

NORTHEAST DAIRY COMPACT COMMISSION**7 CFR Parts 1307 and 1308****Over-Order Price Regulation**

AGENCY: Northeast Dairy Compact Commission.

ACTION: Proposed rule; notice of hearing.

SUMMARY: The Northeast Dairy Compact Commission proposes to amend the method for determining the amount of the administrative assessment charged to milk handlers. The proposed rule would give the Commission discretion, in any given month, to waive the administrative assessment entirely, or to set the rate at an amount less than the current flat rate of 3.2¢ per hundredweight of fluid milk. The Commission's goal is to maintain a reserve account in the range of 80% to 120% of four-months operating expenses, as determined to be necessary in the budget approved by the Commission. However, this range would not be binding on the Commission and the Commission would at all times retain discretion whether to waive the administrative assessment or to set the rate at an amount less than 3.2 cents. The Commission also invites comments on whether the rule should be amended to permit the Commission to adjust the administrative assessment upward, from the current rate of 3.2¢, in exceptional circumstances and, if so, what exceptional circumstances would justify such an adjustment. Finally, the Commission proposes to promulgate a new rule that would require handlers to make payment to the Compact Commission by electronic funds transfer, if the total amount due is greater than \$25,000.

DATES: A public hearing will be held on March 3, 1999 at 9 a.m. Sworn and notarized written testimony, comments and exhibits may be submitted until 5 p.m. on March 17, 1999.

ADDRESSES: The public hearing will be held at Tuck Library, Chubb Auditorium, 30 Park Street, Concord, New Hampshire. Mail, or deliver, sworn and notarized testimony, comments and exhibits to: Northeast Dairy Compact Commission, 34 Barre Street, Suite 2, Montpelier, Vermont 05602.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Becker, Executive Director, Northeast Dairy Compact Commission at the above address or by telephone at (802) 229-1941, or by facsimile at (802) 229-2028.

SUPPLEMENTARY INFORMATION:**I. Background**

The Northeast Dairy Compact Commission ("Commission") was established under authority of the Northeast Interstate Dairy Compact ("Compact"). The Compact was enacted into law by each of the six participating New England states as follows: Connecticut—Pub. L. 93-320; Maine—Pub. L. 89-437, as amended, Pub. L. 93-274; Massachusetts—Pub. L. 93-370; New Hampshire—Pub. L. 93-336; Rhode Island—Pub. L. 93-106; Vermont—Pub. L. 93-57. In accordance with Article I, Section 10 of the United States Constitution, Congress consented to the Compact in Pub. L. 104-127 (FAIR Act), Section 147, codified at 7 U.S.C. 7256. Subsequently, the United States Secretary of Agriculture, pursuant to 7 U.S.C. 7256(1), authorized implementation of the Compact.

Pursuant to its rulemaking authority under Article V, Section 11 of the Compact, the Commission concluded an informal rulemaking process and voted to adopt a compact over-order price regulation on May 30, 1997.¹ The Commission subsequently amended and extended the compact over-order price regulation.² In 1998, the Commission further amended specific provisions of the over-order price regulation.³ The current compact over-order price regulation is codified at 7 CFR Chapter XIII.

On November 27, 1998, the Commission issued a notice of proposed rulemaking proceedings on several subjects and issues, including whether the amount of, or method for determining, the administrative assessment should be amended.⁴ The Commission held a public hearing to receive testimony on December 11, 1998 in Boxborough, Massachusetts and comments were received until 5 p.m. on December 31, 1998.

