missing from the terms of the UMW order. In this regard, the witness said current pooling standards have allowed milk to become pooled on the order without demonstrating regular service to the Class I needs of the market.

Dean explained further in their post-hearing brief that when distant milk attaches to the UMW pool and dilutes the blend price, Class I handlers have to increase their premiums in an effort to offset the negative PPD so that they can retain their producers. This, argued Dean, results in inconsistent product costs between handlers. In conclusion, the Dean brief stressed that Proposal 6 does not establish different standards for in-area and out-of-area milk. Rather, the brief explained, it ensures that all milk will demonstrate regular and consistent service to the fluid market as a criterion for being pooled on the UMW order.

Exceptions to the tentative partial decision received from Dean expressed support for the adoption of pooling requirements that result in actual fluid milk deliveries to fluid milk plants.

A witness appearing on behalf of AMPI, et al., testified in opposition to Proposal 6. According to the witness, the 2-day touch base provision contained in Proposal 6 would only result in additional and unwarranted expense to UMW producers and promote the uneconomic movement of milk for the sole purpose of meeting an unneeded standard. Furthermore, the witness asserted, in a low Class I utilization order like the UMW, a 2-day touch-base standard is unreasonable.

The AMPI, et al., witness also testified that much of AMPI's Grade A milk is commingled with Grade B milk when it is picked up from the farm. Proposal 6 would require AMPI to pick up their Grade A and Grade B milk separately, explained the witness, and thus would be extremely costly and inefficient. The witness was of the opinion that the current order's one-time touch-base provision is sufficient for ensuring an adequate supply of milk for fluid use. Additionally, the witness said that the Market Administrator already has the authority to adjust supply plant shipping standards in the event that distributing plants have difficulty in obtaining adequate milk supplies to meet the market's Class I demands.

A post-hearing brief submitted by AMPI, et al., reiterated their opposition to Proposal 6. The brief contended that if Proposal 6 were adopted, select handlers would face increased handling and transportation costs to meet the new performance standard. The brief further argued that Proposal 6 would necessitate that supply plants invest more capital to build additional silo capacity used only to accommodate the increased volumes of producer milk needing to touch base.

A witness appearing on behalf of Wisconsin Cheesemakers Association (WCMA), also testified in opposition to Proposal 6. WCMA represents a group of dairy manufacturers and marketers in Wisconsin. According to the witness, 32 of WCMA's members operate 42 dairy facilities pooled on the UMW order. The witness was of the opinion that the implementation of Proposal 6 would not result in orderly marketing within the

UMW order because the 2-day touch-base standard would cause uneconomic and inefficient shipments of milk solely for the purpose of meeting the new higher standard. Furthermore, the witness said the additional milk needed to be shipped to a pool supply plant would necessitate that additional silo capacity be built at plants to receive the additional milk volumes arising from establishing a higher touch-base standard.

A witness appearing on behalf of the National Family Farm Coalition, an organization which represents family farms located in 32 states, including those states comprising the UMW marketing area, testified in opposition to all proposals at the hearing. The witness was of the opinion that the entire Federal order system was in need of complete reform. The witness asserted that proponents of the proposals being heard were entities whose actions have lowered prices received by family farmers.

A post-hearing brief submitted by Alto Dairy (Alto), a cooperative with 580 members in Wisconsin and Michigan, expressed their opposition to Proposals 1, 2, and 6. The brief argued that the pooling of milk located far from the marketing area serves to equalize the blend prices between Federal orders and contended that a ban on such pooling in the UWM order would lead to similar bans in other Federal orders. The brief concluded that this would widen blend price differences among all Federal orders.

