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NORTHEAST DAIRY COMPACT COMMISSION

7 CFR Parts 1301 and 1304

Over-Order Price Regulation

AGENCY: Northeast Dairy Compact Commission.

ACTION: Final rule.

SUMMARY: This rule amends the Compact Over-order Price Regulation to limit the payment of the Compact Over-order producer price to milk disposed of within the Compact regulated area, with a seasonally adjusted allowance for diverted or transferred milk, but does not restrict Compact payment on bulk transfers of processed fluid milk products. This rule also amends the definitions of *producer* and *producer milk* to be consistent with the amended rules regarding diverted and transferred milk, and further amends the definition of *producer* to include December 1998 as an additional requirement for qualification.

EFFECTIVE DATE: January 1, 1999.

ADDRESSES: Northeast Dairy Compact Commission, 43 State Street, P.O. Box 1058, Montpelier, Vermont 05601.

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SUPPLEMENTARY INFORMATION:

I. Background

On June 11, 1998 the Northeast Dairy Compact Commission issued a notice of proposed rulemaking [1] to consider amendments to the Compact Over-order Price Regulation that would exclude milk from the pool which is either diverted or transferred, in bulk, out of the Compact regulated area. The Commission held a public hearing to receive testimony on the proposed rules on July 1, 1998 and additional comments and exhibits were received until 5:00 PM on July 15, 1998. The Commission held a deliberative meeting on August 5, 1998 [2] to consider the testimony and comments received and to discuss modifications to the proposed rules based on that information. The Commission determined that it required additional information on the issues and published notice [3] (1) that an additional public hearing would be held on September 2, 1998; (2) that the comment period would be extended to September 16, 1998 to receive further testimony and comment on the proposed rules regarding diverted and transferred milk; and (3) that the Commission was considering updating the definition of *producer* to include December 1998 as an additional requirement for qualification.

The Commission held a second deliberative meeting on October 7, 1998 [4] to consider all oral and written comments received at the public hearings held on July 1, 1998 and September 2, 1998 and the additional comments received by the Commission's published comment deadlines, and to deliberate and act on the proposed amendments to the Over-order Price Regulation.

Based on the oral testimony and written comments and exhibits received, the Commission concludes that appropriate limits must be established to prevent increases in milk supply that are not needed for the New England market and hereby amends the following sections of the Over-order Price Regulation:

(1) 7 C.F.R. 1301.12—to clarify that producer milk must be physically moved to a pool plant, or be diverted as permitted by the regulation, to qualify for the Compact payment;

(2) 7 C.F.R. 1301.23 and 1304.2—to exclude milk from the pool which is either diverted or transferred, in bulk, out of the Compact regulated area, in excess of 8% in the fall months of August, September, October and November, 10% in the transition months of January, February, July and December and 13% in the spring months of March, April, May and June. The percentage is calculated on the milk handler's total producer receipts. The amended rule does not restrict Compact payments on bulk transfers of skim milk and condensed milk, bulk milk transferred and classified Class I by a federal market order and fluid milk processed (i.e., pasturized, homogenized, or blended) or fluid milk diverted or transferred due to certain catastrophic circumstances; and

(3) 7 C.F.R. 1301.11—to be consistent with the amended rules regarding diverted and transferred milk and to add December 1998 as an additional requirement in the definition of *producer*.

II. Summary and Analysis of Issues and Comments

At the July 1, 1998 public hearing, the Commission's Regulations Administrator, Carmen Ross, testified and explained the issues presented under the current Over-order Price Regulation and why the proposed rules were needed.[5] Mr. Ross provided data regarding the volume of milk transferred or diverted out of the Compact regulated area from July 1997 through May 1998.[6] This data showed a clear pattern of an increasing volume of milk being diverted and transferred out of the Compact regulated area since the inception of the Over-order Price Regulation. For example, in July 1997, the first month of the Compact pool, diverted and transferred milk constituted 34.4 million pounds, or 6.5 percent of the July pool. However, in February 1998, the diverted and transferred milk volume had risen to 49.8 million pounds, or 9.8 percent of the February pool. This trend continued and in May 1998, 53.2 million pounds of milk was diverted or transferred out of the Compact regulated area, amounting to 9.2% of the May pool.[7] Mr. Ross provided the most current data at the September 2, 1998 hearing which demonstrated that the volume of milk diverted and transferred out of the

[1] 63 FR 31943 (June 11, 1998). In this same notice of proposed rulemaking, the Commission also proposed to establish a reserve fund for reimbursement to school food authorities. The final rule establishing the reserve fund was published at 63 FR 46385 (September 1, 1998).

[2] Public notice of this meeting was published at 63 FR 40069 (July 27, 1998).

[3] 63 FR 43891 (August 17, 1998).

[4] Public notice of this meeting was published at 63 FR 51864 (September 29, 1998).

[5] Carmen Ross, First Public Hearing Transcript (''Tr.'') 9–28.

[6] Ross, Tr. 17–18.

[7] Ross Tr. 17–21.

Compact regulated area continued to rise to 64.3 million pounds, representing 11.3% of the July 1998 pool, or nearly double the volume of milk diverted and transferred in July 1997.

