

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SELECT MILK PRODUCERS, Inc., et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 1:01CV00060(RCL)
	:	
ANN VENEMAN, SECRETARY	:	
UNITED STATES DEPARTMENT OF	:	
AGRICULTURE,	:	
	:	
Defendant.	:	

**BRIEF OF AMICUS CURIAE ASSOCIATION OF DAIRY COOPERATIVES IN THE
NORTHEAST IN SUPPORT OF THE MOTION OF PLAINTIFFS FOR A
PRELIMINARY INJUNCTION**

I. INTRODUCTION

The Association of Dairy Cooperatives in the Northeast (ADCNE) files this brief in support of the Plaintiff dairy farmer cooperatives' request that the court enjoin a discrete portion of the tentative final decision and order published December 7, 2000, 65 Fed. Reg. 76831-61. ADCNE consists of the following member dairy cooperatives: Agri-Mark, Inc.; Dairy Farmers of America; Dairylea Cooperative Inc.; Land O'Lakes, Inc.; Maryland and Virginia Milk Producers Cooperative Association, Inc.; O-AT-KA Cooperative; St. Albans Cooperative Creamery, Inc.; and Upstate Farms Cooperative, Inc. The members of ADCNE market in excess of 65% of the milk in Order 1, the federal order regulating the marketing of milk in the Northeast marketing area, which is the region from Maine to northern Virginia, including the District of Columbia. Order 1, in turn, represents more than 20% of the milk in the Federal Milk Marketing

Order system. The challenged order provisions will, for the first time in at least 40 years of administration of federal milk marketing orders¹, change the basis for calculating the value of butterfat in dairy farmers' milk used to manufacture cheese. Implementation of the final order, which will be effective with milk deliveries from January 1, 2001, if the price announcements of February 2, 2001, go forward, will immediately and irreparably lead to losses in sales of federal-order-priced milk and butterfat for cheese, thereby reducing the prices which dairy farmers will receive now and in the future for their raw milk production. Plaintiffs allege, and this amicus concurs, that the final order violates the procedural hearing requirements of: (1) the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("the AMAA"); and (2) the Administrative Procedure Act, 5 U.S.C. § 706 (A), (C), (D), and (E) .

In this brief, the amicus association supports the request of plaintiffs that this Court exercise its equitable powers to maintain the longstanding status quo in the federal milk marketing orders with respect to Class III butterfat prices until the Court has time to fully review the plaintiffs' challenges to the Secretary's Tentative Final Rule.²

II. STATEMENT OF THE CASE

A. The Federal Milk Marketing Order System

¹ See Declaration of Herbert E. Shepard, ¶ 6.

² ADCNE quite reluctantly requests the court's intervention because it recognizes that the challenged regulations are well-intentioned on the part of the Secretary and the rule is also superficially appealing in an academic sense. However, ADCNE has concluded, after having had the opportunity for the type of study and analysis which did not occur through the hearing process, that the rules, if allowed to go into effect, will be counter-productive to producer interests and quite destructive to orderly marketing conditions in the markets for milk and cream.

Since the 1930's the United States Department of Agriculture has been authorized to regulate the marketing of raw milk by dairy farmers pursuant to the Agricultural Marketing Agreement Act of 1937 (the "AMAA"), as amended, 7 U.S.C. §601, et seq.³ The regulations, referred to as "orders," promote stable, orderly marketing conditions among and between dairy farmers and milk buyers (commonly referred to as "handlers") in local or regional marketing areas.⁴ The basic tool for promotion of market stability is the establishment of minimum milk prices and a "pool" of milk value shared equally by all farmers supplying the market. The pooling mechanism allows all farmers to receive a uniform minimum price (called the "blend" or "uniform price") regardless of the specific buyer or use to which each farmer's milk is put. At the same time, the purchasers (handlers) pay a uniform minimum price on the basis of the use of their milk. Milk used for fluid (drinking) products, referred to as "Class 1" milk, commands the highest price; milk used for soft products such as yogurt, cottage cheese or ice cream commands a Class II price; milk used to produce cheese is Class III milk; and milk used to produce hard, storable products such as butter and nonfat dry milk powder is Class IV milk⁵. Through the pool

³ The 1937 legislation amended and readopted the 1933 and 1935 agricultural acts: Agricultural Adjustment Act of 1933, 45 Stat. 31; as amended Act of August 24, 1935; 49 Stat. 753.

