

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	AMA M Docket No.10-0283
	)	
GH Dairy, a partnership	)	
	)	<b>Decision and Order</b>
Petitioner	)	

**Preliminary Statement**

GH Dairy, “Petitioner,” seeks to set aside the “Final Decision” by the Secretary of Agriculture that was published on March 4, 2010 (75 FR 10122-01, 2010 WL 723277 (F.R.)), and the implementing “Final Rule” that became effective on June 1, 2010 (75 FR 21157-01, 2010 WL 1625292 (F.R.)). These rulemaking actions by the Secretary limit the exemption of “producer-handlers” from the pricing and pooling requirements of Federal milk marketing orders to those with total Class I route disposition and sales of packaged fluid milk products to other plants of 3,000,000 pounds or less per month across all orders. In that GH Dairy is a producer-handler that distributes in excess of 3,000,000 pounds of packaged fluid milk products per month (Petition, p. 2, ¶3), the plant facilities of its integrated operation shall be regulated, pursuant to the Final Decision and the Final Rule, as a fully-regulated distributing plant, and its dairy farm facilities shall be deemed a “producer” under an applicable Federal milk marketing order (Petition, pp. 5-6, ¶21). GH Dairy shall be required to pay into the milk marketing order’s producer equalization fund, the difference between its higher use-value of milk than the monthly blend price that is computed under the order so as to: (1) include the higher value fluid milk sales of large producer-handlers in the computation of Federal milk marketing order uniform minimum

blend prices that are paid to all dairy farmers supplying the order's regulated marketing area; and (2) reimburse milk handlers who pay blend prices higher than the actual use-value of the milk they acquired.

The challenged Final Decision and Final Rule were issued pursuant to the powers conferred upon the Secretary to promulgate and amend marketing orders through formal rulemaking proceedings under the Agricultural Marketing Agreement Act of 1937, as amended ("AMAA" or "the Act", 7 U.S.C. §§ 601 *et seq.*). Petitioner, GH Dairy, has instituted the instant proceeding under Section 8c(15)(A) of the AMAA, as an aggrieved handler petitioning for modification of, or exemption from the Secretary's Final Decision and Final Rule on the grounds that they are "not in accordance with law" (7 U.S.C. § 608c(15)(A)). Alfred W. Ricciardi and Ryan K. Miltner, Petitioner's attorneys, have agreed with Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, attorney for Respondent, the Secretary of Agriculture, that this proceeding should be decided on the basis of the formal rulemaking record upon which the contested actions are based, with both parties filing for my consideration briefs and an Appendix of excerpts of that record. In addition to the briefs filed by the parties, National Milk Products Federation and International Dairy Foods Association, represented by their attorneys, Marvin Beshore and Steven J. Rosenbaum, have been allowed to file an amici brief in opposition to Petitioner's brief. Petitioner has filed, in addition to its initial "Merit Brief", a brief in rebuttal of both Respondent's brief and the amici brief.

Specifically, GH Dairy asserts that the Final Decision, the Final Rule and the amendments of the Federal milk marketing orders by the Secretary are: (1) contrary to the authority conferred by the AMAA; (2) contrary to binding practices and interpretations

by the Secretary as ratified by Congress, (3) unsupported by substantial record evidence, as well as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (4) based on a hearing record that excluded critical evidence; (5) in violation of the Regulatory Flexibility Act; (6) insufficient under the AMAA's "only practical means" test; and (7) in violation of the AMAA's prohibition against non-uniform pricing by imposing confiscatory, compensatory payments on producer-handlers. After reviewing the legal precedents applicable to the Secretary's powers under the AMAA and other statutes, and the record evidence upon which the Secretary's challenged action is based, I have concluded, for the reasons that follow, that the Secretary's action is in accordance with law; is within the Secretary's powers under the AMAA and other statutes; is fully supported by substantial evidence of record; is not arbitrary, capricious or an abuse of discretion; and is based upon the record of a hearing that did not exclude critical evidence. Accordingly, an order is being entered that dismisses the Petition and denies the relief sought.

### **FINDINGS OF FACT**

1. Producer-handlers are dairy farmers who produce and ship milk only of their own production. Prior to April 2009, each Federal milk marketing order had its own definition of "producer-handler." Though similar, each milk order defined the term so as to exempt milk handled by a "producer-handler" from the pricing and pooling regulations of the order, in slightly different ways. Some Federal milk marketing orders required the filing of an application; others prohibited acquiring milk from other sources. Nonetheless, for many years, the size of a producer-handler was not an issue in allowing exemption from the pooling and pricing regulations of Federal milk orders.

2. The regulatory requirements for the exemption of a dairy farmer as a producer-handler started to change in 2006. On February 24, 2006, “the 2006 final rule” was issued by the Secretary that changed the definition of an exempted producer-handler under the Arizona-Las Vegas milk order and the Pacific Northwest milk order. The 2006 final rule limited the exemption from the pooling and pricing regulations of those milk orders to producer-handlers that have Class I milk route distribution of three million pounds or less per month. *See* 71 FR 9430 (Feb. 24, 2006).

3. In April of 2006, Congress enacted the Milk Regulatory Equity Act of 2005 (Public Law 109-215 (April 11, 2006); codified at 7 U.S.C. § 608c(5)(M)-(O); “the MREA”). Its stated intent was: “To ensure regulatory equity between and among all dairy farmers and handlers for sales of packaged fluid milk in federally regulated milk marketing areas and into certain non-federally regulated milk marketing areas from federally regulated areas, and for other purposes.” Subparagraphs (M) and (N) of the MREA approved the Secretary’s determination in the 2006 final rule that limited the scope of the producer-handler exemption from regulation for those producer-handlers operating within Arizona as regulated by Order No. 131, but rejected such limitation in respect to producer-handlers operating within Nevada. In addition, Subparagraph (M) instructed that the minimum and uniform requirements of a Federal milk marketing order shall apply to “...a handler of Class I milk products (including a producer-handler or producer operating as a handler)” within an area regulated by a Federal milk order that sells to States not subject to a Federal milk order. 7 U.S.C. § 608c(5)(M)(ii). On May 1, 2006, the Secretary issued an order implementing the instructions set forth in the MREA. Subparagraph (O) of the MREA also stated:

(O) Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

4. On April 3, 2009, the United States Department of Agriculture's Agricultural Marketing Service (AMS) issued a Notice of Hearing regarding the need to change the producer-handler definition in all Federal milk marketing orders and to increase the exempt plant monthly limit on the disposition of fluid milk products from 150,000 to 450,000 pounds. *See* 64 FR 16296 (April 9, 2009). The Notice of Hearing was in response to requests from the National Milk Producers Federation (NMPF) and the International Dairy Foods Association (IDFA) to hold such a hearing to address problems in the milk marketing order system caused by the exemption of producer-handlers from regulation by Federal milk marketing orders.