To address the concern of a steadily increasing volume of milk that qualifies for the Compact Over-order producer price and is then diverted and transferred out of the Compact regulated area, the Commission proposed to amend the Over-order Price Regulation, section 1301.12, which defines *producer milk,*[8] and section 1301.23, which defines *diverted milk,* and section 1304.2 relating to classification of transfers of milk. The effect of these proposed amendments would be to depool the volume of producer milk that a handler diverts or transfers, in bulk, outside of the regulated area, thereby excluding it from the Compact Over-order producer price.[9]

The Commission held two public hearings and received testimony and comments from a total of fifteen individuals, including six representatives of dairy cooperatives,[10] two representatives from a milk processor,[11] two state Commissioners of Agriculture and one state dairy economist,[12] a dairy farmer,[13] and two representatives of the Community Development and Applied Economics Department of the University of Vermont.[14] In addition, at the request of the Commission, the Federal Order 1 Market Administrator submitted additional data and testified at the September 2, 1998 hearing to answer the Commission's technical questions relating to that data.[15]

Of the total comments received after the first public hearing on July 1, 1998, two commenters[16] supported the proposed rules relating to diverted or transferred milk, while eight commenters[17] opposed the total exclusion of diverted and transferred milk from the Compact pool. Those commenters opposed to the proposed amendments were most concerned with the seasonal fluctuations of supply and demand in the New England milk market,[18] the vital role diversions and transfers of milk play in balancing the market to accommodate those fluctuations,[19] and the impact, on both producers and the market, of totally depooling diverted and transferred milk.[20] However, most of these commenters also recognized the concerns identified by the Commission regarding the increase in diversions and transfers of milk out of the Compact regulated area, and offered some other solutions, including extending the qualification period for producers[21] and implementing a cap on the volume of diverted and transferred milk that could qualify for the Compact payment.[22]

Nine commenters[23] provided new or supplemental testimony during the extended public comment period. Of those nine commenters, four commenters[24] expressed support for a seasonally adjusted cap on the volume of diverted and transferred milk, calculated as a percentage of total handler producer receipts. No commenters opposed a seasonally adjusted cap. One commenter reiterated his prior suggestion that the qualification period for producers be extended.[25]

In the initial public comment period, one commenter supported the proposed amendments and their intended effect of ''limiting payments of the compact's over-order producer price to milk that is necessary to meet the demand of the New England market.''[26]

The concerns expressed by this commenter reflect the concerns initially identified by the Commission. However, after careful review of all the testimony and comments received during this rulemaking proceeding, and as discussed in detail below, the Commission concludes, as does the commenter,[27] that a seasonally adjusted cap on the total volume of milk diverted and transferred out of the Compact regulated area appropriately addresses these concerns. The Commission further concludes that the Over-order Price Regulation appears to be having its intended result of stabilizing the New England milkshed, and, therefore, also concludes that a seasonally adjusted cap meets the dual goals of the Compact of assuring the continued viability of dairy farming in the Northeast and of assuring consumers of an adequate, local supply of pure and wholesome milk. Compact Article I, Section 1.

A. The New England Milkshed

One of the commenters who supported the proposed amendments at the first hearing stated that the proposals did not go far enough.[28] This commenter further suggested that the Commission should consider not paying the Compact price for any milk produced outside of the Compact area.[29] Another commenter was concerned that the Compact payment should only be made on milk needed to supply the New England market.[30]

In response to questions from the Commission, one commenter[31] stated that there is never enough milk produced in New England to meet the New England milk plant demands.[32] The Commission emphasizes that milk produced outside of the Compact regulated area has traditionally been needed to meet the demand for milk and milk products in New England. As the Commission previously concluded:

> According to data, the six state, New England, region draws approximately seventy percent of the raw product supply needed for the consumption of all milk products, fluid and manufactured, from New England farmers. The total volume of milk supplied for the region is approximately five billion pounds. The predominant remainder is supplied by New York farmers, who have traditionally made up a substantial portion of

[8] 63 FR 31945 (June 11, 1998).

[9] Ross Tr. 14–15.

[10] Robert Wellington and Carl Peterson representing Agri-Mark; Dean Ellinwood representing Dairy Farmers of America; Edward Gallagher representing Dairylea Cooperative, Inc.; Leon Berthiaume representing St. Albans Cooperative Creamery, Inc.; and Sally Beach representing Independent Dairyman's Cooperative Association, Inc.

[11] Neil Marcus and Bill Fitchett from Marcus Dairy.

[12] Jonathan Healy, Commissioner and William Gillmeister, Dairy Economist, Massachusetts Department of Food and Agriculture and Leon Graves, Vermont Commissioner of Agriculture, Food and Markets.

[13] Kenneth Dibbell.

[14] Assistant Professors Rick Wackernagel and Charles Nichols.

[15] Erik Rasmussen, Market Administrator, Federal Milk Order No. 1.

[16] Dibbell Tr. 31; Healy, First Written Comment Period (''WC'') 3.

[17] Marcus, Fitchett, Wellington, Ellinwood, Gallagher, Berthiaume, Graves, and Beach.

[18] *See,* e.g., Marcus Tr. 43; Wellington Tr. 63–64, 68, 72; Ellinwood Tr. 99–100; Gallagher Tr. 119–120; Berthiaume WC 5; Graves WC 14; and Beach WC 15.

[19] *See,* e.g. Marcus Tr. 44, 59; Wellington Tr. 64, 68, 72; Ellinwood Tr. 100–101 and WC 1; Gallagher Tr. 120–121; Berthiaume WC 5–6; Graves WC 13–14; and Beach WC 15.

[20] *See,* e.g. Marcus Tr. 54; Wellington Tr. 65, 67, 69 and WC 11; Ellinwood Tr. 102, 111; Gallagher Tr. 121–123; Berthiaume WC 5, 8; Graves WC 13; and Beach WC 15.

[21] Wellington, on behalf of Agri-Mark and Dairylea, WC 12; Berthiaume WC 7; and Graves WC 14.

[22] Wellington, on behalf of Agri-mark and Dairylea, WC 11; Ellinwood WC 2; Berthiaume WC 7; and Beach WC 16.

[23] Rasmussen, Wellington, Marcus, Dibbell, Berthiaume, Peterson, Gillmeister, Wackernagel and Nichols.

[24] Wellington Extended Public Hearing Transcript (''ETr.'') 55 , Marcus ETr. 112, Berthiaume ETr. 141 and Gillmeister Extended Written Comment Period (''EWC'') 2.