⁴ The Supreme Court has discussed the history of the milk order program and reviewed its operations on several occasions, including: Zuber v. Allen, 396 U.S. 168 (1969); Lehigh Valley Cooperative Farms v. United States, 370 U.S. 76 (1962); Brannan v. Stark, 342 U.S. 451 (1952); Stark v. Wickard, 321 U.S. 288 (1944); and United States v. Rock Royal Coop., 307 U.S. 533 (1939).

⁵ In the majority of federal orders, including order 1, buyers of milk for Classes II, III, and IV products pay for "milk" from farmers on the basis of the components of that milk, namely butterfat, milk protein, and nonfat solids (which are minerals, such as calcium, and lactose (milk sugar)). Changes in the prices set for those components, namely butterfat, are at issue here. However, for purposes of describing the general pooling framework it is not necessary to detail all of the component pricing and accounting system.

or "Producer Settlement Fund" mechanism, a Market Administrator collects payments from handlers based on the handler's use of milk and distributes payments to producers on the basis of the average class use value for the entire market.

B. The Association of Dairy Cooperatives in the Northeast

Amicus, ADCNE, consists of eight member dairy cooperatives: Agri-Mark, Inc.; Dairy Farmers of America; Dairy Lea Cooperative Inc.; Land O'Lakes, Inc.; Maryland and Virginia Milk Producers Cooperative Association, Inc.; O-AT-KA Cooperative; St. Albans Cooperative Creamery, Inc.; and Upstate Farms Cooperative, Inc. The members of ADCNE market in excess of 65% of the milk in Order 1, the federal order regulating the marketing of milk in the Northeast marketing area. Order 1, in turn, represents more than 20% of the milk in the Federal Milk Marketing Order system. St. Albans Cooperative Creamery, Inc. is a Vermont cooperative association of 575 dairy farmer members with headquarters at St. Albans, Franklin County, Vermont. Agri-Mark, Inc. is a Massachusetts cooperative association with 1500 member dairy farmers in Vermont, Maine, New Hampshire, Connecticut, Massachusetts, Rhode Island, and New York. Agri-Mark operates manufacturing plants at Cabot and Middlebury, Vermont and West Springfield, Massachusetts. Dairy Lea Cooperative Inc. is a New York cooperative with 2700 dairy farmer members in the states of Vermont, New York, Connecticut, Massachusetts, Pennsylvania, New Jersey and Ohio. Upstate Farms Cooperative, Inc. is a New York agricultural cooperative association of 420 member producers. Its headquarters is at LeRoy, New York. Dairy Farmers of America is a dairy cooperative headquartered in Kansas City, Missouri, with more than 22,000 member dairy farmers in 45 states. Land O'Lakes is a dairy cooperative, headquartered in Arden Hills, Minnesota, with members from California to New Jersey. Maryland and Virginia Milk Producers Cooperative Association, with principal offices in Reston

Virginia, has members in the east and southeast, from Pennsylvania to Georgia. O-At-Ka Cooperative of Batavia, New York, is a “federated” dairy cooperative, owned by member cooperatives which include Dairylea and Upstate Farms. O-At-Ka owns and operates a butter, powder, and specialty products manufacturing plant at Batavia New York.

The ADCNE cooperatives thus reflect a wide breadth of interests among dairy farmers, in the northeast and throughout the country. The association participates actively in the federal order hearing process because of its importance to the cooperatives and their members. ADCNE devotes considerable time and resources to analysis of proposals for amendment to federal orders and it did so in this proceeding. It supports the Department’s administration of the federal order program which emphasizes communication with the industry in order to keep regulations current with marketing conditions. It also supports the on-the-record rulemaking process for promulgating and amending federal milk order regulations. This process provides for open and thorough consideration of regulations before they are imposed upon the industry. Only because that process went awry in this proceeding and the association finds its members facing unanticipated marketing disorder and income losses has it elected to support plaintiffs’ request for preliminary relief.

