

# 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](mailto: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

on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The established criteria are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these proposed amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This notice 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.

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed rule on small entities. Also, parties may suggest modifications of this proposal for the purpose of tailoring their applicability to small businesses.

*Prior documents in this proceeding:*

*Notice of Hearing:* Issued February 26, 2002; published March 4, 2002 (67 FR 9622).

*Correction of Notice of Hearing:* Issued March 14, 2002; published March 19, 2002 (67 FR 12488).

### Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this tentative final decision with respect to proposed amendments to the tentative marketing

agreements and the orders regulating the handling of milk in the Pacific Northwest and Western marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Room 1083–STOP 9200, 1400 Independence Avenue, SW, Washington, DC 20250–9200, by the October 17, 2003. Six (6) copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The hearing notice specifically invited interested persons to present evidence concerning the probable regulatory and informational impact of the proposals on small businesses. While no evidence was received that specifically addressed these issues, some of the evidence encompassed entities of various sizes.

The proposed amendments set forth below are based on the record of a public hearing held at Salt Lake City, Utah, on April 16–19, 2002, pursuant to a notice of hearing issued February 26, 2002, and published March 4, 2002, (67 FR 9622) and a correction of notice of hearing issued March 14, 2002, and published March 19, 2002 (67 FR 12488).

The material issues on the record of the hearing relate to:

1. Simultaneous pooling of milk on a Federal and a State-operated milk order.
2. Pooling Standards of the Western Order.
  - a. Supply plant performance standards.
  - b. Cooperative supply plant performance standards.
  - c. Standards for Producer milk.
  - d. Proprietary bulk tank handler provision.
  - e. Establishing pooling standards for “State-units.”
3. Marketwide Service Payments.
4. Pooling provision clarifications.
5. Determining whether emergency marketing conditions exist that would warrant the omission of a recommended decision and the opportunity to file written exceptions.

### 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. *Simultaneous Pooling on a Federal and State-Operated Milk Order*

Two proposals, published in the hearing notice as Proposals 1 and 10, seeking to exclude the same milk from being simultaneously pooled on the Pacific Northwest and Western orders and any State-operated order which provides for marketwide pooling, should be adopted immediately. The practice of pooling milk on a Federal order and simultaneously pooling the same milk on a State-operated order has come to be referred to as “double dipping”. The Pacific Northwest and Western orders do not currently prohibit milk to be simultaneously pooled on the order and a State-operated order that provides for marketwide pooling. Proposals 1 and 10 were offered by Northwest Dairy Association (NDA), a cooperative association that markets the milk of their dairy-farmer members in the Pacific Northwest and Western milk marketing areas.

A witness appearing on behalf of NDA, testified that double dipping not only creates disorderly conditions in California, it also results in competitive inequities in Federal milk order areas. The NDA witness explained that once minimal pool qualification standards are met, milk pooled via this manner rarely is delivered to a Federal order marketing area.

The NDA witness provided evidence indicating that in 2001, over \$4.5 million was diverted from the Western Order pool and the producer blend price was reduced by an average of 10 cents per hundredweight (cwt) through double dipping. The witness was of the opinion that milk pooled through double dipping provided no service or delivery of milk from California yet the California milk receives the benefit of the Western order’s blend price.

The NDA witness testified that there was no evidence of double dipping presently occurring on the Pacific Northwest order. However, the witness was of the opinion that the Pacific Northwest order would be targeted. The witness drew this conclusion on the premise that as soon as the double dipping loophole is closed in other orders, California milk will be pooled on orders that do not yet prohibit the practice.

Two witnesses, one representing Gossner Foods, Inc. (Gossner), an ultra high temperature (UHT) fluid milk processor located in Utah, and the second, Utah Dairymen’s Association (UDA), a cooperative located in Utah, also provided testimony in support of Proposal 10. The witnesses concurred that by eliminating double dipping,

producers pooled on the order would benefit financially and enhance their ability to stay in business.

A witness representing River Valley Milk Producers Inc. (River Valley), a dairy farmer cooperative located in Southwestern Idaho, testified in support of eliminating double dipping. The witness was of the opinion that producers from outside of the marketing area should meet pooling standards by demonstrating actual performance in supplying the Western marketing area as a condition for pooling their milk and receiving the blend price. However, the witness stressed that producer milk which already participates in a State marketwide pool should be prohibited from participating in a Federal order pool.

The Commissioner of the Utah Department of Agriculture and Food testified in support of eliminating double dipping on the Western milk order. The witness testified that increasing volumes of California milk are diluting the Class I utilization of the market and lowering the blend price paid to producers. The witness found this to be patently unfair and stressed that double dipping lowers the income of Utah dairy farmers.

Three dairy farmers from Utah testified in support of prohibiting double dipping. These witnesses stated that double dipping on the Western order has had a significant negative impact on their pay prices. They maintained that it is unfair and wrong for dairy farmers to have their milk price reduced as a result of California milk being pooled on the order. One dairy farmer witness also added that the loose pooling provisions of the Western Order have resulted in unwarranted financial gain to those who do not supply the Class I milk market of the Western marketing area. This witness indicated that this contributed to the financial ruin of a quarter of Western Order dairy farmers over the past four years.

There was no direct opposition to eliminating or preventing double dipping. However, a witness testifying on behalf of the Dairy Farmers of America (DFA), a dairy farmer cooperative that markets the milk of their members in both orders and in most other Federal milk orders offered their own proposals. These proposals were published in the hearing notice as Proposals 2, 3, 4, 5, 6, 7, 8, and 9, and are offered, said the witness, to address broader pooling standards and concerns rather than focusing on the single pooling issue of double dipping. These proposals are discussed later in this decision.

For nearly 70 years, the Federal government has operated the milk marketing order program. The law authorizing the use of milk marketing orders, the Agricultural Marketing Agreement Act of 1937 (AMAA), as amended, provides authority for milk marketing orders as an instrument which dairy farmers may voluntarily opt to use to achieve objectives consistent with the AMAA and that are in the public interest. An objective of the AMAA, as it relates to milk, was the stabilization of market conditions in the dairy industry. The declaration of the AMAA is specific: "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce."

The AMAA provides authority for employing several methods to achieve more stable marketing conditions. Among these is classified pricing which entails pricing milk according to its use by charging processors differing prices on the basis of form and use. In addition, the AMAA provides for specifying when and how processors are to account for and make payments to dairy farmers. Plus, the AMAA requires that milk prices established by an order be uniform to all processors and that the price charged can be adjusted by, among other things, the location at which milk is delivered by producers (Section 608c(5)).

As these features and constraints provided for in the AMAA were employed in establishing prices under Federal milk orders, some important market stabilization goals were achieved. The most often recognized goal was the near elimination of ruinous pricing practices of handlers competing with each other on the basis of the price they paid dairy farmers for milk and in price concessions made by dairy farmers. The need for processors to compete with each other on the price they paid for milk was significantly reduced because all processors are charged the same minimum amount for milk, and processors had assurance that their competitors were paying the same value-adjusted minimum price.

The AMAA also authorizes the establishment of uniform prices to producers as a method to achieve stable marketing conditions. Marketwide pooling has been adopted in all Federal orders because of its superior features of

providing equity to both processors and producers, thereby helping to prevent disorderly marketing conditions. A marketwide pool, using the mechanism of a producer settlement fund to equalize on the use-value of milk pooled on an order, meets that objective of the AMAA of ensuring uniform prices to producers supplying a market.

The California State milk order program clearly has objectives similar to those of the AMAA. Exhibits presented at the hearing indicate that the California State order program has a long history in the development and evolution of a classified pricing plan and in providing equity in pricing to handlers and producers. Important as classified pricing has been in setting minimum prices, the issue of equitable returns to producers for milk could not be satisfied by only the use of a classified pricing plan. Some California plants had higher Class I fluid milk use than did others and some plants processed little or no fluid milk products. As with the Federal order system, producers who were fortunate enough to be located nearer Class I processors had been receiving a much larger return for their milk than producers shipping to plants with lower Class I use or to plants whose main business was the manufacturing of dairy products. Over time, disparate price differences grew between producers located in the same production area of the state which, in turn, led to disorderly marketing conditions and practices. These included producers who became increasingly willing to make price concessions with handlers by accepting lower prices and in paying higher charges for services such as hauling. Contracts between producers and handlers were the norm, but the contracts were not long-term (rarely more than a single month) and could not provide a stable marketing relationship from which the dairy farmers could plan their operations.

In 1967, the California State legislature passed and enacted the Gonsalves Milk Pooling Act. The law provided the authority for the California Agriculture Secretary to develop and implement a pooling plan, which was implemented in 1968. The California pooling plan provides for the operation of a State-wide pool for all milk that is produced in the State and delivered to California pool plants. It uses an equalization fund that equalizes prices among all handlers and sets minimum prices to be paid to all producers pooled on the State order. While the pooling plan details vary somewhat from pooling details under the Federal order program, the California pooling

objectives are basically identical to those of the Federal program.

It is clear from this review of the Federal and California State programs that the orderly marketing of milk is intended in both systems. Both plans provide a stable marketing relationship between handlers and dairy farmers and both serve the public interest. It would be incorrect to conclude that the Federal and California milk order programs have differing purposes when the means, mechanisms, and goals are so nearly identical. In fact, the Federal order program has precedent in recognizing that the California State milk order program has marketwide pooling. Under milk order provisions in effect prior to milk order reform, and under § 1000.76(c), a provision currently applicable to all Federal milk marketing orders, the Department has consistently recognized California as a State government program with marketwide pooling.

