

Rules and Regulations

Federal Register

Vol. 64, No. 217

Wednesday, November 10, 1999

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1126 and 1137

[DA-99-08 and DA-99-07]

Milk in the Texas and Eastern Colorado Marketing Areas; Suspension of Certain Provisions of the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final Rule; Suspension of rule.

SUMMARY: This document suspends certain provisions of the Texas and Eastern Colorado Federal milk marketing orders (Orders 126 and 137) from the day after publication in the **Federal Register** until implementation of Federal order reform.

The suspensions have been in effect for both orders for some time, and were expected to become unnecessary under the provisions of the final rule establishing the consolidated Southwest and Central orders under Federal Milk Order Reform.

EFFECTIVE DATE: November 11, 1999.

FOR FURTHER INFORMATION CONTACT: Clifford M. Carman, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 720-9368, e-mail address: clifford.carman@usda.gov.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding:

Notice of Proposed Suspension (Texas): Issued September 15, 1999; published September 21, 1999 (64 FR 51083).

Notice of Proposed Suspension (Eastern Colorado): Issued September 13, 1999; published September 20, 1999 (64 FR 50777).

The Department is issuing this final rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule 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), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the 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. 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 has its 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.

Small Business Consideration

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 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 \$500,000, 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 \$500,000 per year criterion was used to establish a production guideline of 326,000 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.

For the month of May 1999, the milk of 1,314 producers was pooled on the Texas Federal milk order. Of these producers, 812 producers were below the 326,000-pound production guideline and are considered small businesses. During May, there were 12 handlers operating 21 pool plants under the Texas order. Four of these handlers would be considered small businesses.

For the month of June 1999, the milk of 203 producers was pooled on the Eastern Colorado milk order. Of these producers, 105 were below the 326,000-pound production guideline and are considered small businesses. For June 1999, there were eight handlers operating pool plants under the Eastern Colorado milk order. Of these handlers, five are considered small businesses.

This rule suspends portions of the pool plant and producer milk definitions under the Texas order. The suspension lessens the regulatory impact of the order on certain milk handlers and tends to assure that dairy farmers will have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

In addition, this rule suspends portions of the producer definition under the Eastern Colorado order, making it easier for a cooperative association to qualify milk for pooling under the order. The suspension lessens the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and of the orders regulating the handling of milk in the Texas and Eastern Colorado marketing area.

Notice of proposed rulemaking was published in the **Federal Register** on September 20, 1999 (64 FR 50777) concerning a proposed suspension of certain provisions of the Eastern Colorado order, and on September 21, 1999 (64 FR 51083) concerning a proposed suspension of certain provisions of the Texas order. Interested persons were afforded opportunity to file written data, views and arguments

thereon. No comments on either proposed suspension were received.

After consideration of all relevant material, including the proposals in the notices and other available information, it is hereby found and determined that from the day after publication of this rule in the **Federal Register** until implementation of Federal order reform, the following provisions of the Texas and Eastern Colorado orders do not need to effectuate the declared policy of the Act:

1. In § 1126.7(d) introductory text, the words "during the months of February through July" and the words "under paragraph (b) or (c) of this section".

2. In § 1126.7(e) introductory text, the words "and 60 percent or more of the producer milk of members of the cooperative association (excluding such milk that is received at or diverted from pool plants described in paragraphs (b), (c), and (d) of this section) is physically received during the month in the form of a bulk fluid milk product at pool plants described in paragraph (a) of this section either directly from farms or by transfer from plants of the cooperative association for which pool plant status under this paragraph has been requested".

3. In § 1126.13(e)(1), the words "and further, during each of the months of September through January not less than 15 percent of the milk of such dairy farmer is physically received as producer milk at a pool plant".

4. In § 1126.13, paragraph (e)(2).

5. In § 1126.13(e)(3), the sentence "The total quantity of milk so diverted during the month shall not exceed one-third of the producer milk physically received at such pool plant during the month that is eligible to be diverted by the plant operator;"

6. In § 1137.12(a)(2), the words "from whom at least three deliveries of milk are received during the month at a distributing pool plant"; and in the second sentence "30 percent in the months of March, April, May, June, July, and December and 20 percent in other months of", and the word "distributing".