A brief submitted on behalf of Family Dairies USA (Family Dairies), expressed their opposition to Proposals 1, 2, and 6. Family Dairies is a cooperative handler regulated by the UMW order that operates a pool supply plant located in the marketing area. The brief expressed the opinion that these proposals essentially establish performance standards for out-of-area milk that are different from performance standards for in-area milk. The brief contended that establishing different standards based on location is discriminatory, is designed to erect trade barriers to distant milk, and is illegal. In their brief they argued that producers who bear large transportation costs to supply the fluid market, in effect, are not receiving uniform prices. In this regard, the brief asserted that Proposals 1, 2, and 6 violated uniform producer prices because of the transportation cost burden on distant producers.

Exceptions to the tentative partial decision from Grande Cheese Company (Grande) noted that the States of Indiana, Ohio and the southern peninsula of Michigan should be added to the states to which pooled milk may be diverted.

In exceptions to the tentative partial decision, Lamers Dairy, Inc. argued that the decision is a step in the right direction but does not go far enough in preventing disorderly marketing. Lamers was of the view that the order permits the pooling of far more milk on the order than that which could be considered a legitimate reserve supply of distributing plants. Supply plants which meet the performance standards of the order necessarily qualify all of the receipts of the supply plant for pooling. Accordingly, all of the receipts, including diversions of the supply plant, can reasonably be considered a legitimate reserve supply of those distributing plants.

2. Transportation Credits

Two proposals seeking an identical mileage limit for handlers receiving transportation credits for moving milk for Class I uses were adopted in the tentative partial decision and are adopted permanently in this final partial decision. While no handler is currently receiving a transportation credit for milk transported distances greater than 400 miles, the proposed 400-mile limit is reasonable to ensure that milk used in fluid products will be acquired from sources nearest to the distributing plants. Specifically, a transportation credit for milk delivered to distributing plants on the first 400 miles between the transferring and receiving plant was adopted in the tentative partial decision and is thereby adopted in this final partial decision on a permanent basis.

Currently, the UMW order provides for a transportation credit on bulk milk transferred from a pool plant to a pool distributing plant. The transportation credit is calculated by multiplying $0.0028 times the number of miles between the transferring plant and the receiving plant and is applied on a per hundredweight basis. An adjustment is made for the different Class I prices between the transferring and receiving plants. The transportation credit is paid to the receiving distributing plant to partially offset the cost of transporting milk.

A witness appearing on behalf of AMPI, *et al.*, testified in support of the transportation credit limit contained in Proposal 1. The witness said that in 2003 no pooled milk received a transportation credit that was transported over 400 miles. The AMPI, *et al.*, witness also testified that very little milk which did receive a transportation credit was shipped between 300 and 399 miles to the receiving distributing plant. The witness stressed that limiting the transportation credit to 400 miles would not disadvantage any handler currently delivering milk to a distributing plant.

A witness appearing on behalf of Mid-West, *et al.*, testified in support of the transportation credit limit contained in Proposal 2. The witness was of the opinion that milk located within the marketing area is more than adequate to supply the order's distributing plants. The witness said that adopting the proposed limit of 400 miles would not affect any current pool handlers receiving the credit. However, noted the witness, a mileage limit on the transportation credit would prevent any new supply plants that were located great distances from distributing plants from draining money from the producer settlement fund (PSF) in the future.

A brief submitted on behalf of Mid-West, *et al.*, maintained their position that placing a mileage limitation on receiving a transportation credit would avoid the potential of the UMW pool subsidizing the delivery of milk to UMW distributing plants from unneeded areas.

The witness appearing on behalf of LOL also expressed their support for establishing a transportation credit limit.

A witness appearing on behalf of Dean testified in opposition to limiting receipt of the transportation credit. The witness was of the opinion that the purpose of limiting receipt of the transportation credit was only to prevent distant milk from pooling on the UMW order. If milk is needed to supply distributing plants, the witness argued, then it should be pooled without regard to the distance it needs to be transported.

Exceptions to the tentative partial decision from Grande expressed opposition to limiting the transportation credit to 400 miles. They stated that such a limitation would create geographical barriers to dairy farmers seeking to sell milk to UMW distributing plants.

