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Milk in the Central Marketing Area; Final Decision on Proposed Amendments to Marketing Agreement and to Order; Proposed Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

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[Docket No. AO–313–A48; DA–04–06]

Milk in the Central Marketing Area; Final Decision on Proposed Amendments to Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; final decision.

SUMMARY: This document is the final decision proposing to adopt amendments that increase supply plant performance standards, amend features of the ''touch-base'' provision, amend certain features of the ''split plant'' provision and decrease the diversion limit standards of the order. This decision also limits the volume of milk a handler can pool to 125 percent of the total volume of milk pooled in the previous month. This final decision is subject to producer approval.

FOR FURTHER INFORMATION CONTACT: Jack Rower, Marketing Specialist, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231–Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 720–2357, e-mail address: *jack.rower@usda.gov.*

SUPPLEMENTARY INFORMATION: This final decision adopts amendments that: (1) Increase supply plant performance standards to 25 percent for the months of August through February and to 20 percent for the months of March through July; (2) Require the non-pool side of a split plant to maintain nonpool status for 12 months; (3) Amend the ''touch-base'' feature of the order to require that at least one day's production of the milk of a dairy farmer be received at a pool plant in each of the months of January, February, and August through November, to be eligible for diversion to non-pool plants; (4) Lower the diversion limit standards by five percentage points, from 80 percent to 75 percent, for the months of August through February, and by five percentage points, from 85 percent to 80 percent for the months of March through July; and (5) Establish provisions that limit the volume of milk a handler may pool in a month to 125 percent of the volume of milk pooled in the prior month.

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 January 2005, the time of the hearing, there were 5,778 dairy producers pooled on, and 23 handlers regulated by, the Central order. Approximately 5,365 producers, or 92.9 percent, were considered ''small businesses'' based on the above criteria. Of the 23 handlers regulated by the Central order during January 2005, 11 handlers, or 47.8 percent, were considered ''small businesses.''

The adopted amendments regarding the pooling standards serve to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with and consistently serve the fluid needs of the Central milk marketing area. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid 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. 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, record keeping, 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 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 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 for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

No other burdens are expected to fall on the dairy industry as a result of overlapping Federal rules. This rulemaking proceeding does not

duplicate, overlap, or conflict with any existing Federal rules.

Prior documents in this proceeding:

Notice of Hearing: Issued September 17, 2004; published September 22, 2004 (69 FR 56725).

Notice of Hearing Delay: Issued October 18, 2004; published October 13, 2004 (69 FR 61323).

Recommended Decision: Issued February 15, 2006; published February 22, 2006 (71 FR 9015).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreement and the order regulating the handling of milk in the Central 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 governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

The amendments set forth below are based on the record of a public hearing held in Kansas City, Missouri, on December 6–8, 2004, pursuant to a notice of hearing issued September 17, 2004, published September 22, 2004 (69 FR 56725), and a notice of a hearing delay issued October 13, 2004, published October 18, 2004 (69 FR 61323).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, on February 15, 2006, issued a Recommended Decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings, conclusions and rulings of the Recommended Decision, with one minor modification, are hereby approved, adopted and are set forth herein. The material issues on the hearing record relate to:

1. Pooling Standards
   A. Performance standards for supply plants.
   B. The ''Split plant'' provision.
   C. System pooling for supply plants.
   D. Elimination of the supply plant provision.
   E. Standards for producer milk.
2. Establishing pooling limits.
3. Transportation and assembly credits.

Findings and Conclusions

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

1. Pooling Standards

A. Performance Standards for Supply Plants

A portion of a proposal, published in the hearing notice as Proposal 1, seeking to increase supply plant performance standards by five percentage points, from 20 percent to 25 percent, for the months of August through February, and from 15 percent to 20 percent for the months of March through July, is adopted. A portion of another similar proposal, published in the hearing notice as Proposal 5, seeking to increase supply plant performance standards by 20 percentage points, from 15 percent to 35 percent, for the month of July, by 15 percentage points, from 20 percent to 35 percent, for the months of August through January and by 10 percentage points, from 15 percent to 25 percent, for the month of March is not adopted. Currently, the Central order requires a supply plant to ship 20 percent of its total receipts to a distributing plant during the months of August through February, and 15 percent of its total receipts during the months of March through July, in order for the total receipts of the supply plant to be pooled.

Proposal 1 was offered jointly by Dairy Farmers of America, Inc., (DFA), and Prairie Farms Cooperative (PF), hereafter referred to as DFA/PF. DFA/PF are member-owned Capper-Volstead cooperatives that pool milk on the Central order. Proposal 1 would increase the amount of milk a supply plant would be required to ship to a distributing plant by five percentage points, from 20 percent to 25 percent, for the months of August through February, and from 15 percent to 20 percent for the months of March through July, in order to pool all of its receipts on the Central order.

The proponents are of the opinion that current supply plant performance standards enable milk that does not demonstrate a consistent and reliable service to the Class I market to be pooled on the order. The proponents contend that the pooling of this additional milk is causing an unwarranted lowering of the order's blend price.

A witness appearing on behalf of DFA/PF testified in support of Proposal 1. The DFA/PF witness stated that increasing the volume of milk a supply plant is required to ship to a pool distributing plant in order to have all the receipts of the supply plant pooled, combined with other proposed changes to the Central order pooling provisions, will better identify milk ready, willing and able to service the fluid milk needs of the Central marketing area.

The DFA/PF witness testified that the proposed increase in the performance standards for supply plants would increase the blend price received by dairy farmers whose milk is pooled and priced on the Central order. The witness was of the opinion that an increase in the blend price will serve to attract and retain milk supplies that are otherwise shipped from the Central order area to neighboring marketing areas. The witness asserted that increasing supply plant performance standards will ensure that the Class I needs of the Central marketing area are being met.

The DFA/PF witness testified that current supply plant performance standards allow far more milk to be pooled on the Central order than is necessary. Relying on market administrator data, the witness noted that the projected Class I utilization of 50.1 percent, anticipated during Federal order reform for the consolidated marketing area, was not achieved. The witness added that the average Class I utilization in the Central marketing area has ranged from a low of 26 percent in 2002 to nearly 33 percent in 2003. The witness was of the opinion that these average Class I utilization levels demonstrate that reserve supplies of milk in the marketing area of 74 and 67 percent, respectively, for 2002 and 2003, far exceed the 49–50 percent reserve levels projected during Federal order reform. In addition, the witness noted that increased supply plant performance standards implemented in 2001 have not been effective in reducing the excess reserve supply of milk in the marketing area. The witness concluded that this data confirms that the current performance standards of the Central order provide opportunities for milk not regularly and consistently serving the Class I market to be pooled on the order.

The DFA/PF witness described concerns regarding the geography of the Central marketing area and explained that higher prices are received for milk in the bordering Southeast and Appalachian marketing areas. According to the witness, higher milk prices in the Appalachian and Southeast orders tend to attract milk from the Central marketing area and create localized supply imbalances within the eastern portion of the marketing area. The witness testified that increasing supply plant performance standards would deter milk originating from within the Central order boundaries from pooling on the Appalachian and Southeast orders. According to the witness this would tend to increase the

blend price paid to dairy farmers whose milk is pooled on the Central order.

A number of DFA member dairy farmers whose milk is pooled on the Central order testified in support of the portion of Proposal 1 that would increase supply plant performance standards. The dairy farmer witnesses were of the opinion that increasing supply plant performance standards will raise the level of Class I utilization and in turn, increase the blend price.

A witness from National All-Jersey (NAJ) representing AMPI, et al., (Associated Milk Producers Inc., Central Equity Cooperative, Land O' Lakes, Inc., First District Association, Foremost Farms USA, joined by Wells Dairy, Inc., Milnot Holdings and National All-Jersey), testified in opposition to the portion of Proposal 1 that would increase supply plant performance standards. NAJ is a national organization whose mission is to promote milk pricing equity and increase the value and demand for the milk produced by the Jersey breed. The NAJ witness was of the opinion that increasing supply plant performance standards would result in inefficient movements of milk and pass the costs of regulatory inefficiencies to consumers.

In their post hearing brief, DFA/PF reiterated their support for Proposal 1. The brief asserted that adoption of the portion of Proposal 1 that would increase supply plant performance standards would more accurately identify the milk of producers servicing the fluid needs of the market. According to the brief, increasing supply plant performance standards will increase the blend price for the producers who provide regular and consistent service to the Class I market. The DFA/PF brief reiterated support for not pooling milk which does not provide regular and consistent service to the fluid milk needs of the Central marketing area.

A brief from Select Milk Producers, Inc. (Select) and Continental Dairy Products, Inc. (Continental) supported adoption of the higher performance standard features of Proposal 1. Select and Continental are member-owned Capper-Volstead cooperatives whose milk is pooled on the Central order. The brief noted that adoption of higher performance standards would deter the pooling of milk on the order not servicing the fluid needs of the market.

A portion of Proposal 5, advanced by Dean Foods (Dean) (who described themselves as the largest processor and distributor of fluid milk in the United States, owning and operating nine distributing plants regulated by the Central order), would increase supply plant performance standards by 20 percentage points, from 15 percent to 35 percent, for the month of July, by 15 percentage points, from 20 percent to 35 percent, for the months of August through January and by 10 percentage points, from 15 percent to 25 percent, for the month of March. These proposed changes to supply plant performance standards are not recommended for adoption.

Two witnesses appeared on behalf of Dean in support of increasing supply plant performance standards. The witnesses were of the opinion that current supply plant performance standards are inadequate to assure a reasonable supply of fluid milk to the order's distributing plants. The witnesses were of the opinion that increasing supply plant performance standards as they proposed to the levels advanced would better attract an adequate milk supply for Class I use to the marketing area.

The first Dean witness testified that marketwide pooling and classified pricing are built on the assumption that Class I milk is the highest priced class and that pool revenues generated from Class I sales will attract a regular and consistent milk supply. The witness was of the opinion that current supply plant performance standards allow handlers to pool milk on the Central order that does not regularly and consistently serve the Class I market. According to the witness, low supply plant performance standards reduce the blend price paid to producers who consistently serve the needs of the Central order fluid market by allowing lower-valued milk to be pooled on the order.

The first Dean witness was of the opinion that adoption of higher performance standards would increase the volume of milk available to the Class I market. The witness further testified that if the USDA adopted higher performance standards for supply plants, adoption of Proposals 9 and 10, or Proposals 11, 12, and 13 would also be necessary. (Proposals 9, 10, 11, 12, and 13 are discussed later in this decision.)

The second Dean witness also was of the opinion that increasing supply plant performance standards would help to ensure that the fluid milk needs of the marketing area are being met. According to the witness, increasing supply plant performance standards would decrease the volumes of milk in lower-valued uses pooled on the order, thereby increasing the order's blend price. The witness testified that increasing supply plant performance standards would assist fluid milk handlers located in St. Louis and southern Illinois, who compete with handlers located in the Appalachian and Southeast orders, obtain needed milk supplies.

A brief submitted on behalf of DFA/PF opposed adoption of the level of performance standards for supply plants offered by Dean. DFA/PF noted that increasing supply plant performance standards to the levels advanced in Proposal 5 are unnecessarily high and are more restrictive than current market conditions could reasonably justify.

A brief submitted by AMPI, et al., reiterated the group's opposition to increased performance standards for supply plants as advanced by both Dean and DFA/PF. The brief highlighted the contention that increased performance standards for supply plants would unfairly penalize reserve suppliers of the marketing area by restricting their ability to share in the benefits of the marketwide pool.