5. AMS, pursuant to its April 3, 2009 Notice of Hearing, held the hearing, on May 4 through May 20, 2009, at which transcribed testimony was taken and multiple exhibits were received on the need to limit the size of producer-handlers that are exempted by Federal milk marketing orders. Numerous witnesses testified regarding the original industry proposals as well as 17 alternate proposals on regulating producer-handlers. Jeff Sapp, the principal of a producer-handler, Nature's Dairy, that otherwise participated in the hearing and was represented by an attorney, could not travel to the hearing and give his testimony in person on the advice of a cardiologist administering tests to determine if Mr. Sapp needed surgery. The presiding Administrative Law Judge denied a motion to include Mr. Sapp's proffered written testimony and supporting exhibits as part of the record evidence because he was unavailable in person as the governing rules of practice require. After the filing of proposed findings and conclusions

by industry members, the issuance of a recommended decision (74 FR 54383, published October 21, 2009) and the filing and consideration of exceptions, the Secretary issued the Final Decision (75 FR 10122, published March 4, 2010) that was implemented by the Final Rule issued on April 23, 2010, that became effective June 1, 2010 (75 FR 21157). The Final Rule limited the exemption of producer-handlers from pooling and pricing provisions in all Federal milk marketing orders to those with total route disposition and sales of packaged fluid milk products to other plants of 3 million pounds or less during a month.

6. Petitioner, GH Dairy, is a producer-handler that distributes in excess of 3,000,000 pounds of packaged fluid milk products per month (Petition, p. 2, ¶3). Accordingly, the plant facilities of Petitioner's integrated operation shall be regulated, pursuant to the Final Decision, as a fully-regulated distributing plant, and its dairy farm facilities shall be deemed a "producer" under an applicable Federal milk marketing order (Petition, pp. 5-6, ¶21). As a result, GH Dairy shall be required to pay into the Federal milk marketing order's producer equalization fund, the difference between its higher use-value of milk and the monthly blend price that is computed under the order.

### **CONCLUSIONS**

#### **1. The Action of the Secretary Accords with the Powers Conferred By the AMAA**

The Petitioner's initial challenge is to the Secretary's authority under the AMAA to impose the minimum pricing and pooling provisions of Federal milk marketing orders on producer-handlers who do not purchase the milk they distribute from others. Petitioner asserts that producer-handlers are exempt from these provisions under the plain language

of the AMAA as well as by binding interpretative actions by the Secretary that Congress has ratified.

The AMAA states that the Secretary may promulgate Federal milk marketing orders which classify milk in accordance with the form or purpose of its use, and fix: “...minimum prices for each use classification which all handlers shall pay...for milk purchased from producers or associations of producers.” 7 U.S.C. §608c(5)(A)(emphasis added).

This is the “plain language” of the AMAA upon which Petitioner would rely. But this language was found by the Supreme Court to require interpretation within the full context of the AMAA and the legislative intent underlying its enactment. When so read and interpreted, the word “purchased” has the special meaning stated by the Supreme Court in its landmark decision holding the AMAA, and milk marketing orders promulgated under it, to be constitutional. *United States v. Rock Royal Cooperative*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939).

*Rock Royal* rejected a challenge asserting that the plain meaning of “purchased” as used in the AMAA, precluded the application of a milk order’s pricing and pooling provisions to milk handled by a cooperative of dairy farmers distributing milk as an agent. The Supreme Court stated:

It is obvious that the use of the word ‘purchased’ in the Act, Section 8c(5)(A) and (C), would not exclude the ‘sale’ type of cooperative. When 8c(5)(F) was drawn, however, it was made to apply to both the ‘sale’ and ‘agency’ type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C). The section which authorizes all orders, Section 8c(1), makes no distinction. The orders are to be applicable to ‘processors, associations of producers, and others engaged in the handling of commodities. The reports on the bill show no effort to differentiate (*citing*, House Report No. 1241, 74<sup>th</sup> Cong., 1<sup>st</sup> Sess.; Senate Report No.1011, 74<sup>th</sup> Cong., 1<sup>st</sup> Sess.). Neither do the debates in Congress. The statutory provisions for

equalization of the burdens of surplus would be rendered nugatory by the exception of ‘agency’ cooperatives. The administrative construction has been to include such organizations as handlers (*citations omitted*). With this we agree. As here used the word ‘purchased’ means ‘acquired for marketing.’ 307 U.S. at 579-580 (emphasis added).

Petitioner would limit the application of the Supreme Court’s holding that “purchase” means “acquired for marketing”, to milk handled by cooperatives acting as intermediaries, and exclude its application to milk produced on one’s own farm. But again, there is contrary, binding legal precedent.

In *Ideal Farms, Inc. v. Benson*, 288 F.2d 608 (3<sup>rd</sup> Cir.1961), *cert.denied*, 372 U.S. 965 (1963), the Third Circuit dismissed the argument that only ‘purchased’ milk is subject to regulation and that the word ‘purchased’ cannot be construed to include milk which the appellants had obtained from their own farms. The Third Circuit affirmed a lower court decision and held that it had correctly concluded:

‘...that the provisions of ... (the milk order)...are fully in accord with the enabling statute and that the refusal of the secretary to exempt the plaintiffs (appellants) from the obligation to include their own-produced milk in the calculation of their net pool obligations, was in all respects legal and within his statutorily delegated power.’

288 F.2d at 618.

In reaching its holding, the Third Circuit undertook a thorough review of the provisions of the AMAA, pertinent prior case law and the AMAA’s legislative history. As here, the appellants had attempted to distinguish their circumstances from those considered in *Rock Royal*, as well as those considered in *Elm Spring Farm v. United States*, 127 F.2d 920 (1<sup>st</sup> Cir.1942) and *Shawangunk Cooperative Dairies v. Jones*, 153 F.2d 700 (2d Cir.1946). After discussing the facts of those three cases, the Third Circuit stated:

In effect appellants make the argument that although an agency cooperative was held to have ‘purchased’ milk from its principals in *Rock Royal* and *Elm Spring*, two parties were involved whereas here there being only one party no ‘purchase’ is possible as the word was construed in those cases. Such reasoning would mean Congress intended to regulate a handler if he was the agent of a producer, but not a handler who is also the producer, although the effect in both instances is the same. Should the fact of agency make such a crucial difference? We do not think such an illogical distinction was intended. Although not embodying the fact pattern of specific identity of producer and handler in one entity present in appellants’ situations the three cited cases make clear that the word ‘purchased’ is to be liberally construed so as to achieve the purpose of the Act and strongly buttress the position of the Secretary that ‘own-produced’ milk of a handler is subject to regulation. The purpose of the Act and Order was succinctly stated in *Elm Spring Farm v. United States*, *supra*, 127 F.2d at page 927:

‘...The Act and Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cutthroat competition among producers striving for the fluid milk market. This is clearly set forth in the opinion in *United States v. Rock Royal Co-operative, Inc.*, 1939, 307 U.S. 533, 548, 550, 59 S.Ct. 993, 83 L. Ed. 1446.’