C. Factual and Procedural Background

The hearing of May 8 to 12, 2000, was called pursuant to the mandate of Congress⁶ that the Secretary hold formal⁷ rulemaking proceedings in 2000 to reconsider the price formulas for

⁶ Section 1000(a)(8) of P.L. 106-113, 115 Stat. 1501 (Nov. 29, 1999), adopting by reference Sec. 1(c) of H.R. 3428.

⁷ The rules which were effective January 1, 2000, had been developed pursuant to notice and comment rulemaking which had been specially directed by prior legislation, referred to as the FAIR Act (Federal Agriculture Improvement and Reform Act), Pub.L. 104-127, April 4, 1996,

Class III and IV milk which had been promulgated effective January 1, 2000. The hearing was held pursuant to a Notice published in the Federal Register on April 14, 2000, 65 Fed. Reg. 20094, *et seq.* The Notice consisted of 32 proposals, 31 of which were submitted by the industry at the invitation of the Secretary. The final proposal was a routine proposal submitted by the Department alerting the industry to the possible need to amend portions of the regulations not directly in issue in order to “conform” the regulations in whole to effectuate the amendments adopted.

None of the proposals suggested a change in the calculation of the Class III butterfat price from its longstanding linkage with butter values. When, at the hearing, Dr. David Barbano of Cornell University testified with respect to a proposal of his that would have linked the Class III butterfat price to cheese values, rather than butter values, the Administrative Law Judge ruled that it was not within the scope of the hearing, stating: “I’m going to rule that Dr. Barbano’s pricing formula is not one of the proposals being considered at this hearing.” (Transcript of hearing, p. 790) No other witnesses testified in support of Dr. Barbano’s proposal, or any similar proposals, and no witnesses testified or presented evidence commenting upon that proposal, since it was not viewed as part of the proceeding.⁸ Neither ADCNE (nor any other parties to our knowledge) discussed the Barbano proposal, or any proposals similar in concept or content in post-hearing briefs. This again reflected the understanding of the hearing participants that these issues were not open upon the hearing record.⁹ While all parties now have an opportunity to file

110 Stat. 915, codified in part at 7 U.S.C. § 7253.

⁸ Declaration of Dennis J. Schad; Declaration of Elvin Hollon.

⁹ Declarations of Schad, Shepard, and Hollon.

exceptions to the tentative final rule on this issue, the ability to address all of the issues involved is severely compromised by virtue of the lack of an evidentiary record on the proposals.¹⁰

When the tentative final order was published by the Secretary, the industry was required to analyze *de novo* the Secretary's now-adopted Class III butterfat and protein pricing changes. That analysis has led to the conclusion that the adopted pricing system, however well-intended, will have serious adverse consequences in the marketplace. In particular, there will be an immediate loss of sales and income because of the displacement of Class III butterfat by lower-priced alternative fat sources, domestic or imported.¹¹ With this change in fat-sourcing by Class III fat users will come marketing disorder in the marketing of cream on a day to day basis by handlers in federal order markets, both cooperative and proprietary. Furthermore, when Class III becomes the mover of Class I prices in the federal orders, producers will suffer massive losses in income because of the reduction in the price of Class III protein values, the primary ingredient in the Class III skim milk price.

III. ARGUMENT

A. Plaintiffs Will Prevail on the Merits of Their Claim.

Plaintiffs will prevail on the merits of their claim because the Secretary's adoption of the proposed Class III pricing portion of the regulation plainly violates the procedures for on-the-

¹⁰ The Department's rules of procedure, 7 CFR § 900.9(b), provide with respect to the basis for post-hearing briefs and the Department's decision: "**Factual material other than that adduced at the hearing or subject to official notice shall not be alluded to therein, and, in any case, shall not be considered in the formulation of the marketing agreement or marketing order.**" (Emphasis supplied)

¹¹ See Declarations of Herbert E. Shepard and Elvin Hollon.