On January 13, 1999, the Commission held its deliberative meeting, pursuant to 7 CFR 1361.8, to consider all oral and written comments received at the public hearing and the additional comments received by the Commission's published comment deadline of December 31, 1998, and to deliberate and act on the proposed subjects and issues rulemaking regarding whether the amount of, or method for determining, the administrative assessment should be amended.⁵

Based on the oral testimony and written comments and exhibits received in that proceeding, the Commission proposes to amend the method for determining the amount of the administrative assessment charged to milk handlers.⁶ The proposed rule would give the Commission discretion, in any given month, to waive the administrative assessment entirely, or to set the rate at an amount less than the current flat rate of 3.2¢ per hundredweight of fluid milk. The waiver or reduction would be based on the Commission's reserves and expenses. The Commission's goal is to maintain a reserve account in the range of 80% to 120% of four-months operating expenses, as determined to be necessary in the budget approved by the Commission. However, this range would not be binding on the Commission and the Commission would at all times retain discretion whether to waive the administrative assessment or to set the rate at an amount less than 3.2 cents. The Commission would welcome public comments on these proposals. The Commission also invites comments on whether the rule should be amended to permit the Commission to adjust the administrative assessment upward, from the current rate of 3.2¢, in exceptional circumstances and, if so, what exceptional circumstances would justify such an adjustment.

In addition to the proposed amendments to the administrative assessment, the Commission also proposes to promulgate a new rule that would require handlers to make payment to the Compact Commission by electronic funds transfer, if the total amount due is greater than \$25,000.

II. Summary and Analysis of Issues and Comments**Administrative Assessment**

The Commission received oral and written testimony and comment from the Commission's Regulations Administrator, Carmen Ross, and eight commenters in the subjects and issues rulemaking proceeding regarding whether the amount of, or method for determining, the administrative assessment should be amended.⁷

Mr. Ross testified that the Compact authorizes the Commission to impose an assessment on milk handlers to cover

⁶ The current administrative assessment regulation is published at 7 CFR part 1308.

⁷ Carmen L. Ross, Transcript ("Tr.") at 4; Charles Arbing, Tr. at 30; Diane Bothfeld Tr. at 54 and Written Comment ("WC") at 32; Leon J. Berthiaume, WC 13; Robert D. Wellington, WC 16; Edward W. Gallagher, WC 18; Sally J. Beach, WC 21; Michael L. Altman, WC 25; and Leon Graves, WC 34.

¹ 62 FR 29626 (May 30, 1997)

² 62 FR 62810 (Nov. 25, 1997)

³ 63 FR 10104 (Feb. 27, 1998); 63 FR 46385 (Sept. 1, 1998); and 63 FR 65517 (Nov. 27, 1998).

⁴ 63 FR 65563 (Nov. 27, 1998).

⁵ 64 FR 533 (Jan. 5, 1999).

the costs of the administration and enforcement of the over-order price regulation. The Compact also requires the Commission to establish a reserve for the ongoing operating expenses.⁸ Mr. Ross explained that the current regulation requires handlers of Class I milk products disposed of in the regulated area to pay their pro rata share of the expenses of the administration and enforcement of the over-order price regulation. The current administrative assessment is a flat rate of 3.2 cents per hundredweight and results in a variance in income of up to 13% per month.⁹

The Commission regulation is, in all material respects, the same as corresponding provisions of the Federal Order # 1 regulations.¹⁰

Under the Compact, like Federal Order #1, the handler is responsible for making payments of the administrative assessment. Under the Compact, like Federal Order #1, the handler is responsible for payment to the pool. Both the Compact and the Federal Order # 1 regulate handlers of fluid milk products disposed of in the regulated area, and define "handler" to cover operator's of pool plants, partially regulated plants, cooperative associations and others who receive and distribute fluid milk products.¹¹

Mr. Ross explained that under the Federal Market Order # 1 regulation, "the Federal Market Order (Administrator) can, when conditions warrant it, reduce or even waive the administrative assessment."¹² Under Federal Market Administrator Instruction #207, the United States Department of Agriculture Dairy Division recommends that budgeted operating reserves be maintained within a range of 80% to 120% of the designated reserve level.¹³

Some commenters¹⁴ suggested that the Commission waive or reduce the administrative assessment in months in which there is no producer pool. Conversely, other commenters¹⁵ concluded that the administrative assessment should be charged in all months, regardless of whether there is a Compact producer pool in a particular month, to ensure adequate funding of the Commission's other functions. Mr. Ross testified, that the Commission has responsibilities in addition to running the pool. In particular, he stated that it

is imperative that the Compact Commission continues to monitor the Compact pool because the handlers still have to report and producers may be qualified in and out of the pool, even in months when the federal price is above the Compact minimum price and there is no Compact producer pool.¹⁶ Accordingly, the Commission does not agree that the administrative assessment should be tied to whether there is a producer pool in a particular month.