B. The ''Split Plant'' Provision

A proposal from Dean, published in the hearing notice as Proposal 10, seeking to require the nonpool side of a split plant to maintain nonpool status for 12 months, is adopted. Another Dean proposal, published in the hearing notice as Proposal 9, seeking to eliminate the split plant provision is not adopted.

The current split plant provision provides for designating a portion of a pool plant as a nonpool plant provided that the nonpool portion of the plant is physically separate and operated separately from the regulated or ''pool'' side of the plant. Current provisions afford handlers operating a split plant the option of maintaining nonpool status or qualifying the nonpool side of the plant for pooling on a monthly basis.

The Dean witness testified that the nonpool side of a split plant can facilitate the pooling of milk that does not demonstrate a regular and consistent service to the fluid milk needs of the Central marketing area. The witness stated that if Proposal 10 was adopted, then Proposal 4, a proposal to eliminate all supply plant provisions, and Proposal 9, a proposal to eliminate split plants, would not be needed.

The Dean witness testified that Proposal 10 would require the nonpool side of a split plant to maintain nonpool status for a 12-month interval. According to the witness, adoption of this provision would deter pooling milk that does not regularly and consistently serve the Class I market. The witness added that Proposal 10 was advanced as an alternative to Proposal 9. The witness testified that as advanced in Proposal 9, a split plant could either be a pool plant

or a nonpool plant but not both. The witness stated that if USDA did not eliminate split plants then Dean would seek the adoption of Proposal 10.

In a post hearing brief, Select and Continental supported adoption of Proposal 10. The brief stated that Proposal 10 would deter the pooling of milk that does not regularly and consistently serve the Class I market. According to the brief, split plants should be prohibited from using milk receipts in the nonpool side of the plant from being pooled without demonstrating actual service to the Class I market. The brief expressed the opinion that reducing the volume of milk that a split plant could pool on the order from its nonpool side would tend to increase the Central order blend price.

The Select and Continental brief however, opposed the elimination of split plants as advanced in Proposal 9. The brief stated that requiring a split plant to elect non-pool status for 12 months for its nonpool side would provide sufficient incentive to prevent the pooling of excess milk through split plants.

DFA/PF commented on brief that Dean's Proposals 4–13 in general ''go too far, too fast'' given the current market conditions of the Central marketing area. According to the brief, DFA/PF contend that the adoption of the Dean proposals would not serve the needs of small dairy farms. The brief noted that some small producers may not have alternative markets for their milk if Dean's proposal to eliminate the split plant provision was adopted.

The AMPI, et al., brief opposed elimination of the split plant provision or requiring a 12-month pooling commitment from operators of split plants. Their opposition was based on the view that elimination of split plants, or imposing a 12-month pooling commitment for split plant operators, would unfairly restrict their ability to pool milk on the order.

C. System Pooling for Supply Plants

Three proposals presented by Dean, published in the hearing notice as Proposals 11, 12 and 13, and modified at the hearing, are not adopted. Proposal 11 would have eliminated providing for supply plant systems. Proposal 12 would have required a supply plant system to be operated by only one handler. Proposal 13 would have required that every plant participating in a system ship 40 percent of the system's qualifying shipment as if they had been operating as separate plants. Proposal 13 also would have prohibited using milk shipped directly from producer farms as qualifying shipments. Current Central order provisions provide the ability for 2 or more supply plants (subject to certain additional conditions) to operate as a ''system'' in meeting the qualifications for pooling in the same manner as a single plant.

The Dean witness testified that system pooling affords handlers the ability to link several supply plants together in an effort to qualify producer milk for pooling on the order. According to the witness, current system pooling provisions allow plants and farms close to distributing plants to deliver producer milk on behalf of more distant plants, thereby providing for the pooling of milk that does not regularly and consistently serve the Class I market. According to the witness, adoption of Proposal 11 would require plants to transfer milk to obtain and maintain eligibility for pool qualification. The witness stated that Proposal 11 would require every handler to pool their producers on the basis of actual deliveries to distributing plants.

The Dean witness testified in support of Proposal 12 in the event supply plant systems were not eliminated as advanced in Proposal 11. According to the witness, Proposal 12 would limit the use of supply plant systems to a single handler rather than multiple handlers as currently provided in the order. The witness testified that allowing only a single handler to qualify pool supply plants through system pooling provisions would ensure that each handler is willing and able to demonstrate regular and consistent service to the fluid milk needs of the Central marketing area.

The Dean witness testified that Proposal 13 would require each plant in a supply plant system to meet at least 40 percent of the total performance standard required for pooling. According to the witness, Proposal 13 is similar to Proposal 11 in that it would prohibit the use of milk shipped directly from producer farms to qualify a supply plant system. However, the witness stated that Proposal 13 also would require every supply plant in a supply plant system to ship a significant volume of milk to the fluid market. The witness noted that qualification of distant milk would be discouraged by adoption of Proposals 12 and 13 since the use of milk shipped directly from producer farms for qualification purposes would be prohibited. The Dean witness expressed preferences for the adoption of Proposal 11 over Proposal 12, and adoption of Proposal 12 over Proposal 13.

A witness from DFA/PF expressed opposition to Proposals 11, 12, and 13, because their adoption would eliminate or overly restrict the operation of supply plant systems. On brief, DFA/PF noted that, as with elimination of the split plant provision, some small producers may not have alternative markets for their milk if supply plant systems are eliminated or are made overly restrictive.

In a post hearing brief, AMPI, et al., reiterated opposition to Proposals 11, 12, and 13. The AMPI, et al., brief opposed restrictions on pooling milk of producers ready, willing, and able to serve the Class I needs of the Central marketing area. The brief opposed elimination or restriction of supply plant systems contending such action would eliminate markets for the milk of small dairy farmers without alternative markets available.

Select and Continental also opposed adoption of Proposals 11, 12 and 13 in their post-hearing brief. The brief opposed eliminating or restricting supply plant systems on the basis that no verifiable evidence was presented demonstrating that supply plant systems do not provide consistent and reliable service to the Class I market.

D. Elimination of the Supply Plant Provision

A proposal by Dean, published in the hearing notice as Proposal 4, seeking to eliminate the supply plant provision, is not adopted.

A Dean witness characterized Proposal 4 as a preferred alternative to increasing supply plant performance standards sought in Proposals 1 and 5. The witness explained that if Proposal 4 is adopted, then Proposals 9–13, seeking to increase performance standards for supply plants and supply plant systems would not be needed. The witness testified that while the role of supply plants in the milk order system is to supply the needs of distributing plants, the milk supply of plants for the Central marketing area is only of residual concern because it provides an outlet for reserve producers when their milk is not needed for fluid use.

The Dean witness testified that supply plants no longer represent the most efficient means for supplying distributing plants. According to the witness, supply plants play a minor role in the Central marketing area, representing less than 5 percent of the milk shipped to distributing plants. According to the witness, milk assembled from farms must be received at a supply plant, cooled and stored, and reloaded and delivered to distributing plants. The witness stated that the increased handling of milk through supply plants reduces its

quality compared with milk that is direct delivered from farms. The witness said that direct delivery from farms to distributing plants is a superior method for ensuring that milk pooled on the order serves the Class I needs of the market. The witness was of the opinion that supply plants inappropriately facilitate pooling milk that does not regularly and consistently serve the Class I market.

A witness representing NAJ testified in opposition to the elimination of supply plants. According to the witness, elimination of the supply plant provision also would reduce the ability of dairy farmers to pool milk on the Central order. The witness was of the opinion that eliminating the supply plant provision would have a negative impact on the income of the cooperatives represented by NAJ. The witness stated that supply plants provide a legitimate means by which producers continue to serve the Class I market of the Central marketing area.

A witness for DFA/PF testified in opposition to the elimination of supply plants. According to the witness, provisions for supply plants should be provided because they continue to play a role in supplying milk to distributing plants. DFA/PF reiterated this opposition to Proposal 4 in their post-hearing brief. AMPI, et al., joined DFA/PF in opposing this proposal.

E. Standards for Producer Milk

Several amendments to the *Producer milk* provision of the Central order are adopted. The amendments were largely contained in Proposal 1. Changes to the producer milk provision are necessary to more accurately identify the milk of those dairy farmers that are regularly and consistently serving the Class I needs of the market. The adopted amendments include: (1) Increasing the touch-base standard so that one day's milk production of a dairy farmer must be delivered to a pool plant in each of the months of January, February and August through November for the milk of the dairy farmer to be eligible for diversion to a nonpool plant; and (2) Decreasing the diversion limit standards to not more than 75 percent of receipts during August through February, and not more than 80 percent of receipts for March through July.

The feature of Proposal 1 to geographically limit the location of nonpool plants eligible to receive diverted milk to those plants in States located in the marketing area and New Mexico is not adopted.

Proposal 1 increases the touch-base standard to require the equivalent of at least one days' milk production of a dairy farmer be physically received at a pool plant in each of the months of January, February and August through November. If the touch-base standard is not met, the milk would have to be physically received at a pool plant in each of the months of March through July and December. The current touch-base standard of the Central order specifies a one-time only delivery standard.

The DFA/PF witness explained that the current one-time touch-base standard of the Central order should be replaced by the strengthened touch-base feature of Proposal 1. The witness continued that the months of January, February, and August through November, were added to the proposed touch-base standard to correspond with periods of higher Class I demands. The DFA witness explained that requiring one day's milk production of a producer to be delivered to a pool plant in each of these six months should increase milk available for Class I use. The DFA/PF witness was opposed to any touch-base standard of more than one day per month for the six months advanced by the proposal, as being overly restrictive.

The DFA/PF witness testified that increasing the touch-base standard and lowering the diversion limit standards of the Central order will help to ensure that milk that could not consistently and reliably demonstrate service to the Class I market is not pooled on the order. The witness testified that the pooling of such milk on the order reduces the blend price paid to producers who consistently and reliably serve the Class I needs of the Central marketing area.

The DFA/PF witness acknowledged that amendments to the pooling provisions of the Central order implemented in 2003 reduced the volume of milk pooled that was not serving the Class I needs of the market. However, the witness noted that those changes did not contemplate that milk from the Mountain States might seek to be pooled on the Central order. The witness was of the opinion that the current touch-base and diversion limit standards were inadequate to prevent the sharing of Class I revenue with the milk of producers that could not possibly serve the Class I market of the Central marketing area. The witness was of the opinion that if milk located far from the Upper Midwest marketing area [1] and currently pooled on the Upper Midwest order were to seek an alternative order on which to pool, the current pooling standards of the Central order make it the most likely candidate among Federal milk orders. The witness testified that the current pooling standards of the Central order can not adequately prevent such milk from pooling because the pooling standards are too liberal. According to the witness, this milk can not demonstrate regular and reliable service to the Class I market.

The DFA/PF witness illustrated that milk produced in Idaho, for example, cannot profitably be delivered to distributing plants located in the Central marketing area. According to the witness, milk produced in this region would need to travel more than 680 miles for delivery at the nearest distributing plant of the order located in Denver. The witness asserted that the current one-time touch-base standard combined with the existing diversion limit standards of the order provide the incentive for milk located far from the marketing area to be profitably pooled on the order which otherwise would not be economically feasible.

The witness provided a scenario where a single 50,000-pound load of milk delivered once to Denver could cause one million pounds of milk to be pooled on the Central order through the diversion process but delivered to plants far from the marketing area. According to the witness' calculations, a 50,000-pound load of milk delivered once to a pool plant located in Denver would incur a loss $4,640. However, the witness explained that each additional load of milk, up to one million pounds now qualified for diversion to nonpool plants located near producers farms, would return an additional $7,081. The witness emphasized that the milk portrayed in this example would rely solely on the liberal pooling standards of the order. The milk would never consistently and reliably supply the Central marketing area.