Since the 1960's the Federal milk order program recognized the harm and disorder that resulted to both producers and handlers when the same milk of a producer was simultaneously pooled on more than one Federal order. When this occurs, producers do not receive uniform minimum prices, and handlers receive unfair competitive advantages. The need to prevent "double pooling" became critically important as distribution areas expanded and orders merged. The issue of California milk, already pooled under its State-operated program and able to simultaneously be pooled under a Federal order, has essentially the same undesirable outcomes that Federal orders once experienced and subsequently corrected. It is clear that the Pacific Northwest and Western orders should be amended to prevent the ability of milk to be pooled on more than one order when both orders employ marketwide pooling.

There are other State-operated milk order programs that provide for marketwide pooling. For example, New York operates a milk order program for the western region of that State. A key feature explaining why this State-operated program has operated for years alongside the Federal milk order program is the exclusion of milk from the State pool when the same milk is already pooled under a Federal order. Because of the impossibility of the same milk being pooled simultaneously, the Federal order program has had no reason to specifically address double dipping or double pooling issues, the disorderly marketing conditions that arise from such practice, or the primacy of one regulatory program over another.

The other states with marketwide pooling similarly do not double-pool Federal order milk.

The record testimony and evidence show milk pooled on the Western order originates from locations distant from the area. However, this decision acknowledges that with the advent of the economic incentives for California milk to be pooled on the Western order and, at the same time, enjoy the benefits of being pooled under California's State-operated milk order program, more milk has come to be pooled on the order that has no legitimate association with the integral milk supplies of Western order pool plants. The association at present has been made possible only through what some market participants describe as a regulatory loophole. The record also supports concluding that the Pacific Northwest order should be similarly amended to preclude the ability to simultaneously pool the same milk on the order if the same milk is already pooled on a State-operated order that provides for marketwide pooling.

California milk should only be eligible for pooling on the Pacific Northwest and Western orders when it is not pooled on the California State order and when it meets the Pacific Northwest and Western order pooling standards. It is the ability of milk from California to "double dip" that is a source of disorderly marketing conditions for the Western order and should be preempted in the case of the Pacific Northwest order.

Proposals 1 and 10 offer a reasonable solution for prohibiting the same milk to draw pool funds from Federal and State marketwide pools simultaneously. It is consistent with the current prohibition against the same milk pooling simultaneously in more than one Federal order pool. Adoption of Proposals 1 and 10 will not establish any barrier to the pooling of milk from any source that actually demonstrates performance in supplying the Pacific Northwest and Western market's Class I needs. In this regard, adoption of Proposals 1 and 10 specifically prohibit the practice of double dipping which two other proposals (Proposals 2 and 9), discussed below, do not.

The amendatory language provided below has been modified by the Department but nevertheless accomplishes the intent of Proposals 1 and 10. As published in the hearing notice, amendatory language was proposed for the *Producer* definition of the Pacific Northwest and Western milk orders. The amendments adopted in this tentative decision to prohibit double dipping has been made in each respective order's *Producer milk*

definition. This change is made because milk marketing orders do not regulate producers in their capacity as producers. Additionally, the amendatory language adopted is consistent with that adopted in other milk orders where the practice of double dipping has been eliminated.

## 2. Pooling Standards of the Western Order

Testimony summaries regarding the pooling standards for the Western order are provided individually. The discussion of all pooling standards and the decision's findings and conclusions regarding pooling standards is presented immediately after testimony summary for d below.

### a. Supply Plant Performance Standards

An inadequacy of the supply plant pooling provision contributes to the inappropriate pooling of milk and the unwarranted erosion of the blend price received by those producers who are regularly and consistently serving the fluid demands of the Western marketing area. Proposal 3, offered by DFA, seeking adoption of a "net shipments" standard for supply plant deliveries to the order's distributing plants for the purpose of meeting the shipping standard, should be adopted immediately. A net shipments standard would exclude from a supply plant's qualifying shipments any transfer or diversion of bulk fluid milk products made by the distributing plant receiving the shipment.

The Western marketing order currently provides automatic pool plant status during the 6-month period of March through August for supply plants provided they were pool plants during each of the immediately preceding months of September through February. The current order does not provide for a net shipments method in determining if the supply plant performance standard has been met.

A witness appearing on behalf of DFA testified that a net shipments provision for pooling purposes would better ensure that milk physically received and retained at a distributing plant for Class I use would be a superior method of determining if the supply plant performance standard is being met. According to the witness, this feature would deter a supply plant from physically shipping milk into the facilities of a distributing plant only to have the milk reloaded and moved to another plant for uses other than Class I. The witness added that a net shipments provision also would ensure that milk being pooled was

demonstrating a service in meeting the Class I needs of the market.

A witness appearing on behalf of NDA testified in opposition to adopting Proposal 3. The witness was of the opinion that the net shipments provision for supply plants was designed and intended to reduce the amount of milk that could be pooled on the Western order. The witness explained that no other Federal milk order contained a net shipments provision because pool supply plants and other reserve plants provide a benefit by balancing the needs of the fluid market and pooling milk in a way that prevent disorderly marketing conditions from arising.

A witness representing Gossner opposed the establishment of a net shipment provision for the Western order. Additionally a witness representing Glanbia Foods, Inc. (Glanbia), and another witness representing Davisco Foods International (Davisco), offered testimony in opposition to the adoption of a net shipments provision for the Western order. Glanbia is a handler that operates two cheese plants located in the Western marketing area, and Davisco is a handler that operates proprietary cheese plants located in Idaho and in Minnesota. The Glanbia witness testified that a net shipments provision would preclude many producers located in Idaho from being pooled on the Western order when their milk is not needed for fluid use even though it is available and stands ready and able to supply the Class I needs of the marketing area. The Gossner witness indicated that market alternatives for pooling milk within the Western region were already very limited and the adoption of this proposal could entirely eliminate them. The Davisco witness testified that a net shipments provision would limit their ability to pool their producers and viewed this as essentially erecting barriers to market entry on the Western order.

A witness representing KDK, Inc. (KDK), a fluid processing plant located in Draper, Utah, also presented testimony in opposition to adopting a net shipments provision. The witness indicated that their plant transfers milk to exempt plants and, on occasion, to producer-handlers. The witness was of the opinion that adoption of a net shipments provision would result in milk currently associated with their plant no longer being able to be pooled because their supplier would be unable to meet the shipping standard.

#### b. Cooperative Supply Plant Performance Standards

A proposal, published in the hearing notice as Proposal 4, seeking to increase the cooperative supply plant pooling standard should not be adopted. Proposal 4, offered by DFA, seeks to increase the cooperative supply plant performance standard that specifies the percentage of cooperative producer milk that needs to be physically received by a distributing plant of the Western order to 50 percent in order for the cooperative supply plant to qualify as a pool plant of the order.

The Western order currently provides for a cooperative association that operates a plant as a unique type of supply plant. The cooperative association's plant must be located within the marketing area and at least 35 percent of the milk which the cooperative association handles is physically received at a Western order distributing plant during the month or the immediately preceding 12-month period.

In offering Proposal 4, the DFA witness testified that while no plants currently utilize the cooperative supply plant provision, some cooperatively-owned manufacturing plants may seek such status if DFA's other proposal to decrease the diversion limit standard, (discussed later in this decision) is adopted. The witness maintained that increasing the cooperative supply plant shipping standard is intended to ensure that plants opting for this type of pool plant status would be demonstrating adequate performance in supplying the Class I needs of the Western marketing area.

Opposition to Proposal 4 was offered by witnesses representing Glanbia, Gossner, and Davisco. The Glanbia witness was of the opinion that the proposal was designed to prevent market entry and participation by dairy farmers who may be attracted to the Western market. The Gossner witness stated that producers should have as many options as possible in marketing their milk because it brings about increased competition and may also bring better milk prices. The Davisco witness asserted that Proposal 4 would only decrease opportunities for Idaho milk from becoming pooled on the Western order. This would, the witness said, pressure Idaho producers to find other means by which to pool their milk on the Western order.

The NDA witness also testified in opposition to Proposal 4. The witness was of the opinion that increasing the cooperative supply plant performance standard would create competitive

inequities and may even create new disorderly marketing conditions. The witness indicated that to be able to utilize the cooperative supply plant provision, Class I sales would need to be increased and to accomplish this, a cooperative would likely need to engage in price cutting tactics to win sales from competitors. The witness predicted that an outcome such as this would be disorderly.

#### c. Standards for Producer Milk

A proposal, published in the hearing notice as Proposal 6, seeking to lower the diversion limit standard for producer milk should not be adopted. This proposal was offered by DFA. Specifically, Proposal 6 seeks to reduce the diversion limit for producer milk to nonpool plants to 70 percent of total receipts. The Western order currently provides a diversion limit standard for producer milk of 90 percent of total milk receipts. The DFA witness was of the opinion that the pooling of milk which does not demonstrate a service in supplying the needs of the Class I market is inconsistent with Federal order policy. Returns to producers who regularly supply the Class I market are unnecessarily reduced when milk is pooled that cannot demonstrate such service, the witness asserted.