Many commenters¹⁷ encouraged the Commission to amend the administrative assessment regulation to allow the flexibility to adjust the assessment rate, as needed and appropriate, to meet the Commission's expenses, and to waive or reduce the assessment when the Commission operating reserves permit it. For example, Mr. Arbing testified that the Commission should waive the administrative assessment in months in which the Commission has sufficient reserves.¹⁸ He testified that he would support a methodology that allowed the Commission discretion to waive or adjust the assessment depending on the reserves and expenses of the Commission.¹⁹ He further testified that he would consider four months operating reserves, based on the budget approved by the Commission, to be an appropriate level for a reserve fund.²⁰ Other commenters also recommended that the Commission establish adequate reserves based on the Commission's budget.²¹

The Commission concludes that these commenters²² raise valid points and, therefore, proposes to amend the method for determining the amount of the administrative assessment charged to milk handlers, without regard to whether there is a producer pool in a given month. The proposed rule would give the Commission discretion, in any given month, to waive the administrative assessment entirely, or to set the rate at an amount less than the current flat rate of 3.2 cents per

hundredweight of fluid milk. The waiver or reduction would be based on the Commission's reserves and expenses. The Commission's goal is to maintain a reserve account in the range of 80% to 120% of four-months operating expenses, as determined to be necessary in the budget approved by the Commission. This range, however, would not be binding on the Commission and the Commission would at all times retain discretion whether to waive or set a lower rate for the administrative assessment. The Commission also is considering an additional amendment that would give the Commission discretion to adjust the administrative assessment upward, from the current rate of 3.2 cents, in exceptional circumstances and, if so, what exceptional circumstances would justify such an adjustment.

One commenter²³ offered several arguments related to the Commission's use of the funds generated by the administrative assessment. This commenter argues that section 18 of the Compact only permits the Commission to assess and use the administrative assessment for the direct costs of administering the producer pool, i.e. computation and announcement of the over-order price, pursuant to 7 CFR part 1305, and the computation and announcement of the producer price, pursuant to 7 CFR part 1306, and the receipt and distribution of monies from the producer-settlement fund.²⁴ This commenter asks the Commission to amend its regulations to conform to this narrow interpretation of the Compact.²⁵

The implication of this argument is that the commenter does not view the Commission as authorized to use the administrative assessment funds for administration and enforcement of any other regulation or provision of the Compact. Some of the Commission activities authorized by these other regulations and Compact provisions include rulemaking,²⁶ prescribing and verifying handler's reports (which are the basis for the administration of the over-order price),²⁷ determining the qualification of producers,²⁸ classifying milk,²⁹ providing an exemption process for regulated persons,³⁰ to meet and

⁸ Ross, Tr. at 5; See also, Compact Article IV, Section 10 (9) and Article VII, Section 18(a).

⁹ Ross, Tr. at 5-6.

¹⁰ Ross, Tr. at 6-8.

¹¹ Ross, Tr. at 6.

¹² Ross, Tr. at 8.

¹³ Market Administrator Instruction #207, WC at 3-11.

¹⁴ Arbing, Tr. at 31-32; Bothfeld, Tr. at 55; Berthiaume, WC at 14; and Graves, WC at 34.

¹⁵ Wellington, WC at 16-17; Gallagher, WC at 20; and Beach, WC at 22.

¹⁶ Ross, Tr. at 24-25.