In another scenario, the DFA/PF witness illustrated the impact of 25 million pounds of milk a month shipped from southern Idaho that would be pooled on the Central order through the diversion process by meeting the one-time touch-base standard during the months of November 2003–January 2004. The witness explained that pooling this volume of milk would have reduced the Central order's blend price by $0.25 per cwt.

In a third scenario, the DFA/PF witness demonstrated how milk located in southern Idaho can be pooled every month through the diversion process by meeting the one-time touch-base standard of the Central order. The

[1] Amendments to the pooling provisions of the Upper Midwest order were implemented on February 1, 2006 (70 FR 73126). See Final Partial Decision published in the **Federal Register**, October 5, 2005 (70 FR 58086).

witness said that this scenario was based on the 58-month period of January 2000 to October 2004. The witness explained that this scenario assumes that a single 50,000-pound load of milk was shipped to a distributing plant located in the Central marketing area and all other milk diverted to nonpool plants are located in Idaho. The witness testified that the shipping handler would receive a positive return averaging $0.348 per cwt per month ($201,000 over the 58-month period) on the total volume of milk pooled. The DFA/PF witness concluded that from their scenarios, the current Central order diversion limit and touch-base standards encourage pooling of milk that can not and does not regularly and consistently supply the Class I needs of the market.

A brief submitted by Select and Continental supported the producer milk amendments called for in Proposal 1, except for limiting diversions to nonpool plants that are located in the States comprising the Central marketing area. The brief noted that the goal of the Federal order program should be to ensure that milk pooled on the order actually serves the Class I market.

Features of Proposal 5, offered by Dean, regarding diversion limits and touch-base standards are not adopted. Proposal 5 seeks to raise the touch-base standard to 4 days in each month of the year and decrease diversion limits to 65 percent for the months of July through January, and 75 percent during the months of February through June. A Dean witness stated that increasing the touch base requirement would ensure the increased availability of milk to serve the needs of the fluid market. The witness testified that adopting higher touch-base and lower diversion limit standards would ensure that pool plants would keep their facilities operating at a higher level of output than would be the case if more milk were diverted.

The diversion limit standard feature of Proposal 5 was modified by Dean on brief. The modification specified that milk would not be eligible for diversion ''unless'' (instead of ''until'') milk has been physically received as producer milk at a pool plant, and the exception for a loss of Grade A status was changed to a period not to exceed 21 rather than 10 days in a calendar year.

The witness from NAJ, on behalf of AMPI, et al., testified in opposition to increasing the touch-base and lowering the diversion limit standards as advanced. The witness stated that the proposed lowering of diversion limits together with increasing supply plant performance standards as called for in Proposal 5 would have negative consequences for dairy farmer income, if adopted. The NAJ witness was of the opinion that the aim of Proposal 5 was to deter milk from being pooled on the order. It was the witness' opinion that the adoption of Proposal 5 would create marketing inefficiencies and additional costs for members of NAJ. The witness also was of the opinion that the adoption of Proposal 5 would discourage available milk supplies in the milkshed from pooling on the Central order.

NAJ and AMPI, et al., also submitted exceptions to increasing the touch-base standard and lowering the diversion limit standards in the recommended decision. NAJ and AMPI, et al., reaffirmed their opinion that adoption of a one day touch-base standard along with a decrease in diversion limits would unnecessarily burden their members.

Central Equity, a dairy farmer cooperative located in Missouri, also took exception to increasing the touch-base standard. One hundred and fourteen Central Equity dairy farmer members submitted a form-letter detailing the difficulties the cooperative would endure in meeting the increased touch-base standard. The cooperative members were of the opinion that the recommended touch-base standard would significantly increase hauling costs and require the cooperative to pay pooling fees for access to pool plants. The cooperative added that they are not opposed to increased performance standards in general, but are concerned with difficulties that small cooperatives and independent dairy farmers face in obtaining access to pool facilities.

Exceptions to increasing the touch-base standard and lowering the diversion limit standard were also received from Wells Dairy (Wells). Wells Dairy is an Iowa based dairy products manufacturer. Wells was of the opinion that the recommended touch-base standard would be difficult for certain dairy farmers and dairy farmer cooperatives to meet. Wells noted that increasing the touch-base standard and lowering the diversion limit standard will unduly burden dairy farmers and cooperatives that have limited access to pooling facilities served under full-supply contracts.

The record reveals that distributing plants in certain areas of the marketing area are having difficulty obtaining reliable milk supplies. Because this decision does not adopt transportation credits (discussed later in this decision) for the movement of milk to distributing plants, increasing the performance standards for supply plants is a reasonable measure to better assure that all distributing plants of the order are adequately supplied. Additionally, other measures are being taken to prevent the pooling of milk which can not demonstrate regular and consistent service in supplying the Class I needs of the marketing area. The pooling of such milk results in an unwarranted lowering of the blend price returned to those producers who demonstrate regular and consistent service in supplying the Class I needs of the market.

The pooling standards of all Federal milk marketing orders, including the Central order, 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 in meeting the Class I needs of the market and thereby receive the order's blend price. The pooling standards of the Central order are represented in the *Pool plant, Producer,* and the *Producer milk* provisions of the order and are based on performance, specifying standards that if met, qualify a producer, the milk of a producer, or a plant to share in the benefits arising from the classified pricing of milk.

Pooling standards that are performance-based provide the only viable method for determining those producers eligible to share in the marketwide pool. It is usually the additional revenue generated from the higher-valued Class I use of milk that adds additional income to producers, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should share in the returns arising from higher-valued Class I sales. An important objective of pooling standards is identifying the milk that serves the fluid milk needs of the market, a feature which if ineffective can result in pooling milk that is not providing such service

Record evidence supports finding that certain features of pooling standards of the Central order relating to performance standards for supply plants, diversion limits, touch-base, and split plants need to be amended given the pooling of milk that does not regularly and consistently serve the Class I needs of the Central marketing area.

The most recent amendments to the Central order (published in the August 27, 2003, Final Decision (68 FR 51640)) intended to correct similar inadequacies of the supply plant pooling provisions and diversion limit standards for the consolidated Central order. However, the record reveals that the combination and features adopted for pool plants in

2003 have not been as effective as intended to reasonably assure that only milk of producers who regularly and consistently serve the Class I market is pooled on the order.

Record evidence reveals that the performance and pooling standards of the Central order are inadequate to ensure that the benefits of consistently and reliably servicing the Class I market are shared equitably among those producers who actually bear the costs of serving that market. The record evidence demonstrates that milk distant from the Central marketing area does not provide reasonable service to the Class I market but can be pooled on the order because of current pooling standards. This evidence shows that pooling large volumes of milk at lower class-use values has lowered the order's blend price. Specifically, the record shows that the current one-time touch-base standard and the diversion limit standard of the order do not properly identify the milk of producers who reliably and consistently serve the Class I market.

The record demonstrates that current pooling standards of the Central order make it the most logical order for distant milk—such as in Southern Idaho—to be pooled. The record shows that the current performance standards of the Central order are insufficient to prevent milk from qualifying for pooling while not performing service to the Class I market.

In addition, the record provides evidence that milk produced in areas distant from the marketing area cannot profitably be delivered to distributing plants in the Central marketing area. However, the current liberal touch-base and diversion limit standards make pooling on the Central order attractive while reducing the blend price of the order for those producers who actually provide service to the Class I market.

Record evidence reveals the continued importance of supply plants for producers whose milk provides consistent and reliable service to the Class I market. According to the record, opposition to restrictive supply plant standards beyond those advanced in Proposals 1 and 10 was based on the continued need for supply plant service to distributing plants in the marketing area. Similarly, the record reveals a consensus among producers concerning their continued support for supply plant systems as an integral part of milk supply networks in the Central marketing area. Opposition to the elimination or additional restriction of supply plants and supply plant systems in Proposals 4, 11, 12, and 13, is revealed by the record to be based on the continued importance of supply plant systems to supplying the Class I market.

Record evidence from proponents and opponents of limiting diversions to supply plants located in the marketing area or New Mexico supports concluding that dairy farmers in some regions of the Central marketing area rely on supply plants to market their milk. In addition, the record contains evidence that supply plants and supply plant systems continue to provide necessary service to the Class I market without regard to the location of those plants or plant systems. According to the record, distant milk may use the pooling standards of the Central order as a means to pool milk that will never perform service to the Class I market. However, the record does not show clearly that milk diverted to supply plants outside the marketing area or New Mexico cannot be part of the legitimate reserve of the market which may require additional pooling safeguards. Performance rather than plant location continues to be the standard for identifying the milk of producers who should share in the benefits of pooling. In that regard, this decision finds agreement with the opponents of limiting diversions to supply plants located within the marketing area or New Mexico, as sought in Proposal 1.

Despite the comments by AMPI et al., NAJ, Central Equity and Wells Dairy, this decision continues to find that several of the performance standards advanced in Proposal 1 are reasonable in light of other adopted changes to the order's pooling provisions. The combination of amendments increasing supply plant performance standards, modifying the split plant provision, reducing diversion limit standards and increasing the touch-base standard are appropriate in light of denying proposals to establish transportation and assembly credits. The adopted amendments should more accurately identify the milk of those producers that provide a consistent and reliable supply of milk to the Class I needs of the Central marketing area and assure that distributing plants are adequately supplied.

The record indicates that milk located either inside or outside the marketing area can be reported as diverted milk by a pooled handler. This milk is eligible to receive the order's blend price. Under the current pooling provisions, this can occur after a one-time delivery to a Central marketing area pool plant. After the initial delivery, however, such milk need never again be physically delivered to a Central marketing area pool plant. The record evidence confirms that usually this milk is delivered to a nonpool plant located nearer the farms of producers located far from the marketing area who cannot serve the Class I market. It is therefore appropriate to amend the order's diversion provisions to ensure that milk pooled through the diversion process is part of the legitimate reserve supply of the pool plant from which it was diverted. This standard is a necessary safeguard against excessive milk supplies becoming associated with the market through the diversion process to prevent the unwarranted reduction of the order's blend price.

However, the record does not support finding that diversions to plants not located within the marketing area or New Mexico cannot be part of the legitimate reserve supply for the marketing area. In this regard, the proposed limitation on diversions based on plant location is not reasonable. Based on the record, the proposed increase in the touch-base standard and lowering of the diversion limitation standard is adequate to ensure that milk consistently and reliably serving the Class I market is properly identified. Accordingly, the portion of Proposal 1 seeking to limit diversions to plants located in the marketing area or New Mexico is not adopted.

Exceptions received by AMPI, et al., NAJ, Central Equity and Wells Dairy opined the difficulties that certain cooperatives and independent dairy farmers face in meeting an increased touch-base standard. However, this decision continues to find that that the touch-base standard should be amended so that at least one days' milk production of a dairy farmer is physically received at a pool plant during January, February, and August through November for the milk of the dairy farmer to be eligible for diversion to a nonpool plant. Amending the touch-base standard is widely supported by the record and should reduce the ability of milk not performing a consistent and reliable service to the Class I market from being pooled. The months of January, February, and August through November are, according to the record, the high demand months for fluid milk. Adoption of the one-day touch base standard for each of these six months will more properly identify the milk of those producers serving the market's Class I needs. Accordingly, exceptions received from AMPI, et al., NAJ, Central Equity and Wells Dairy are found to not be compelling.