The DFA witness also testified that milk which does not actually supply the Class I needs of the market, but shares in the revenue generated from fluid milk sales, is an indicator of faulty pooling provisions. The witness asserted that if the current pooling standards are not amended, local dairy farmers who are actually supplying the local Class I market will continue to receive lower returns.

The DFA witness testified that the Western order's current diversion limit standard of 90 percent is inadequate because it allows milk to be pooled on the order than can not demonstrate a regular and consistent service in meeting the needs of the fluid market. According to the witness, it is appropriate to lower the limit on the amount of producer milk that pool plants can divert to nonpool plants.

The Commissioner of the Utah Department of Agriculture and Food testified in support of Proposal 6. The witness reasoned that by lowering the diversion limit standard, prices paid to Utah dairy farmers would increase. Lowering the diversion limit standard would increase the relative Class I use of milk pooled on the order, explained the witness. It would also allow Utah family dairy farms to compete fairly, and be compensated more equitably for the service they provide, the witness

said. If the diversion limit standard is not lowered, cautioned the witness, dairy farms in Utah will continue to be endangered and result in harming Utah's rural communities.

A witness representing UDA, testified in support of Proposal 6. This witness stated that reducing the diversion limit standard from 90 to 70 percent would result in similar diversion limit standards in effect in other Federal milk orders such as the Arizona-Las Vegas, Mideast, Appalachian, Central and Southwest orders. The UDA witness added that lowering the diversion limit standard also would remedy some of the financial damage borne by Utah and Idaho milk producers resulting from the reform of Federal milk marketing orders in 2000.

A witness representing River Valley also testified in support of lowering the Western order's diversion limit standard. The witness, however, supported lowering the standard to 80 percent, not the 70 percent proposed by DFA. The witness expressed concern about the consequences of easily pooling large volumes of milk on the Western order. The witness provided evidence showing that the amount of milk pooled on a daily basis increased by more than 5.5 million pounds between October and November 2001—a 58 percent increase. The witness hypothesized that an 80 percent diversion limit would continue to allow handlers the ability to efficiently divert milk to nonpool plants while also providing a smoother regulatory transition for regulated handlers.

Seven Utah dairy farmers provided testimony supporting the lowering of the diversion limit standard. The witnesses were of the opinion that the pooling standards adopted as part of Federal milk order reform created loopholes that have caused some handlers and producers to be financially rewarded without the need to demonstrate actual shipments of milk for the Class I market. As a result, the witnesses said, dairy farmers have observed that their blend price is lower than it otherwise would be. These witnesses asserted that dairy farmers should not be permitted to collect money from their fellow dairy farmers if they do not demonstrate performance in supplying the fluid needs of the market.

The witness representing Gossner testified in opposition to Proposal 6. The witness was of the opinion that great disruption would occur to their business operation if the diversion limit standard is lowered. The witness explained that a large portion of their Class I sales are contracts with governmental agencies. The contracts

they hold are bid annually, the witness said, and the loss of a contract would make it very difficult for them to meet the proposed pooling standards.

The Gossner witness also asserted that DFA holds a virtual monopoly in supplying the Class I market in Utah and Southern Idaho. In this regard, the witness advocated the view that dairy farmers are best served when they have more than one buyer for their milk and that Gossner is trying to provide producers an alternative Class I market for their milk. The witness stated that producers would benefit by maintaining a 90 percent diversion limit standard because it leaves Gossner with the flexibility to add producers for pooling as needed and maintain the flexibility to react to changing marketing conditions.

A witness representing Glanbia also testified against lowering the diversion limit standard. The witness was of the opinion that the proposed change was an unwarranted attempt to disassociate much of Idaho's historically pooled milk supply because it is not needed for fluid use. If diversion limits are decreased, the witness said, a large portion of their producer milk would not be pooled. If a producer wished to remain pooled, the witness explained, they would be forced to join a cooperative whose supply is large enough to meet the proposed standards. If adopted, the witness concluded, the new diversion limit standard would inhibit a producer's ability to choose how to market their milk and remain pooled on the order.

The witness representing Magic Valley Milk Producer Association, Inc. (Magic Valley), testified in opposition to Proposal 6. Magic Valley is a milk marketing cooperative located in Idaho that has producer members in both Idaho and Utah. The witness was of the opinion that adoption of Proposal 6 would severely hinder Magic Valley's ability to pool the milk of their producers thereby placing them at a competitive disadvantage in their ability to market the milk of their members at competitive prices. For example, the witness explained, with the 90 percent diversion limit standard in effect from January 2001 to March 2002, the monthly volume of milk pooled on the order averaged 396,900,356 pounds. If a 70 percent standard had been in effect over that same time period, the witness contrasted, the monthly average volume of milk that could have been pooled would have been 285,410,615 pounds. The witness concluded from this example that on average, about 111,489,741 pounds would no longer have been able to be pooled.

The witness representing Davisco, also testified in opposition to lowering the diversion limit standard. The witness was of the opinion that disorderly marketing in the Western market already exists and attributed the disorder to the pooling standards adopted as part of Federal milk order reform. Since January 1, 2000, the witness emphasized, Davisco had been unable to pool two-thirds of their producers. The witness concluded that their inability to pool all of their producers would be remedied by raising the diversion limit standard to 95 percent or by suspending the diversion limit standard altogether.

The witness representing NDA also testified in opposition to lowering the diversion standard. Not only would there be less milk that could be pooled, the witness noted, but the current Western order already pools far less than the total milk production that occurs within the marketing area. The witness concluded from this observation that lowering the diversion limit standard would only make it more difficult for producers to pool their milk on the order. The witness was of the opinion this would give rise to disorderly marketing conditions in a number of forms including the use of "price incentives" serving to undercut the published Class I price, the potential expansion or creation of new bottling operations which could be used to "raid" the retail market, the "paper-pooling" of milk on other Federal milk orders, and being charged a fee for the benefit of being pooled on the order.

The NDA witness estimated that if Proposal 6 is adopted, approximately 150 million pounds, or about 38 percent of the monthly average volume of milk pooled in 2001 would no longer be pooled. This occurrence, according to the witness, would bring an immediate shift in the balance of economic power within the Western order. This result, together with the forms of disorderly conditions previously described cited above, the witness asserted, also would result in political reaction, Congressional review, and waning political support for the Federal milk order program.

The NDA witness asserted that the practice of buying and selling pooling rights is an important indicator and cause of disorderly marketing conditions. The witness explained that this is because a person selling pooling rights can gain competitive advantages not available to others thus compounding disorderly marketing conditions. Finally, the witness concluded, no justification exists for lowering the diversion limit standard of

the Western order, adding that perhaps the standard should be raised.

A proposal, published in the hearing notice as Proposal 7, seeking to establish a "netting" provision for diverted milk from a pool distributing plant by the amount of any transfers out of that plant, should be adopted immediately. This proposal was offered by DFA. The Western order does not currently contain this provision as a feature of how the order defines producer milk.

The DFA witness testified that by adopting a "netting" provision, a distributing plant's ability to divert milk would be based on the actual amount of milk retained by the distributing plant. According to the witness, this feature would deter a plant from physically receiving milk into the facility only to have milk reloaded and moved to another plant for uses other than Class I. The witness added that the provision would ensure that milk being pooled was demonstrating a service in meeting the Class I needs of the market.

Many witnesses testified in opposition to Proposal 7. A witness representing NDA was of the opinion that if adopted, the provision would reduce the ability to pool milk by limiting the ability of a plant to maximize the use of its pooling base. Witnesses representing Davisco, Glanbia, Gossner and Magic Valley all concurred that adoption of DFA's proposal would have a dramatic negative impact on their ability to pool the milk of their producers. The witnesses were all of the opinion that Proposal 7's only real purpose was to prevent many Idaho producers from having their milk pooled on the Western order.

#### d. Proprietary Bulk Tank Handler Provision

A proposal, published in the hearing notice as Proposal 5, seeking to eliminate the *Proprietary bulk tank handler* (PBTH) provision of the Western order, should be adopted immediately. The proposal was offered by DFA. The PBTH provision is a pooling provision and feature of only the Western order. It provides for a person who operates a plant that produces Class II, III, and IV milk products, and who operates a truck that picks up the milk of a producer, to be a regulated handler of the order.

According to the DFA witness, PBTH's are able to pool large volumes of milk that do not actually service the Class I market. The witness testified that PBTH milk is received into a plant to qualify it for pooling and is subsequently pumped back out of the plant to be delivered to a manufacturing

plant. The witness emphasized that milk pooled through a PBTH in this manner never services the Class I market.

The DFA witness testified, however, that their major concern with the PBTH provision was that some entities are purchasing milk below the order's minimum prices from PBTH's. The witness asserted that this results in inequity among handlers in the minimum prices they pay for milk and undermines the key pricing principle of the Federal milk order system of uniform prices to handlers. The witness testified that in removing the PBTH provision handlers currently using the provision could be able to pool their milk by utilizing other provisions that are contained in the order.

In brief, DFA asserted that the record evidence clearly demonstrated that large volumes of milk are pooled on the order through the PBTH provision, but demonstrates only minimal service to the Class I market. DFA noted that under the current diversion limit standard, a PBTH can pool 20 loads of milk for every one load used in actual Class I production. More importantly, DFA stressed that this one load of milk is sold at less than minimum class prices.