Were we to accept appellants construction of the word ‘purchased’ they would avoid the intent of the Act to achieve a fair division of the more profitable fluid milk market among all producers and they would avoid the necessity of sharing the burden of surplus milk. *See United States v. Rock Royal Co-operative, Inc.*, *supra*, 307 U.S. at pages 548, 580, 59 S.Ct. at pages 1001, 1016.

*Ideal Farms, Inc. v. Benson*, *supra*, 288 F.2d at page 613.

In 1963, the Fifth Circuit in *Freeman v. Vance*, 319 F.2d 841 (5<sup>th</sup> Cir.1963), also reviewed the language of the AMAA in respect to the power of the Secretary to regulate own-produced milk and agreed with the reasoning and conclusion of the Third Circuit in *Ideal Farms, Inc.*

Petitioner contends that a footnote reference to *Ideal Farms, Inc.* in a subsequent Third Circuit decision, *U. S. v. United Dairy Farmers Coop. Assn.*, 611 F.2d 488, 491 fn.7 (3<sup>rd</sup> Cir. 1979), limits its holding to handlers that purchase at least some milk produced by other parties. Though the cited footnote alluded to the fact that the producers

held subject to regulation as handlers in *Ideal Farms, Inc.*, dealt “partially in milk produced at their own facilities,” there is nothing in the later decision indicating any intent to narrow the court’s prior holding. The subsequent Third Circuit decision in *United Dairy Farmers, id.*, was limited to its affirmance of a lower court decision that had granted a summary judgment motion by the Secretary on the grounds that the appellant, a dairy cooperative that transported, processed and distributed its own milk, was a “handler” within the meaning of the AMAA and therefore must first exhaust the administrative remedy provided “handlers” by section 8c(15)(A) of the AMAA.

Moreover, there are more recent liberal interpretations of the Secretary’s power to regulate an individual who performs both producer and handler functions when acting as a handler that follow and are consistent with *Ideal Farms, Inc.*. See *Stew Leonard’s v. USDA*, 199 F.R.D. 48, 60 Agric. Dec. 1 (D.Conn. 2001); *Marvin D. Horne, et al v. U. S. Dept. of Agric.*, Case No. 10-15270, slip opinion, pp. 11-12, July 25, 2011, \_\_F.3d \_\_ (9<sup>th</sup> Cir. 2011). *Horne* is a very recent decision by the Ninth Circuit concerning similar regulation under a Raisin Marketing Order:

...the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered ‘silent or ambiguous’ on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S.C. 837, 842-43; see 7 U.S.C. § 608c(1); see also *Morales-Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9<sup>th</sup> Cir. 2010); *Midway Farms v. U.S. Dept. of Agric.*, 188 F.3d 1136, 1140 n.5 (9<sup>th</sup> Cir. 1999). Other courts have similarly rejected the Hornes’ argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. See, e.g., *Freeman v. Vance*, 319 F.2d 841, 842 (5<sup>th</sup> Cir. 1963)(per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), cert. denied, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency’s permissible interpretation, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

*Id.*, Slip opinion at 11-12.

Petitioner has cited the lower court decision in *Horne*, as authority for the assertion that the word “purchase” as used in the AMAA, should be interpreted and applied solely on the basis of its “plain meaning” because *Horne*’s determination of when raisins were “acquired” by a handler was based on the “plain terms of the regulation.” However, the quoted language by the Ninth Circuit makes it clear that, in accordance with the doctrine of *stare decisis*, the liberal interpretation of the holding in *Rock Royal*, *id.*, by *Freeman v. Vance*, 319 F.2d 841, 842 (5<sup>th</sup> Cir. 1963)(per curiam); and *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir.1961), *cert. denied*, 372 U.S. 965 (1963); are binding precedents. Those cases require that deference be given to the Department’s interpretation that the word ‘purchased’, as applied by the AMAA to milk orders, means ‘acquired for marketing’ in every circumstance where milk comes into a milk handler’s possession regardless of its source.

The fact that various Supreme Court decisions since *Chevron* have been decided on the basis of a statute’s “plain meaning” rather than an agency’s interpretation, does not mean, as Petitioner seemingly urges in its rebuttal brief, we are now free to disregard either the seminal interpretation of the AMAA’s language by the Supreme Court in *Rock Royal*, or what Petitioner characterizes as “simply wrong” subsequent decisions by Circuit Courts that have applied it to producer-handlers’ own milk. We may not now undertake to interpret the language anew. As the Supreme Court cautioned Courts of Appeal in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989):

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

The fact that the challenged interpretation by the Supreme Court in *Rock Royal*, was made in 1939, without subsequent alteration by Congress, provides additional reason why it must be followed. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763-64, 118 S.Ct. 2257, 2270 (1998) quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S.Ct.2061, 2069-2070, 52 L.Ed.2d 707 (1977):

("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation").

But even if we were free to treat the language of the AMAA as a matter of first impression, we would find its "plain meaning" to be less than obvious in light of the AMAA's other controlling language for milk orders, such as the following provision of section 8c(5)(C):

In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

Emphasis added.

The "purchased from producers" language of section 8c(5)(A) must necessarily be reconciled with that of section 8c(5)(C) which contemplates the regulation of producers who are handlers. To do so, the legislative history of the Act needs to be consulted, and deference given to administrative interpretations by the Secretary. Exactly what *Rock Royal* and *Ideal Farms* did, and what is still appropriate under *Chevron*.

## **2. The Contested Action is Not Contrary to Binding Practices and Interpretations Ratified by Congress**

Petitioner next asserts that practices and interpretations by the Secretary related to his power to regulate producer-handlers, as ratified in seven statutes enacted by Congress from 1965 through 1990, limit his actions and supercede the more liberal interpretations of his power under the AMAA expressed in *Rock Royal*, *Ideal Farms* and subsequent cases.

Petitioner argues that a self-imposed diminishment of power was first noted and approved by Congress when it stated in the Food and Agricultural Act of 1965, Pub. L. No. 89-321, 79 Stat. 1187, § 104:

The legal status of producer handlers of milk under provisions of the Agricultural Adjustment Act, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, shall be the same subsequent to the adoption of the amendments made by this title as it was prior thereto.

Similar statements are found in Pub.L.No.91-524, § 201(b), 84 Stat.1358 (Nov.30, 1970); Pub.L.No. 93-86, 87 Stat.221 (Aug.10, 1973); Pub.L.No.95-113, § 202, 91 Stat.913 (Sept.29, 1977); Pub.L.No.97-98, § 102, 95 Stat.1213 (Dec. 22, 1981); Pub.L.No.99-198, § 134, 99 Stat.1354 (Dec. 23, 1985); and Pub.L.No.101-624, § 115, 104 Stat.3359 (Nov. 28,1990).