Record evidence does not support finding that the 4-day touch base

standard advanced by Dean would improve the identification of dairy farmers whose milk serves beyond what a 1-day standard would provide within the context of current marketing conditions. This will be reinforced by the other adopted amendments to the order's pooling standards.

The amendment requiring a handler to make a 12-month commitment if opting to create a split plant will ensure that the milk shipped from the pool side of a split-plant serves the Class I market. This amendment (Proposal 10, advanced by Dean) is a reasonable modification of the split plant feature for supply plants to provide for orderly marketing and maintain the integrity and intent of the order's performance standards. The proposal retains the principle that milk regularly and consistently demonstrating service to the Class I needs of the market should benefit from being pooled on the order. Accordingly, Proposal 10 is adopted.

The Federal milk order system recognizes that there are costs incurred by producers in servicing an order's Class I market. The primary reward to producers for performing such service is receiving the order's blend price. Taken as a whole, the amended pooling provisions will ensure that milk seeking to be pooled consistently demonstrates service in meeting the marketing area's Class I needs. Consequently, adoption of these amended pooling provisions will provide for more equitable sharing of revenue generated from Class I sales among those producers who bear those costs and assure Class I handlers of a regular and reliable supply for fluid use.

2. Establishing Pooling Limits

Preliminary Statement

Federal milk marketing orders rely on the tools of classified pricing and marketwide pooling to assure an adequate supply of milk for fluid (Class I) use and to provide for the equitable sharing of the revenues arising from the classified pricing of milk. Classified pricing assigns a value to milk according to how the milk is used. Regulated handlers who buy milk from dairy farmers are charged class prices according to how they use the farmer's milk. Dairy farmers are then paid a weighted average or ''blend'' price. The blend price that dairy farmers are paid for their milk is derived through the marketwide pooling of all class uses of milk in a marketing area. Thus each producer receives an equal share of each use class of milk and is indifferent as to the actual Class for which the milk was used. The Class I price is usually the highest class price for milk. Historically, the Class I use of milk provides the additional revenue to a marketing area's total classified use value of milk.

The series of Class prices that are applicable for any given month are not announced simultaneously. The Class I price and the Class II skim milk price are announced prior to the beginning of the month for which they will be effective. Class prices for milk in all other uses for the month are not determined until on or before the 5th day of the following month. The Class I price is determined by adding a differential value to the higher of either an advanced Class III or Class IV value. These values are calculated based on formulae using National Agricultural Statistics Service (NASS) survey prices of cheese, butter, and nonfat dried milk powder for the first two weeks of the prior month. For example, the Class I price for August is announced in late July and is based on the higher of the Class III or IV value computed using NASS commodity price surveys for the first two weeks of July.

The Class III and IV prices for the month are determined and announced after the end of the month based on the NASS survey prices for the selected dairy commodities during the month. For example, the Class III and IV prices for August are based on NASS survey commodity prices during August. A large increase in the NASS survey price for the selected dairy commodities from one month to the next can result in the Class III or IV price exceeding the Class I price. This occurrence is commonly referred to by the dairy industry as a ''class price inversion.'' A producer price inversion generally refers to when the Class III or IV price exceeds the average classified use value, or blend price, of milk for the month. Price inversions have occurred with increasing frequency in Federal milk orders since the current pricing plan was implemented on January 1, 2000, despite efforts made during Federal Order Reform to reduce such occurrences. Price inversions can create an incentive for dairy farmers and manufacturing handlers who voluntarily participate in the marketwide pooling of milk to elect not to pool their milk on the order. Class I handlers do not have this option; their participation in the marketwide pool is mandatory.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Classes. In essence, the PPD is the dairy farmer's share of the additional/reduced revenues associated with the Class I, II and IV milk pooled in the market. If the weighted average price of Class I, II and IV milk in the pool is greater than the Class III price, then dairy farmers receive a positive PPD. However, a negative PPD can occur if the value of the Class III milk in the pool exceeds the value of the remaining classes of milk in the pool. This can occur as a result of the price inversions discussed above.

The Central Federal order operates a marketwide pool. The Order contains pooling provisions which specify criteria that, if met, allow dairy farmers to share in the benefits that arise from classified pricing through pooling. The equalization of all class prices among handlers regulated by an order is accomplished through a mechanism known as the producer settlement fund (PSF). Typically, Class I handlers pay the difference between the blend price and their use-value of milk into the PSF. Manufacturing handlers typically receive a draw from the PSF, usually the difference between the Class II, III or IV price and the blend price. In this way, all handlers pay the class value for milk and all dairy farmer suppliers receive at least the order's blend price.

When manufacturing class prices of milk are high enough to result in a use-value of milk for a handler that is higher than the blend price, handlers of manufacturing milk may choose to not pool their milk receipts. Opting to not pool their milk receipts allows these handlers to avoid the obligation of paying into the PSF. The choice by a manufacturing handler to not pool their milk receipts is commonly referred to as ''de-pooling''. When the blend price rises above the manufacturing class use-values of milk these same handlers again opt to pool their milk receipts. This is often referred to as ''re-pooling''. The ability of manufacturing handlers to de-pool and re-pool manufacturing milk is viewed by some market participants as being inequitable to both producers and handlers.

The ''De-pooling'' Proposals

Proponents are in agreement that milk marketing orders should contain provisions that will tend to deter the practice of de-pooling. Four proposals intending to deter the de-pooling of milk were considered in this proceeding. The proposals offered different degrees of deterrence against de-pooling by establishing limits on the amount of milk that can be re-pooled. The proponents of these four proposals are generally of the opinion that de-pooling erodes equity among producers and handlers, undermines the orderly marketing of milk and is detrimental to the Federal order system.

Two different approaches to deter de-pooling are represented by these four

proposals. The first approach, published in the hearing notice as Proposals 2 and 8, addresses de-pooling by limiting the volume of milk a handler can pool in a month to a specified percentage of what the handler pooled in the prior month. The second approach, published in the hearing notice as Proposals 6 and 7, addresses de-pooling by establishing what is commonly referred to as a ''dairy farmer for other markets'' provision. These proposals would require milk of a producer that was de-pooled to not be able to be re-pooled by that producer for a defined time period. All proponents agreed that while none of the proposals would completely eliminate de-pooling, they would likely deter the practice.

Of the four proposals received that would limit de-pooling, this decision adopts Proposal 2, offered by DFA/PF. Specifically, adoption of the proposal will limit the volume of milk a handler can pool in a month to no more than 125 percent of the volume of milk pooled in the prior month. Milk diverted to nonpool plants in excess of this limit would not be pooled, and milk shipped to pool distributing plants and allocated as Class I in excess of the volume shipped to pool distributing plants in the prior month will not be subject to the 125 percent limitation. The 125 percent limitation may be waived at the discretion of the Market Administrator for a new handler on the order or for an existing handler whose milk supply changes due to unusual circumstances.

As published in the hearing notice, Proposal 8, offered by Dean Foods, addresses de-pooling in a similar manner as Proposal 2, but would establish a limit on the total volume of milk a handler could pool in a given month to 115 percent of the volume that was pooled in the prior month. This proposal was modified at the hearing to allow for pooling the milk receipts of a new handler on the order without volume restrictions.

As published in the hearing notice, Proposals 6 and 7, also offered by Dean Foods would address de-pooling by establishing defined time periods during which de-pooled milk could not be pooled. Proposal 6 essentially would require an annual pooling commitment by handler to the market. Under Proposal 6, if the milk of a producer is de-pooled in a month, then the milk of the producer could not re-establish eligibility for pooling on the order during the following eleven months unless ten days milk production was delivered to a pool distributing plant. Under Proposal 6, handlers that de-pool milk have limited options to return milk to the pool, either shipping ten days milk production of a producer to a pool distributing plant or waiting eleven months for eligibility to re-pool.

Under Dean's Proposal 7, a handler that de-pools milk cannot re-pool for a 2 to 4 month time period, depending on the month in which de-pooling occurred. Proposal 7 also provides the option to return milk to the pool by shipping ten days milk production of a producer to a pool distributing plant. Proposals 6 and 7 were modified at the hearing.

A witness appearing on behalf of DFA/PF testified in support of Proposal 2 and in general opposition to the practice of de-pooling. The witness testified that adoption of Proposal 2 would minimize the practice of de-pooling since not all the milk that was de-pooled could immediately return to the pool in the following month. The witness noted that both DFA and Prairie Farms de-pool milk when advantageous but stressed that the practice of de-pooling and re-pooling is detrimental to the Federal order system.

The DFA/PF witness testified that restricting the pooling of milk on the basis of prior performance is not a new concept in Federal milk marketing order provisions. The witness referenced the ''dairy farmer for other markets'' provision currently in place in the Northeast order as an example of pooling provisions based on prior performance. The witness noted that Proposal 2 is similar to a ''dairy farmer for other markets'' provision as it limits pooling based on the handler's previous month's pooled volume. The DFA/PF witness speculated that the manner in which Proposal 2 attempts to reduce the practice of de-pooling is too drastic for some and not strong enough for others. Nevertheless, adoption of Proposal 2, the witness stressed, would provide an appropriate economic consequence to discourage those entities that might otherwise choose to de-pool.

The DFA/PF witness was of the opinion that since the purpose of Federal milk marketing orders are to ensure an adequate supply of milk for the fluid market, equitably share pool proceeds, and promote orderly marketing, milk order provisions should attract milk to its highest valued use when needed and provide for milk to clear the market when not needed in higher-class uses. Since Class I milk cannot be de-pooled, the witness noted, Class I handlers can be at a disadvantage to handlers who can de-pool during periods of price inversions. Class I handlers are unable to maintain a competitive pay price for their milk supply, the witness explained, since Class II, III or IV handlers who de-pool may pay dairy farmers a higher price for their milk. The witness stressed that when the Class I price is not high enough to attract milk from other uses, disorderly conditions arise in the marketplace.

The DFA/PF witness asserted that when a Class II, III or IV handler de-pools milk, inequities arise for the dairy farmers who supplied the de-pooling handler. In the absence of provisions to discourage de-pooling, the witness explained, de-pooling becomes a rational economic practice since only Class I milk is required to be pooled and its value shared through the order's blend price.

The DFA/PF witness testified that the combination of de-pooling with recent increasingly volatile milk prices requires immediate regulatory measures to mitigate the disorderly effects that de-pooling has on market participants. The witness cited market administrator data showing that since implementation of Federal order reform in 2000 there have been 43 months when opportunities to de-pool existed for the Central order.

Relying on statistics provided by the market administrator, the witness illustrated that in April 2004 a handler in the Central order choosing to de-pool was able to pay over $4.00 per hundredweight (cwt) more for milk than a Class I handler unable to de-pool because the Class III price was $19.66 and the uniform price was $15.64. The witness characterized pricing differences of this magnitude as disruptive, disorderly and a competitive disadvantage for any Class I handler. When similarly situated handlers face disparate costs in procuring a supply of milk, the witness added, producers in common procurement areas are negatively affected. The witness asserted that this is a disorderly marketing condition.

Two DFA member dairy farmers from Nebraska testified in support of Proposal 2. Both witnesses maintained that they received smaller milk checks than they otherwise would have received if milk had not been de-pooled. The witnesses added that when fluid milk bottlers experience difficulties in obtaining a milk supply, the costs to supply that milk should be passed on to consumers, not dairy farmers. The witnesses also stated that in order to equalize returns from all classified uses of milk, there needs to be a commitment to have all milk pooled every month of the year.