[25] Wellington ETr. 56, 96–97 and EWC 2.

[26] Healy WC 3.

[27] Gillmeister EWC 1–3, on behalf of the Massachusetts Department of Food and Agriculture.

[28] Dibbell Tr. 30.

[29] Dibbell Tr. 30–31.

[30] Healy WC 3.

[31] Gallagher Tr.135.

[32] Gallagher Tr. 136–7.

the New England milkshed. Less than three percent of the raw milk supply for the New England market is produced outside of the six state/New York milkshed.[33]

The data submitted in this rulemaking proceeding confirms that the New England market, Federal Order 1, continues to rely on New York producers to meet the consumer demand for milk and milk products.[34] Since July 1997, New York producers have accounted for between 25% and 28% of the total producers supplying the New England market.[35] The data also shows that the total number of producers supplying the New England market since July 1997 is still less than the total number of producers in 1995 and 1996.[36]

Mr. Rasmussen explained that the data reflects that over time, dairy farms get larger and, with New England urbanizing, there is less milk and fewer farmers in New England. As the number of dairy farms in New England continues to decline, milk handlers must look to New York to replenish their supply, because New England is surrounded on all other sides by ocean and Canada. Therefore, there is less of a decline in the number of producers in New York supplying the New England market.[37]

Additional data compiled by the University of Vermont demonstrates that Vermont and New York have provided the largest volume of the milk supply to the New England market for the period of the study 1977–1997.[38] While the volume of milk produced in Vermont has increased substantially over this time period, the supply from New York state appears to be more volatile, with a small net increase over the twenty year period.

The Commission emphasizes that payment of the Compact Over-order premium to all producers supplying the New England market, regardless of location of production, is needed to stabilize the milkshed and assure a local supply of milk. In implementing the Over-order Price Regulation, the Commission found that, although milk production and consumption are in balance in New England, the situation is under considerable distress, and that it is necessary to at least stabilize, if not increase, the present, local supply of milk through the price regulation.[39] The Commission also found that ''the present, distant supply itself must be stabilized as well, to ensure that the milkshed does not reach further west.'' [40]

Since the inception of the Over-order Price Regulation, the supply of milk to the New England market and the Compact pool has steadily risen.[41] The commenters offered several explanations for this increase in supply, and a simultaneous increase in diversions and transfers, such as the closing of a manufacturing plant in Hinesburg, Vermont and a slight increase in production in the region due to favorable weather conditions, lower grain prices, and good quality forage.[42] A few commenters also observed that the Compact price regulation has attracted some milk to the New England market.[43] Therefore, the Commission concludes that the price regulation appears to be having the intended effect of stabilizing the milkshed and increasing the supply of milk available to the New England market, thus assuring consumers of a local supply of pure and wholesome milk.

B. Seasonal/Balancing

Eight commenters [44] who opposed the total exclusion of diverted and transferred milk in the proposed amendments commented that diversions and transfers are necessary due to seasonal or other normal and predictable fluctuations of supply and demand in the milk market, and are a routine method of balancing the market [45]; that the normal production swing from spring to fall in the supply of milk is in direct opposition to the normal fluctuation in the demand for milk [46]; that in order to meet the consumer demand for milk in the low production months, typically in the fall, cooperative associations and milk handlers must accept and market milk from their supplying producers in the high production months, typically in the spring [47]; and that handlers must also establish a reserve pool of milk to meet the New England fluid processing needs.[48]

As these same commenters explained, cooperative associations and milk handlers must have a method of balancing the supply of milk at times when supply exceeds demand.[49] Balancing often is accomplished at a balancing plant, where milk that is not needed to meet the demand is processed into other marketable products such as butter and powder.[50] Reloading milk and shipping it to another plant outside of the Compact regulated area (transferring), or diverting milk to such a plant directly from a farm, also are common methods of balancing the supply of milk in the New England market.[51] Five commenters [52] noted that the federal order regulations allow transfers and diversions to meet the processors' balancing needs.

One commenter [53] observed that every Class 1 market has a large butter/powder plant for balancing. However, as this commenter also explained, when the New England market lost the Hinesburg, Vermont manufacturing plant, the West Springfield, Massachusetts butter/powder plant suddenly became a manufacturing plant, thus limiting the capacity of that plant to balancing the market.

The Commission recognizes the normal fluctuations of supply and demand of milk in the New England market and, as noted above, the traditional supply of milk to New England from outside the Compact area. The Commission appreciates the concerns expressed by the commenters and recognizes the seasonal fluctuations in milk supply and demand, and also recognizes the importance of balancing plants and methods in the New England milk market. In recognition of this integral part of the milk market, the Commission includes in the amended rules a seasonally adjusted allowance for the total of volume of diverted and transferred milk as a percentage of a milk handler's total producer receipts.

While the Commission concludes that the price regulation appears to be having the desired impact of increasing the supply of milk to the New England market and thereby stabilizing the

[33] 62 FR 23039 (April 28, 1997).

[34] Rasmussen, New England Milk Market Statistics 1994–1998.

[35] Rasmussen EWC Tables 2 and 3.

[36] Rasmussen EWC Table 3.

[37] Rasmussen ETr. 14, 24.

[38] Wackernagel EWC 3, Figure 1.

[39] 62 FR 23039–40 (April 28, 1997); 62 FR 29635 (May 30, 1997); 62 FR 62814 (November 25, 1997).

[40] 62 FR 23040 (April 28, 1997).

[41] Ross, Second Addendum, EC 1.

[42] Rasmussen ETr. 22; Wellington ETr. 48, 95; and Berthiaume ETr. 136.

[43] Wellington ETr. 91, EWC 10–11; Berthiaume EWC 4; Gillmeister EWC 2; Wackernagel EWC 4–5; and Nichols EWC 2.