However, Petitioner's interpretation of this language is contradicted by the fact that Congress, at the very time it enacted the Food and Agricultural Act of 1965, rejected an amendment that would have specifically denied authority to regulate producer-handlers. In 1967, the Secretary noted this fact when he interpreted section 104 of the 1965 Act and its implications:

Section 104 did not purport to change the previous law but merely reaffirmed it. The language is specifically directed to reaffirming legal status under the statute, rather than the provisions of any order that has been issued under the authority of the statute. The Congress rejected an amendment which would have specifically denied authority for regulation of producer-handlers. Thus producer-handlers who were potentially subject to regulation under the statute prior to the 1965 amendment remain potentially subject to regulation thereafter.

Decision on Proposed Amendments to Puget Sound, Washington Order, 32 FR 10742, 10746 (July 21, 1967).

Petitioner nevertheless argues that the statements in the seven cited statutes, constitute Congressional approval and ratification of a decision by the Secretary, subsequent to 1965, to exempt all producer-handlers from regulation and to deny proposals to eliminate their exemption. Petitioner relies upon the following comment by the Department when it denied a proposed rule on order reform (64 FR 16135, April 2, 1999):

One of the public comments received proposed that the exemption of producer-handlers from the regulatory plan of milk orders be eliminated. This proposal is denied. In the legislative actions taken by Congress to amend the AMAA since 1965, the legislation has consistently and specifically exempted producer-handlers from regulation. The 1996 Farm Bill, unlike previous legislation, did not amend the AMAA and was silent on continuing to preserve the exemption of producer-handlers from regulation. However, past legislative history is replete with the specific intent of Congress to exempt producer-handlers from regulation. If it had been the intent of Congress to remove the exemption, Congress would likely have spoken directly to the issue rather than through omission of language that had, for over 30 years, specifically addressed the regulatory treatment of producer-handlers.

The rejected proposal had sought the complete elimination of the exemption of every producer-handler from regulation including those small dairy farmers who sell such little milk that their sales have been treated as *de minimis non curat lex*. Black's Law Dictionary, 4<sup>th</sup> Edition. See *Stew Leonard's, supra*, 199 F.R.D.48 at 55; 60 Agric. Dec. 1, at 4 (2001):

...‘Typically, a producer-handler conducts a small family-type operation, processing, bottling and distributing only his own farm production.’ Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders, 25 Fed. Reg. 7819, 7825 (Aug. 16, 1960). The rationale for this exemption is ‘that such businesses are so small that they have little or no effect upon the pool.’

The reason given by the Department, in 1999, for rejecting a proposal that would have eliminated the exemption of producer-handlers with small family-type operations from regulation was inapt and, taken out of context, seemingly supports Petitioner’s argument. But the ability of the Secretary to regulate producer-handlers when they act as handlers has consistently been recognized by the Courts, Congress and, but for the language quoted, by the Secretary. Any doubt that the Secretary is empowered under the AMAA to regulate producer-handlers with large volumes of milk distribution sufficient to depress the blend prices paid to producers under a Milk Order and place other milk handlers at a competitive pricing disadvantage, was subsequently clarified by Congress. When it enacted the Milk Regulatory Equity Act of 2005, Congress specifically approved, adopted and mandated such action in respect to producer-handlers handling over 3 million pounds of milk per month in Arizona.

The following language of the MREA does not support Petitioner’s premise that Congress presently requires the Secretary to exempt all producer-handlers from regulation regardless of their size and their ability to disrupt orderly marketing in areas regulated by Milk Orders:

(O) Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

This language merely recognizes the continuance of the Secretary's power under the AMAA to regulate, or not regulate, various types of producer-handlers subject to Congressional oversight.

**3. The Amendments are Supported by Substantial Record Evidence, and are Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law**

The negative effects of exempting producer-handlers from regulation by Federal milk marketing orders were set forth in *Stew Leonard's v. Glickman*, 199 F.R.D. 48, 50-51, 60 Agric. Dec. 1, 4-5 (D.Conn. 2001):

The effects of this exemption are twofold. First, if the producer-handler uses all the milk it produces as Class I milk, it avoids having to make payments into the producer settlement fund; it merely sells the milk at the market price, which is tempered only by the production costs. Assuming all other conditions are equal, the exemption allows the producer-handler to make a greater profit because it sells Class I milk without having to pay the full Class I price into the settlement fund.

The second effect of the exemption is upon the pool as a whole. Because the total amount of Class I milk purchased in the marketing area is a factor in calculating the aggregate blend price for the marketing area, removing a handler's Class I purchases from the calculus brings the aggregate price down. Exemption of a handler who purchases a significant quantity of Class I milk from producers in the pool depresses the blend price in the region.

The exemption may also provide an additional windfall to producer-handlers who 'ride the pool.' This term refers to a producer-handler who draws upon pool resources to compensate for any deficiency in its own supply during the lean production months, thereby allowing the producer-handler to maintain a relatively smaller supply of animals with a minimal surplus of milk in periods of greater production. Producer-handlers could also take advantage of the price regulation by 'riding the pool' if they do dispose of any surplus because the milk they dispose of most likely is used as Class II or Class III milk, but the producer-handler is still able to collect the relatively higher blend price. Thus, in theory, producer-handlers who 'ride the pool' could reap the benefits of the regulatory scheme without sharing the burdens.

The 2009 hearing on proposals to change the producer-handler definition in all federal milk orders was undertaken to address such concerns.

The initial proposals were made by the National Milk Producers Federation (“NMPF”) and by the International Dairy Foods Association (“IDFA”). NMPF is a trade association representing thirty-one dairy farmer cooperatives that constitute three-fifth’s of the nation’s commercial dairy farmers and a like share of milk production. Most of the milk produced by NMPF members is purchased under Federal milk marketing orders, and NMPF members act as handlers regulated under Federal milk marketing orders, and many own and operate dairy processing and manufacturing plants that are either regulated by or receive milk regulated by Federal milk marketing orders. IDFA is a trade association of 530 dairy manufacturing and marketing companies and their suppliers. IDFA’s members include 220 dairy processors that run more than 600 plant operations that range from large multi-national organizations to single-plant companies. Together, they represent more than 85% of the milk, cultured products, cheese and frozen desserts produced and marketed in the United States. Most of the milk bought and handled by IDFA members is purchased under Federal milk marketing orders. (Amici brief, pp.1-2).

The two proposals jointly submitted by NMPF and IDFA were to: (1) eliminate the producer-handler provision from all Federal milk orders; (2) increase the exempt plant monthly limit on disposition of fluid milk products from 150,000 to 450,000 pounds; and (3) require unique labeling for fluid milk products distributed by exempt plants. *See*, Final Decision, 75 FR 10122 at 10125.

These initial two proposals prompted 17 alternative proposals also considered at the May 4-20, 2009 hearing held in Cincinnati, Ohio. *Id.* The Final Decision organized

the evidence presented during the hearing into six categories, and identified for each category the industry groups supporting or opposing various proposals and then summarized their testimony and evidence. 75 FR 10122 at 10125-10140.