The DFA brief maintained that pooling milk is not an entitlement. Instead, milk must demonstrate actual performance to the Class I market. DFA concluded that because the order contains other provisions that are more performance based through which a PBTH could qualify for pooling, the PBTH provision should be removed.

A witness representing River Valley testified in support of eliminating the PBTH provision. The witness viewed the provision as a loophole in the Western order's pooling provisions that allows manufacturing plants to qualify milk for pooling on the order that does not demonstrate any reasonable service in supplying the Class I needs of the market. The witness asserted that PBTH's have used financial incentives to solicit producers located near distributing plants to become patrons and then use those nearby producers to qualify all the milk of a PBTH. Because the producers were already delivering milk to the distributing plant, the witness emphasized, no actual new milk is being made available to service fluid demand, but the amount of milk that can be pooled is significantly increased. The witness noted that this milk is being used in Class II, III, and IV uses. The witness characterized pooling milk in this way as fostering disorderly marketing conditions which justifies

removing the PBTH provision from the Western order.

A witness representing NDA testified in opposition to Proposal 5. The NDA witness said that the PBTH provision is provided as a more efficient way for some handlers to operate their plants. The witness is of the opinion that the goal of Proposal 5 is to make it more difficult for some producers to be pooled. According to the witness, accomplishing this end should not be a reason for its removal from the order. If there are problems with the PBTH provision it should be modified, not eliminated, the witness stressed.

A brief filed by NDA also expressed opposition to removing the PBTH provision. NDA agreed that all pool plants should be accountable to the pool at minimum class prices and that different wholesale prices for milk between handlers can create disorderly marketing conditions. Nevertheless, NDA also held there would be no guarantee that uniformity of pricing between handlers would actually be achieved by eliminating the provision. NDA stressed that it is a handler's need to pool milk that is the catalyst for selling milk below class prices.

Eliminating the PBTH provision would, maintained NDA, agitate the problem and cause handlers to seek other ways to pool milk. Rather than its elimination, the NDA witness advocated modification of the provision to address its shortcomings.

Two witnesses representing Glanbia and Davisco also testified in opposition to Proposal 5. These witnesses stated that if adopted, the proposal would create market disorder and discontent for some Idaho producers who would no longer be able to pool their milk on the Western order. The Davisco witness asserted that Federal order reform adopted performance standards that could not accommodate pooling the milk supply of the consolidated Western order, even though this milk supply stood willing and available to serve the Class I needs of the market. Under the current standards, Davisco is able to pool less than half of the producers they did prior to milk order reform, the witness said. The Davisco witness estimated that if the PBTH provision is removed, they would be able to pool less than 5 percent of their milk supply.

The Davisco witness emphasized that their milk stands ready to supply the Class I market, but is has never been needed for the fluid market. In this regard, the witness was of the opinion that producers should not be penalized by not having the ability to pool their milk simply because it is not needed for Class I use.

The Glanbia witness was of the opinion that eliminating the PBTH provision would inhibit the ability and freedom of dairy farmer to choose how to market their milk. The witness thought this may also force producers to join a cooperative to assure that their milk would be pooled on the order, an outcome consistent with lowering the diversion limit standard. A brief submitted by Glanbia and Davisco continued stressing their opposition to Proposal 5. Their brief maintained, among other things, that elimination of the PBTH provision would prevent many producers, who stand willing to service the Class I market, from being able to pool their milk on the Western order.

A witness representing Stoker Wholesale, Inc., a pool distributing plant located in Idaho, testified against eliminating the PBTH provision. The witness indicated that if adopted, the proposal would jeopardize their ability to remain competitive with other processors in the marketing area. The Stoker witness indicated that their main concern was that the removal of the PBTH provision would allow a dominant cooperative to gain too much market power. In this regard, the witness foreshadowed that Stoker might be forced to purchase milk from a dominant cooperative and along with paying the order's minimum class prices, would also be forced to pay other charges dictated by the cooperative. Such an outcome would be devastating to Stoker and hinder their ability to compete in the Western marketing area, concluded the witness.

Two Idaho dairy farmers testified in opposition to Proposal 5. The farmers were of the opinion that if the PBTH provision was eliminated, farmers would have to pool their milk through a cooperative. One witness testified that this would eliminate the number of outlets available to farmer's to market their milk and put the market's milk supply in the hands of fewer entities. The witness also noted that while the fewer entities controlling the milk supply could raise their prices, it would also result in higher retail costs to consumers. The witnesses were also of the opinion that the low milk prices they are facing arise from complicated economic and political factors and are not caused by dairy farmers having the opportunity to pool their own milk.

A proposal, published in the hearing notice as Proposal 11, seeking to reach a balance of assuring handler equity while retaining the PBTH provision should not be adopted. Proposal 11 was offered by Meadow Gold Dairies (Meadow Gold). Meadow Gold is a dairy

processor regulated in the Western order. Because this decision eliminates the PBTH provision from the Western order, amending the provision is rendered moot.

Two companion proposals to Proposal 11, also offered by Meadow Gold, published in the hearing notice as Proposals 12 and 13, should not be adopted. Proposals 12 and 13 offer language for the Western order to address payment obligation changes which would arise from modifying the PBTH provision. Because the PBTH provision is eliminated from the order, the need for these proposals are also rendered moot.

Similarly, another proposal, published in the hearing notice as Proposal 14, offered by the Market Administrator to provide additional clarity to the PBTH definition, is not adopted. The need to provide additional clarity to a provision that is being eliminated is also rendered moot.

A witness representing Meadow Gold viewed Proposals 11 and 13 as a remedy to the alternative to removing the PBTH provision and Proposal 12 as ensuring that pool plants must pay PBTH's at least the order's minimum class prices. According to the Meadow Gold witness, their major concern with the PBTH provision is that plants buying from a PBTH are not required to pay minimum class prices. Proposals 11 and 13 would ensure that milk is considered producer milk at the pool plant and that the pool plant is responsible for accounting to the pool and paying producers, the witness said. This would give the MA authority to verify payment to the Producer-Settlement Fund and to the producers supplying the PBTH, the witness said.

The witness maintained that the AMAA provides authority for the Secretary to ensure that handlers are paying minimum class prices for their milk purchases. The witness indicated that Meadow Gold would not object to removing the PBTH provision if the Department determined that the problems arising from the provision would be more appropriately remedied by its removal from the order.

A witness representing NDA, testified that while NDA understood the current problems regarding the PBTH provision, they had yet to determine their position on Proposals 11 through 13. However, in their post-hearing brief, NDA expressed support of Proposals 11, 12 and 13. They acknowledged that Proposals 11 and 13 are presented as a "package" and viewed Proposal 12 as an alternative. NDA asserted that they had no preference as to which approach should be adopted and expressed

confidence in the Department for rendering its decision on how best to address the PBTH issue.

A witness representing DFA testified that while they support evidence presented in support of Proposals 11 through 13, DFA believed that removal of the PBTH provision was a more appropriate course of action.

Witnesses representing Glanbia, Davisco, and Stoker testified in opposition to Proposal 11. The witnesses stated that they could not support this proposal because it would essentially regulate transactions between one type of handler to another while leaving other similar transactions such as bulk transfers, packaged milk transfers, custom bottling, tolling arrangements, and pooling fees untouched. The Davisco witness was also of the opinion that the AMAA does not grant the Secretary authority to regulate handler-to-handler transactions. The Stoker witness opposed Proposals 11 through 13 for the same reasons given in opposing the removal of the PBTH provision.

The witness representing NDA supported Proposal 14, stating that they were of the opinion that the Market Administrator's proposal would assist in the interpretation and administration of the order.

The pooling standards of all milk marketing orders are intended to ensure that an adequate supply of milk is supplied to meet the Class I needs of the market and to provide the criteria for identifying the milk of those producers who are reasonably associated with the market as a condition for receiving the order's blend price. The pooling standards of the Western order are represented in the *Pool Plant, Producer, Proprietary bulk tank handler*, and the *Producer milk* provisions of the order. Taken as a whole, these provisions are intended to ensure that an adequate supply of milk is available to meet the Class I needs of the market. In addition, these provisions provide the criteria for identifying those producers whose milk is reasonably associated with the market and thereby share in the marketwide distribution of proceeds arising primarily from Class I sales. Pooling standards of the Western order 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 eligible to share in the marketwide pool. This is because it is the added value from the Class I use of milk that adds

additional income, and it is reasonable to expect that only those producers who consistently bear the costs of supplying the market's fluid needs should be the ones to share in the distribution of pool proceeds. Pooling standards are also needed to identify the milk of those producers who are providing service in meeting the Class I needs of the market. If the pooling provisions do not reasonably accomplish these aims, the proceeds that accrue to the marketwide pool from fluid milk sales are not properly shared with the appropriate producers. The result is the unwarranted lowering of returns to those producers who actually incur the costs of servicing and supplying the fluid needs of the market.

Similarly, pooling standards should provide for those features and accommodations that reflect the needs of proprietary handlers and cooperatives in providing the market with milk and dairy products. When the use of a pooling feature provision deviates from its intended purpose and gives rise to conditions that are contrary to the objectives of classified pricing and marketwide pooling as articulated in the AMAA, it is appropriate to re-examine the need for continuing to provide that feature as a necessary component of the pooling standards of the order. Because one of the objectives of classified pricing is assuring that all similarly situated handlers regulated under the terms of an order pay the same classified use-value, a pooling feature which can be used to circumvent this objective should be considered as inappropriate for inclusion in the order.