[44] Marcus; Pritchett; Wellington; Ellinwood; Gallagher; Berthiaume; Graves; and Gillmeister.

[45] Marcus Tr. 43; Ellinwood Tr. 99–100; Wellington Tr. 63–64; Gallagher Tr. 116; Berthiaume WC 5; Graves WC 13; Beach WC 15; and Gillmeister EWC 2.

[46] Marcus Tr. 44; Wellington Tr. 63–64, 68; Ellinwood Tr. 99–100; Gallagher Tr. 119–120, 131, 133; Berthiaume WC 5–6; Graves WC 14; and Beach WC 15.

[47] Marcus Tr. 59; Wellington Tr. 63–64, 68; and Berthiaume WC 5.

[48] Ellinwood Tr. 100.

[49] Wellington Tr. 72, WC 11; Gallagher Tr. 131, 133; Berthiaume WC 5–6; Graves WC 14; and Beach WC 15.

[50] Beach WC 16; Wellington EWC 1–4.

[51] Ellinwood WC 1; Wellington Tr. 72, ETr. 34–40, EWC 1–4; Gallagher Tr. 120

[52] Ellinwood Tr. 100–101, WC 1; Wellington Tr. 64, WC 10; Gallagher Tr. 121 and Rasmussen ETr. 17–18.

[53] Wellington ETr. 40–41.

milkshed, it also concludes that appropriate limits must be established to prevent increases in milk supply that are not needed for the New England market.

C. Technical Amendments to the Price Regulation

Five commenters [54] observed that milk coming into the compact regulated area and being transferred or diverted back out of the compact regulated area is a problem. Three of these commenters [55] stated that such milk should not receive the compact payment. Two of these commenters [56] stated that this was a problem that would be difficult to solve.

Eight commenters opposed the proposed amendment of the current Over-order Price Regulation. However, some of these commenters did suggest alternative regulatory changes as discussed below.

1. Definition of Producer

Five commenters [57] proposed that the Commission amend the regulation at 1301.11 which defines ''producer.'' One of these commenters [58] suggested that the existing rule, at 7 CFR 1301.11(b)(2) limits the handler's ability to replace producers. The Commission amends this section to delete the current language and to substitute ''the volume of milk excluded from producer milk pursuant to section 1304.2.'' This amended language both addresses the concerns raised by the commenter and also makes this provision consistent with the amended diversion and transfer provisions adopted by the Commission.

The Commission also adds the language ''and December 1998'' to the provisions of sections 1301.11(b) and (b)(1) to update the current requirement that a producer must move milk to a pool plant in December 1996 and December 1997 and December 1998. The remaining four commenters all suggested that the five-month qualification period contained in the regulation at 1301.11(b) be extended to eight months . One commenter [59] further suggested that the Commission eliminate the December 1996 and 1997 provisions from this regulation. The Commission responds that increasing the qualification period cannot be expected to have a significant impact on the issue of how much milk should be moved in and moved out of the market.[60]

In response to a question from the Commission, one commenter [61] observed that extending the qualification requirement that requires producers to move their milk into the Compact regulated area on more than one-half of the days on which they move milk would create higher transportation costs and decrease the balancing options for that milk. Similarly, Mr. Ross explained that increasing the number of days per month for qualifying purposes would not address the problem identified by the Commission and could actually make the situation worse by causing handlers to then move other milk, which would in turn create a financial burden on the handlers.[62] As a result, the Commission concludes that no amendment to the qualifying period provisions of the existing regulation is justified at the present time.

2. Definition of Producer Milk

The Commission's initial rulemaking notice proposed to amend the definition of *producer milk* to clarify that the milk must be physically moved to a pool plant in the regulated area or be diverted pursuant to the Commission's regulation.[63] Mr. Ross explained that this amendment will depool producer milk that is moved to plants outside of the Compact regulated area and will treat all qualified producers the same.[64]

The Commission received no comments on this provision and thus adopts the amendment as proposed.

3. Diverted and Transferred Milk Provisions

The Commission initially proposed to amend sections 1301.23 and 1304.2 to exclude all milk from the pool which was diverted or transferred out of the Compact region. During the first public hearing and comment period, five commenters [65] suggested that the Commission impose a five percent cap on transferred milk and one of these commenters [66] suggested the Commission impose a cap on both diverted and transferred milk. Four of these commenters [67] also stated that if the Commission imposed a cap, then certain processed milk products, such as skim and skim condense, should be excluded from the cap, and also, that provision be made to suspend the cap for an individual cooperative or handler in appropriate circumstances, such as equipment failure.

Three commenters [68] recommended that a five percent cap on transferred milk be applied to the total volume of milk pooled by the cooperative or handler, with an exclusion for skim, and skim condense or other processed fluid milk products. Two commenters also recommended excluding milk sold for Class I purposes outside of the compact area.[69] The Commission discussed the recommendation for a five percent cap at its deliberative meeting on August 5, 1998.

During the second public hearing and comment period, some of those commenters and an additional commenter [70] refined their positions and instead proposed that the Commission adopt a seasonally adjusted allowance for a combined volume of diverted and transferred milk. These commenters explained in detail, and provided substantial data to support their arguments, that a seasonally adjusted allowance would best address the Commission's concerns and accommodate the realities of the New England milk market, including the possible negative impact that a five percent cap would have on the primary balancing plant in the Compact regulated area.[71]

After careful consideration of the entire record, the Commission agrees that a seasonally adjusted allowance for diversions and transfers of milk more appropriately addresses the Commission's concerns. The Commission also agrees that the seasons should be defined as follows: Transition months—January, February, July, December; Spring months—March, April, May, June; Fall months—August, September, October, November.[72]

[54] Dibbell Tr. 30–31; Jonathan Healy WC 3; Leon J. Berthiaume WC 5–6; Leon Graves WC 13; and Sally Beach WC 15.

