

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1124 and 1135

[Docket No. AO-368-A30, AO-380-A18; DA-01-08]

Milk in the Pacific Northwest and Western Marketing Areas; Tentative Decision on Proposed Amendments and Opportunity To File Written Exceptions to Tentative Marketing Agreement and to Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This tentative decision adopts, on an interim final and emergency basis, provisions that amend certain features of the Pacific Northwest and Western milk marketing orders. Specifically, the ability to simultaneously pool the same milk on either the Pacific Northwest or the Western orders and on a State-operated order that has marketwide pooling is eliminated. For the Western order, the *Pool plant* provision is amended to establish a "net shipments" provision for milk deliveries to distributing plants and the *Producer milk* provision is amended to establish a net diversions provision. Additionally, the *Proprietary bulk tank handler* provision of the Western order is removed. Public comments on these actions, the other pooling and related provisions not adopted, and the marketwide service payment provision not adopted by this tentative decision are requested. This decision requires determination of whether producers approve the issuance of the amended orders on an interim basis.

DATES: Comments are due on or before October 17, 2003.

ADDRESSES: Comments (6 copies) should be filed with the Hearing Clerk, United States Department of Agriculture, Room 1083-STOP 9200, 1400 Independence

Avenue, SW., Washington, DC 20250-9200.

FOR FURTHER INFORMATION CONTACT:

Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, Room 2968-STOP 0231, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 690-1366, e-mail address: gino.tosi@usda.gov.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

These 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 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, 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 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.

In the Western Federal milk order, 551 of the 791 dairy producers (farmers), or almost 70 percent, whose milk was pooled under the order at the time of the hearing, April 2002, would meet the definition of small businesses. On the processing side, 5 of the 12 milk plants associated with the Western milk order during April 2002 would qualify as "small businesses," constituting about 42 percent of the total.

In the Pacific Northwest Federal milk order, 805 of the 1,164 dairy producers (farmers), or about 69 percent, whose milk was pooled under the Pacific Northwest Federal milk order at the time of the hearing, April 2002, would meet the definition of small businesses. On the processing side, 9 of the 20 milk plants associated with the Pacific Northwest milk order during April 2002, would qualify as "small businesses," constituting about 45 percent of the total.

Based on these criteria, more than 69 percent of the producers in both orders would be considered as small businesses. The adoption of the proposed pooling standards serves to revise established criteria that determine those producers, producer milk, and plants that have a reasonable association with, and are consistently serving the fluid needs of the Pacific Northwest and Western milk marketing area and are not associated with other marketwide pools concerning the same milk. Criteria for pooling are established