¹⁷ Arbing, Tr. at 31; Bothfeld, Tr. at 55; Berthiaume, WC at 14; Wellington, WC at 16; Gallagher, WC at 20; and Graves, WC at 34.

¹⁸ Arbing, Tr. at 31.

¹⁹ Arbing, Tr. at 53-54.

²⁰ Arbing, Tr. at 38, 40-41.

²¹ Bothfeld, Tr. at 55; Berthiaume, WC at 14; Wellington, WC at 16; Gallagher, WC at 20; and Graves, WC at 34.

²² Arbing, Tr. at 31, 38, 40-41 (re: importance to processors to waive the administrative assessment when the Commission has adequate reserves); and Bothfeld, Tr. at 55, Berthiaume, WC at 14, Wellington, WC at 16, Gallagher, WC at 20, Beach, WC at 22, Graves, WC at 34 (re: in support of the Commission having the flexibility to waive or reduce the administrative assessment rate when the operating reserves permit it)

²³ Altman, WC at 26.

²⁴ Altman, WC at 26-30.

²⁵ Altman, WC at 30.

²⁶ 7 CFR 1300.1 and 7 CFR parts 1361 and 1371 and Compact Article V.

²⁷ 7 CFR 1300.1, 7 CFR Part 1303 and Compact Article VI.

²⁸ 7 CFR 1301.11.

²⁹ 7 CFR part 1304.

³⁰ 7 CFR part 1381, Compact Article VI, Section 16.

conduct business,³¹ enforcing the Compact and over-order price regulation,³² and conducting and administering the activities authorized by Articles I, II, IV or VII of the Compact.

The Commission respectfully disagrees with this commenter's narrow interpretation of its authority as being contrary to both the letter and the spirit of the Compact. The Compact charges the Commission with the broad mission of taking "such steps as are necessary to assure the continued viability of dairy farming in the northeast, and to assure consumers of an adequate, local supply of pure and wholesome milk." Compact Article I, Section 1. In addition to the activities authorized by the Compact cited above, the Compact specifically authorizes the Commission to adopt a compact over-order price regulation, and permits that regulation to include "an assessment for the specific purpose of their administration." Compact Article VII, Section 18(a). The Compact further states that any price regulation may include "[o]ther provisions and requirements as the commission may find are necessary or appropriate to effectuate the purposes of this compact and to provide for the payment of fair and equitable minimum prices to producers." Compact Article IV, Section 10 (11). The Compact also requires the regulations to "provide for establishment of a reserve for the commission's ongoing operating expenses." Compact, Article VII, Section 18(a). The Commission has promulgated regulations at 7 CFR Chapter XIII to effectuate its obligations and responsibilities under the Compact. The Commission is responsible for the administration and enforcement of each of the individual regulations that constitute the Northeast Dairy Compact Over-order Price Regulation, not only those selected regulations identified by the commenter.

Finally, three commenters,³³ asked the Commission to consider amending the regulations to eliminate the over-order obligation and administrative assessment on raw skim milk that is sold in bulk to other processing plants who further process and bottle that milk. The Commission considered the concerns expressed by these commenters, but declines to propose the requested amendments at this time. The Commission notes that the present Compact regulations are, in all material respects, identical to the Federal Order

1 regulations in the treatment of the raw skim milk that is sold for further processing.

The Northeast Dairy Compact Commission has considered all the testimony and comments provided and proposes to amend the method for determining the amount of the administrative assessment charged to milk handlers. The proposed rule would give the Commission discretion, in any given month, to waive the administrative assessment entirely or to set the rate at an amount less than the current flat rate of 3.2 cents per hundredweight of fluid milk. The waiver or reduction would be based on the Commission's reserves and expenses.