Statement of Consideration

Suspension of the provisions for an indefinite period (until implementation of Federal order reform) is necessary because implementation of the 11 consolidated orders under Federal order reform has been delayed by judicial action. The Final Rule containing the 11 consolidated orders was issued August 23, 1999, and published September 1, 1999 (64 FR 47898). A Delay of Effective Date rule was issued September 30,

1999, and published October 5, 1999 (64 FR 53885).

For the Texas order, this rule reinstates a suspension that expired July 31, 1999, of portions of the pool plant and producer milk definitions under the Texas order. The rule will be in effect from the day after publication of the suspension in the **Federal Register** until the implementation of Federal order reform is completed. The action suspends: (1) The 60 percent delivery standard for pool plants operated by cooperatives; (2) the diversion limitation applicable to cooperative associations; (3) the limits on the amount of milk that a pool plant operator may divert to nonpool plants; (4) the shipping standards that must be met by supply plants to be pooled under the order; and (5) the individual producer performance standards that must be met in order for a producer's milk to be eligible for diversion to a nonpool plant.

The order provides for regulating, as a supply plant, a plant that each month ships a sufficient percentage of its receipts to distributing plants. The order sets the shipping standard at 15 percent of the plant's milk receipts during August and December and 50 percent of the plant's receipts during September through November and January. In addition, the order provides that a plant that is pooled as a supply plant during each of the immediately preceding months of September through January may be pooled under the order during the following months of February through July without making qualifying shipments to distributing plants. The requested action would suspend these performance standards, but only for supply plants that were regulated under the Texas order during each of the immediately preceding months of September through January.

The order also permits a cooperative association plant located in the marketing area to be a pool plant if at least 60 percent of the producer milk of members of the cooperative association is physically received at pool distributing plants during the month. In addition, a cooperative association may divert to nonpool plants up to one-third of the amount of milk that the cooperative causes to be physically received during the month at handlers' pool plants, and the operator of a pool plant may divert to nonpool plants not more than one-third of the milk that is physically received during the month at the handler's pool plant. This action suspends the 60 percent delivery standard for plants operated by a cooperative association and removes the diversion limitations applicable to a

cooperative association and to the operator of a pool plant.

The order also specifies that some milk of each producer must be physically received at a pool plant in order for any of the producer's milk to be eligible for diversion to a nonpool plant. During the months of September through January, 15 percent of a producer's milk must be received at a pool plant for the remainder to be eligible for diversion. This rule suspends these requirements.

The reinstatement of the suspension was requested by DFA, a cooperative association that represents a substantial number of dairy farmers who supply the Texas market. The cooperative stated that marketing conditions have not changed materially since the provisions were initially suspended, prior to 1990, and therefore should be suspended until restructuring of the Federal order program is implemented as mandated in the 1996 Farm Bill.

The cooperative stated that the reinstatement of the suspension is necessary to assure that dairy farmers who have historically supplied the Texas market will have their milk priced under the Texas order. In addition, DFA maintains that the suspension will provide handlers the flexibility needed to move milk supplies in the most efficient manner and to eliminate costly and inefficient movements of milk that would be made solely for the purpose of pooling the milk of dairy farmers who have historically supplied the market. No comments opposing the suspension were received.

Implementation of the consolidated Southwest order, which contains provisions that would accommodate the market's current conditions, was to have taken place on October 1, 1999. Implementation of that final rule has been delayed by judicial action, and continued suspension of the Order 126 provision is necessary to prevent uneconomical and inefficient movements of milk and to ensure that producers historically associated with the markets will continue to have their milk pooled under the order.

Accordingly, the suspension is found to be necessary for the purpose of assuring that producers' milk will not have to be moved in an uneconomic and inefficient manner to assure that producers whose milk has long been associated with the Texas marketing area will continue to benefit from pooling and pricing under the order.

For the Eastern Colorado order, this rule suspends a portion of the producer definition to enable a cooperative association to more easily qualify milk

for pooling under the order until implementation of Federal Order Reform. The language suspended requires the milk of cooperative association members to "touch base" at pool distributing plants at least 3 times per month to be eligible for diversion. In addition, language limiting the quantity of milk diverted to nonpool plants by cooperative associations to 30 percent in the months of March through July and December, and to 20 percent in other months of the quantity received at pool distributing plants is suspended so that the effective limit on diversions becomes 50 percent of the total milk pooled by cooperatives.