Two DFA member dairy farmers from Missouri also testified in support of Proposal 2. The witnesses noted that de-pooling amplifies the problem of

negative PPD's. The witnesses were of the opinion that de-pooling creates differences in pay prices among similarly located dairy farmers whose milk is pooled in the Central market, and that different pay prices represent a disorderly marketing condition. The witnesses stated that in order to enjoy the additional funds usually generated by the Class I market, handlers should be required to demonstrate that their milk is available for the Class I market by not de-pooling.

A dairy farmer from Kansas testified in opposition to the practice of de-pooling. The witness was of the opinion that a commitment to serve the Class I market should be required in order to share in the blend price. The witness stressed that in order to share in the returns generated from the marketwide pool handlers and cooperatives should participate in the pool every day not only when it may be profitable.

A witness testified on behalf of Dean in support of Proposal 8. The witness explained that Proposal 8 addresses the practice of de-pooling in a similar manner as Proposal 2 but would limit the pooling of milk to 115 percent of the volume that was pooled in the prior month. The witness was of the opinion that a monthly pooling limit would discourage the de-pooling of milk since the greater the proportion of a handler's milk that is de-pooled, the longer it will take to re-pool that milk. Accordingly, the witness concluded, those who benefit the most from de-pooling also would have the most difficulty in attempting to regain pool status.

A witness for Dean also testified in support of Proposals 6 and 7 which would establish defined time periods during which de-pooled milk could not be re-pooled. The witness testified that Dean prefers adoption of Proposal 6 over Proposal 7. Proposal 6 would impose a 12-month period during which de-pooled milk could not again be pooled while Proposal 7 would establish a 2 to 4 month period during which de-pooled milk could not again be pooled. Under Proposal 6, the witness explained, if the milk of a producer were de-pooled, the milk could only reassociate before the annual commitment period if ten days production of the milk of the producer was delivered to a pool distributing plant. According to the witness, Proposal 7 would provide an option for milk that had been de-pooled to return to the pool during certain specified months of the year depending on when the milk was de-pooled or by shipping ten days production of the milk of a producer to a pool distributing plant.

The Dean witness testified that a similar provision to those contained in Proposals 6 and 7 is currently in place in the Northeast order. The witness was of the opinion that defined time periods during which de-pooled milk cannot again become pooled causes handlers to behave differently by taking a longer term view of pooling. The witness explained that handlers in the Northeast order need to evaluate more than the current month's economic impacts of pooling or not pooling milk, along with possible future missed opportunities.

The Dean witness further contrasted the current ''dairy farmer for other markets'' provision effective in the Northeast to the standards proposed in Proposals 6 and 7. The witness testified that in the Northeast order, July is a month when de-pooled milk can return to the pool regardless of when the milk had been de-pooled during the previous year. Relying on market administrator data, the witness related that during the months of February through July 2004, large volumes of milk were de-pooled from the Northeast order. Because of the ''dairy farmer for other markets'' provision, the witness explained, milk that was de-pooled during the months of February through June could not return to the pool until July. During this period, noted the Dean witness, a large volume of milk usually pooled on the Northeast order was pooled on the Mideast order.

The Dean witness testified that Proposal 6 would require a handler that de-pooled milk in a month to remain off the pool for eleven additional months or ship 10 days milk production of a producer to a pool distributing plant in order for all milk of a producer to return to the pool, while Proposal 7 would provide the option to either return during designated months depending on the month in which milk was de-pooled, or ship 10 days milk production of a producer to a pool distributing plant in order for all milk of a producer to return to the pool.

A second Dean witness offered additional testimony in support of Proposal 6. The witness testified that Proposal 6 would exclude from the pool the milk of any dairy farmer not continuously pooled under a Federal milk order during the previous twelve months. The only exception to this exclusion would be a dairy farmer who temporarily lost Grade A status but was reinstated as a Grade A producer within 21 days, noted the additional Dean witness. The witness emphasized that the portion of Proposal 6 that would require delivery of 10 days milk production of a dairy farmer to a pool distributing plant in order for all milk of a producer to re-join the pool would discourage de-pooling. The 10 day delivery requirement would insure that participation in the pool was open to any dairy farmer for whom it was technically and economically feasible to supply milk for fluid use. According to the witness, Proposals 6 and 7 also would make more milk readily available to service the fluid needs of the market.

The additional Dean witness also stressed that adoption of Proposal 6 would not totally eliminate de-pooling but would make it more difficult to re-pool milk after it had been de-pooled. The Dean witness testified that producer milk continuously pooled on the Central, or any other Federal milk order, which shares in both the costs and benefits of pool participation on a continuous basis would not be affected by adoption of Proposal 6.

The second Dean witness added that adoption of Proposal 6 would increase returns to producers and provide for more orderly marketing conditions. The witness was of the opinion that adoption of Proposal 6 would cause Class II, III or IV milk to remain pooled during times when the blend price was lower than the respective class price. This would increase the PPD, by making it less negative, and raise the blend price received by all producers, the witness concluded. Adoption of Proposal 6 also would cause some Class III milk that is de-pooled to never return to the pool, the witness noted, since it would no longer be financially advantageous.

A Kansas dairy farmer testified in support of Proposal 6. The witness stated that de-pooling cost Kansas dairymen who supplied the needs of the fluid market $6.2 million between March 2004 and October 2004. The witness spoke in favor of any proposal that would require greater commitment to servicing the Class I needs of the Central marketing area.

A DFA member dairy farmer from Missouri testified that de-pooling hurts dairy farmers and was in favor of any proposal that would limit the ability for milk to return to the pool the immediate month after de-pooling. The witness stated that there should be a waiting period of at least 2 or 3 months to pool milk after the milk had been de-pooled or a limit on the milk volume that could return to the pool the month after de-pooling.

Land O' Lakes (LOL), initially a member of AMPI, et al., opposing adoption of Proposals 2, 6, 7 or 8, submitted a comment to the recommended decision in support of adoption of Proposal 2. LOL suggested, however, a 135 percent pooling limit for

the month of March to compensate for 28 days in the month of February and the increases in milk production typically seen during the spring months.

A witness appearing on behalf of Dean testified in opposition to Proposal 2. The witness was of the opinion that limiting pooling to 125 percent of receipts pooled during the previous month was too loose of a standard and urged the adoption of Proposal 6 or Proposal 8.

A witness appearing on behalf of AMPI, et al., testified in opposition to Proposals 2, 6, 7, and 8. The witness was of the opinion that de-pooling was an issue that was national in scope, and should be addressed in a national hearing. The witness testified that the voluntary option of pooling or not pooling milk delivered to a nonpool plant has been a mainstay of the Federal order system and should not be amended. The witness was of the opinion that Proposals 2, 6, 7, and 8 do not address the root cause of price inversions—advance Class I pricing—but rather only treats the symptom of the problem. Class I prices are announced by the USDA in advance, noted the witness, while milk prices for manufactured uses are announced after the month has passed. This can cause a lag between changes in the value of milk and changes in the advanced Class I price, added the witness, sometimes resulting in a Class III price that exceeds the uniform and Class I price, otherwise known as a price inversion. The witness added that it would be appropriate to reconsider whether advanced pricing remains sound regulatory policy.

The AMPI, et al., witness was also of the opinion that Federal order Class I price differentials are artificially high. Milk used to produce cheese, the witness noted, is priced entirely through the marketplace and receives benefit from the Federal order system only when the uniform price is higher than the Class III price. Adoption of Proposals 2, 6, 7 or 8, the witness noted, would penalize milk used in the production of cheese by limiting the amount of milk that could be pooled and was a radical change in Federal order pooling philosophy. The witness added that adoption of these proposals would require cheese manufacturers to estimate Federal order blend prices and PPDs in an effort to decide whether it was more profitable to de-pool, remain pooled or a combination of both.

The AMPI, et al., witness testified that the de-pooling of milk does not cause any reduction to the amount of milk available to serve the fluid market. The witness was of the opinion that when milk was de-pooled there was not a reduction in the amount of milk made available to service the fluid market since the de-pooled milk may rejoin the pool the next month. The AMPI, et al., witness added that the Federal order system should be sharing money derived from Class I handlers, not taking money from dairy farmers whose milk is used in the production of cheese simply to offset a low Class I price created by the timing of announcing Class prices.

The AMPI, et al., witness was also of the opinion that the Department should not consider Proposals 2, 6, 7 and 8 on an emergency basis. The witness testified that the proposed shift in regulatory policy as contained within these proposals should require the issuance of a recommended decision with opportunity for public comment.

A witness representing NAJ testified that the problems arising from de-pooling are a result of the timing of price announcements. The witness also stated that the de-pooling issue would best be addressed at a national hearing.

In a post hearing brief, DFA/PF reiterated the position that the pooling of milk in any month should not exceed 125 percent of the milk volume pooled in the previous month. The brief indicated that the pooling proposals (Proposals 6, 7, and 8) advanced by Dean are too restrictive for the current marketing conditions in the Central marketing area. According to the brief, Proposal 2 represents the least restrictive pooling proposal that could be supported by current marketing conditions while providing a reasonable deterrent to de-pooling.

A brief on behalf of AMPI, et al., reiterated the view that de-pooling and re-pooling should be addressed on a national basis and that pooling decisions should continue to be based on immediate market conditions. The brief expressed the view that the ability to de-pool continues to be unrelated to the willingness to serve the needs of the Class I market.

A brief by Select/Continental supported Proposal 6 as advanced by Dean. The brief noted that this ''dairy farmer for other markets'' proposal offered the most comprehensive means to eliminate the inequities of de-pooling while maintaining the strongest possible support for producers continuously and reliably serving the needs of the Class I market. The brief noted that Proposals 2 and 8, seeking to restrict the ability to pool to 125 percent and 115 percent of the previous month's volume respectively, was an improvement over current conditions but was not as robust as Proposal 6 which would require a 12-month pooling commitment by handlers. The brief found agreement with AMPI, et al., that de-pooling is an issue that should be addressed on a national basis.

The brief by Dean reiterated support for Proposals 6, 7 or 8, in order of preference, seeking to restrict the ability of handlers to de-pool and re-pool milk in the Central marketing area. The brief expressed the view that Class I handlers who are required to pool their milk receipts are at a constant financial disadvantage to those handlers who may opt to pool or not pool.

Dean, in comments to the Recommended Decision, supported adoption of Proposal 2, but was of the opinion that the adopted amendments may not go far enough in preventing de-pooling.

AMPI, along with First District Association (AMPI Group), took exception to the adoption of any proposals that would deter the practice of de-pooling. The AMPI Group reiterated their position that Proposals 2, 6, 7 and 8 do not address the root cause of price inversions—advance Class I pricing—but rather only treats the symptom of the problem.

Family Dairies, a dairy farmer cooperative that pools milk on the Central order, took exception to adopting any proposals that would deter the practice of de-pooling. The comment suggested that price inversions and negative PPDs should be the focus of any regulatory change.

All Federal milk marketing orders require the pooling of milk received at pool distributing plants—which is predominantly Class I milk—and all pooled producers and handlers on an order share in the additional revenue arising from higher valued Class I sales. Manufacturing handlers and cooperatives of Class II, III and IV uses of milk who meet the pooling and performance standards make all of their milk receipts eligible to be pooled and usually find it advantageous. Manufacturing handlers and cooperatives who supply a portion of their total milk receipts to Class I distributing plants receive the difference between their use-value of milk and the order's blend price. Federal milk orders, including the Central order, establish limits on the volume of milk eligible to be pooled that is not for fluid uses primarily through diversion limit standards. However, manufacturing handlers and cooperatives are not required, as are Class I handlers, to pool all their eligible milk receipts.