Method of Payment and Charges on Overdue Accounts

The Commission also proposes to add a new regulation which would require that handlers make payment of the over-order obligation and administrative assessment to the Commission by electronic transfer of funds if the aggregate total due for the month is greater than \$25,000. The Commission seeks to add this rule in order to best ensure the efficient and timely transfer of funds into the producer-settlement fund and the corresponding timely distribution of funds from the producer-settlement fund. Based on the experience of the Commission in administering the producer-settlement fund, most handlers already use electronic transfer of funds. The Commission also uses electronic transfer of funds for distribution to handlers of monies from the producer-settlement fund.

Official Notice of Technical, Scientific or Other Matters

Pursuant to the Commission regulations, 7 CFR 1361.5(g)(5), the Commission hereby gives public notice that it may take official notice, at the public hearing March 3, 1999, or afterward, of relevant facts, statistics, data, conclusions, and other information provided by or through the United States Department of Agriculture, including, but not limited to, matters reported by the National Agricultural Statistics Service, the Market Administrators, the Economic Research Service, the Agricultural Marketing Service and information, data and statistics developed and maintained by the Departments of Agriculture of the States or Commonwealth within the Compact regulated area.

The Commission will also receive into the record of this rulemaking proceeding the entire record, including

the public hearing transcript and written comments and submissions, of the subjects and issues rulemaking proceeding regarding whether the amount of, or method for determining, the administrative assessment should be amended.

Public Participation in Rulemaking Proceedings

The Commission seeks and encourages oral and written testimony and comments from all interested persons regarding these proposed rules. The Commission continues to benefit from the valuable insights and active participation of all segments of the affected community including consumers, processors and producers in the development and administration of the Over-order Price Regulation.

Date, Time and Location of the Public Hearing

The Northeast Dairy Compact Commission will hold a public hearing at 9 a.m. on March 3, 1999 at the Tuck Library, Chubb Auditorium, 30 Park Street, Concord, New Hampshire.

Request for Pre-filed Testimony and Written Comments

Pursuant to the Commission rules, 7 CFR 1361.4, any person may participate in the rulemaking proceeding independent of the hearing process by submitting written comments or exhibits to the Commission. Comments and exhibits may be submitted at any time before 5 p.m. on March 17, 1999.

Please note: Comments and exhibits will be made part of the record of the rulemaking proceeding only if they identify the author's name, address and occupation, and if they include a sworn and notarized statement indicating that the comment and/or exhibit is presented based upon the author's personal knowledge and belief. Facsimile copies will be accepted up until the 5 p.m. deadline, but the original must then be sent by ordinary mail.

The Commission is requesting pre-filed testimony from any interested person. Pre-filed testimony must include the name, address and occupation of the witness and a sworn notarized statement indicating that the testimony is presented based upon the author's personal knowledge and belief. Pre-filed testimony must be received in the Commission office no later than 5 p.m. February 22, 1999 to insure distribution to Commission members prior to the public hearing.

Pre-filed testimony, comments and exhibits should be sent to: Northeast Dairy Compact Commission, 34 Barre Street, Suite 2, Montpelier, Vermont 05602 or by facsimile to (802) 229-2028.

³¹ Compact Article III.

³² Compact Article VI.

³³ Bothfeld, Tr. at 55-59; Berthiaume, WC at 14-15; and Beach, WC at 22.

List of Subjects in 7 CFR Parts 1307 and 1308

Milk.

Codification in Code of Federal Regulations

For reasons set forth in the preamble, the Northeast Dairy Compact Commission proposes to amend 7 CFR parts 1307 and 1308 as follows:

PART 1307—PAYMENTS FOR MILK

1. The authority citation for part 1307 continues to read as follows:

Authority: 7 U.S.C. 7256

§ 1307.4 [Redesignated as § 1307.5]

2. Section 1307.4 is redesignated § 1307.5.

3. A new § 1307.4 is added to read as follows:

§ 1307.4 Method of payment.

If the combined total of the handler's producer-settlement fund debit for the month as determined under § 1307.2(a) and the handler's obligation for the month as determined under § 1308.1 of this chapter is greater than \$25,000, then the handler must make payment to the compact commission by electronic transfer of funds on or before the 18th day after the end of the month.