[55] Dibbell Tr. 30; Healy WC 3; and Berthiaume WC 5, 6.

[56] Graves WC 13; and Beach WC 15–16.

[57] Marcus Tr. at 47; Wellington, on behalf of Agri-Mark and Dairylea at WC 11; Berthiaume at WC 7; and Graves at WC 14.

[58] Marcus Tr. at 47.

[59] Berthiaume at WC 7.

[60] Ross ETr. 149–150.

[61] Wellington ETr. 96–97.

[62] Ross ETr. 150–152.

[63] 63 FR 31943 (June 11, 1998).

[64] Ross Tr. 13.

[65] Ellinwood at WC 2; Wellington on behalf of Agri-Mark and Dairylea at WC 11; Berthiaume at WC 7; and Beach at WC 16.

[66] Beach at WC 16.

[67] Ellinwood at WC 2; Wellington on behalf of Agri-Mark and Dairylea at WC 11; and Berthiaume at WC 7.

[68] Wellington WC at 11; Ellinwood WC at 2; and Berthiaume WC at 7.

[69] Wellington WC at 11; Berthiaume WC at 7.

[70] Wellington ETr. 53–4, EWC 12; Marcus ETr. 112; Berthiaume ETr. 137, 145–6; and Gillmeister EWC 2.

[71] Rasmussen ETr. 16, 21, 31; Wellington ETr. 41–2, 45, 47, 93, EWC 1–7, 12–13, and Table 9 (supplemental); Marcus ETr. 99, 112; Dibbell ETr. 129; Berthiaume ETr. 133, 135, 137, EWC 3–4; and Gillmeister EWC 2–3.

[72] Wellington EWC 12; Berthiaume ETr. 141; Gillmeister EWC 2.

In setting the allowance for each season, the Commission has carefully reviewed the data and arguments of the commenters. The Commission is mindful of the importance of maintaining an allowance high enough to accommodate the reasonable balancing needs of the market while at the same time establishing reasonable limits on the amount of milk supplying the New England market relative to the demand for milk products within the Compact regulated area. Therefore, the Commission establishes the following seasonally adjusted allowance: Transition months—10%; Spring months—13%; Fall months—8%.

The Commission notes that these allowances were recommended by one commenter,[73] although the method adopted by the Commission is somewhat different than that used by the commenter. The Commission also notes that these percentages are slightly lower than those recommended by a commenter,[74] and supported by two commenters.[75] The Commission carefully considered the data provided by Mr. Wellington in Table 9 in his supplemental written comments. This commenter explained that the data provided in that table supported a seasonally adjusted allowance of 12% in the Transition months, 15% in the Spring months and 10% in the Fall months.[76] However, this commenter also acknowledged that the diversion and transfer volume numbers included in the table reflected milk transferred on behalf of other handlers, and that the handler volume used in the chart did not similarly reflect the total volume of milk handled.[77]

The Commission concludes that adjusting the figures in Table 9 to reflect the percentage of the handler's milk diverted and transferred relative to the handler's volume for each month and excluding volumes attributable to other handlers results in appropriate percentage limits of 10% in the Transition months, 13% in the Spring months and 8% in the Fall months. The Commission also notes that the data provided in Table 9 include Class 1 transfers [78] which, as discussed below, are excluded from the allowance calculation.

The Commission emphasizes that the amendments regarding diverted and transferred milk specifically apply to milk received at a pool plant in the regulated area. These amendments do not affect milk diverted or transferred to a partially regulated plant having Class 1 disposition in the regulated area. The Commission also emphasizes that the amendments apply only to bulk diversions and transfers of fluid milk, and do not apply to packaged milk products.

In addition, the Commission recognizes the importance of accommodating milk temporarily displaced due to catastrophic circumstances and adopts a provision for suspending the seasonally adjusted allowance in circumstances such as fire, flood, storm and equipment failure which are completely beyond the pool plant operator's control. The suspension provision requires the operator of the pool plant (and the handler, in the case of diverted milk) to notify the Commission of the catastrophic circumstance within two (2) days of the occurrence.

The Commission also recognizes the commenters' concerns regarding the treatment of processed milk under the diversion and transfer provisions. The commenters noted (1) that milk transferred or diverted for Class I utilization should be excluded from any cap because all producers benefit from the Class I utilization,[79] (2) that reloads for Class I utilization are for proper long distance hauling,[80] and (3) that processed products such as skim and condensed milk have separate markets. The Commission recognizes that these milk products do not present the problem identified by the Commission, which was acknowledged by several commenters,[81] of ''reloaded'' milk, which is brought into a pool plant simply to qualify for the compact payment. Therefore, the Commission excludes bulk transfers of skim milk, condensed milk, bulk milk transferred and classified Class I by a federal market order and milk processed (i.e. pasturized, homogenized, or blended). All other fluid milk products transferred in bulk from a pool plant to a plant located outside of the regulated area, except a partially regulated plant having Class I disposition in the regulated area, will be subject to the seasonally adjusted allowance.

If the handler exceeds the diversion and transfer allowance, the plant operator may select the sources to be excluded. If the plant operator fails to select the sources to be excluded, then the transferred milk that is excluded under this rule shall be prorated to all sources of milk received at that plant. The Commission notes that this provision is analogous to the federal order system regarding selection, by the handler, of classification of milk.