The record of this proceeding finds that several amendments to the pooling standards of the UMW order should be adopted on a permanent basis to more properly identify the milk of those producers that should share in the order's marketwide pool proceeds. Currently, milk located far from the UMW marketing area that demonstrates no consistent service to the Class I needs of the market is able to qualify for pooling on the UMW order. The addition of this milk to the order at lower classified use-values results in a

lower blend price returned to those producers who consistently supply the Class I needs of the UMW market. Such milk does not demonstrate a reasonable level of performance in servicing the Class I milk needs of the UMW marketing area and therefore should not be pooled.

The pooling standards of all Federal milk marketing orders, including the UMW order, are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and to provide the criteria for identifying the milk of those producers who are reasonably associated with the market as a condition for receiving the order's blend price. The pooling standards of the UMW order are represented in the *Pool Plant, Producer,* and the *Producer milk* provisions of the order and are performance based. Taken as a whole, these provisions are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market and provide the criteria for determining the producer milk that has demonstrated service to the Class I market and thereby should share in the marketwide distribution of pool proceeds.

Pooling standards that are performance based provide the only viable method for determining those eligible to share in the marketwide pool. It is primarily the additional revenue generated from the higher-valued Class I use of milk that adds additional income, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the returns arising from higher-valued Class I sales so that costs can be recovered.

Pooling standards are needed to identify the milk of those producers who are providing service in meeting the Class I needs of the market. If a pooling provision does not reasonably accomplish this end, the proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers. The result is the unwarranted lowering of returns to those producers who actually incur the costs of servicing and supplying the fluid needs of the market.

Pool plant standards, specifically standards that provide for the pooling of milk through supply plants, need to reflect the supply and demand conditions of the marketing area. This is important because producers whose milk is pooled on the order, regardless of utilization, receive the order's blend price. When a pooling feature's use deviates from its intended purpose, and its use results in pooling milk that cannot reasonably be considered as serving the fluid needs of the market, it is appropriate to re-examine the standard in light of current marketing conditions.

Unlike other consolidated orders established as a part of Federal milk order reform on the basis of the area in which Class I handlers compete with each other for the majority of their sales, the current consolidated UMW marketing area also was based primarily on a common procurement area. In this regard, it would be unreasonable to conclude that areas far from the UMW area, such as Idaho, are part of a common procurement area with those states that comprise the current UMW marketing area. The same is true for the states of Indiana, Ohio and the southern peninsula of Michigan. While it is the Class I use of milk by regulated handlers in the marketing area that provides additional revenue to the pool and not the procurement area, the procurement area was nevertheless envisioned to be the primary area relied upon by the order's distributing plants for a supply of milk.

The geographic boundaries of the UMW order were not intended to limit or define which producers, which milk of those producers, or which handlers could enjoy the benefits of being pooled on the order. What is important and fundamental to all Federal orders, including the UMW order, is the proper identification of those producers and the milk of those producers that should share in the proceeds arising from Class I sales. The UMW order's current pooling standards do not reasonably accomplish this.

The hearing record clearly indicates that the milk of producers located in areas distant from the marketing area is pooled on and receives the UMW order's blend price. Current inadequate supply plant performance standards enable milk which has de minimis physical association with the market and which demonstrates no consistent service to the market's Class I needs to be pooled on the UMW order. The inappropriate pooling of milk occurs because the order has inadequate diversion provisions that allow for milk to be diverted to a manufacturing plant located far from the marketing area. The ability for such milk to pool on the UMW order is made possible by distant handlers working out an arrangement with pooled handlers located within the UMW to pool the milk of the distant handler, often for a fee. The milk is included as part of the total receipts of the pooled handler even though such milk is diverted to plants located far from the marketing area.

Requiring milk originating outside of the 7-state milkshed to qualify for pooling separately by delivering milk to a UMW distributing plant or distributing plant unit is not needed to ensure that such milk is actually servicing the Class I needs of the market. The adopted changes of limiting diversions to plants physically located within the 7-state milkshed in conjunction with not permitting handlers to use in-area milk to qualify milk located outside the 7-state milkshed essentially accomplishes the intent of ensuring the proper identification of milk that services the Class I needs of the market. In their exceptions to the tentative decision, Mid-West, *et al.,* continued to endorse qualifying milk for pooling separately by delivering milk to a UMW distributing plant or distributing plant unit. This final partial decision maintains the conclusion that such a measure is not needed for the same reasons cited above.