The evidence favoring greater restrictions on producer-handler exemption from Federal milk marketing order pricing and pooling regulation included analysis of marketing practices and trends by consultant dairy economists who qualified as experts, as well as the testimony by dairy farmers and plant operators on their personal observations and business experiences. These witnesses gave testimony on the disorderly marketing conditions they believed were presently being caused, and that were likely to become greater in the future, due to producer-handlers becoming large, integrated milk production and handling operations significantly different from the small *de minimis* dairy farm operations that the existing producer-handler exemptions were fashioned to accommodate.

Testimony was also received in opposition to placing greater limitations on producer-handler exemptions, from a panel of consultant witnesses representing the American Independent Dairy Alliance (AIDA), and from Petitioner, GH Dairy, and 16 other dairy interests and operations. AIDA's consultant witnesses, and Petitioner in its brief, dispute the correctness of the Secretary using the difference between a Federal milk marketing order's uniform blend price and its Class I price as the measure for assessing the need for producer-handlers to be subject to milk order pricing and pooling requirements. It is their contention that the actual costs associated with a producer-handler's operations should be used to measure the appropriate transfer price of acquiring own-farm milk rather than the blend price. They contend that when this standard is

employed producer-handlers do not have a competitive advantage over regulated handlers and their exempt status cannot be found to cause disorderly marketing. *See* testimony of Dr. Knutson (Tr. 3044, Tr. 3067-3069, Tr. 3119-20, Ex. 89), Dr. Knoblauch (Tr. 3022-23, Tr. 3411-12, Ex. 90). They supported this contention with testimony by various producer-handlers that their actual costs were higher than milk order blend prices (Tr. 254, Tr. 290-291, Tr. 630-640, Tr. 746, Tr. 1183-1189, Tr. 2462, Tr. 2565, Tr. 2663; Tr. 2910-2916, Tr. 3602).

The Secretary's final decision addressed these contentions directly:

While opponents to the elimination of the producer-handler definitions argue otherwise, this decision agrees with the proponent arguments, presented by witnesses testifying in support of NMPF and IDFA positions, that the difference between the Class I price and the blend price is a reasonable estimate of the price advantage enjoyed by producer-handlers even if it is not possible to determine the precise level of the advantage for any individual producer-handler. This price advantage is compounded as a producer-handler's Class I utilization increases. In addition, allowing producer-handlers to have unlimited Class I sales will result in a measurable impact on the blend price received by pooled producers.

This decision finds no reason to consider the higher costs purportedly associated with the operation of producer-handlers a relevant factor for determining conditions in which handlers should or should not be subject to full regulation. All handlers face different processing costs. These differences may be the result of divergent plant operating efficiencies related to size or to that portion, if any, of milk supplied, which may be produced or supplied from own-farm sources. Whatever the costs differences may be and the reasons for them, all fully regulated handlers must pay the same minimum Class I price, and equalize their use-value of milk (generally, the difference between the Class I price and the blend price) through payment into the order's producer-settlement fund. Similarly, all producers face different milk production costs. Producer cost differences, for example, may be the result of farm size or variation in milk production levels attributable to management ability. Producers, regardless of their individual costs, receive the same blend price.

75 FR 10122 at 10147-10148.

This finding is consistent with past Departmental precedent. *See, e.g.*, 70 FR 74166 at 74186 (Dec. 14, 2005). It is supported by testimony in the record evidence that a

producer-handler has a competitive advantage in the market in that, unlike their competitors, they do not pay the difference between the Class I price and the blend price into the producer settlement funds of Federal milk orders. *See* testimony of Dr. Roger Cryan (Tr. 406-407, Tr. 1693, Ex. 23), Dr. Robert Yonkers (Tr. 2435, Ex. 80), Elvin Hollon (Tr. 3792), J. T. Wilcox (Tr. 1316-1317), Dennis Tonak (Tr. 516-517, Ex. 24) and Mike Asbury (Tr. 575-577).

Petitioner further argues that producer-handlers are self-sufficient and assume the entire burden of balancing their production with their fluid milk requirements. Petitioner cites prior rulemaking decisions that have used this rationale to exempt producer-handlers from Federal milk marketing order regulation. Petitioner recognizes that this rationale was modified when, in 2006, Orders 124 and 131 were amended to limit the exemption of producer-handlers to those with route disposition of no more than 3 million pounds per month because they were shifting the burden of balancing their milk production onto the orders' pooled producers as demonstrated by their sales of fluid milk products into the unregulated areas of Alaska and California (70 FR 74166 at 74187 (December 14, 2005); implemented by 71 FR 9430 (Feb. 24, 2006)). Petitioner asserts the impact of the Secretary's 2006 decision should be limited to its facts and "...does not stand for a wholesale departure from prior reasoning, but was allegedly premised on the unique marketing conditions of those two particular marketing areas." Petitioner then maintains that the present record evidence (Tr. 254, Tr. 630, Tr. 2462, Tr. 2565, Tr. 2633, Tr. 2910, Tr. 2915, Tr. 2931, Tr. 3602, Tr. 3639) demonstrates that producer-handlers do bear the burden of disposing all of their surplus milk.

Again, the Secretary addressed this contention directly:

The record supports the finding that adoption of a limit on producer-handlers' monthly Class I disposition and sales of packaged fluid milk products to other plants can mitigate the disorderly marketing which arises when producer-handlers are able to avoid bearing the burden of surplus disposal. Bearing the burden of surplus disposal is a fundamental demonstration of a producer-handler balancing their milk production with market demand for their Class I products. Disorderly marketing conditions are present when a producer-handler becomes able to directly or indirectly balance their Class I marketings with the surplus milk of pooled producers. The record indicates examples of indirect balancing of producer-handlers on the regulated market. The record also indicates that as a producer-handler's sales volume increases, conditions arise that offer an even greater ability to effectively transfer the balancing burden to the regulated market.

75 FR 10122 at 10147

This finding is supported by the testimony of various witnesses (Tr. 521-524, Tr. 636-637, Tr. 1300-1311, Tr. 1384, Tr. 2309-2310, Tr. 2470). The ways in which producer-handlers are able to balance their milk production with market demand for their Class I products at the expense of pool market participants was explained by NMPF's witness, Dr. Roger Cryan:

...[P]roducer-handlers, even if they bottle all of their milk and buy or sell no one else's, can sell to wholesalers or large retail chains at a significant price advantage. Such wholesalers or retailers can either balance their own supplies of milk, with purchases from, and at the expense of, pooled market participants; or they can raise and lower their prices seasonally, so that consumers will balance their supply at other stores, also at the expense of pooled market participants....

\* \* \* \* \*

The reality is that no producer-handler plant can truly be made to balance its own supply, because customers always have a choice of alternative sources for fluid milk.

Tr. 409-410, Ex. 23.