In sum, the Commission adopts a seasonally adjusted allowance that is calculated on the total of all diverted milk, which by definition is not processed milk, and non-excluded transferred milk, in determining the volume of milk on which the Compact payment will be made. This seasonally adjusted allowance is calculated on the total producer receipts reported by the handler.[82] The Commission concludes that the seasonally adjusted allowance appropriately accommodates the competing interests and needs of the producers, consumers, cooperative associations and handlers, in order to assure New England consumers of an adequate, local supply of pure and wholesome milk throughout the year.[83] The Commission acknowledges the many and varied concerns raised by the commenters, and will continue to monitor closely the Over-order Price Regulation, as amended, to assure that the mission, purposes and objectives of the Compact and the price regulation are met.

III. Summary of Required Findings

Article V, Section 12 of the Compact directs the Commission to make four findings of fact before an amendment of the Over-order Price Regulation can become effective. Each required finding is discussed below.

a. Whether the Public Interest Will Be Served by the Amendments

The first finding considers whether the amendment of the Over-order Price Regulation serves the public interest. The Commission previously has determined that an Over-order Price Regulation serves the public interest,[84] and the Commission reaffirms that determination. The Commission also finds that the public interest will be served by amendment of the Over-order Price Regulation to exclude milk from the pool that is either diverted or transferred in bulk out of the Compact regulated area in excess of a seasonally adjusted allowance of total producer receipts, set at 10% in the Transition months of January, February, July and

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[73] Gillmeister EWC 2–3.

[74] Wellington ETr. 55, EWC 12.

[75] Marcus ETr. 112; Berthiaume ETr. 141.

[76] Wellington ETr. 55, EWC 12.

[77] Wellington ETr. 55, EWC 11, Table 8.

[78] Wellington EWC 11.

[79] Marcus Tr. 45, 53, 55, ETr. 111; Ellinwood WC 2; Wellington WC 11, ETr. 72, EWC 10; Berthiaume WC 5–8, ETr. 138; and Rasmussen ETr. 21.

[80] Berthiaume WC 7.

[81] Ross Tr. 13; Dibbell Tr. 30–31; Healy WC 3; Berthiaume WC 5–6; Graves WC 13; and Beach WC 15.

[82] Concurring with this method: Wellington ETr. 53–4, EWC 12.

[83] *See,* discussion *infra* at III. a.

[84] 62 FR 29638 (May 30, 1997); 62 FR 62825 (November 25, 1997); 63 FR 10110 (February 27, 1998).

December, 13% of the Spring months of March, April, May and June, and 8% in the Fall months of August, September, October and November. The Commission further finds that the public interest will be served by amending the definitions of *producer* and *producer milk* to be consistent with the amended rules regarding diverted and transferred milk and to further amend the definition of *producer* to include December 1998 as an additional requirement.

The Commission emphasizes that the amendments regarding diverted and transferred milk do not impact on the New England consumers. The Over-order Price Regulation is structured so that assessments and obligations are based on Class I milk distributed in the New England market. Data submitted by the New England Market Administrator demonstrates that Class I utilization has been relatively constant over the last several years, although there has been a slight decline.[85] Therefore, the amount of milk subject to the Over-order Price Regulation is relatively stable and the cost to the consumer is defined by only this volume of Class I milk consumed in New England. The amended rules restricting the volume of diverted and transferred milk that is eligible for the Compact Over-order payment to a seasonally adjusted allowance is, therefore, cost-neutral to New England consumers.

b. The Impact on the Price Level Needed To Assure a Sufficient Price to Producers and an Adequate Local Supply of Milk

The second finding considers impact of the amendments on the level of producer price needed to cover costs of production and to assure an adequate local supply of milk for the inhabitants of the regulated area.[86]

The Commission reaffirms its prior findings regarding the sufficiency of pay prices for milk needed to meet the New England market demand.[87] In adopting these amendments, the Commission notes that the primary impact of the increase in the pool beyond the capacity of the New England market, as reflected in the volume of milk that is diverted and transferred out of the Compact regulated area, is revealed in a slight depression of the producer pay price per hundred weight of milk. The Commission concludes that the diverted and transferred milk amendments will not negatively impact on the price level paid to producers that is needed to assure an adequate local supply of milk. The Commission reaffirms its prior finding that the over-order price level will assure a sufficient price to producers and an adequate local supply of milk.[88]

In reaching this conclusion, the Commission recognizes the seasonal variation in supply and demand for milk and milk products and the vital role diversions and transfers play in balancing the New England milk market. The Commission recognizes that the historical movement of milk in the New England milkshed involves both movement of milk into the Compact area from outside of the Compact area, and the reverse.[89] The Commission, in adopting these amendments, is focusing on the Compact payment to producers who supply milk to the New England market. The Commission recognizes the many challenges involved in balancing the supply and demand for milk in the New England market and therefore builds in a seasonally adjusted allowance on diverted or transferred milk.

The Commission further notes that the Compact payments to producers are intended to assure the continued viability of dairy farming in the northeast. Compact Art. 1, Section 1. The Over-order Price Regulation, as amended, balances this purpose with the equally important purpose of assuring an adequate, local supply of pure and wholesome milk for the Compact area consumers. Compact Art. 1, Section 1. The Compact specifically charges the Commission to also ‘‘take such action as necessary and feasible to ensure that the over-order price does not create an incentive for producers to generate additional supplies of milk.’’ Compact Art. IV, Section 9(f). The Commission concludes that the amended regulation meets all three of these objectives and best preserves the integrity of the Compact by appropriately balancing these objectives.

c. Whether the Major Provisions of the Order, Other Than Those Fixing Minimum Milk Prices, Are in the Public Interest and Are Reasonably Designed To Achieve the Purposes of the Order

The third finding requires a determination of whether the provisions of the regulation other than those establishing minimum milk prices are in the public interest. The amendments establish a seasonally adjusted allowance on milk diverted or transferred out of the Compact region. Therefore, the matter of the public interest is addressed under the first required finding and not under this finding. In any event, the Commission finds that the price regulation, as hereby amended, is in the public interest in the manner contemplated by this finding.

d. Whether the Terms of the Proposed Amendment Are Approved by Producers

The fourth finding, requiring a determination of whether the amendment has been approved by producer referendum pursuant to Article V, section 13 of the Compact is invoked in this instance given that the amendments will affect the level of the price regulation on the producer side. In this final rule, as in the previous final rules, the Commission makes this finding premised upon certification of the results of the producer referendum. The procedure for the producer referendum and certification of the results is set forth in 7 CFR Part 1371.