Some entities on brief argued that requiring out-of-area milk to perform separately is a form of location discrimination and is a means of erecting trade barriers. This argument is without merit. Pooling standards for plants located outside the 7-state milkshed will not prohibit milk from being pooled if it meets the UMW's order pooling standards. The amended pooling provisions provide identical pooling standards to both in-area and out-of-area supply plants, as both must ship 10 percent to the Class I market. Nevertheless, for the reasons stated above, other changes to the pooling standards negate the need to provide for separate pooling standards for out-of-area milk.

The Federal milk order system has consistently recognized that there is a cost incurred by producers in servicing an order's Class I market, and the primary reward to producers for performing such service is receiving the order's blend price. The amended pooling provisions will ensure that milk seeking to be pooled and receive the order's blend price is consistently servicing the order's Class I needs. Consequently, the adopted pooling provisions will ensure the more equitable sharing of revenue generated from Class I sales among producers who bear the costs.

Changes to the order's diversion provisions are needed to ensure that milk pooled on the order not used for Class I purposes is part of the legitimate reserve supply of Class I handlers. Providing for the diversion of milk is a desirable and needed feature of an order because it facilitates the orderly and

efficient disposition of milk when not needed for fluid use. However, it is necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process. Associating more milk than is actually part of the legitimate reserve supply of the diverting plant unnecessarily reduces the potential blend price paid to dairy farmers who service the market's Class I needs. Without reasonable diversion provisions, the order's performance standards are weakened and give rise to disorderly marketing conditions.

The hearing record clearly indicates that milk located far from the marketing area can be reported as diverted milk by a pooled handler and receive the order's blend price. Under the current pooling provisions, this can occur after a one-time delivery to a UMW pool plant. After the initial delivery, such milk need never again be delivered to a UMW pool plant. The record evidence confirms that usually this milk is delivered to a nonpool plant located as far from the marketing area as the diverted milk. This milk is never again physically associated with a plant in the marketing area, nor does it serve the Class I needs of the market.

Despite the comments by Grande, it is appropriate to permanently amend the order's diversion provisions so that diversions can be made only to plants physically located within the 7-state milkshed. Milk diverted to such plants better ensures that this milk is a legitimate reserve supply of the diverting handler and is readily available to service the Class I market when needed.

The Agricultural Marketing Agreement Act of 1937 (the Act) was amended by the Food Security Act of 1985 to provide authority for the establishment of marketwide service payments. Under the Act, as amended, marketwide service payments can be established to partially reimburse handlers for services provided of marketwide benefit by using money out of the PSF before a blend price is computed.

Class I sales add additional revenue to the marketwide pool, so ensuring an adequate supply of milk to distributing plants benefits, in general, all market participants. Consequently, a transportation credit was established in the pre-reform Chicago Regional order to reimburse a portion of the cost of transporting milk to a distributing plant for use in Class I products. The transportation credit provision was carried into the consolidated UMW order as part of Federal order reform.

Transportation credits in the current UMW order assist plants in obtaining a milk supply to fulfill Class I demand and promote the orderly marketing of milk. However, it is important that the transportation credit provision not be used as a method of circumventing the intent of other performance-based pooling standards. Establishing a mileage limit on the transportation credit will encourage distributing plants to use milk located in the nearby procurement area. The UMW has an abundance of milk within the marketing area beyond Class I demands and there should be no incentive given to attract milk for Class I use beyond that available within 400 miles of a distributing plant, a reasonable proxy for describing the common procurement area of the order's distributing plants. A handler may acquire a milk supply from far distances; however, the transportation credit would apply only to the first 400 miles of milk movement.