According to the record, manufacturing handlers and cooperatives have opted to not pool their milk receipts when the manufacturing class prices of milk are

higher than the order's blend price—commonly referred to as being ''inverted.'' During such months, manufacturing handlers and cooperatives have elected to not pool all of their eligible milk receipts because doing so would require them to pay into the PSF of the order, the mechanism through which handler and producer prices are equalized. When prices are not inverted, handlers would pool all of their eligible receipts and receive a payment or draw from the PSF. In receiving a draw from the PSF, such handlers will have sufficient money to pay at least the order's blend price to their supplying dairy farmers.

When manufacturing handlers and cooperatives opt to not pool all of their eligible milk receipts in a month, they are essentially avoiding a payment to the PSF. This, in turn, enables them to avoid the marketwide sharing of the additional value of milk that accrues in the higher-valued uses of milk other than Class I. When the Class I price again becomes the highest valued use of milk, or when other class-price relationships become favorable, the record reveals that these same handlers opt to again pool their eligible milk receipts and draw money from the PSF. It is the ability of manufacturing handlers and cooperatives opting to not pool milk and thereby avoid the marketwide sharing of the revenue accruing from non-Class I milk sales that is viewed by proponents as giving rise to disorderly marketing conditions. According to proponents, producers and handlers who cannot escape being pooled and priced under the order are not assured of equitable prices.

The record reveals that since the implementation of Federal milk marketing order reform in January 2000, and especially in more recent years, large and rapid increases in manufactured product prices during certain months have provided the economic incentives for manufacturing handlers to opt not to pool eligible milk on the Central order. For example, during the three month period of February to April 2004, the Class III price increased over 65 percent from $11.89 per cwt to $19.66 per cwt. During the same time period, total producer milk pooled on the Central order decreased by nearly 50 percent from 1.16 billion pounds to 612 million pounds. When milk volumes of this magnitude are not pooled the impacts on producer blend prices are significant. Producers who incur the additional costs of consistently servicing the Class I needs of the market receive a lower return than would otherwise have been received if they did not continue to service the Class I market. Prices received by dairy farmers who supplied the other milk needs of the market are not known. However, it is reasonable to conclude that prices received by dairy farmers were not equitable or uniform.

The record reveals that ''inverted'' prices of milk are generally the result of the timing of Class price announcements. Despite changes made as part of Federal milk order reform to shorten the time period of setting and announcing Class I milk prices and basing the Class I price on the higher of the Class III or Class IV price to avoid price inversions, large month-to-month price increases in Class III and Class IV product prices sometimes trumped the intent of better assuring that the Class I price for the month would be the highest-valued use of milk. In all orders, the Class I price (and the Class II skim price) is announced prior to or in advance of the month for which it will apply. The Class I price is calculated by using the National Agricultural Statistics Service (NASS) surveyed cheese, butter, nonfat dry milk and dry whey prices for the two most current weeks prior to the 24th day of the preceding month and then adding a differential value to the higher of either the advanced Class III or Class IV price.

Historically, the advance pricing of Class I milk has been used in all Federal orders because Class I handlers cannot avoid regulation and are required to pool all of their Class I milk receipts, they should know their product costs in advance of notifying their customers of price. However, milk receipts for Class III and IV uses are not required to be pooled; thus, Class III and IV product prices (and the Class II butterfat value) are not announced in advance. These prices are announced on or before the 5th of the following month. Of importance here is that manufacturing plant operators and cooperatives have the benefit of knowing all the classified prices of milk before making a decision to pool or not pool eligible receipts.

The record reveals that the decision of manufacturing handlers or cooperatives to pool or not pool milk is made on a month-to-month basis and is generally independent of past pooling decisions. Manufacturing handlers and cooperatives that elected to not pool their milk receipts did so to avoid making payments to the PSF and they anticipated that all other manufacturing handlers and cooperatives would do the same. However, the record indicates that normally pooled manufacturing handlers and cooperatives met the pooling standards of the order to ensure that the Class I market was adequately supplied and that they established eligibility to pool their physical receipts, including diversions to nonpool plants. Opponents to proposals to deter de-pooling are of the view that meeting the pooling standards of the order and deciding how much milk to pool are unrelated events. Proponents took the view that participation in the marketwide pool should be based on a long-term commitment to supply the market because in the long-term it is the sales of higher priced Class I milk that adds additional revenue to the pool.

The producer price differential, or PPD, is the difference between the Class III price and the weighted average value of all Class I, II and IV milk pooled. In essence, the PPD is the residual revenue remaining after all butterfat, protein and other solids values are paid to producers. If the pooled value of Class I, II and IV milk is greater than the Class III value, dairy farmers receive a positive PPD. While the PPD is usually positive, a negative PPD can occur when class prices rise rapidly during the six-week period between the time the Class I price is announced and the time the Class II butterfat and III and IV milk prices are announced. When manufacturing prices fall, this same lag in the announcement of class prices yields a positive PPD.

As revealed by the record, when manufacturing plants and cooperatives opted to not pool milk because of inverted price relationships, PPD's were much more negative. When this milk is not pooled, a larger percentage of the milk remaining pooled will be ''lower'' priced Class I milk. When manufacturing milk is not pooled, the weighted average value of milk decreases relative to the Class II, III or IV value making the PPD more negative. For example, record evidence demonstrated that in April 2004, a month when a sizeable volume of milk was not pooled, the PPD was a negative $3.97 per cwt. If all eligible milk had been pooled, the PPD would have been $.87 per cwt higher or a negative $3.10 per cwt. This $0.87 per cwt represents the additional burden borne by those producers who remained pooled.

The record reveals that when manufacturing handlers and cooperatives opt to not pool milk, unequal pay prices may result to similarly located dairy farmers. For example, Dean noted that when a cooperative delivers a high percentage of their milk receipts to a distributing plant, it lessens their ability to not pool milk, making them less competitive in a marketplace relative to other producers and handlers. Other evidence in the record supports conclusions identical to Dean that when a dairy

farmer or cooperative is able to receive increased returns from shipping milk to a manufacturing handler during times of price inversions, other dairy farmers or cooperatives who may have shipped more milk to a pool distributing plant are competitively disadvantaged.

The record of this proceeding reveals that the ability of manufacturing handlers and cooperatives to not pool all of their eligible milk receipts gives rise to disorderly marketing conditions and warrants the establishment of additional pooling standards to safeguard marketwide pooling. Current pooling provisions do not require or prohibit handlers and cooperatives from pooling all eligible milk receipts. However, the record reveals that when handlers and cooperatives opt to not pool milk inequities arise among producers and handlers that are contrary to the intent of the Federal milk marketing order program—maintaining orderly marketing conditions.

The record contains extensive testimony regarding the effects on the milk order program resulting from advance pricing and the priority the milk order program has placed on the Class I price being the highest valued use of milk. It remains true that the Class I use of milk is still the highest valued use of milk notwithstanding those occasional months when milk used in usually lower-valued classes may be higher. This has been demonstrated by an analysis of the effective Class I differential values—the difference in the Class I price at the base zone of Jackson County, Missouri, and the higher of the Class III or Class IV price—for the 65 month period of January 2000 through May 2005 performed by USDA.[2] These computations reveal that the effective monthly Class I differential averaged $1.97 per cwt. Accordingly, it can only be concluded that in the longer-term Class I sales continue to be the source of additional revenue accruing to the pool even when, in some months, the effective differential is negative.

Price inversions occur when the wholesale price for manufactured products rises rapidly indicating a tightening of milk supplies to produce those products. It is for this reason that the Department chose the higher of the Class III and Class IV prices as the mover of the Class I price. Distributing plants must have a price high enough to attract milk away from manufacturing uses to meet Class I demands. As revealed by the record, this method has not been sufficient to provide the appropriate price signals to assure an adequate supply of milk for the Class I market. Accordingly, additional measures are needed as a means of assuring that milk remains pooled and thus available to the Class I market. Adoption of Proposal 2 is a reasonable measure to meet the objectives of orderly marketing.

This decision does find that disorderly marketing conditions are present when producers do not receive uniform prices. Handlers and cooperatives opting to not pool milk do not account to the pool at the classified use-values of those milk receipts. They do not share in all the additional costs and burdens with those producers who are pooled and who are incurring the costs of servicing the Class I needs of the market. This is not a desired or reasonable outcome especially when the same handlers and cooperatives will again pool all of their eligible receipts when class-price relationships change in a subsequent month. These inequities borne by the market's producers are contrary to the intent of the Federal order program's reliance on marketwide pooling—ensuring that all producers supplying the market are paid uniform prices for their milk regardless of how the milk of any single producer is used.

Despite the exceptions submitted by AMPI Group and Family Dairies, it is reasonable that the order contain pooling provisions intended to deter the disorderly conditions that arise when de-pooling occurs. Such provisions maintain and enhance orderly marketing. Accordingly, this decision finds it reasonable to adopt provisions that limit the volume of milk a handler or cooperative may pool in a month to 125 percent of the total volume pooled by the handler or cooperative in the prior month. Adoption of this standard will not prevent manufacturing handlers or cooperatives from electing to not pool milk. However, it should serve to maintain and enhance orderly marketing by encouraging participation in the marketwide pooling of all classified uses of milk.

This decision does not adopt a 135 percent pooling limit for the month of March as suggested by LOL in their comments and exceptions to the recommended decision. A 135 percent standard applicable for the month of March was not considered and examined at the hearing.

Consideration was given on whether de-pooling should be considered at a national hearing with other, broader national issues of milk marketing. However each marketing area has unique marketing conditions and characteristics which have area-specific pooling provisions to address those specific conditions. Because of this, pooling issues are considered unique to each order. This decision finds that it would be unreasonable to address pooling issues, including de-pooling, on a national basis.

Some manufacturing handlers and cooperatives argued at the hearing, and noted in exceptions to the Recommended Decision, that their milk did perform in meeting the Class I needs during the month and this occurred before making their pooling decisions. They argue that the Class I market is therefore not harmed and that the intents and goals of the order program are satisfied. With respect to this proceeding and in response to these arguments, this decision finds that the practice of de-pooling undermines the intent of the Federal order program to assure producers uniform prices across all uses of milk normally associated with the market as a critical indicator of orderly marketing conditions. Similarly, handlers and cooperatives who de-pool purposely do so to gain a momentary financial benefit (by avoiding making payments to the PSF) which would otherwise be equitably shared among all market participants. While the order's performance standards tend to assure that distributing plants are adequately supplied with fresh, fluid milk, the goals of marketwide pooling are undermined by the practice of de-pooling. Producers and handlers who regularly and consistently bear the costs of serving the Class I needs of the market will not equitably share in the additional value arising momentarily from non-fluid uses of milk. These same producers and handlers will, in turn, be required to share the additional revenue arising from higher-valued Class I sales in a subsequent month when class-price relationships change.

The four proposals considered in this proceeding to deter the practice of de-pooling in the Central order have differences. They all seek to address market disorder arising from the practice of de-pooling. However, this decision does not find adoption of the two ''dairy farmer for other markets'' proposals—Proposals 6 and 7—reasonable because they would make it needlessly difficult for milk to be re-pooled and because their adoption may disrupt prevailing marketing channels or cause the inefficient movement of milk. Likewise, Proposal 8, to restrict pooling in a month to 115 percent of the prior month's volume pooled by the handler, is not adopted. Adoption of

[2] Official notice is taken of data and information published in Market Administrator Bulletins, as posted on individual Market Administrator Web sites.

this proposal would disrupt current marketing conditions beyond what the record justifies. Therefore, this decision adopts Proposal 2 to limit the pooling of milk in any month by a handler to 125 percent of the handler's pooled receipts in the prior month because it provides the most reasonable measure to deter the practice of de-pooling.