Pursuant to 7 CFR Part 1371.3, and the referendum procedure certified by the Commission, a referendum was held during the period of October 26, 1998 through November 6, 1998. All producers who were producing milk pooled in the Federal Order #1, or for consumption in New England during June, 1998, the representative period determined by the Commission, were deemed eligible to vote. Ballots were mailed to these producers on or before October 26, 1998 by the Federal Order #1 Market Administrator. The ballots included an official summary of the Commission’s action. Producers were notified that, to be counted, their ballots had to be returned to the Commission offices by 5:00 p.m. on November 6, 1998. The ballots were opened and counted in the Commission offices on November 9, 1998 under the direction and supervision of Mae S. Schmidle, Vice-Chair of the Commission and designated ‘‘Referendum Agent.’’

Twelve Cooperative Associations were notified of the procedures necessary to block vote. Cooperatives were required to provide prior written notice of their intention to block vote to all members on a form provided by the Commission, and to certify to the Commission that (1) timely notice was provided, and (2) that they were qualified under the Capper-Volstead Act. Cooperative Associations were further notified that the Cooperative

85 Rasmussen, New England Market Statistics 1994–1998.

86 As noted in prior rulemaking proceedings, the Commission limits its assessment to issues relating to the fluid milk market. 62 FR 29632 (May 30, 1997); 62 FR 62812 (November 25, 1997); and 63 FR 10109 (February 27, 1998).

87 62 FR 29632–29637 (May 30, 1997); 62 FR 62812–62817 (November 25, 1997); and 63 FR 10109–10110 (February 27, 1998).

88 62 FR 29638 (May 30, 1997); 62 FR 62825 (November 25, 1997).

89 *See*, 62 FR 23039 (April 28, 1997).

Association block vote had to be received in the Commission office by 5:00 p.m. on November 6, 1998. Certified and notarized notification to its members of the Cooperative's intent to block vote or not to block vote had to be mailed by October 28, 1998 with notice mailed to the Commission offices no later than October 30, 1998.

Notice of Referendum Results

On November 9, 1998 the duly authorized referendum agent verified all ballots according to procedures and criteria established by the Commission. A total of 4,080 ballots were mailed to eligible producers. All producer ballots and cooperative block vote ballots received by the Commission were opened and counted. Producer ballots and cooperative block vote ballots were verified or disqualified based on criteria established by the Commission, including timeliness, completeness, appearance of authenticity, appropriate certifications by cooperative associations and other steps taken to avoid duplication of ballots. Ballots determined by the referendum agent to be invalid were marked ''disqualified'' with a notation as to the reason.

Block votes cast by Cooperative Associations were then counted. Producer votes against their cooperative associations block vote were then counted for each cooperative association. These votes were deducted from the cooperative association's total and were counted appropriately. Ballots returned by cooperative members who cast votes in agreement with their cooperative block vote were disqualified as duplicative of the cooperative block vote.

Votes of independent producers not members of any cooperative association were then counted.

The referendum agent then certified the following:

A total of 4,080 ballots were mailed to eligible producers.

A total of 3,006 ballots were returned to the Commission.

A total of 15 ballots were disqualified—late, incomplete or duplicate.

A total of 2,989 ballots were verified.

A total of 2,966 verified ballots were cast in favor of the price regulation.

A total of 23 verified ballots were cast in opposition to the price regulation.

Accordingly, notice is hereby provided that of the verified ballots cast, 2,989, 99.2%, or 2,966, a minimum of two-thirds were in the affirmative.

Therefore, the Commission concludes that the terms of the proposed amendment is approved by producers.

IV. Required Findings of Fact

Pursuant to Compact Article V. Section 12, the Compact Commission hereby finds:

(1) That the public interest will be served by the amendment of minimum milk price regulation to dairy farmers under Article IV to: (1) exclude milk from the pool which is either diverted or transferred, in bulk, out of the compact regulated area, in excess of a seasonally adjusted allowance of total producer receipts, set at 10% for the Transition months of January, February, July and December, 13% for the Spring months of March, April, May and June and 8% for the Fall months of August, September, October and November, with specified exclusions; (2) to amend the definitions of *producer* and *producer milk* to be consistent with the amended provisions regarding diverted and transferred milk; and (3) to amend the definition of *producer* to include December 1998 as a requirement.

(2) That a level price of $16.94 (Zone 1) to dairy farmers under Article IV will assure that producers supplying the New England market receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

(3) That the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) That the terms of the proposed amendments are approved by producers pursuant to a producer referendum required by Article V. section 13.

List of Subjects in 7 CFR Parts 1301 and 1304

Milk.

Codification in Code of Federal Regulations

For reasons set forth in the preamble, the Northeast Dairy Compact Commission amends 7 CFR Chapter XIII as follows:

PART 1301—DEFINITIONS

1. The authority citation for part 1301 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. Section 1301.11(b) is revised to read as follows:

§ 1301.11 Producer.