The Final Decision of Federal milk order reform examined and discussed the various pooling standards and features of the pre-reform orders for their applicability in new and larger consolidated milk orders. The pooling standards and features adopted for the consolidated Western Order were designed to reflect and retain those standards and features of the pre-reform orders so as not to cause a significant change and indeed to provide for the continued pooling of milk that had been pooled by those market participants.

The record provides evidence to conclude that a performance standard feature for supply plants is needed. Additionally, a pooling feature in defining producer milk is also needed to provide an appropriate limit on diversions by distributing plants. The lack of adequately defining how much milk a distributing plant can divert contributes to the inappropriate pooling of milk through the diversion process. Some milk being pooled under the Western order by diversion is not an

integral reserve supply of the distributing plant diverting milk. These inadequacies inappropriately pool milk classified at lower-valued uses which results in an unwarranted lowering of the blend price to those producers whose milk actually and consistently demonstrates service to the Class I needs of the market.

The record evidence also provides strong evidence that the *Proprietary bulk tank handler* provision gives rise to disorderly marketing conditions because the order is unable to establish minimum prices that are uniform among regulated handlers, a requirement of Section 608c(5) of the AMAA. The record clearly reveals that this pooling feature of the Western order is being used as a means to pool milk that could not otherwise be pooled and allows for the sale of milk for Class I use below the order's minimum Class I price. While this provision served its purpose in the pre-reform Southwest Idaho-Eastern Oregon order, its purpose and usefulness for the larger consolidated Western order can no longer be justified.

This decision finds that some milk is being pooled and is receiving the benefit of the Western order blend price without demonstrating actual and consistent service in supplying the Class I needs of the Western milk marketing area. This finding is attributed to inadequate pooling standard features needed to accomplish the intent of the order's pooling standards. The pooling provisions provided in the Final Decision of milk order reform established pooling standards and pooling features that envisioned the needs of the market participants resulting from the consolidation of two pre-reform milk marketing areas to form the current Western milk marketing area. The milk order reform Final Decision did not intend or envision that the pooling standards and pooling features adopted would result in the sharing of Class I revenues with those persons, or the milk of those persons, who would not be demonstrating a measure of service in fulfilling the Class I needs of the Western marketing area. The reform Final Decision also did not envision that the PBTH provision, carried into the consolidated Western order from the pre-reform Southwestern Idaho-Eastern Oregon order, would enable entities to sell milk for fluid use below the order's minimum Class I price.

The Final Decision of milk order reform examined and discussed various pooling standards and features of the pre-reform orders for applicability in a new, larger consolidated milk order. The pooling standards and features

adopted for the Western order were intended to reflect and retain those standards and features of the pre-reform orders so as to not cause a significant change, and indeed to provide for the continued pooling of milk that had been pooled by market participants. The 35 percent shipping standard for supply plants adopted as part of milk order reform was slightly higher than that of the Southwestern Idaho-Eastern Oregon order and was slightly lower than that provided for in the Great Basin order. Nevertheless, the adopted 35 percent standard was intended to result in no milk losing its association in the larger consolidated order due to a change in a regulatory provision.

With regard to producer milk, the Final Decision of milk order reform established a limit for producer milk diversions to nonpool plants at 90 percent. This standard is identical to the diversion limit then applicable in the Southwestern Idaho-Eastern Oregon order, but is higher than the applicable standards of 75 percent for cooperatives and 70 percent for proprietary handlers in the Great Basin order. The 90 percent standard was determined to be appropriate for the consolidated Western order because it would permit all milk then associated with the market that was not needed at pool plants to continue to be pooled and priced under the order. The 90 percent standard was also adopted because it was envisioned that it would provide handlers more flexibility to efficiently move milk and not preclude most producers associated with either the Great Basin or Southwestern Idaho-Eastern Oregon orders from having their milk pooled in the new consolidated order.

This decision agrees with DFA and those who expressed support for adopting Proposals 3 and 7. The record reveals that because the Western order does not account for milk deliveries from supply plants to distributing plants on a net basis, more milk is being pooled on the order through the diversion process than can be considered an integral reserve supply of distributing plants. The act of physically receiving milk certainly demonstrates performance in supplying the fluid needs of the market. However, by pumping the same amount, or some portion of the milk physically received out of a distributing plant for other than Class I use, undermines the intent and importance of the performance standard. In practice, the unloading and reloading of milk creates an artificial base for pooling additional milk that cannot otherwise meet the specified performance standards.

Similarly, a netting provision on producer milk diverted from distributing plants is also needed to properly identify the milk of those producers that actually supply the marketing area's fluid needs. A "net diversions" provision is warranted for inclusion as part of the *Producer milk* definition of the order because the current diversion limit standard of the order does not properly limit the amount of milk that can be pooled by distributing plants. The diversion limit standard as it relates to supply plants is based on receipts. For supply plants, diverted milk is a component of the total receipts of the plant. For distributing plants, however, the pooling basis is determined by the amount of milk physically received. If a supply plant delivery no longer becomes a pool-qualifying shipment because shipments are determined on a net basis, then that milk should not be considered as physically received by the distributing plant and should therefore not be included as part of the basis for calculating the amount of milk that can be diverted from the distributing plant.

This decision finds that the adoption of Proposals 3 and 7 is warranted. Milk deliveries to distributing plants will be limited to milk transferred or diverted and physically received by distributing pool plants, less any transfers or diversions of bulk fluid milk products from the distributing plant. Relying on net shipments and net diversions for determining pool qualifying deliveries to distributing plants strengthens the principle of performance in supplying the Class I needs of the market as a condition for pooling diverted milk. Determining shipments and diversions on a net basis should also more appropriately identify the milk of those producers that should share in the distribution of Class I revenue by receipt of the order's blend price.

The record evidence does not support increasing the cooperative supply plant performance standard above the current 35 percent of receipts as sought in Proposal 4. The proposal is presented on the assumption that this decision would lower the diversion limit standard to 70 percent, and that in doing so, may cause entities to seek this special pool plant status. This proposal is rejected on the basis that the record does not reveal why this standard should be different from the "regular" supply plant standard. Additionally, speculation of how entities may choose to pool milk on the order is not, in the context of proposing a change in this performance standard, an appropriate basis upon which to make a change.

Providing for the diversion of milk is a desirable and needed feature of an order because it facilitates the orderly and efficient disposition of milk not needed for fluid use. When producer milk is not needed by the market for Class I use, some provision should be made for milk to be diverted to nonpool plants for use in manufactured products and still be pooled and priced under the order. Additionally, it is also necessary to safeguard against excessive milk supplies becoming associated with the market through the diversion process.

In the context of this proceeding, milk diverted by distributing plants is milk not physically received at the plants. While diverted milk is not physically received, it is nevertheless an integral part of the milk supply of the diverting distributing plant. If such milk is not part of the integral supply of the diverting plant, then that milk should not be associated with the diverting plant and should not be pooled. Associating more milk than is actually part of the legitimate reserve supply of the diverting plant unnecessarily reduces the potential blend price paid to dairy farmers who service the market's Class I needs.

Diversion limit standards that are too high can open the door for pooling more milk on the market. The record does not support lowering the diversion limit below the current 90 percent standard. As explained above, the lack of a netting provision for diversions by distributing plants has resulted in the inappropriate pooling of milk on the Western order. In this regard, the record evidence cannot attribute more milk being pooled on the order because the diversion limit standard is too high.

These findings, together with the original intents of the order's pooling provisions, may be altered if marketing conditions warrant their adjustments. In this regard, the Western order provides the Market Administrator with the authority to make needed adjustments to the shipping and diversion limit standards of the order.

#### e. Establishing Pooling Standards for State-Units

Two Proposals, published in the hearing notice as Proposals 2 and 9, seeking to establish pooling units organized and reported as "State-units" in the Pacific Northwest and Western milk orders respectively, should not be adopted. These proposals were offered by DFA. Specifically, the proposals would specify that milk from those States located outside of the States and counties that comprise the Western and Pacific Northwest marketing areas would be reported separately in units,

organized by the State from which the milk originates. Each State-unit would need to meet the performance standards applicable for supply plants as a condition for being pooled on the orders. Neither order currently provides separate pooling standards for milk located outside of each respective marketing area.

The DFA witness explained that Proposals 2 and 9 address broader pooling issues by establishing reasonable performance standards for milk located outside of market areas and do not just simply prohibit the practice of double dipping as discussed earlier in this decision. In this regard, the witness indicated that Proposals 2 and 9 are offered to address the pooling of large volumes of milk from locations distant from the Pacific Northwest and Western marketing areas. According to the witness, large volumes of milk are being pooled without meeting any reasonable measures of performance in serving the Class I needs of the market.

The DFA witness testified that since the implementation of milk order reform, organizations like DFA have made purposeful pooling decisions to maximize returns and have engaged in the practice of double dipping to accomplish this end. Nevertheless, the witness acknowledged that the practice of double dipping is unfair and should be corrected. The witness continued to explain that the impact of double dipping on an order's blend price paled in comparison to the blend price impact caused by inadequate pooling provisions that do not properly stress the importance of demonstrating performance in regularly and consistently supplying the Class I needs of a marketing area. Additionally, the witness expressed the opinion that the relationship between the Class I pricing surface and the pooling provisions was fundamentally changed as part of milk order reform. Specifically, the witness noted, the movement to a nationally coordinated Class I pricing structure that makes adjustments to the Class I differential level by county accounts for the changed relationship.

