

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1040

[Docket No. AO-225-A45-R01; DA-92-10]

Milk in the Southern Michigan Marketing Area; Order Amending Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the Southern Michigan Federal milk marketing order based on industry proposals considered at public hearings. This rule adopts a multiple component pricing (MCP) plan for pricing milk on the basis of its butterfat and protein components and a "fluid carrier" residual. The plan includes adjustments to the producer protein price based on the somatic cell count of producer milk. This rule also adopts amendments to certain shipping percentages and increases the maximum allowable administrative and marketing service assessment rates. The amended order has been approved by more than two-thirds of the producers in the market who were eligible to have their milk pooled during the representative month for voting purposes.

EFFECTIVE DATE: October 1, 1995.

FOR FURTHER INFORMATION CONTACT:

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

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amended order will promote more orderly marketing of milk by producers and regulated handlers.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have a retroactive effect. This rule will 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) (the Act), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may file with the Secretary 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 and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary 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 is the handler's principal place of business, has jurisdiction in equity to review the Secretary'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.

Prior documents in this proceeding:

Notice of Hearing: Issued December 3, 1992; published December 10, 1992 (57 FR 58418).

Supplemental Notice of Hearing: Issued January 19, 1993; published January 29, 1993 (58 FR 6447).

Recommended Decision: Issued November 29, 1993; published December 6, 1993 (58 FR 64176).

Notice of Reopened Hearing: Issued February 18, 1994; published February 24, 1994 (59 FR 8874).

Extension of Time for Filing Briefs: Issued April 6, 1994; published April 13, 1994 (59 FR 17497).

Emergency Partial Final Decision: Issued May 12, 1994; published May 23, 1994 (59 FR 26603).

Final Rule: Issued June 22, 1994; published June 29, 1994 (59 FR 33418).

Revised Recommended Decision: Issued December 2, 1994; published December 14, 1994 (59 FR 64464).

Extension of Time for Filing Exceptions: Issued January 18, 1995; published January 24, 1995 (60 FR 4571).

Final Decision: Issued August 11, 1995; published August 18, 1995 (60 FR 43066).

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the Southern Michigan order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where

they may conflict with those set forth herein.

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Southern Michigan marketing area.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the 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;

(3) The said order, as hereby amended, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held; and

(4) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1040.85.

(b) *Determinations.* It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in section 8c(9) of the Act) of more than 50 percent of the milk which is marketed within the marketing area to sign a proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order amending the order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the respective order as hereby amended; and

(3) The issuance of the order amending the order is approved or favored by at least two-thirds of the producers who during the determined representative period were engaged in the production of milk for sale in the marketing area.

List of Subjects in 7 CFR Part 1040

Milk marketing orders.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Southern Michigan marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby further amended, as follows:

PART 1040—MILK IN THE SOUTHERN MICHIGAN MARKETING AREA

1. The authority citation for 7 CFR Part 1040 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Section 1040.7 is amended by adding paragraphs (b)(5)(iii) and (b)(7) to read as follows:

§ 1040.7 Pool Plant.

* * * * *

- (b) * * *
- (5) * * *

(iii) Partially regulated distributing plants that are neither other order plants, producer-handler plants, nor exempt plants and from which there is route disposition in consumer-type packages or dispenser units in the marketing area during the month.

* * * * *

(7) The shipping percentages determined pursuant to paragraphs (b)(1) or (b)(6) of this section may be increased or decreased by the market administrator if the market administrator finds that such revision is necessary to encourage needed shipments or to prevent uneconomic shipments. Before making such a finding, the market administrator shall investigate the need for revision either on the market administrator's own initiative or at the request of interested parties. If the investigation shows that a revision of the shipping requirements might be appropriate, the market administrator shall issue a notice stating that the revision is being considered and invite data, views, and arguments. Any request for revision of shipping percentages shall be filed with the market administrator no later than the 15th day of the month prior to the month for which the requested revision is desired to be effective.

* * * * *

3. Section 1040.30 is amended by revising paragraphs (a) and (c), and removing paragraph (d), to read as follows:

§ 1040.30 Reports of receipts and utilization.

* * * * *

(a) Each handler described in § 1040.9 (a), (b), and (c) shall report for each of its operations the following information:

(1) Product pounds, pounds of butterfat, pounds of protein, and the value of the somatic cell adjustment contained in or represented by:

(i) Receipts of producer milk, including producer milk diverted by the handler, and

(ii) Receipts of milk from handlers described in § 1040.9(c).

(2) Product pounds and pounds of butterfat contained in:

(i) Receipts by transfer or diversion of bulk fluid milk products;

(ii) Receipts of fluid milk products not included in (a)(1) or (a)(2)(i) of this section and bulk fluid cream products from any source;

(iii) Receipts of other source milk; and

(iv) Inventories at the beginning and end of the month of fluid milk products and products specified in

§ 1040.40(b)(1).