Continuation of the Eastern Colorado suspension that expired on August 31, 1999, was requested by DFA, a cooperative association which represents nearly all of the dairy farmers who supply the Eastern Colorado market. DFA contended that milk from some producers is required every day of the month in order to meet market demands, while milk from some other producers is required most days of the month and milk from a few producers is required only a few days each month to meet market demands. DFA asserted that with the suspension in place the market can be served in the most efficient manner possible because milk required by the market only a few days each month can maintain association with the market without being required to be delivered to pool distributing plants each month. DFA projected that, without the suspension, inefficient and costly movements of milk would have to be made to maintain the pool status of producers who historically have supplied the market. No comments opposing the suspension were received.

Implementation of the consolidated Central order, which contains provisions that would accommodate the market's current conditions, was to have taken place on October 1, 1999. Implementation of that final rule has been delayed by judicial action, and continued suspension of the Order 137 provision is necessary to prevent uneconomical and inefficient movements of milk and to ensure that producers historically associated with the markets will continue to have their milk pooled under the order.

Accordingly, the suspension is found to be necessary for the purpose of assuring that producers' milk will not have to be moved in an uneconomic and inefficient manner to assure that producers whose milk has long been associated with the Eastern Colorado marketing area will continue to benefit from pooling and pricing under the order.

It is hereby found and determined that thirty days' notice of the effective date hereof is impractical, unnecessary and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing areas, in that such rule is necessary to permit the continued pooling of the milk of dairy farmers who have historically supplied the markets without the need for making costly and inefficient movements of milk;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of proposed rulemaking was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. No comments were received.

Therefore, good cause exists for making this order effective less than 30 days from the date of publication in the **Federal Register**.

List of Subjects in 7 CFR Parts 1126 and 1137

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR Parts 1126 and 1137 are amended as follows for the period from the day after publication of this rule in the **Federal Register** until implementation of Federal order reform.

1. The authority citation for 7 CFR Parts 1126 and 1137 continues to read as follows:

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

PART 1126—MILK IN THE TEXAS MARKETING AREA

§ 1126.7 [Suspended in part]

2. In § 1126.7(d) introductory text, the words "during the months of February through July" and the words "under paragraph (b) or (c) of this section" are suspended.

3. In § 1126.7(e) introductory text, the words "and 60 percent or more of the producer milk of members of the cooperative association (excluding such milk that is received at or diverted from pool plants described in paragraphs (b), (c), and (d) of this section) is physically received during the month in the form of a bulk fluid milk product at pool plants described in paragraph (a) of this section either directly from farms or by transfer from plants of the cooperative association for which pool plant status under this paragraph has been requested" are suspended.

§ 1126.13 [Suspended in part]

4. In § 1126.13(e)(1), the words "and further, during each of the months of September through January not less than 15 percent of the milk of such dairy farmer is physically received as producer milk at a pool plant" are suspended.

5. In § 1126.13, paragraph (e)(2) is suspended in its entirety.

6. In § 1126.13(e)(3), the sentence "The total quantity of milk so diverted during the month shall not exceed one-third of the producer milk physically received at such pool plant during the month that is eligible to be diverted by the plant operator;" is suspended.

PART 1137—MILK IN THE EASTERN COLORADO MARKETING AREA

§ 1137.12 [Suspended in part]

7. In § 1137.12(a)(1), the words "from whom at least three deliveries of milk are received during the month at a distributing pool plant"; and in the second sentence "30 percent in the months of March, April, May, June, July, and December and 20 percent in other months of", and the word "distributing" are suspended.

Dated: November 3, 1999.

F. Tracy Schonrock,

Acting Deputy Administrator, Dairy Programs.

[FR Doc. 99-29317 Filed 11-9-99; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1131 and 1138

[DA-99-05 and DA-99-09]

Milk in the Central Arizona and New Mexico-West Texas Marketing Areas; Suspension of Certain Provisions of the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments; suspension.

SUMMARY: This document suspends certain provisions of the Central Arizona (Order 131) and New Mexico-West Texas (Order 138) Federal milk marketing orders from the day after publication in the **Federal Register** until implementation of Federal order reform.

The suspensions have been in effect for both orders for periods beginning in 1995 in Central Arizona and 1993 in New Mexico-West Texas at the request of cooperatives representing nearly all of the producers in Order 131 and most