The DFA witness stressed that while the new Class I price structure has a relationship to the blend price paid to producers, the connection between milk value and the distance of milk from the market are not adequately linked. The disconnect is further aggravated by the adoption of faulty pooling standards that run counter to three key criteria used during milk order reform in establishing the Class I price structure, the witness asserted. The three key criteria include, the witness said, sending appropriate marketing signals,

recognizing the value of milk at location, and recognizing handler equity with regard to raw product costs. The witness expressed the opinion that these outcomes were not anticipated by the Department.

The DFA witness drew from the Final Decision on milk order reform which detailed how milk marketing orders should pool milk and for identifying those producers whose milk should be eligible for pooling in the consolidated orders. In this regard, the witness particularly noted the Department's rejection of "open pooling" and that pooling provisions be performance oriented. According to the witness, the lack of pooling provisions that are sufficiently performance oriented result in volumes of "distant" milk pooled on orders that do not and would not ever perform any reasonable and consistent servicing of the Class I needs of a market in a manner similar to "local" milk. The witness asserted that inadequate performance standards have lowered producer blend prices and have caused the type of disorderly marketing conditions intended to be avoided by the Class I price structure criteria cited above.

The DFA witness concluded Proposals 2 and 9 are justified because their adoption would more appropriately link milk value and where milk is located relative to a market. According to the witness, these proposals are also superior to the adoption of other proposals (Proposals 1 and 10) because those proposals are aimed solely at eliminating or preventing double dipping. DFA asserted that Proposals 2 and 9 provide: (1) appropriate recognition to the concept of a marketing area where handlers compete for the majority of their Class I sales and the importance of performance as a condition for having milk eligible for pooling, (2) a measurable economic outcome consistent with Federal milk marketing order principles which do not prohibit pooling milk if the economics for doing so are positive, and (3) an adequate and reasonable safeguard for low Class I utilization markets in which lower diversion limits or higher performance standards for supply plants might otherwise cause hardship.

A NDA witness indicated an initial lack of understanding on the ramifications of Proposals 2 and 9 and expected to articulate a position in post-hearing briefs. The witness did express dissatisfaction on how milk order reform addressed the location value of milk and its relationship to pooling provisions in general. In their post-hearing brief, NDA indicated that they

can support adoption of Proposal 9. However, NDA viewed Proposal 9 as having limited usefulness. With regard to Proposal 2, NDA's brief concluded that a State-unit pooling approach for out-of-area milk was not appropriate for the Pacific Northwest order because it does not adequately address the issue of double dipping. The brief was of the opinion that other proposals under consideration in another rulemaking proceeding for the Pacific Northwest order were more appropriate for that marketing order.

A witness representing River Valley testified in support of Proposal 9. The witness was of the opinion that local producer milk should not be used as a basis for qualifying distant milk for pooling on the order. The witness testified that the milk of producers from outside the market should be expected to meet the pooling standards of the order in the way local milk does as a condition for receiving the order's blend price.

Opposition to Proposal 9 was presented by Glanbia and Davisco. The Glanbia witness viewed the proposal as being designed to build barriers to market entry by dairy farmers located in and out of the Western order milkshed who otherwise may be attracted to pool their milk on the Western order.

The record does not support the adoption of performance standards for pooling milk on the Pacific Northwest or Western orders on the basis of its location or as the proponent and supporters of Proposal 2 and 9 describe as State-units. The marketing conditions of the Pacific Northwest and Western orders do not exhibit the need to require additional performance standards for milk located outside of the marketing area beyond those adopted in this decision. Accordingly, all plants, regardless of location, may become eligible to have the milk of producers pooled on the Pacific Northwest and Western orders by meeting the performance standards specified for the various types of pool plants.

It is not important who provides the milk for Class I use or from where this milk originates. The order boundaries of the Pacific Northwest and Western orders were not intended to limit or define which producers, which milk of those producers, or which handlers could enjoy the benefits of being pooled on those orders. What is important and fundamental to all Federal orders, including the Pacific Northwest and Western orders, is assuring an adequate supply of milk to meet the market's fluid needs, the proper identification of those producers who supply the market, and an equitable means of compensating

those producers from the market's pool proceeds.

A significant portion of the testimony received at the hearing implicated the current Class I price structure as an important factor that has caused the inappropriate pooling of milk across the Federal order system including the Pacific Northwest and Western orders. The current price structure was faulted specifically as not providing appropriate location adjustments for milk as had been the case prior to the implementation of milk order reform.

Testimony indicated that the lack of location adjustments effectively undermines the pooling standards of the order. The decision to pool milk was once based on the economics of transporting milk—comparing the costs of transporting milk to the benefit of receiving the order's blend price. Testimony indicates this factor is as important as the pooling standards of the order. Critics of the Class I pricing structure were of the opinion that placing a relative value on milk based on its distance from the market provides appropriate pooling discipline and fosters orderly marketing conditions.

The reform of milk orders, contained in the Recommended Decision (63 FR 4802) and Final Decision (64 FR 16026), made purposeful changes to the Class I pricing structure. In this regard, a fixed adjustment for Class I milk prices was provided for every county location in the 48 contiguous states to create a national Class I pricing surface for the system of milk marketing orders. Changing this characteristic of the pricing structure ensured handlers that regardless of the marketing order by which regulated, the applicable prices they are charged would be the same.

Such changes made a more clear distinction between the value milk has at location and the pooling standards of any individual marketing order. Location adjustments were never a part of the pooling standards of the Pacific Northwest and Western orders or any other milk marketing order. Instead, location adjustments were an integral part of the pricing provisions of the order. However, it is acknowledged that how location adjustments were applied tended to strengthen the effectiveness of the order's pooling standards. Pooling standards have always established the criteria for pooling milk on the order and continue to do so in the consolidated milk marketing orders. With the Class I price surface adopted by order reform, more direct reliance is placed on pooling standards to identify the milk that should be pooled on the order.

Pooling provisions of all orders are intended to define appropriate standards for the prevailing marketing conditions in assuring that the marketing area would be supplied with a sufficient supply of milk for fluid use and to identify those producers—and the milk of those producers—that actually service the Class I needs of the market. The issue before the Department regarding pooling is the consideration of amendments that will provide standards for determining reasonable performance measures and to more properly identify the milk that regularly and consistently supplies the market's Class I needs.

As discussed earlier, the pooling standards of the consolidated Federal milk orders, including the Pacific Northwest and Western orders, were not intended to exclude any milk from being pooled on any order, provided the fluid needs of a marketing area are served. The reform of Federal milk orders rejected the concept of open pooling, and provided that each market would pool the milk that actually demonstrates a reasonable level of serving the fluid needs of the market as reflected in those order's pooling standards. The determination of the boundaries of the Pacific Northwest and Western marketing areas was guided by identifying the common characteristics of the predecessor orders that could be consolidated and to promulgate a marketing order containing provisions to provide for orderly marketing conditions. The consolidation of the pre-reform orders into the current Pacific Northwest and Western orders was not intended to determine those areas from which milk should, or should not, be obtained to serve the market.

The adoption of revised pooling standards, specifically adoption of netting provisions for supply plant performance standards and diversions from distribution plants and the removal of the PBTH provision in this decision, should assure milk will be available for the market's fluid needs and properly identify the milk of those producers that actually demonstrates consistent service to the market's Class I needs. Therefore the proposal for establishing State units is unnecessary for the Pacific Northwest and Western orders. Additionally, the State-unit proposal does not adequately or specifically prohibit the practice of double dipping in either the Pacific Northwest or Western orders. Accordingly, Proposals 2 and 9 are not adopted.

### 3. *Marketwide Service Payments*

A proposal, published in the hearing notice as Proposal 8, seeking to establish a marketwide service payment provision in the form of a transportation and assembly credit for the Western order, should not be adopted. Currently, the Western order does not provide for transportation and assembly credits or any other form of a marketwide service payment.

Proposal 8, offered by DFA, specifically seeks to modify the Western order by establishing a transportation credit and an assembly credit. The transportation credit would provide \$0.0032 per mile for each hundredweight(cwt) of milk delivered to a pool distributing plant when the farm supplying the plant is located over 80 miles away. The credit would only apply to milk picked up directly from a farm located within the marketing area, processed at a Class I pool plant located in the order, with payment being made to the milk supplying producer or cooperative. The assembly credit of ten cents per cwt would apply to milk delivered to pool distributing plants. The proposal also recognizes that the reporting requirements of the order would also need amending to properly administer the transportation and assembly credit provision.

A witness appearing on behalf DFA testified that establishing a transportation and assembly credit is necessary to recoup costs associated with supplying the Western marketing area's Class I market. The witness argued that some producers are providing services which benefit the entire marketplace, but are unable to recoup the cost of these services from the marketplace. The DFA witness was of the opinion that the Federal milk marketing order system is structured to allow producers servicing the Class I needs of the marketing area to equitably share in the revenues generated in that marketing area. However, the DFA witness was also of the opinion that in the Western order, the costs of supplying the Class I market is noticeably higher for some, explaining that not all producers equitably share the cost of servicing the Class I market.