(3) The utilization or disposition of all milk, filled milk, and milk products required to be reported pursuant to this paragraph.

(4) Such other information with respect to the receipts and utilization of skim milk, butterfat, milk protein, and somatic cell information, as the market administrator may prescribe.

* * * * *

(c) Each handler not specified in paragraphs (a) and (b) of this section shall report with respect to its receipts and utilization of milk, filled milk, and milk products in such manner as the market administrator may prescribe.

4. Section 1040.31 is amended by revising paragraph (a) to read as follows:

§ 1040.31 Payroll reports.

(a) On or before the 20th day after the end of each month, each handler described in § 1040.9(a), (b), and (c) shall report to the market administrator its producer payroll for such month, in the detail prescribed by the market administrator, showing for each producer:

(1) The producer's name and address;

(2) The total pounds of milk received from such producer, with its protein and butterfat percentage;

(3) The total pounds of butterfat contained in the producer's milk;

(4) The total pounds of protein contained in the producer's milk;

(5) The somatic cell count of the producer's milk;

(6) The amount, or the rate per hundredweight, or rate per pound of component, the somatic cell adjustment to the protein price, the gross amount due, the amount and nature of any deductions, and the net amount paid.

* * * * *

5. Section 1040.41 is amended by revising the second sentence of paragraph (c) to read as follows:

§ 1040.41 Shrinkage.

* * * * *

(c) * * * If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined by farm bulk tank calibration, with protein and butterfat tests and somatic cell counts determined from farm bulk tank samples, the applicable percentage for the cooperative association shall be zero.

6. Section 1040.50 is amended by revising the section heading, introductory text and paragraph (a), and adding paragraphs (e) through (l), to read as follows:

§ 1040.50 Class and component prices.

Subject to the provisions of § 1040.52, the class prices per hundredweight of milk containing 3.5 percent butterfat and the component prices per hundredweight or per pound for the month shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus \$1.75.

* * * * *

(e) *Class I differential price.* The Class I differential price shall be the difference between the current month's Class I and Class III price (this price may be negative).

(f) *Class II differential price.* The Class II differential price shall be the difference between the current month's Class II and Class III price (this price may be negative).

(g) *Class III-A differential price.* The Class III-A differential price shall be the difference between the current month's Class III-A and Class III price (this price may be negative).

(h) *Skim milk price.* The skim milk price per hundredweight, rounded to the nearest cent, shall be the Class III price less an amount computed by multiplying the butterfat differential by 35.

(i) *Butterfat price.* The butterfat price per pound, rounded to the nearest one-hundredth cent, shall be the Class III price plus an amount computed by multiplying the butterfat differential by

965 and dividing the resulting amount by one hundred.

(j) *Protein price.* The protein price per pound, rounded to the nearest one-hundredth cent, shall be 1.32 times the average monthly price per pound for 40-pound block Cheddar cheese on the National Cheese Exchange as reported by the Department.

(k) *Fluid carrier price.* The fluid carrier price per hundredweight, rounded to the nearest whole cent, shall be the Class III price, less the sum of the butterfat price times 3.5 and the protein price times the average protein test of the basic formula price as reported by the Department for the month (this price may be negative).

(l) *Somatic cell adjustment.* For each producer, an adjustment to the protein price for the somatic cell count of the producer's milk shall be determined by multiplying the constant associated with the appropriate somatic cell count interval in the following table by the simple average price for the month of 40-pound blocks of Cheddar cheese at the National Cheese Exchange as reported by the Department. If a handler has not determined a monthly average somatic cell count, it will be determined by the market administrator.

| Somatic cell counts | Constants for computing the somatic cell adjustment |
|--------------------------|---|
| 1 to 50,000 | .078125 |
| 51,000 to 100,000 | .062500 |
| 101,000 to 150,000 | .046875 |
| 151,000 to 200,000 | .031250 |
| 201,000 to 250,000 | .015625 |
| 251,000 to 300,000 | .0078125 |
| 301,000 to 350,000 | .000000 |
| 351,000 to 400,000 | .000000 |
| 401,000 to 450,000 | -.0078125 |
| 451,000 to 500,000 | -.015625 |
| 501,000 to 550,000 | -.0234375 |
| 551,000 to 600,000 | -.031250 |
| 601,000 to 650,000 | -.0390625 |
| 651,000 to 700,000 | -.046875 |
| 701,000 to 750,000 | -.062500 |
| 751,000 and above | -.078125 |

7. Section 1040.53 is revised to read as follows:

§ 1040.53 Announcement of class and component prices.