Petitioner next challenges the evidentiary and the statutory bases for the Secretary placing restrictions on the exemption of producer-handlers from Federal milk marketing order regulation because of increases in their size. The Secretary found:

The...de minimus impact on orderly marketing owed to producer- handler Class I sales volume has been, in part, the rationale for their exemption from full regulation. Simply stated, producer-handlers have historically conducted small scale operations and have been subject to certain requirements to remain exempt from full regulation.

\* \* \* \*

[A]mendments to the producer-handler definitions became necessary when producer-handler size was shown to be a cause of disorderly marketing conditions in the Arizona and Pacific Northwest marketing areas, and a cap of three million pounds per month on Class I dispositions in the marketing area was adopted. The record reveals that the number of producer-handlers and all other categories of handlers is declining. Opponents of change from the status quo conclude that this is justification to leave the producer-handler provisions unchanged. This decision disagrees. In evaluating the impact producer-handlers may have on orderly marketing, the volume of milk marketed by any producer-handler is more important than the overall trend in the number of producer-handlers.

The size of individual producer-handlers will impact orderly marketing conditions in any of the Federal order marketing areas if left without limit. Size of operation will have a direct bearing on competitive equity between producer-handlers and fully regulated handlers. Producer-handler size will increasingly magnify disorderly marketing conditions and practices where the burden of balancing and surplus disposal is effectively transferred to the regulated market. These examples of the presence and anticipation of disorderly marketing conditions can be largely mitigated by establishing a reasonable limit on a producer-handler's Class I route disposition and sales of packaged fluid milk products to other plants.

75 FR 10122 at 10150.

Petitioner asserts that the testimony of Dr. Cryan and other witnesses that support these findings to be speculative and fail to provide a sufficient basis for restrictions based on size. Though the testimony of the proponents stressed potential threats posed by a future increase in the number of large producer-handlers, there was evidence of the present existence of large producer-handlers who threaten orderly marketing because of their ability to exploit the producer-handler price advantage while having the benefit of economies of scale in both milk production and fluid milk processing. Data developed at the hearing indicate 17 producer-handlers with route sales in excess of 300,000 pounds, including 7 with route sales above 2,000,000 pounds. Producer-handlers were shown to

have grown from an average of 34,645 pounds of Class I sales in October 1959 to an average of 1,422,080 pounds in December 2008. (Ex. 7, Ex. 20). The sales of the 7 largest producer-handlers, according to the testimony of Dr. Cryan, were estimated to average some 80 million pounds per plant (Tr. 1867-1874). The Secretary's findings are therefore supported by record evidence showing present threats in addition to potential threats to orderly marketing attributable to large producer-handlers if left unregulated.

Moreover, it has long been recognized that the Secretary may regulate producer-handlers on the basis of their potential threats to orderly marketing. In 1961, the Secretary's amendment of the Puget Sound Milk Order was challenged on such basis and the Department's Judicial Officer held:

The Secretary can regulate to cope with potential threats to a then-existing orderly market. The Secretary need not stand powerless or shut his eyes to possible disruptive factors or eventualities in a regulated market....

\* \* \* \*

...As indicated above, potential threats to order objectives may form a basis for regulation and evidence indicating such possibility is sufficient to support regulation to maintain orderly conditions. In addition, while the number of producer-handlers has decreased since the inception of the order, the volume of milk handled by such handlers and the size of producer-handlers have substantially increased and the advantages which producer-handlers enjoy over fully regulated handlers clearly operate as an incentive to other producers, and at least one handler, to attain the producer-handler status and withdraw Class I milk from pooling under the order.

*Independent Milk Producer-Distributors' Assn.*, 20 Agric. Dec. 1, 24-25 (1961).

Here, I feel it necessary to observe that pertinent decisions by the Judicial Officer, if affirmed or unappealed, do have precedential authority in this proceeding, and Petitioner's argument, at page 16 of its rebuttal brief, that they may be disregarded is rejected as contrary to our system of administrative adjudication that, like our system of

courts under Article 3 of the Constitution, is built on the bedrock doctrine of *stare decisis*.

Petitioner next challenges the Secretary's conclusion that formerly exempt producer-handlers with over 3 million pounds per month disposition, such as Petitioner, should be required to pay into producer settlement funds in order to mitigate disorderly marketing conditions. But including virtually all handlers in a marketing order's pooling and pricing provisions to achieve this purpose is the rule not the exception. *See, Leonard, id.* The historical background of Federal milk marketing orders and the central objective of the AMAA to maintain orderly marketing that may otherwise be undermined by free-lance farmers competing for fluid milk outlets with farmer members of cooperatives who pool their milk in acceptance of lower "blend prices", is set forth in *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 13-16 (D.C.Cir.1979). "The present statutory provisions can be seen as a shoring, with the power of the Federal Government, of the classified pricing system initiated by the cooperatives." *Id*, quoted in *Mil-Key Farm Inc.*, 54 Agric Dec. 26, 30 (1995), a decision by the Department's Judicial Officer that strictly limited the producer-handler exemption and expressed concern for the fact that a "... 'producer-handler' has a distinct economic advantage over the other producers." *Mil-Key*, at 33. For other descriptions of the historical background and the central objective of the AMAA to protect pricing and pooling of milk through the use of Federal milk marketing orders, *see also, Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 78-81 (1962); *United States v. Rock Royal Coop., Inc.*, *supra*, at 542-45, 550; *Fairmount Foods Co. v. Hardin*, 442 F.2d 762, 764 (D.C. Cir.1971); *Block v. Community Nutrition Institute*, 467 U.S. 340, 341-43 (1984); *Zuber v. Allen*, 396 U.S. 168, 172-178 (1969).

The previous review of the Secretary's challenged findings shows that they were fully supported by "substantial evidence" under the standard set forth in 5 U.S.C. § 706 (2)(E). The challenged findings were directly supported by the testimony of dairy industry members recounting actual operational and marketing experiences as well as by the analysis of operant market conditions and forces by expert dairy economists and consultants. Upon canvassing the entire administrative record, the competing evidence in opposition to the findings that eventuated in the Final Decision and the Final Rule, has not been found to be so compelling as to require or permit the displacement of the Secretary's choice between two fairly conflicting views, even if a reviewing court would have made a different choice if the matter was before it de novo. *See, Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 465, 95 L.Ed. 456 (1951). It is therefore concluded that the Secretary's challenged findings are supported by substantial evidence which is defined as the relevant evidence that a reasonable person might accept to support a conclusion. *Consolo v. Federal Maritime Commission*, 383 U. S. 607, 619-620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966).

The review also shows that the challenged findings should not be set aside under 5 U.S.C. § 706(2)(A) as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As previously demonstrated, the Secretary did consider all relevant data and "articulate(d) a rational connection between the facts found and the choices made." *Public Service Comm'n of Kentucky v. FERC*, 397 F.3d 1004 (D.C.Cir. 2005) quoting, *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 60 (D.C.Cir.1999). Under the "arbitrary and capricious" standard of the Administrative Procedure Act, an agency must "examine the relevant data and articulate a satisfactory

explanation for its action.” *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). However, a reviewer “... is not to substitute its judgment for that of the agency,” *id.*, and should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned,” *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). These prior decisions by the Supreme Court were quoted by Justice Scalia writing for the majority, in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810, 173 L.Ed.2d 738 (2009), which held that even when agency action changes prior policy, a more substantial explanation is not required.