3. Transportation and Assembly Credits

A proposal, published in the hearing notice as Proposal 3 and modified at the hearing, seeking establishment of transportation and assembly credits in the Central Order is not adopted. The published proposal seeks to provide a credit for the shipment of milk from supply plants to distributing plants. The proposal was modified at the hearing to expand the transportation credit to include milk shipped directly from dairy farms to distributing plants. In addition, the modified proposal would provide an assembly credit for milk shipped directly from dairy farms to distributing plants.

The proposal would provide a credit for the shipment of milk from supply plants and dairy farms to distributing plants at a rate of $0.003 per cwt per mile, excluding the first 25 miles of shipment and all shipments farther than 500 miles. In addition, the proposal would provide for a credit of $0.10 per cwt for the assembly of milk from dairy farms to distributing plants. The Central order does not currently have transportation or assembly credit provisions.

As published in the hearing notice, Proposal 3 was advanced by AMPI, et al. The modification to Proposal 3, presented at the hearing to include transportation credits for shipments from dairy farms directly to distributing plants was advanced by DFA/PF.

On behalf of all proponents of Proposal 3, the Foremost, et al., witness requested that the proposal be modified to remove all references to ''milk reload stations'' as originally offered in the proposal. Accordingly, no additional references will be made concerning reload stations in this decision.

A witness appearing on behalf of AMPI, et al., testified that transportation and assembly credits are needed in the Central marketing area to allow transporting handlers to recover costs of assembling and transporting milk to serve the Class I needs of the market.

The AMPI, et al., witness was of the opinion that the rates and distance limitations proposed for the transportation and assembly credits would compensate handlers for approximately 75 percent of the cost of moving milk from supply plants to distributing plants within the marketing area. The witness asserted that this was reasonable because it would keep transportation and assembly cost recovery at less than full cost. According to the witness, the proposed rates and distance limitations would tend to discourage inefficient movements of milk by handlers from seeking transportation and assembly credits.

The AMPI, et al., witness expressed the opinion that all producers receiving the benefits of marketwide pooling should contribute to the recovery of costs associated with moving milk within the marketing area to serve the Class I needs of the market. The witness provided examples of milk movements where supply plant handlers moving milk to distributing plants were unable to recover the full costs of assembling and transporting milk at Federal order minimum prices. The witness testified that because handlers transporting milk directly from dairy farms to distributing plants incur costs similar to the overhead costs incurred by handlers transporting milk from supply plants, the proponents seek an assembly credit for all milk that serves the Class I market. The AMPI, et al., witness testified that even though dairy farmers currently are charged for the cost of assembling their milk into loads and transporting the milk to distributing plants, the charges are insufficient to completely recoup the costs incurred by handlers.

A witness representing DFA/PF testified in support of Proposal 3 and modified the proposal to include the transportation and assembly credits for milk shipped directly from farms to distributing plants. The witness asserted that the costs of assembly and transportation of milk in the Central marketing area are not fully recouped in the market by handlers. The witness noted that the $0.003 per mile transportation credit rate would apply to milk shipped to a distributing plant.

The DFA/PF witness testified that additional compensation for the transportation and assembly of milk for fluid use is needed in particular areas of the Central marketing area because the order's blend price is insufficient to keep milk produced in the marketing area within the marketing area. The witness noted this was specifically apparent in the southeastern portion of the marketing area that borders portions of the Southeast and Appalachian orders. In addition, the witness testified that the location values of milk for markets within the Central marketing area, for example in St. Louis, Missouri, and areas of southern Illinois, are similarly insufficient to attract milk. According to the witness, this causes milk procurement problems for some distributing plants in this localized portion of the Central marketing area.

The DFA/PF witness testified that marketwide service payments are authorized in the legislation that provides for Federal milk orders. The witness explained that payments for services not elsewhere compensated can be taken from producer revenue to compensate providers of services that are of marketwide benefit. The witness asserted that transportation and assembly operations performed in the Central marketing area meet the general objectives of providing marketwide service for marketwide benefit. According to the witness, Proposal 3, as modified, describes a set of services that benefit the entire market. The witness was of the opinion that the marketwide services include: marketing of milk, farm pick-up of milk, off-load and reload of milk, procurement of milk, selling milking equipment, disseminating information and prices to producers, milk testing, delivery to distributing plants, and other field services.

According to the DFA/PF witness, inclusion of milk shipped directly from dairy farms to distributing plants for transportation and assembly credits would be more representative of how the majority of milk is transported to distributing plants regulated by the order. The witness noted that in the Central marketing area distributing plants receive only about 4.5 percent of their milk from supply plants. The witness testified that the modification of Proposal 3 to include milk shipped from farms to distributing plants would more accurately represent the transportation compensation requirements needed to ensure delivery of milk for fluid use.

According to the DFA/PF witness, the inclusion of farm to distributing plant shipments would require the Market Administrator of the Central order to verify handler claims for receiving credits. The witness indicated that least-distance routes for delivery from each point of origin to the destination distributing plants would need to be determined. According to the witness, the additional cost that would be borne by the Market Administrator in administering transportation and assembly provisions would be negligible and should not require a higher administrative assessment. However, the witness acknowledged that proponents had not consulted the Market Administrator's office for an estimate of additional administrative costs that may be borne in operating a

transportation and assembly credit provision.

The DFA/PF witness testified that the St. Louis area market is unable to consistently and successfully attract milk from the Central order's milkshed because the order's Class I price and the blend price are lower than those in the nearby Appalachian and Southeast marketing areas. According to the witness, marketwide service payments for transportation and assembly of milk to serve markets such as St. Louis would provide sufficient financial incentive to offset the higher blend prices of these bordering Federal milk marketing areas. Additionally, it would ensure a consistent and reliable supply of milk to meet the needs of that portion of the Central marketing area's Class I market, the witness said.

A witness for Prairie Farms (PF) testified in support of the adoption of Proposal 3 as modified at the hearing. The witness was of the opinion that without expansion of transportation and assembly credits that included direct shipped milk, the ability to serve the Class I needs of all locations in the Central marketing area would not be achieved because milk would seek the higher blend prices available in the nearby markets of the Appalachian and Southeast orders. The witness from Prairie Farms provided example scenarios of actual and hypothetical net returns possible for handlers shipping milk to distributing plants in the Central, Appalachian, and Southeast marketing areas. The witness compared these returns to net returns available from shipping to distributing plants in Illinois and St. Louis within the Central marketing area. According to the witness, these example scenarios reinforced the assertion that milk is attracted by higher Class I prices in localized areas of the Appalachian and Southeast marketing areas.

The PF witness was of the opinion that inappropriate Class I differential levels, as in the St Louis area example, were the root cause of the market's inability to attract sufficient fluid milk; however, modifications to the Class I price surface are not currently feasible. In light of this, the witness stated that obtaining the needed financial incentives to ensure delivery of milk to this deficit portion of the marketing area by the use of transportation and assembly credits is a reasonable alternative to changing the Class I differentials.

The DFA/PF witness estimated that providing credits for milk transported from farms to distributing plants would reduce the Central order's blend price to dairy farmers by $0.045 per cwt per month. The Foremost, et al., witness testified that the impact of providing credits for assembly would reduce the Central order's blend price by $0.036–$0.040 per cwt per month. The DFA/PF witness testified that the combined impact of transportation credits for the supply plant to distributing plant movements, direct delivery from farms to distributing plants, and assembly credits would reduce the Central marketing area's blend price by a total of $0.081–$0.085 per cwt per month.

DFA/PF took exception to the Recommended Decision and reiterated their support for the adoption of transportation and assembly credits. DFA/PF again noted that transportation and assembly credits, as proposed, were designed to reward those who supply the fluid milk needs of the entire market and are necessary to facilitate the orderly movement of milk.

A witness for Dean testified in support of Proposal 3 as modified by DFA/PF. The Dean witness expressed a preference for the DFA/PF modification to include direct farm milk shipments to distributing plants but did not support adoption of assembly credits. The witness noted that Dean would consider the entire Proposal 3, including the DFA/PF modification, if the assembly credit feature were retained. The witness was of the opinion that adopting the proposal would increase equity among handlers and producers who supply the Class I market. However, the witness was unable to identify distributing plants in the St. Louis and southern Illinois portions of the marketing area that did not or could not receive sufficient milk supplies. In addition, the witness was unable to recall if handlers had asked or relied on the Central marketing area's Market Administrator to increase the Central order's performance standards to bring forth milk to meet the market's Class I needs.

Dean reiterated support for adoption of transportation and assembly credits in exceptions to the Recommended Decision. Dean noted that handlers face higher costs in procuring milk supplies in the St. Louis area, and that adoption of transportation and assembly credits would help reduce those costs.

In a post hearing brief, Select/Continental indicated general opposition to adopting transportation and assembly credits for milk movements from supply plants to distributing plants. The brief expressed support for a transportation and assembly credit provision that would be limited to milk shipped directly from dairy farms to distributing plants. According to the brief, milk should be attracted to markets for specific use through classified pricing. Fluid milk, according to the brief, should be attracted to distributing plants by appropriate location values. According to the brief, implementing transportation and assembly credits in the Central marketing area would be an admission that the Class I price surface was no longer successful in meeting the Class I needs of the marketing area.

In a post hearing brief, DFA/PF reiterated their support for transportation and assembly credits as modified. The brief reiterated support and reinforcement of the testimony offered to expand the scope for transportation and assembly credits to include direct farm-to-plant milk movements. Likewise, Dean Foods reiterated its support in a post-hearing brief for expanding transportation and assembly credits to include direct farm-to-plant milk movements as a means to improve the available milk supply for its distributing plant operations in the southeastern portion of the Central order.

Geographically, the Central marketing area is the largest Federal milk marketing area, spanning the distance from eastern Illinois to western Colorado. It is bordered by the Upper Midwest, Mideast, Appalachian, Southeast, and Southwest marketing areas. The marketing area also is bordered by unregulated areas on the west including Utah, portions of western South Dakota, western portions of Nebraska, and all of Wyoming. In addition the Central marketing area completely surrounds a large unregulated area in central Missouri.

Proposal 3 as advanced by AMPI, et al., seeks to establish a marketwide service payment in the form of a transportation credit for the movement of milk from supply plants to distributing plants at a rate of $0.003 per cwt per mile. The proposal provides for a distance limit for receipt of the credit for milk movements between 25 to 500 miles from the supply plants to distributing plants. The proposal also seeks the establishment of an assembly credit feature for which handlers would collect $0.10 per cwt for the assembly of loads of milk within the marketing area.

The modification to Proposal 3, advanced by DFA/PF, seeks expansion of the transportation credit to include milk shipped directly from dairy farms to distributing plants. The modification would establish a transportation credit rate of $0.003 per cwt per mile for milk shipped directly from dairy farms to distributing plants. The combination of the two proposals effectively seeks transportation and assembly credits for

all Class I milk pooled on the Central order. The rationale for the modification to Proposal 3 is that milk shipped directly from farms to distributing plants represents more than 95 percent of all milk shipped to distributing plants. Milk shipped from supply plants represents about 5 percent of all milk shipped to distributing plants.