On or before the 5th day of the month, the market administrator shall announce the following prices and any other price information deemed appropriate:

- (a) The Class I price for the following month;
- (b) The Class II price for the following month;
- (c) The Class III price for the preceding month;
- (d) The Class III-A price for the preceding month;

- (e) The skim milk price for the preceding month;
 - (f) The butterfat price for the preceding month;
 - (g) The protein price for the preceding month;
 - (h) The fluid carrier price for the preceding month;
 - (i) The butterfat differential for the preceding month;
8. The section heading in § 1040.60 and the undesignated centerheading preceding it, the introductory text, and paragraphs (a) and (f) are revised to read as follows:

Producer Price Differential

§ 1040.60 Handler's value of milk.

For the purpose of computing a handler's obligation for producer milk, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1040.9 (b) and (c), as follows:

- (a) Calculate the following values:
 - (1) Multiply the total hundredweight of producer milk in Class I as determined pursuant to § 1040.44(c) by the Class I differential price for the month;
 - (2) Add an amount obtained by multiplying the total hundredweight of producer milk in Class II as determined pursuant to § 1040.44(c) by the Class II differential price for the month;
 - (3) Add an amount obtained by multiplying the total hundredweight of producer milk eligible to be priced as Class III-A by the Class III-A differential price for the month;
 - (4) Add an amount obtained by multiplying the hundredweight of skim milk in Class I as determined pursuant to § 1040.44(a) by the skim milk price;
 - (5) Add an amount obtained by multiplying the pounds of skim milk in Class II and Class III as determined pursuant to § 1040.44(a) by the average protein content of producer skim milk received by the handler, and multiplying the resulting pounds of protein by the protein price for the month computed pursuant to § 1040.50(j) and adjusted pursuant to § 1040.50(l) for the weighted average somatic cell content of the handler's receipts of milk; and
 - (6) Add a fluid carrier value calculated as follows: Subtract from the pounds of skim milk allocated to Class II and Class III pursuant to § 1040.44(a) the protein pounds contained therein, determined by multiplying the pounds of skim milk in Class II and Class III by the average protein content of producer skim milk received by the handler; then

multiply the resulting pounds (in hundredweight) of fluid carrier by the fluid carrier price.

* * * * *

(f) Add an amount obtained from multiplying the Class I differential price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat in receipts of concentrated fluid milk products assigned to Class I pursuant to § 1040.43(e) and § 1040.44(a)(7)(i) and the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1040.44(a)(11) and the corresponding steps of § 1040.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

* * * * *

9. Section 1040.61, including the section heading, is revised to read as follows:

§ 1040.61 Producer price differential.

For each month the market administrator shall compute a producer price differential per hundredweight of milk received from producers as follows:

- (a) Combine into one total for all handlers:
 - (1) The values computed pursuant to § 1040.60 (a)(1), (a)(2), (a)(3) and (b) through (i) for all handlers who made reports pursuant to § 1040.30 for the month and who made payments pursuant to § 1040.71 for the preceding month;
 - (2) Add the values computed pursuant to § 1040.60 (a)(4), (a)(5), and (a)(6); and subtract the values obtained by multiplying the handlers' total pounds of protein and total hundredweight of fluid carrier contained in such milk by their respective prices;
 - (3) Add an amount equal to the total value of the applicable location adjustments computed pursuant to § 1040.75(a)(1); and
 - (4) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund.
- (b) Divide the aggregate value computed pursuant to paragraph (a) of this section by the sum of the following:
 - (1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1040.60(f).

(c) Subtract not less than 6 cents nor more than 7 cents per hundredweight. The result shall be the "producer price differential."

10. Section 1040.62 is revised to read as follows:

§ 1040.62 Announcement of producer prices.

On or before the 11th day after the end of each month, the market administrator shall announce the following prices and information:

- (a) The producer price differential;
- (b) The protein price;
- (c) The fluid carrier price;
- (d) The butterfat price;
- (e) The average butterfat content and protein content of producer milk; and
- (f) The statistical uniform price for milk containing 3.5 percent butterfat, computed by combining the Class III price and the producer price differential.

11. A new section 1040.63 is added under the new center heading "Producer Price Differential" to read as follows:

§ 1040.63 Value of producer milk.

The value of producer milk shall be the sum of:

- (a) The producer price differential computed pursuant to § 1040.61 and adjusted for location pursuant to § 1040.75, multiplied by the total hundredweight of producer milk received from the producer;
- (b) The butterfat price computed pursuant to § 1040.50(i), multiplied by the total pounds of butterfat contained in the producer milk received from the producer;
- (c) The protein price computed pursuant to § 1040.50(j), adjusted for somatic cell count pursuant to § 1040.50(l), multiplied by the total pounds of protein contained in the producer milk received from the producer; and
- (d) The fluid carrier price computed pursuant to § 1040.50(k), multiplied by the total hundredweight of fluid carrier contained in the producer milk received from the producer.