record rulemaking established under the AMAA¹², required by the Administrative Procedure Act¹³, and detailed in the Secretary's own regulations.¹⁴ Hearings for the amendment of federal milk market orders are not typical notice and comment rulemaking as conducted by many federal agencies pursuant to 5 U.S.C. § 553. As the notice of hearing herein pointed out, the hearing was "governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code." 65 Fed. Reg. 20094. The scope of the hearing was defined by the proposals listed. Again, as the notice of hearing stated: "As detailed below, thirty-two proposals (and any appropriate modifications thereof) will be heard. A number of other proposals were rejected in that they lacked authority, were beyond the purpose of the hearing, or were otherwise inappropriate." 65 Fed. Reg. at 20095. Thus, the Secretary's notice set out, and confirmed, the industry's understanding of what was at issue in the hearing and that it was limited to the proposals accepted in the hearing notice and any appropriate modifications thereof.

Thus, when Dr. Barbano of Cornell testified to a proposal not included in the notice, certain parties objected. The resulting ruling by the Administrative Law Judge confirmed that Dr. Barbano's proposal, the only proposal verbalized at the hearing to change the basis for pricing Class III butterfat, was not part of the hearing. With that ruling, all hearing participants understood those issues not to be subject to consideration at the hearing and there was no subsequent testimony with respect to Dr. Barbano's proposal, or modifications of it. In addition, and just as important, there were no arguments in post-hearing briefs of any parties, to ADCNE's

¹² See 7 USC § 608c(3), (4), (17), and (18).

¹³ 5 USC §§ 556-557; 5 USC § 706(2) (D).

¹⁴ 7 CFR Part 900.1–900.18.

knowledge, which addressed these issues since they were understood not to be present in the hearing. ADCNE's hearing spokesman, Dennis J. Schad, Director of Marketing and Regulatory Affairs for Land O'Lakes, succinctly summarized this situation in his declaration, ¶ 6:

ADCNE analyzed and took a position on each proposal at the hearing. I testified for the Association with respect to those positions. We took no position, presented no testimony or evidence, and advocated no position in our post-hearing brief on changing the calculation of the butterfat price in class III because no such changes were proposed or advocated by anyone at the hearing, other than Dr. Barbano whose proposal was held by Administrative Law Judge Hunt not to be included in the scope of the hearing. If Dr. Barbano's proposal or any like it would have been included in the agenda of the hearing, ADCNE would have had the opportunity to study its implications and present testimony and evidence at the hearing with respect to whether we would support or oppose its adoption.

A detached review of this record will lead the Court to conclude that the proposal for Class III butterfat and protein pricing in the tentative final rule was not part of the hearing and plaintiffs, therefore, will prevail on the merits of their contention.

The Secretary's position seems to be that certain language in the hearing notice, which was not part of any proposal, can serve as the basis for the regulation adopted in the tentative final rule. This amounts to an invitation to the Court to authorize action by the Department without the industry having any reasonable understanding about what is at issue. The Court should not accept this invitation to extend the Agency's prerogatives beyond the statutory and regulatory scope.

As the Secretary's own notice sets out, the proposals accepted for hearing, and any appropriate modifications thereof, define the scope of the hearing. The Secretary's brief does not cite any proposal which was appropriately modified to embody the adopted Class III pricing. If the Secretary's comments under the heading "Class III and Producer Butterfat Prices" after

proposal 32 in the hearing notice were intended to publish a proposal that the Class III butterfat price should be changed to “be based directly on the value of butterfat in cheese instead of the value of butterfat in butter,” it is impossible to reconcile the Secretary’s representatives’ acquiescence in the ruling with respect to Dr. Barbano’s testimony. In fact, the Secretary’s comment in the hearing notice (upon which she now relies) with respect to Class III and producer butterfat prices was linked explicitly to the proposals to change the Class IV butterfat price (all of which were rejected) and was not an independent proposal that the Class III butterfat price should be changed. If the Secretary intended her language to authorize the action now taken, the Department at a minimum had the obligation to place the hearing participants on notice that it was interpreting the scope of the hearing in that manner. Not having done so, it was not free to expand the scope of the hearing *sub silentio* and adopt a proposal which no hearing participants thought was on the table.