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review.

*Id.*, at 1810.

Thus, the findings of the Final Decision and the Final Rule fully meet the APA’s “arbitrary and capricious” standard as it has been interpreted and applied by the Supreme Court and lower courts.

#### **4. The Amendments are Based on a Hearing Record that did not Exclude Critical Evidence**

All evidence critical to the decision made to amend the Federal milk marketing orders was before the Secretary despite the exclusion of a declaration with attached exhibits by Jeff Sapp, co-owner of Nature’s Dairy of Roswell, New Mexico.

Mr. Sapp, through his attorney, advised the Administrative Law Judge presiding over the administrative rulemaking hearing, on May 15, 2009 (11 days after the hearing’s start), that health problems precluded his flying to Cincinnati to personally testify. His attorney moved that in Mr. Sapp’s absence, his written declaration with attached exhibits

be received in evidence. The motion was denied on the basis that the rules of practice (7 C.F.R. §900.8(b)(1) and (d)(1)(i)) require actual testimony that is open to cross examination (Tr. 3264-3294). Additionally, it is noted that under the governing rules of practice “when necessary, in order to prevent undue prolongation of the hearing, the judge may limit the... amount of corroborative or cumulative evidence....and shall, insofar as practicable, exclude evidence which is immaterial, irrelevant or unduly repetitious...”( 7 C.F.R. §900.8(d)(1)ii) and(iii)). The declaration and the exhibits were placed in a sealed envelope and marked as Exhibits 92 and 93 (Tr. 3287). By May 15, 2009, there was an abundance of evidence in the Hearing Record on the competitive difficulties facing small producer-handlers which was the gist of Mr. Sapp’s proffered testimony. A motion was later made to the Secretary to reverse the ruling and re-open the hearing for cross-examination of any material fact in genuine dispute. That motion was also denied. Copies of the motion to the Secretary with the written declaration and the exhibits are found in the Appendix of Excerpts from the Rulemaking Hearing Record as Appendices L and M.

I have reviewed the proffered declaration and the attached exhibits and find them to be inconsequential to the final outcome of the rulemaking action. Mr. Sapp’s company, Nature’s Dairy, is a producer-handler whose operation, according to his proffered declaration, has less than 3 million pounds of monthly milk distribution, and as such remains exempt from Federal milk order regulation under the Secretary’s actions. The declaration and the exhibits Nature’s Dairy sought to have introduced concerned an example of the economic disadvantages that a small producer-handler can experience in competing for accounts with large handlers. The hearing record has

an abundance of other testimony on the same subject that was received prior to the contested motion. Moreover, although Petitioner is a producer-handler, it is not a small dairy operation. Its distribution exceeds the 3 million pound monthly limit that has been placed on the producer-handler exemption. Mr. Sapp's testimony, if received, would have no relevance to Petitioner or any other of the large producer-handlers that are no longer exempt from regulation. It therefore makes no sense to debate the merits of the ruling on the original motion that excluded the declaration and exhibits, or the affirmance of that ruling by the Secretary. The rulings concerned evidence on a subject that has become moot. If any aspect of the ruling was in error, which I do not find to be the case, it must now be construed to be harmless error that does not merit setting aside the Final Decision and the Final Rule, or reopening the record upon which they were based for the receipt of the declaration and the exhibits.

**5. The Secretary's Final Decision did not violate the Regulatory Flexibility Act**

Petitioner seeks to have the Secretary's Final Decision set aside for violating the Regulatory Flexibility Act by failing to analyze the impact of the Final Rule on small entity producer-handlers as measured by plant operator criteria instead of the size of their dairy farm operations.

The Secretary succinctly explained in the Final Decision why he employed the size of a producer-handler's dairy farm operation to distinguish those that are small from those that are large:

Producer-handlers are persons who operate dairy farms and generally process and sell their own milk production. A pre-condition to operating a processing plant as a producer-handler is the operation of a dairy farm. Consequently, the size of the dairy farm determines the production level of a producer-handler's farm operation and is also the controlling factor of the volume that is processed by the plant that

is available for distribution. Accordingly, the major consideration in determining whether a producer-handler is a large or small business is its capacity as a dairy farm. Under SBA criteria, a dairy farm is considered large if its gross revenue exceeds \$750,000 per year which equates to a production guideline of 500,000 pounds of milk per month. Accordingly, a producer-handler with Class I disposition and sales of packaged fluid milk products to other plants in excess of three million pounds per month is considered by this decision to be a large business.

Final Decision, 75 FR 10122 at 10147

Furthermore, the requirements of the Regulatory Flexibility Act were specifically addressed by the Secretary at the outset of the Final Decision:

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a “small business” if it has annual gross revenue of less than \$750,000, and a dairy products manufacturer is a “small business” if it has fewer than 500 employees. For the purpose of determining which dairy farms are “small businesses,” the \$750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most “small” dairy farms. For purposes of determining a handler’s size, if the plant is part of a 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.

Producer-handlers are dairy farms that process their own milk production. These entities must operate one or more dairy farms as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm(s) determines the production level of the operation and is a controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered a small or large business is therefore dependent on the capacity of its dairy farm(s), where a producer-handler with annual gross revenue in excess of \$750,000 is considered a large business.

Final Decision, 75 FR 10122 at 10122-10123

The Final Decision went on to explain that its regulatory impact will be limited to producer-handlers exceeding the three million pounds of monthly disposition criterion.

In *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture*, 415 F.3d 1078, 1100-1102 (9<sup>th</sup> Cir.2005), the history and the requirements of the Regulatory Flexibility Act (“RFA”) were explained:

....The RFA was passed in 1980 to ‘encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses.’ *Assoc. Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 111 (1<sup>st</sup> Cir.1997). In certain cases, it requires agencies to publish an ‘initial regulatory flexibility analysis’ at the time a proposed rule is published, and a ‘final regulatory analysis’ at the time a final rule is published. 5 U.S.C. §§ 603, 604. Judicial review is available only of the final analysis. 5 U.S.C. § 611.

\* \* \* \* \*

The RFA imposes no substantive requirements on an agency; rather, its requirements are ‘purely procedural’ in nature. *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C.Cir.2001); *see also Env’tl. Defense Ctr., Inc. v. United States EPA*, 344 F.3d 832, 879 (9<sup>th</sup> Cir.2003), *cert. denied*, 541 U.S. 1085, 124 S.Ct. 2811, 159 L.Ed.2d 246 (2004) (‘Like the Notice and Comment process required in administrative rulemaking by the APA, the analyses required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit.’) To satisfy the RFA, an agency must only demonstrate a ‘reasonable, good-faith effort’ to fulfill its requirements. *United States Cellular*, 254 F.3d at 88; *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5<sup>th</sup> Cir.2000); *Assoc. Fisheries*, 127 F.3d at 114.