* * * * *

(b) A dairy farmer who produces milk outside of the regulated area that is moved to a pool plant, provided that on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during December 1996, December 1997, and December 1998, all of that milk was physically moved to a pool plant in the regulated area. Or: to be considered a qualified producer, on more than half of the days on which the handler caused milk to be moved from the dairy farmer's farm during the current month and for five (5) months subsequent to July of the preceding calendar year, all of that milk must have moved to a pool plant, provided that the total amount of milk at a pool plant eligible to qualify producers who did not qualify in December 1996, December 1997, and December 1998 shall not exceed the total bulk receipts of fluid milk products less:

(1) Producers receipts as described in paragraph (a) of this section and producer receipts as described in paragraph (b) of this section who are qualified based on December 1996, December 1997, and December 1998; and

(2) The volume of milk excluded from producer milk pursuant to §§ 1301.23 (d) and (e), and 1304.2 (c) and (d).

* * * * *

3. Section 1301.12 is revised to read as follows:

§ 1301.12 Producer milk.

Producer milk means milk that the handler has received from producers and is physically moved to a pool plant in the regulated area or is diverted pursuant to § 1301.23(d). The quantity of milk received by a handler from producers shall include any milk of a producer that was not received at any plant but which the handler or an agent of the handler has accepted, measured, sampled, and transferred from the producer's farm tank into a tank truck during the month. Such milk shall be considered as having been received at the pool plant at which other milk from the same farm of that producer is received by the handler during the month, except that in the case of a cooperative association in its capacity as a handler under § 1301.9(d), the milk shall be considered as having been received at a plant in the zone location of the pool plant, or pool plants within the same zone, to which the greatest aggregate quantity of the milk of the cooperative association in such capacity was moved during the current month or the most recent month.

4. Section 1301.23 is amended by adding paragraphs (d) and (e) to read as follows:

§ 1301.23 Diverted milk.

* * * * *

(d) Milk moved, as described in paragraphs (a) and (b) of this section, from a dairy farmer's farm to a plant located outside of the regulated area, except a partially regulated plant having Class I disposition in the regulated area, the volume of milk (including milk transferred pursuant to § 1304.2(c)) in excess of the percentage of total producer receipts, pursuant to paragraph (e) of this section, shall be excluded from producer milk. This paragraph will not apply to milk normally associated with a pool plant which was caused to be diverted because the facilities of the pool plant are temporarily unusable because of fire, flood, storm, equipment failure or similar extraordinary circumstances completely beyond the pool plant operator control, provided both the handler and the operator of the pool plant notify the Commission within two (2) days following such occurrence;

(e) Milk diverted in excess of the following percentage of total producer receipts shall be excluded from producer milk:

	Percent
January, February, July, December	10
March, April, May, June	13
August, September, October, November	8

PART 1304—CLASSIFICATION OF MILK

1. The authority citation of part 1304 continues to read as follows:

Authority: 7 U.S.C. 7256.

2. Section 1304.2 is amended by adding paragraphs (c) and (d) to read as follows:

§ 1304.2 Classification of transfers and diversions

* * * * *

(c) *Transfers to plants located outside of the regulated area.* Fluid milk products (not including bulk transfers of skim milk, condensed milk, bulk milk transferred and classified Class I by a federal market order and milk processed (i.e., pasturized, homogenized, or blended) transferred in bulk from a pool plant to a plant located outside of the regulated area, except a partially regulated plant having Class I disposition in the regulated area, the volume of milk (including milk diverted pursuant to § 1301.23(d)) in excess of the percentage of total producer receipts, pursuant to paragraph (d) of this section, shall be excluded from producer milk. The transferred milk excluded pursuant to this paragraph shall be prorated to all sources of milk received at this plant unless the operator of the plant selects the sources to be excluded. This paragraph will not apply to any pool plant in which the facilities are temporarily unusable because of fire, flood, storm, equipment failure or similar extraordinary circumstances completely beyond the pool plant operator's control; provided, the operator of the pool plant notifies the Commission within two (2) days following such occurrence;

(d) Milk transferred in excess of the following percentages of total producer receipts shall be excluded from producer milk:

	Percent
January, February, July, December	10
March, April, May, June	13
August, September, October, November	8

Dated: November 17, 1998.

Kenneth M. Becker,

Executive Director.

[FR Doc. 98–31587 Filed 11–25–98; 8:45 am]

BILLING CODE 1650–01–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1439

RIN: 0560–AF29

American Indian Livestock Feed Program

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This regulation sets forth the terms and conditions of the American Indian Livestock Feed Program (AILFP). Assistance will be available to Federally recognized Indian tribes when, as a result of natural disaster, a significant loss of livestock feed has occurred and a livestock feed emergency exists, as determined by the Commodity Credit Corporation.

DATES: This interim rule is effective on November 27, 1998. Comments on this rule must be received on or before December 28, 1998 to be assured of consideration. Comments on the information collection in this rule must be received on or before January 26, 1999.

ADDRESSES: Submit written comments on this rule to Sean O'Neill, Chief, Noninsured Assistance Programs Branch (NAPB), Production, Emergencies, and Compliance Division (PECD), Farm Service Agency (FSA), United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW, Washington, DC 20250–0517; telephone (202) 720–9003; e-mail Sean__Oneill@wdc.fsa.usda.gov.

FOR FURTHER INFORMATION CONTACT: Sean O'Neill, Chief, Noninsured Assistance Programs Branch (NAPB), Production, Emergencies, and Compliance Division (PECD), Farm Service Agency (FSA), United States Department of Agriculture, STOP 0517, 1400 Independence Avenue, SW, Washington, DC 20250–0517; telephone (202) 720–9003; e-mail Sean__Oneill@wdc.fsa.usda.gov.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This interim rule is issued in conformance with Executive Order 12866 and has been determined to be significant and has been reviewed by OMB.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because neither FSA nor the Commodity Credit Corporation is required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Evaluation

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is needed.

Executive Order 12988

The interim rule has been reviewed in accordance with Executive Order 12988. The provisions of this interim rule preempt State laws to the extent such laws are inconsistent with the provisions of this rule. Before any judicial action may be brought concerning the provisions of this rule, the administrative remedies must be exhausted.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).