The decision of this court in National Farmers Organization v. Lyng, 695 F. Supp. 1207 (D.D.C. 1988), demonstrates that both the Secretary and the industry have construed the proposals in the notices of rulemaking hearings to define the scope of those hearings. In National Farmers Organization, the plaintiff objected to the Department’s refusal to include its proposals in a milk order hearing notice. The proposals, which called for payment to farmers for milk three times a month, rather than once or twice, had been rejected by the Secretary as lacking sufficient industry support. The Court considered this truncation of the subject matter of the hearing arbitrary and capricious and issued a preliminary injunction, forbidding the hearing without the proposals, and subsequently ordered their inclusion in an amended hearing notice. The underlying rationale was clearly that the proposals in the hearing notice set the agenda for the

hearing and participants and the Department were bound thereby. The same principle applies to this matter.

B. **Dairy Farmers Will Suffer Irreparable Injury as a Result of the Implementation of This Rule If Plaintiffs' Request for a Preliminary Injunction Is Not Granted.**

Plaintiffs, and the dairy farmer members of the amicus association and its cooperatives, will suffer immediate and irreparable injury in two respects if the requested preliminary injunction is not granted: First, there will be an immediate and irreparable loss of income to producers because of the abrupt change in the price of Class III butterfat. As the declaration of Mr. Shepard for St. Albans Cooperative Creamery and Mr. Hollon for Dairy Farmers of America detail, purchasers of Class III butterfat will immediately seek alternative, less expensive sources for their Class III butterfat needs. This result is confirmed by the declarations submitted by other persons in support of Plaintiffs and the amicus National Cheese Institute. This loss of markets, which will mean a loss of income, is not subject to any remedy at law. It is beyond remediation through legal procedures and, therefore, by definition irreparable. In addition to these immediate market effects, implementation of the rule will mean that producers will be in jeopardy of suffering the huge losses which would come from the use of the Class III price as the mover for Class I prices when that occurs.

Secondly, ADCNE, and all similarly-situated members of the industry including Plaintiffs, will immediately have lost their statutory rights to participate in the development of regulations to which they are subject. Certainly, these statutory rights are entitled to no less protection than direct economic losses. That is the clear rationale of Judge Greene's ruling in National Farmers Organization v. Lyng, supra, where preliminary and permanent injunctive relief

was granted to correct the notice of a milk order hearing which had been arbitrarily and capriciously drawn to eliminate the proposals advanced by the National Farmers Organization.

The nature of this loss of right is underscored by the contention made in the Government's brief that no preliminary relief need be granted since comments in opposition to the interim final rule can be submitted. The Secretary argues that she is "accepting comments through February 5, 2001, and Plaintiffs can present their **evidence** to the Secretary through that channel". (Brief of Defendant at Page 21, emphasis supplied) This is incorrect as a matter of law under the Secretary's own regulations and highlights the harm which Plaintiffs have suffered. Precisely because this is an on-the-record rulemaking proceeding, there is no opportunity to provide additional evidence at this stage. Evidence was closed when the hearing was closed and the loss of the opportunity of Plaintiffs and others to critique the rule (which has been adopted) by presenting evidence is now irreparable if the rule is implemented. The Defendant's rules of practice for these hearings make this procedure absolutely clear. They state:

"Briefs, proposed findings and conclusions. . . . [F]actual material other than that introduced at the hearing or subject to official notice shall not be alluded to therein, and, in any case, shall not be considered in the formulation of the marketing agreement or marketing order." 7 C.F.R. § 900.9 (b).

Whether this would be a different case if parties could now submit evidence which they did not have the opportunity to at the hearing in May need not be decided. Evidence may not be submitted now or in any exceptions on February 5 and all participants including Plaintiffs (and amici) have been irreparably and permanently denied that opportunity if the regulation is allowed to go into effect. The preliminary injunction should therefore be granted.

IV. **CONCLUSION**

On the basis of the foregoing arguments, amicus, the Association of Dairy Cooperatives in the Northeast, respectfully requests that the Court grant the preliminary injunction which Plaintiffs have requested.

Respectfully submitted,

MILSPAW & BESHORE

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By: _____

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