The Secretary has fully complied with the RFA. The Notice of Hearing (74 FR 16296, Appendix F) contained an initial RFA analysis. The Final Decision certified that the “... proposed rule will not have a significant economic impact on a substantial number of small entities,” and then provided the requisite statement of the factual basis for such certification, as required by 5 U.S.C. § 605(b). The statement was in the form of findings that demonstrated that all essential elements had been considered, and gave a rational explanation of the choices made together with their anticipated effects on various industry members large and small. This is far more than what has been held sufficient for RFA compliance. *See, Carpenter, Chartered v. Secretary of Veteran Affairs*, 343 F.3d 1347, 1356-1357 (Fed.Cir.2003). *See also*, the cases cited in *Ranchers Cattlemen, id.*

**6. The Final Rule Meets the AMAA’s “Only Practical Means” Standard**

Petitioner further argues that the Final Rule fails to comply with a provision of the AMAA that when marketing orders are issued over the objection of handlers they need to meet an “only practical means” test.

Under section 8c(9) of the AMAA, the Secretary may issue a federal marketing order “notwithstanding the refusal or failure of handlers...to sign a marketing agreement...on which a hearing has been held” upon determining:

(A) That the refusal or failure to sign a marketing agreement...tends to prevent the effectuation of the declared policy of (the AMAA), with respect to this commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity (which, in respect to milk, is favored by at least two-thirds of the producers in the specified marketing area).

7 U.S.C. § 608c(9)

The Final Rule contained the following determinations by the Secretary:

(1) The refusal or failure of handlers...of more than 50 percent of the milk, which is marketed within the specified marketing areas, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the AMAA;

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

(3) The issuance of this order amending the Northeast and other orders is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the respective marketing areas.

Final Rule, 75 FR 21157 at 21160.

Petitioner contends that these determinations are insufficient because they are unsupported by any analysis. However, this standard was addressed in *Suntex Dairy v. Block*, 666 F.2d 158, 164-165 (5<sup>th</sup> Cir.1982) where it was held:

....The Secretary must make a factual determination after the hearing about the tendency of the order to serve the purposes of the Act. In that situation, the Secretary's discretion is limited by his lawful consideration of the evidence that is presented at the 'tendency' hearing under 7 U.S.C. § 608c(4). Under 7 U.S.C. § 608c(9)(B), however, the Secretary is directed to determine, without the development of an additional evidentiary record, the necessity of the proposed order. The statute imposes rigorous obligations on the Secretary to develop an evidentiary record with respect to the 'tendency' aspect of the order, but leaves him to make a determination of its 'necessity' aspect without any further evidence to be taken. The most sensible construction of the statutory scheme, under these circumstances, is that the Secretary's determination for the 'necessity' of the order - once the evidentiary 'tendency' hearing establishes the Secretary's statutory authorization to issue it - is left to his administrative decision whether or not to issue it as 'the only practical means of advancing the interests of the producers... pursuant to the declared policy (of the Act)', 7 U.S.C. § 608c(9)(B). We are reinforced in our view that this is the proper interpretation of the statutory provisions, because the Act has been so administratively construed and administered (albeit it without issue being raised, until now) since its enactment.

The *Suntex* court also noted that:

On oral argument the Court was informed that never in the history of the Act have the handlers voted to approve a marketing arrangement. Thus, the additional finding of necessity has always followed as a matter of course without further hearing or findings. It would alter the established practice of over forty years under the Federal Milk Marketing Act to discover now a separate judicial review of the 'necessity' finding of the Secretary. Thus, the logic of the finding of 'necessity' being based upon the 'tendency' hearing coalesces with the entrenched practice to establish that the 'necessity' determination by the Secretary is discretionary administrative action.

*Id.* at 165.

There are no contrary judicial decisions and, in accordance with *Suntex*, the Secretary's explicit finding that 'the only practical means' test has been met, satisfies this provision of the AMAA.

**7. The Final Rule Does Not Impose a Prohibited Form of Milk Pricing**

Petitioner contends that the Final Rule will subject it to confiscatory, compensatory payments and non-uniform pricing prohibited by the AMAA. In support of its argument, Petitioner cites *Lehigh Valley Coop. Farmers, Inc. v. U.S.*, 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345 (1962), and *Sani-Dairy, a Div. of Penn Traffic Co., Inc. v. Espy*, 939 F.Supp. 410 (W.D.Pa.1993), *aff'd* 91 F.3d 15 (3d Cir. 1996). Both cases are inapposite. They deal with so-called “compensatory payments” assessed upon nonpool milk brought into an order’s marketing area that without the payments would unfairly compete with pool milk. The compensatory payments in both cases were found to have been higher than needed to place pool and nonpool milk on substantially similar competitive positions at source, and so excessive as to constitute economic trade barriers prohibited under section 608c(5)(G) of the AMAA (7 U.S.C. § 608c(5)(G)) that states:

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production are in the United States.

The charges Petitioner seeks to avoid are not compensatory payments assessed on nonpool milk it handles. They are instead charges it must pay under the pricing and pooling provisions of the Federal milk order where it is now regulated as a handler of pool milk. As is presently the case for any other handler regulated by the milk order disposing all of its milk as Class I, Petitioner will now be required to pay the difference between the order’s Class I price and the blend price whenever all of the milk it handles goes to Class I fluid milk outlets. Such payments are not “compensatory payments” on nonpool milk entering a market regulated by the milk order from sources outside the market, as were those that were the subject of the two cited cases. Petitioner is subject to

the Order's regulation as a handler of pool milk and, as is the case with all other pool handlers, must therefore account for the milk it handles in accordance with the order's pricing and pooling provisions which are identical for all pool milk handlers. Petitioner argued at the rulemaking hearing that because there was evidence that it cost producer-handlers more to produce milk than milk order blend prices, an order's blend price should not be used in computing a producer-handler's obligations to the order's producer-settlement fund if uniform pricing is to be achieved. But the Secretary fully addressed all of those arguments when he examined the record evidence upon which he based his Final Decision and Final Rule, and for the reasons discussed at length in Conclusion 3, *supra*, deference must now be given to his underlying findings.

Accordingly, having considered and discussed all of the Petitioner's arguments, the following Order is being entered.

### **ORDER**

The Petition is dismissed and the relief it seeks is denied.

It is ruled that the Secretary's Final Decision, 75 FR 10122-01, 2010 WL 723277 (F.R.) and the Secretary's implementing Final Rule (75 FR 21157-01, 2010 WL 1625292 (F.R.)) are both in accordance with law. Therefore, neither should be modified, nor should Petitioner be exempted from their regulatory effects.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on the Petitioner unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

October , 2011

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Victor W. Palmer  
Administrative Law Judge