12. Section 1040.71 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 1040.71 Payments to the producer-settlement fund.

- (a) * * *
 - (1) The total value of milk of the handler for such month as determined pursuant to § 1040.60.
 - (2) The sum of:

(i) An amount obtained by multiplying the total hundredweight of producer milk as determined pursuant to § 1040.44(c) by the producer price differential, excluding any applicable location adjustment pursuant to § 1040.75(a)(3);

(ii) An amount obtained by multiplying the total pounds of protein contained in producer milk by the protein price adjusted pursuant to § 1040.50(l) for the weighted average somatic cell content of the handler's receipts of milk;

(iii) An amount obtained by multiplying the total hundredweight of fluid carrier contained in producer milk by the fluid carrier price; and

(iv) An amount obtained by multiplying the pounds of skim milk and butterfat for which a value was computed pursuant to § 1040.60(f) by the producer price differential.

* * * * *

13. Section 1040.73 is amended by revising the first sentence of paragraph (a), paragraph (b)(1)(ii), and paragraph (c), to read as follows:

§ 1040.73 Payments to producers and to cooperative associations.

- (a) Except as provided by paragraph (b) of this section, on or before the 15th day of each month, each handler (except a cooperative association) shall pay each producer for milk received from the producer during the preceding month not less than the value determined pursuant to § 1040.63 adjusted by the location differential pursuant to § 1040.75, less the payment made pursuant to paragraph (d) of this section. * * *
- (b) * * *
 - (1) * * *
 - (ii) The total pounds of butterfat, total pounds of protein, and total pounds of fluid carrier contained in the producer's milk, and the average somatic cell count of the producer's milk;

* * * * *

(c) On or before the 13th day after the end of each month, each handler shall pay a cooperative association which is a handler with respect to milk received by the handler from a pool plant operated by such cooperative association, or by bulk tank delivery pursuant to § 1040.9(c), not less than an amount computed pursuant to § 1040.63.

* * * * *

14. Section 1040.74 is revised to read as follows:

§ 1040.74 Butterfat differential.

The butterfat differential, rounded to the nearest one-tenth cent, shall be 0.138 times the current month's butter

price less 0.0028 times the preceding month's average pay price per hundredweight, at test, for manufacturing grade milk in Minnesota and Wisconsin, using the "base month" series, adjusted pursuant to § 1040.51 (a) through (e), as reported by the Department. The butter price means the simple average for the month of the Chicago Mercantile Exchange, Grade A butter price as reported by the Department.

15. Section 1040.75 is amended by revising paragraphs (a)(1) and (c), to read as follows:

§ 1040.75 Plant location adjustments for producers and on nonpool milk.

(a) * * *

- (1) May deduct from the producer price differential the rate per hundredweight applicable pursuant to § 1040.52(a)(1) or (2) for the location of the plant at which the milk was first physically received.

* * * * *

(c) For purposes of computation pursuant to §§ 1040.71 and 1040.72, the statistical uniform price shall be adjusted at the rates set forth in § 1040.52 applicable at the location of the nonpool plant from which the other source milk was received except that the statistical uniform price, so adjusted, shall not be less than the Class III price.

16. Section 1040.76 is amended by revising paragraph (a)(4) and the third sentence of paragraph (b)(1)(ii), to read as follows:

§ 1040.76 Payments by handler operating a partially regulated distributing plant.

* * * * *

(a) * * *

- (4) Multiply the remaining pounds by the amount by which the Class I differential price exceeds the producer price differential, both prices to be applicable at the location of the partially regulated distributing plant (but not to be less than the Class III price); and

* * * * *

(b) * * *

- (1) * * *
- (ii) * * * Any such transfers remaining after the above allocation which are classified in Class I and for which a value is computed for the handler operating the partially regulated distributing plant pursuant to § 1040.60 shall be priced at the statistical uniform price (or at the weighted average price if such is provided) of the respective order regulating the handling of milk at the transferee-plant, with such statistical uniform price adjusted to the location of the nonpool plant (but not to be less than the lowest class price of the respective order), except that transfers

of reconstituted skim milk in filled milk shall be priced at the lowest class price of the respective order; and

* * * * *

§ 1040.85 [Amended]

17. In § 1040.85 the introductory text is amended by removing the words “2 cents” and adding in their place the words “4 cents”.

§ 1040.86 [Amended]

18. In § 1040.86 paragraph (a) is amended by removing the words “5 cents” and adding in their place the words “7 cents”.

Dated: August 28, 1995

Patricia Jensen,

Acting Assistant Secretary, Marketing and Regulatory Programs.

[FR Doc. 95-21653 Filed 8-30-95; 8:45 am]

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