Evidence presented at the hearing, despite the comments by Grande, revealed that currently no distributing plant is receiving a transportation credit for milk located farther than 400 miles from their plant. Therefore, the adopted amendment should not alter any current UMW handler's business practices. The ability of handlers to use the transportation credit as a means of having milk that is not part of the procurement area meet the performance standards of the order will be limited. This limitation is consistent with the UMW order boundaries that were established based, in part, on the commonality of a milk procurement area. This is consistent with other changes adopted in this decision that stress meeting performance-based standards as a condition for receiving the order's blend price.

A proposal seeking to increase the order's touch-base standard as a means of ensuring that the Class I needs of the market are met is not adopted. While the touch-base standard is an important feature of an order's pooling standards, increasing the standard is not appropriate given the marketing conditions of the UMW marketing area. The UMW marketing area has an abundance of milk located within the marketing area and as a result, it's Class I utilization is relatively low. For example, during 2003, the order's Class I utilization averaged 24.2 percent. Increasing the touch-base standard is unwarranted because it would likely cause the uneconomic movement of milk for the sole purpose of meeting a higher standard.

3. Determination of Emergency Marketing Conditions

Record evidence established that pooling standards of the UMW order were inadequate and were resulting in the erosion of the blend price received by producers who were serving the Class I needs of the market and were changed on an emergency basis. The unwarranted erosion of such producer blend prices stemmed from improper supply plant standards and the lack of appropriate limits on diversions of milk to only plants located within the 7-state milkshed.

It was also appropriate to establish a mileage limit on the transportation credit on an emergency basis to prevent the credit from being used to circumvent the amended pooling provisions contained in the interim decision regarding supply plant performance standards and diverted milk. Establishing a mileage limit ensured that other changes made to ensure consistent performance to the Class I market before milk was eligible to be pooled and receive the order's blend price were not weakened.

Consequently, it was determined that emergency marketing conditions existed in the Upper Midwest marketing area and the issuance of a recommended decision was omitted. As stated in the tentative partial decision, a separate decision will be issued addressing proposals concerning pooling and repooling of milk, temporary loss of Grade A status and increasing the maximum administrative assessment.

Rulings on Proposed Findings and Conclusions

Briefs, proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

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.

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable with respect to 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

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, the marketing agreement upon which a hearing has been held.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

Marketing Agreement and Order

Annexed hereto and made a part hereof is one document: A Marketing Agreement regulating the handling of milk. The order amending the order regulating the handling of milk in the Upper Midwest marketing area was approved by producers and published in the **Federal Register** on June 1, 2005 (70 FR 31321), as an Interim Final Rule. Both of these documents have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire final decision and the Marketing Agreement annexed hereto be published in the **Federal Register**.

Determination of Producer Approval and Representative Period

March 2005 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended in the Interim Final Rule published in the **Federal Register** on June 1, 2005 (70 FR 31321), regulating the handling of milk in the Upper Midwest marketing area is approved or favored by producers, as defined under the terms of the order (as amended and as hereby proposed to be amended) who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

List of Subjects in 7 CFR Part 1030

Milk Marketing order.

Dated: September 29, 2005.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Milk in the Upper Midwest Marketing Area

This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the 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.

(a) *Findings.* 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. 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 said 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 said 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.

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:

The provisions of the order amending the order contained in the interim amendment of the order issued by the Administrator, Agricultural Marketing Service, on May 26, 2005, and published in the **Federal Register** on June 1, 2005 (70 FR 31321), are adopted without change and shall be and are the terms and provisions of this order.