The DFA witness stated that large supplies of milk produced in the Western order are, in general, located far from distributing plants. As such, the witness continued, the costs of transporting milk to pool distributing plants are higher than in other Federal orders. The witness explained that a transportation credit would provide producers a means to recoup some of the cost of transporting milk to a pool

distributing plant when it must be shipped long distances.

The DFA witness testified that because of weekly and monthly fluctuations in demand for Class I milk, supplying extra milk for Class I use or processing excess milk not needed for Class I use imposes extra costs for manufacturing plants that have the capacity to process this milk. The witness presented an example that detailed a DFA manufacturing plant's 2001 average daily processing capacity, referred to as "throughput." The example illustrated that plant throughput was noticeably lower in the fall months of 2001, ranging from a low of 795,951 pounds per day to a high of 1,269,379 pounds per day in the spring months. Given such significant variation, the witness said, it is necessary that the market have the available balancing capacity to accommodate such fluctuations in demand.

The DFA witness also noted that a plant's manufacturing costs have a direct correlation to the plant's capacity that is idled during certain times of the year. During months of low Class I demand, explained the witness, manufacturing plants operate at full capacity resulting in lower per unit costs. However, during months of high fluid demand, the witness continued, manufacturing plants operate at less than full capacity but incur costs similar to when plants are operated at capacity. It is the costs arising from idled or unused capacity that is borne by a few pool manufacturing plants of the order while their service in balancing the Class I demand of the marketplace benefits the entire market, explained the witness. Therefore, concluded the witness, an assembly credit would help producers who are providing a service of marketwide benefit the means to recoup some of the costs they are unable to generate from the marketplace. The DFA witness estimated that the blend price would be reduced by approximately 2.2 cents per cwt if the assembly credit was adopted.

Two Utah dairy farmers testified in support of Proposal 8. The farmers stated that since Federal order reform, the Class I utilization in Utah has dramatically decreased which in turn has had a direct negative impact on the blend price Utah farmers receive. The dairy farmers were of the opinion that the adoption of an assembly and transportation credit would help restore some of the lost revenue represented by a lower blend price.

A witness appearing on behalf of Stoker testified in support of Proposal 8. Another witness appearing on behalf of

the Utah Farmers Union, also testified in support of Proposal 8.

A witness appearing on behalf of NDA, testified in opposition to Proposal 8. The witness stated that currently only one Federal order, the Upper Midwest order, has an assembly credit provision, stressing that the marketing conditions of that order are quite different from the Western order. In the Upper Midwest, the witness explained, farms tend to be significantly smaller and it is necessary to assemble milk from numerous farms in order to "assemble" a full tanker load of milk. The witness contrasted this by explaining that most farms in the Western order are large enough that a single farm is capable of shipping a full tanker load of milk. The witness concluded that it was therefore not appropriate to provide credit for the assembly of milk that does not need "assembling."

The NDA witness also asserted that the justification given for an assembly credit—the need to recover some of the balancing costs of the market—is itself inconsistent. Typically, the witness said, balancing functions are provided by manufacturing plants for processing milk when it is not needed at Class I plants. However, explained the witness, the proposed assembly credit would apply to those who deliver milk to Class I facilities and would not be limited to manufacturing plants that actually perform the balancing function. In this regard, the witness indicated, a credit for balancing should instead be paid to those pool plants that actually provide a balancing function and not to those who supply milk to Class I facilities.

The witness concluded that NDA was not aware of any difficulty of Western order distributing plants obtaining necessary milk supplies where milk must be assembled into a full tanker load before delivery to a pool distributing plant. Money should not be drawn from the Western order producer-settlement fund as an assembly credit because no "assembly" actually takes place, emphasized the witness.

The NDA witness also opposed the transportation credit feature of Proposal 8. While there are transportation credits in three other Federal orders, the witness said, they function in a different manner than that proposed for the Western order. In the Upper Midwest order transportation credits only apply to transfers of milk between plants, stated the witness, and not to direct shipments from farms to distributing plants. The witness also noted that in two southern orders where Class I use is high, transportation credits were established to fund bringing milk into the marketing area to fulfill all Class I

needs. However, the witness contrasted, Western order Class I utilization is relatively low and does not exhibit the need for a transportation credit to encourage shipments of milk to satisfy Class I demands.

The NDA witness also asserted that the Western order already has a \$0.30 difference in the level of applicable Class I differentials to encourage milk shipments towards population centers where most distributing plants are located. Accordingly, the witness maintained, there is no need to provide an additional incentive for moving milk to pool distributing plants.

The witness also predicted that adopting a transportation credit would give rise to disorderly marketing conditions because it would provide an incentive for milk located farther away to be delivered to distributing plants while milk located nearer would then need to be shipped to manufacturing plants located farther away. The NDA witness concluded that there are no cost disadvantages that would be corrected by providing the Western order with transportation and assembly credit provisions.

Two witnesses appearing on behalf of KDK and Gossner testified in opposition to Proposal 8. The witnesses were of the opinion that Western order producers should not be paying for assembly credit for a few pool plants that are unable to recoup their costs of balancing. They also stressed that it was inappropriate to establish a transportation credit to encourage the movement of distant milk when producers located nearer to pool distributing plants are willing and able to supply the market without a credit.

A witness appearing on behalf of River Valley also testified in opposition to Proposal 8. The witness stated that the order's blend price should not be reduced to pay for transportation and assembly credits. Instead, the witness said, Class I plants should pay their milk suppliers a direct delivery differential in lieu of a transportation credit and that the level of the Class I differential should be increased. In that way, the witness explained, the blend price paid to producers would be unaffected.

Objections by several parties were raised regarding evidence presented in support of some features of Proposal 8. The objecting parties argued that the testimony given equating balancing costs with assembly costs was beyond the scope of the hearing notice. The objectors moved that such testimony be stricken from the record. Objectors maintained that assembly costs and balancing costs are two entirely different concepts. Because the concept

of balancing was not noticed in the hearing notice, the objectors stressed, interested parties were not prepared to discuss the concept of balancing. The objectors also maintained that in previous Federal order hearings where assembly credits were proposed, balancing functions and associated costs were never presented in a context for explaining the need for an assembly credit.

The presiding Administrative Law Judge (ALJ) overruled the objection to strike evidence regarding balancing costs from the record. However, the presiding ALJ found that balancing is fundamentally different from assembly. Accordingly, the ALJ ruled the assembly credit feature of Proposal 8 as being beyond the scope of the proposal presented in the hearing notice.

The record lacks sufficient evidence for the adoption of the transportation and assembly credit proposal. The relative low Class I utilization of the Western marketing area characterizes the order as a market in which manufacturing predominates. In this regard, the record makes clear that the Class I needs of the market are sufficiently supplied, even though certain pooling provisions lack needed features. In fact, the record evidence which supports the adoption of a net diversions feature for diverted milk by distributing plants effectively undercuts the argument that somehow additional compensation or incentive should be provided to attract milk to distributing plants beyond that provided by the level of the Class I differential. If distributing plants engage in the behavior of physically receiving milk and then pumping the milk out of the plant and diverting it for uses other than Class I, it is abundantly clear that distributing plants are certainly adequately supplied with milk.

This decision finds that the evidence and testimony for the adoption of Proposal 8 has more to do with proponents responding to the Western order's improper and inadequate features of pooling provisions than in explaining how the "services" of a few are providing benefit for the entire market. Improper or inadequate features of pooling provisions do not provide justification for adopting this sort of mechanism by which to compensate for lower producer revenue resulting from improper or inadequate features of pooling provisions.

Additionally, this decision agrees with the ALJ's determination that the assembly credit portion of Proposal 8 is beyond the scope of the hearing notice. For this reason alone the proposal warrants denial. As indicated by NDA,

the concept of "assembly" is far different from the concept of "balancing." This is especially so given the context of testimony explaining balancing and balancing costs as a reflection of unused manufacturing plant capacity while diminimus testimony on milk assembly and assembly costs was offered.

#### 4. Pooling Provision Clarifications

Proposals 15 and 16, seeking to clarify order language in the *Producer* and *Producer milk* provisions of the Western order, should be adopted immediately. Currently the *Producer* provision does not list Class II milk at nonpool plants as a type of utilization that a handler can opt to not pool without causing a producer to lose producer status. The current *Producer milk* definition does not allow a dairy farmer who lost producer status to again qualify milk for diversion until delivery of one days' milk production has been received at a pool plant.

Proposal 15, offered by the Western order Market Administrator (MA), seeks to modify the *Producer* provision by adding Class II utilization of milk at a non-pool plant as a type of milk utilization a handler may elect to not pool without jeopardizing the producer status of that producer. Proposal 16, also offered by the MA, seeks to modify the *Producer milk* provision by allowing a dairy farmer to re-qualify for producer status in the same manner that a dairy farmer who has never qualified can have their milk pooled on the order.

Witnesses appearing on behalf of DFA and NDA testified in support of Proposals 15 and 16. The witnesses stated that both proposals make necessary changes to the order that reflect current market needs. Furthermore, said the witnesses, the changes will assist in the interpretation and administration of the order. Neither proposal received opposition testimony.