PART 1308—ADMINISTRATIVE ASSESSMENT

1. The authority citation for part 1308 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. Section 1308.1 is amended by revising the introductory text to read as follows:

§ 1308.1 Assessment for pricing regulations administration.

On or before the 18th day after the end of the month, each handler shall pay to the compact commission his pro rata share of the expense of administration of this pricing regulation. The payment shall be at the rate of 3.2 cents per hundredweight. The Commission may waive, or set the rate at an amount less than 3.2 cents, pursuant to § 1308.2. The payment shall apply to:

* * * * *

3. A new § 1308.2 is added to read as follows:

§ 1308.2 Method to waive or change the administration assessment.

The compact commission may waive or change the assessment for pricing regulation administration to maintain the operating reserve in the range of 80% to 120% of four months operating

expenses, as determined in the budget approved by the commission. The compact commission will announce, pursuant to § 1305.2 of this chapter, the waiver or change in rate of assessment.

Dated: January 22, 1999.

Kenneth M. Becker,

Executive Director.

[FR Doc. 99-1993 Filed 1-27-99; 8:45 am]

BILLING CODE 1650-01-P

DEPARTMENT OF AGRICULTURE**Animal and Plant Health Inspection Service****9 CFR Parts 1 and 3**

[Docket No. 98-106-1]

Animal Welfare; Petition for Rulemaking

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of petition and request for comments.

SUMMARY: We are notifying the public of our receipt of a petition for rulemaking, and we are soliciting public comment on that petition. The petition, sponsored by several petitioners, requests that the Secretary of Agriculture amend the definition of "animal" in the Animal Welfare Act regulations to remove the current exclusion of rats and mice bred for use in research and birds and grant such other relief as the Secretary deems just and proper."

DATES: Consideration will be given only to comments received on or before March 29, 1999.

ADDRESSES: We are accepting comments in two ways—either in hard copy or via the Internet. However, comments submitted in either method must be submitted as described below; comments sent to other than the physical address or the Internet address listed below will not be considered. For comments submitted in hard copy, please send an original and three copies to Docket No. 98-106-1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comments refer to Docket No. 98-106-1. Anyone wishing to see copies of comments received or the petition may do so by coming to USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Please call ahead on (202) 690-2817 to facilitate entry into the comment reading room. Any person

who wishes to submit a comment electronically must use a form located on the Internet at <http://comments.aphis.usda.gov>. Electronically submitted comments need only be submitted once. These comments are available for public viewing at the same Internet address.

FOR FURTHER INFORMATION CONTACT: Dr. Jerry DePoyster, Senior Veterinary Medical Officer, AC, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737-1228, (301) 734-7833.

SUPPLEMENTARY INFORMATION:**Background**

Under the Animal Welfare Act (AWA) (7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, and carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA). Within APHIS, the responsibility for AWA administration has been delegated to Animal Care. Regulations established under the Act are contained in the Code of Federal Regulations (CFR) in 9 CFR parts 1, 2, and 3. Part 1 contains definitions for terms used in parts 2 and 3; part 2 contains general requirements for regulated parties; and part 3 contains specific requirements for the care and handling of certain animals.

The Secretary has received a petition for rulemaking sponsored by the Alternatives Research and Development Foundation; In Vitro International and Rich Ulmer, president of In Vitro International; Barbara Orlans, senior research fellow at the Kennedy Institute of Ethics at Georgetown University; George K. Russell, professor for the Department of Biology at Adelphi University; and Ruy Tchao, associate professor for the Department of Pharmacology and Toxicology at the Philadelphia College of Pharmacy and Science. The petition requests the Secretary of Agriculture to take two actions: (1) Initiate rulemaking proceedings to amend the definition of "animal" contained at 9 CFR 1.1 to eliminate the exclusion of birds, rats, and mice; and (2) grant such other relief as the Secretary deems just and proper.

The term "animal" is defined in the AWA as follows: any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal as the Secretary may determine is