[This marketing agreement will not appear in the Code of Federal Regulations]

Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ 1030.1 to 1030.86 all inclusive, of the order regulating the handling of milk in the Upper Midwest marketing area (7 CFR part 1030) which is annexed hereto; and

II. The following provisions: Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he/she handled during the month of March 2005,_____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Deputy Administrator, or Acting Deputy Administrator, Dairy Programs, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Department in accordance with section 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, The contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

Signature By (Name)

(Title) _____

(Address) _____

(Seal)

Attest

[FR Doc. 05–20017 Filed 10–4–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1260

[No. LS–01–06]

Amendment to the Beef Promotion and Research Rules and Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Beef Promotion and Research Order (Order) established under the Beef Promotion and Research Act of 1985 (Act) to reduce assessment levels for imported beef and beef products based on revised determinations of live animal equivalencies and to update and expand the Harmonized Tariff System numbers and categories, which identify imported live cattle, beef, and beef products to conform with recent updates in the numbers and categories used by the U.S. Customs and Border Protection (USCBP).

DATES: Written comments regarding changes to this proposed rule must be received by December 5, 2005.

ADDRESSES: Send any written comments to Kenneth R. Payne, Chief; Marketing Programs Branch, Room 2638–S; Livestock and Seed Program; Agricultural Marketing Service (AMS), USDA; STOP 0251; 1400 Independence Avenue, SW.; Washington, DC 20250–0251. Comments may be sent by facsimile to 202/720–1125 and by electronic mail to *BeefComments@usda.gov* or *www.regulations.gov.* State that your comments refer to Docket No. LS–01–06. Comments received may be inspected at this location between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays, or on the Internet at *http://www.ams.usda.gov/lsg/mpb/rp-beef.htm.*

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Chief, Marketing Programs Branch on 202/720–1115, fax 202/720–1125, or by e-mail at *Kenneth.Payne@usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect.

Section 11 of the Act provides that nothing in the Act may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State. There are no administrative proceedings that must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Administration has considered the economic effect of this action on small entities and has determined that this proposed rule will not have a significant economic impact on a substantial number of small business entities. The effect of the Order upon small entities was discussed in the July 18, 1986 **Federal Register** [51 FR 26132]. The purpose of RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly burdened.

There are approximately 270 importers who import beef or edible beef products into the United States and 198 importers who import live cattle into the United States. The majority of these operations subject to the Order are considered small businesses under the criteria established by the Small Business Administration (SBA) [13 CFR 121.201]. SBA defines small agricultural businesses as those with annual receipts of less than $5 million.

The proposed rule imposes no significant burden on the industry. It would merely update and expand the HTS numbers and categories to conform to recent updates in the numbers and categories used by USCBP. This proposed rule also adjusts the live animal equivalencies used to determine the amount of assessments collected on imported beef and beef products. This adjustment reflects an increase in the average dressed weight of cows slaughtered under Federal inspection that has occurred since the inception of the Beef Checkoff Program. Total import assessments collected under the Beef Checkoff Program in 2004 were $8,322,145 including both live cattle and beef and beef products. The Department estimates that the proposed adjustment for 2005 could result in a decrease in importer assessment of approximately $800,000. Accordingly, the Administrator of AMS has determined that this action will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with OMB regulations [5 CFR part 1320] that implement the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], the information collection and recordkeeping requirements contained in the Order and Rules and Regulations have previously been approved by OMB under OMB control number 0581–0202 and merged into OMB control number 0581–0093.

Background and Proposed Change

The Act authorized the establishment of a national beef promotion and research program. The final Order was published in the **Federal Register** on July 18, 1986, (51 FR 21632) and the collection of assessments began on October 1, 1986. The program is administered by the Cattlemen's Beef Promotion and Research Board (Board) appointed by the Secretary of Agriculture (Secretary) from industry nominations composed of 104 cattle producers and importers. The program is funded by a $1-per-head assessment on producer marketing of cattle in the United States and on imported cattle as well as an equivalent amount on imported beef and beef products.

Importers pay assessments on imported cattle, beef, and beef products. USCBP collects and remits the assessment to the Board. The term ''importer'' is defined as ''any person who imports cattle, beef, or beef products from outside the United States.'' Imported beef or beef products is defined as ''products which are imported into the United States which the Secretary determines contain a substantial amount of beef including those products which have been assigned one or more of the following