#### 5. Determination of Emergency Marketing Conditions

Evidence presented at the hearing establishes that the pooling standards of the Western order are inadequate and have resulted in the unwarranted erosion of the blend price received by producers who are serving the Class I needs of the market and should be changed on an emergency basis. The unwarranted erosion of such producers' blend prices stems, in part, from improper performance standard features as they relate to pool supply plants, from inadequate features as they relate to producer milk diversions by distributing plants, and the PBTH provision. These shortcomings of the

pooling provisions have allowed milk that does not provide consistent and reasonable service in meeting the needs of the Class I market to be pooled on the Western order. Additionally, the PBTH provision gives rise to disorderly marketing conditions and renders the order unable to establish prices to handlers that are uniform.

Consequently, it is determined that emergency marketing conditions exist and the issuance of a recommended decision is therefore being omitted. The record clearly establishes a basis as noted above for amending the order on an interim basis and the opportunity to file written exceptions to the proposed amended order remains.

Evidence presented at the hearing also establishes that California milk pooled simultaneously on the California State-operated order and a Federal order, a practice commonly referred to as double dipping, would render the Pacific Northwest milk order and does render the Western milk order unable to establish prices that are uniform to producers and to handlers and contributes to the unwarranted erosion of milk prices to Western producers and the erosion of milk prices that could result to producers supplying milk for the Pacific Northwest marketing area should double dipping occur in the Pacific Northwest marketing area.

In view of this situation, an interim final rule amending the orders should be issued as soon as the procedures are completed to determine the approval of producers whose milk is pooled in both the Pacific Northwest and Western orders.

#### 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 Pacific Northwest and Western orders were first issued and when they were 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 agreements and orders:

(a) The interim marketing agreements and the orders, 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 areas, and the minimum prices specified in the interim marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The interim marketing agreements and the orders, 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 agreements upon which a hearing has been held.

#### Interim Marketing Agreement and Interim Order Amending the Orders

Annexed hereto and made a part hereof are two documents, an Interim Marketing Agreement regulating the handling of milk, and an Interim Order amending the orders regulating the handling of milk in the Pacific Northwest and Western marketing areas, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire tentative decision and the interim order and the interim marketing agreement annexed hereto be published in the **Federal Register**.

#### Determination of Producer Approval and Representative Period

The month of April 2002 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the Pacific Northwest and Western marketing areas is approved or favored by producers, as defined under the terms of the orders as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

**List of Subjects in 7 CFR Part 1124 and 1135**

Milk marketing orders.

Dated: August 8, 2003.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

**Interim Order Amending the Orders Regulating the Handling of Milk in the Pacific Northwest and Western Marketing Areas**

This interim 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 orders were first issued and when 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 agreements and to the orders regulating the handling of milk in the Pacific Northwest and Western marketing areas. 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 orders 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 orders as hereby amended regulate 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, the marketing agreements 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 Pacific Northwest and Western marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby amended, as follows:

**PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA**

1. The authority citation for 7 CFR part 1124 and 1135 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Section 1124.13 is amended by:  
(a) Revising the introductory text; and  
(b) Adding a new paragraph (f).

The revision and addition read as follows:

**§ 1124.13 Producer milk.**

Except as provided for in paragraph (f) of this section, *Producer milk* means the skim milk (or skim milk equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

\* \* \* \* \*

(f) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

**PART 1135—MILK IN THE WESTERN MARKETING AREA**

3. Section 1135.7 is amended by adding a new paragraph (c)(5).

The addition reads as follows:

**§ 1135.7 Pool plant.**

\* \* \* \* \*

(c) \* \* \*

(5) Shipments used in determining qualifying percentages shall be milk transferred or diverted to and physically received by distributing pool plants, less any transfers of bulk fluid milk products from such distributing pool plants.

\* \* \* \* \*

**§ 1135.11 [Removed]**

4. Section 1135.11 is removed.

5. Section 1135.13 is amended by:

(a) Revising the introductory text.

(b) Revising paragraph (d)(1);

(c) Redesignating paragraph (d)(3) through (d)(6) as (d)(4) through (d)(7);  
(d) Adding a new paragraph (d)(3); and

(e) Adding a new paragraph (e).

The revisions and additions read as follows:

**§ 1135.13 Producer milk.**

Except as provided for in paragraph (e) of this section, *Producer milk* means the skim milk (or skim milk equivalent of components of skim milk), including nonfat components, and butterfat in milk of a producer that is:

\* \* \* \* \*

(d) \* \* \*

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

\* \* \* \* \*

(3) Receipts used in determining qualifying percentages shall be milk transferred to, diverted to, or delivered from farms of producers pursuant to § 1000.9(c) and physically received by plants described in § 1135.7(a) or (b), less any transfers of diversions of bulk fluid milk products from such pool distributing plants.

\* \* \* \* \*

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing program imposed under the authority of a State government maintaining marketwide pooling of returns.

6. Section 1135.12 is amended by:

(a) Revising paragraph (b)(5).

The revision reads as follows:

**§ 1135.12 Producer.**

\* \* \* \* \*

(b) \* \* \*

(5) A dairy farmer whose milk was received at a nonpool plant during the month from the same farm (except a nonpool plant that has no utilization of milk products in any class other than Class II, Class III, or Class IV) as other than producer milk under the order in this part or any other Federal order. Such a dairy farmer shall be known as a dairy farmer for other markets.

\* \* \* \* \*

**Marketing Agreement Regulating the Handling of Milk in Certain Marketing Areas**

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part

900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ \_\_\_\_\_<sup>1</sup> to \_\_\_\_\_, all inclusive, of the order regulating the handling of milk in the (\_\_\_\_ Name of order \_\_\_\_\_) marketing area (7 CFR PART \_\_\_\_<sup>2</sup>) which is annexed hereto; and

II. The following provisions: § \_\_\_\_\_<sup>3</sup>  
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 \_\_\_\_\_<sup>4</sup> 2002, \_\_\_\_\_<sup>5</sup> 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.

§ \_\_\_\_\_<sup>6</sup> Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary 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. 03-20689 Filed 8-15-03; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 2003-CE-21-AD]

RIN 2120-AA64

#### Airworthiness Directives; AeroSpace Technologies of Australia Pty Ltd. Models N22B and N24A Airplanes

AGENCY: Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This document proposes to adopt a new airworthiness directive (AD) that would apply to all AeroSpace Technologies of Australia Pty Ltd. (ASTA) Models N22B and N24A airplanes. This proposed AD would require you to visually inspect the ailerons for damage and replace if necessary; adjust the engine power levers aural warning microswitches; set flap extension and flap down operation limitations; and fabricate and install cockpit flap extension and flap down operation restriction placards. This proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Australia. The actions specified by this proposed AD are intended to prevent damage to the aileron due to airplane operation and pre-existing and undetected damage, which could result in failure of the aileron. Such failure could lead to reduced or loss of control of the airplane.

**DATES:** The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before September 19, 2003.

**ADDRESSES:** Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003-CE-21-AD, 901 Locust, Room 506, Kansas City, Missouri 64106. You may view any comments at this location between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. You may also send comments electronically to the following address: 9-ACE-7-Docket@faa.gov. Comments sent electronically must contain "Docket No. 2003-CE-21-AD" in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII text.

You may get service information that applies to this proposed AD from Nomad Operations, Aerospace Support Division, Boeing Australia, PO Box 767, Brisbane, QLD 4000 Australia; telephone 61 7 3306 3366; facsimile 61 7 3306 3111. You may also view this information at the Rules Docket at the address above.

**FOR FURTHER INFORMATION CONTACT:** Ron Atmur, Aerospace Engineer, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627-5224; facsimile (562) 627-5210.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

*How do I comment on this proposed AD?* The FAA invites comments on this proposed rule. You may submit whatever written data, views, or arguments you choose. You need to include the proposed rule's docket number and submit your comments to the address specified under the caption **ADDRESSES**. We will consider all comments received on or before the closing date. We may amend this proposed rule in light of comments received. Factual information that supports your ideas and suggestions is extremely helpful in evaluating the effectiveness of this proposed AD action and determining whether we need to take additional rulemaking action.

*Are there any specific portions of this proposed AD I should pay attention to?* The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this proposed rule that might suggest a need to modify the rule. You may view all comments we receive before and after the closing date of the rule in the Rules Docket. We will file a report in the Rules Docket that summarizes each contact we have with the public that concerns the substantive parts of this proposed AD.

*How can I be sure FAA receives my comment?* If you want FAA to acknowledge the receipt of your mailed comments, you must include a self-addressed, stamped postcard. On the postcard, write "Comments to Docket No. 2003-CE-21-AD." We will date stamp and mail the postcard back to you.

#### Discussion

*What events have caused this proposed AD?* The Civil Aviation Safety Authority (CASA), which is the airworthiness authority for Australia, recently notified FAA that an unsafe condition may exist on all ASTA Models N22B and N24A airplanes. The CASA reports several incidents of ailerons incurring damage during flight. Extensive tests and analysis revealed that the cause of the damage to the ailerons is a result of operation outside approved limits and undetected pre-existing damage. This condition causes the aileron to flutter as well as damage and failure.

The CASA lowered the operational limits of the affected airplanes in order to prevent damage from occurring. Additional reports of aileron flutter have been received even when operating within these lower approved limits.

As a precautionary measure, the CASA is further restricting flight operations.

<sup>1</sup> First and last sections of applicable order.

<sup>2</sup> Appropriate part number.

<sup>3</sup> Applicable section number.

<sup>4</sup> Appropriate representative period for the order.

<sup>5</sup> Hundredweight poundage of milk.

<sup>6</sup> Applicable section number.