Proponents estimate that the Central order blend price would be lowered in the range of $0.036–$0.040 per cwt per month by the assembly credit feature for all Class I milk, if adopted. The proponents estimate that the impact of the transportation credit for all Class I milk pooled on the Central order would be a blend price reduction of approximately $0.045 per cwt, if adopted. The combined reduction to the Central order blend price per month would be $0.081–$0.085 per cwt.

The transportation and assembly credits advanced by the proponents are similar to the transportation and assembly credits implemented in the Chicago Regional order, a predecessor order of the current Upper Midwest order. The transportation and assembly credit provisions of the Chicago Regional order were carried forward into the provisions of the current Upper Midwest order as a part of Federal milk order reform. These provisions were first implemented in 1987 to ensure that the costs of serving the Class I market of the Chicago Regional marketing area were shared by all market participants that benefited from the revenue generated from Class I sales. The impact on producer revenue was expected to be minimal according to the Final Decision published October 15, 1987, (7 CFR 10130).

The transportation credit provisions of the Upper Midwest order provide a credit of $0.028 cents per mile for bulk milk delivered from pool plants to distributing plants. The assembly credit provisions of the Upper Midwest order provide a credit of $0.08 cents per cwt to the operator of a distributing plant for milk received from dairy farms and pool plants. The credits are computed by the Market Administrator and are deducted from the marketwide value of milk before calculation of the order's blend price. The impact of these credits on the Upper Midwest blend price ($0.02–$0.03 per cwt) are one fourth to one third the magnitude of impact that proponents expect the proposed transportation and assembly credits would have on the Central order blend price, if adopted.

The transportation and assembly credit features of the current Upper Midwest order and the pre-reform Chicago Regional order are similar in the magnitudes of their costs per mile and per hundredweight of milk handled. The transportation and assembly credit provisions of the Chicago Regional order applied to a geographically compact milkshed with the emphasis on encouraging milk movements to the single urban market of Chicago. The Chicago Regional marketing area (and the Chicago metropolitan area of the current Upper Midwest marketing area) was supplied with milk primarily from southern and central Wisconsin. The transportation and assembly credit feature of the current Upper Midwest marketing order provides pool plants that serve the Class I market with some recovery of assembly and transportation costs incurred in transferring milk to distributing plants.

In contrast, the Central marketing area is geographically much larger and handlers with Class I route disposition serve multiple urban centers in a variety of States located from Illinois to Colorado. Despite exceptions to the Recommended Decision from DFA, the record reveals that the area of concern to the proponents is a relatively limited area of St. Louis and portions of southern Illinois. The record does not reveal that there are other portions of the marketing area where problems have been identified in procuring milk supplies for Class I use. Accordingly, it is reasonable to conclude that marketwide service payments in the form of transportation and assembly credits on all Class I milk may only solve a localized problem while all dairy farmers would receive a lower blend price for their milk.

The impact of transportation and assembly credits on dairy farmer income is far lower in the Upper Midwest marketing area than that proposed for the Central order. For example, according to Market Administrator data, the reduction to the Upper Midwest blend price in October 2004 was $ 0.015 per cwt and $0.0125 per cwt for the assembly and transportation credits, respectively. This represents an overall reduction of $0.0275 per cwt to the Upper Midwest blend price in that month. Market Administrator data shows that during May 2005 the reduction to the Upper Midwest blend price attributable to the combined impact of the transportation and assembly credit features was $0.020 per cwt.

The record reveals that the impact anticipated by proponents of transportation and assembly credits on the Central order blend price would be a reduction of as much as $0.081–$0.085 per cwt. The reduction in blend prices and dairy farmer income that would result from the adoption of a transportation and assembly credit of this magnitude would be 3–4 times the magnitude of the blend price reduction that dairy farmers experience in the Upper Midwest. According to Market Administrator information, the average sized producer in the Central marketing area produces and markets about 200,000 pounds of milk per month. The average reduction in income for such an average producer per month would be $160–$170 per month, or about $2000 per year. A similar sized producer in the Upper Midwest marketing area would experience a reduction in income of $40–$57 per month or about $500–$680 per year. The differences in magnitudes are interesting but germane only to the extent that transportation and assembly credits are justified.

The proposed transportation and assembly credits are justified by proponents on the basis that the movement of milk to serve the Class I market is a marketwide service of marketwide benefit and credits for providing marketwide services are authorized in the Agricultural Marketing Agreement Act of 1937, (AMAA) as amended. However, the focus of the record evidence is on the marketing conditions in the southern Illinois and St. Louis regions of the Central marketing area. However, the record does not indicate that price differences as noted in proponent testimony concerning the eastern portion of the marketing area occur elsewhere in the Central marketing area. The record does not support concluding that handlers serving major urban areas in other regions of the marketing area (such as, Denver, Oklahoma City, or Tulsa) experience difficulty in attracting milk supplies. This supports concluding that the issues raised by the proponents are at best localized in nature rather than marketwide.

In addition, the record reveals in the testimony of the AMPI, et al., witness that some transportation and assembly costs incurred by handlers for milk delivered to distributing plants are recovered by the marketplace. While proponents have asserted that the recovery of costs for assembly by handlers is incomplete, the record contains insufficient information upon which to judge if lowering producer blend prices by as much as $.08 per cwt is reasonable. The size of the likely blend price reduction is important but not the critical factor in determining whether transportation and assembly credits are reasonable for the Central marketing area. The most important factor in that regard is whether the

marketwide costs would provide marketwide rather than local benefits.

Contrary to exceptions to the Recommended Decision from Dean, record evidence supplied by a Class I handler located in St. Louis indicates that the firm is able to continue receiving, bottling, and selling milk in the St. Louis area. This evidence suggests that milk movements to handlers in the St. Louis area are occurring and meet the order's Class I needs. This evidence provides a basis to conclude that the order provisions attract sufficient milk for fluid use. In this regard, the need for additional government intervention beyond what the order currently provides in meeting the market's fluid demands is not warranted.

The record evidence concerning challenges faced by handlers in moving milk within the Central marketing area to distributing plants in St. Louis and Illinois indicates that there may be, at best, localized issues in supplying the Class I needs of these plants. The proponents for transportation and assembly credits attribute these difficulties to the higher location values and blend prices of nearby or bordering portions of the Southeast and Appalachian orders. However, the record reveals that handlers have not sought alternative actions to bring forth additional milk supplies to meet Class I demands. For example, there is no record evidence illustrating that the Market Administrator has been called upon to change performance standards or diversion limits which would better ensure that the Class I needs of any of the Central marketing area's distributing plants would be met.

This decision finds that adoption of the proposed transportation and assembly credit provision is not supported by record evidence. Accordingly, this decision does not find agreement with the rationale advanced by proponents that marketwide service payments in the form of transportation and assembly credits for milk are needed to overcome deficiencies of the Central order. At best, record evidence demonstrates that if there are difficulties in procuring milk for Class I use, they are isolated to a fraction of the marketing area. Adopting transportation and assembly credits would unreasonably lower the returns to all dairy farmers pooled on the order to address a localized issue.

Withdrawn Proposal

A proposal published as Proposal 14, seeking to require payments from the producer settlement fund to be made no later than the next business day after the due date for payments into the producer settlement fund, was advanced by the Market Administrator. The proposal was withdrawn and was not considered in this decision.

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 Central 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 aforesaid marketing agreement and order:

(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 in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, ensure 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 are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the order regulating the handling of milk in the Central marketing area, which has been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the **Federal Register**.

Determination of Producer Approval and Representative Period

March 2006 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended in the Recommended Decision published in the **Federal Register** on February 22, 2006 (71 FR 9015), regulating the handling of milk in the Central 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 1032

Milk marketing orders.

Dated: September 1, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Milk in the Central 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 Central 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 Central 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 Recommended Decision issued by the Administrator, Agricultural Marketing Service, on February 15, 2006, and published in the **Federal Register** on February 22, 2006 (71 FR 9015), are adopted and shall be the terms and provisions of this order. The revised order follows.

PART 1032—MILK IN THE CENTRAL MARKETING AREA

1. The authority citation for 7 CFR Part 1032 continues to read as follows:

Authority: 7 U.S.C. 601–674, and 7253.

2. Section 1032.7 is amended by revising paragraph (c) introductory text and paragraph (h)(7) to read as follows:

§ 1032.7 Pool plant.

* * * * *

(c) A supply plant from which the quantity of bulk fluid milk products shipped to (and physically unloaded into) plants described in paragraph (c)(1) of this section is not less than 25 percent during the months of August through February and 20 percent in all other months of the Grade A milk received from dairy farmers (except dairy farmers described in § 1032.12(b)) and from handlers described in § 1000.9(c), including milk diverted pursuant to § 1032.13, subject to the following conditions:

* * * * *

(h) * * *

(7) That portion of a regulated plant designated as a nonpool plant that is physically separate and operated separately from the pool portion of such plant. The designation of a portion of a plant must be requested in advance and in writing by the handler and must be approved by the market administrator. Such nonpool status shall be effective on the first day of the month following approval of the request by the market administrator and thereafter for the longer of twelve (12) consecutive months or until notification of the desire to requalify as a pool plant, in writing, is received by the market administrator. Requalification will require deliveries to a pool distributing plant(s) as provided for in § 1032.7(c). For requalification, handlers may not use milk delivered directly from producer's farms pursuant to § 1000.9(c) or § 1032.13(c) for the first month.

3. Section 1032.13 is amended by revising paragraph (d)(1), redesignating paragraphs (d)(2) through (6) as paragraphs (d)(4) through (8), adding new paragraphs (d)(2) and (d)(3), revising redesignated paragraph (d)(4), and adding a new paragraph (f), to read as follows:

§ 1032.13 Producer milk.

* * * * *

(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 one day's milk production is caused by the handler to be physically received at a pool plant in each of the months of January and February, and August through November;

(3) The equivalent of at least one day's milk production is caused by the handler to be physically received at a pool plant in each of the months of March through July and December if the requirement of paragraph (d)(2) of this section (§ 1032.13) in each of the prior months of August through November and January through February are not met, except in the case of a dairy farmer who marketed no Grade A milk during each of the prior months of August through November or January through February;

(4) Of the 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)) the handler diverts to nonpool plants not more than 75 percent during the months of August through February, and not more than 80 percent during the months of March through July, provided that not less than 25 percent of such receipts in the months of August through February and 20 percent of the remaining months' receipts are delivered to plants described in § 1032.7(a), (b) or (i);

* * * * *

(f) The quantity of milk reported by a handler pursuant to either § 1032.30(a)(1) or § 032.30(c)(1) for the current month may not exceed 125 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 in excess of the 125 percent limit, other than pool distributing plants, shall be classified pursuant to § 1000.44(a)(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 provisions of paragraph (d)(5) of this provision shall apply. The following provisions apply:

(1) Milk shipped to and physically received at pool distributing plants shall not be subject to the 125 percent limitation;

(2) Producer milk qualified pursuant to § ____.13 of any other Federal Order in the previous month shall not be included in the computation of the 125 percent limitation; provided that the producers comprising the milk supply have been continuously pooled on any Federal Order for the entirety of the most recent three consecutive months.

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

(i) For a new handler on the order, subject to the provisions of paragraph (f)(3) of this section, 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.

Marketing Agreement Regulating the Handling of Milk in the Central Marketing Area

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 §§ 1032.1 to 1032.86 all inclusive, of the order regulating the handling of milk in the Central marketing area (7 CFR Part 1032 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 January 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. 06–7498 Filed 9–6–06; 8:45 am]

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