UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

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

Introduction

On May 19, 2010, GH Dairy instituted this proceeding pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) by filing a petition.[1] GH Dairy seeks to set aside a final decision published at 75 Fed. Reg. 10,122 (Mar. 4, 2010) [hereinafter the Final Decision] and the implementing final rule published at 75 Fed. Reg. 21,157 (Apr. 23, 2010) [hereinafter the Final Rule]. The challenged Final Rule amends the "producer-handler" definition of all federal milk marketing orders to limit exemption from pooling and pricing provisions to those with total route disposition

[1]GH Dairy entitles its petition "Verified Petition for Expedited Adjudicatory Review of Final Agency Decision, Published at 75 Fed. Reg. 10122 (Mar. 4, 2010), and of Final Order, Published at 75 Fed. Reg. 21157 (Apr. 23, 2010), in National Hearing Docket No. AMS-DA-09-0007" [hereinafter the Petition].

and sales of packaged fluid milk products to other plants of 3,000,000 pounds or less per month. GH Dairy distributes in excess of 3,000,000 pounds of packaged fluid milk products per month (Pet. at 2 ¶ 3); therefore, the plant facilities of GH Dairy's integrated operation became regulated, pursuant to the Final Rule, as a fully regulated distributing plant, and GH Dairy's dairy farm facilities were deemed a "producer" (Pet. at 5-6 ¶ 21). GH Dairy is required by the Final Rule 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 federal milk marketing order.

GH Dairy contends (1) the Secretary of Agriculture has no authority under the AMAA to issue the Final Rule, as it regulates producer-handlers who do not purchase milk; (2) the Final Rule violates the AMAA's requirement of uniform minimum pricing among handlers in 7 U.S.C. § 608c(5)(C); (3) the Final Rule violates the AMAA's prohibition on trade barriers in 7 U.S.C. § 608c(5)(G); (4) the Final Rule does not comply with the "only practical means" requirement of the AMAA in 7 U.S.C. § 608c(9)(B); (5) the Final Decision and the Final Rule do not comply with the Regulatory Flexibility Act; (6) the Final Decision and Final Rule are not supported by substantial evidence; and (7) critical evidence was excluded from the formal rulemaking proceeding upon which the Final Decision and Final Rule are based.

Alfred W. Ricciardi of Aiken, Schenk, Hawkins & Ricciardi, P.C., Phoenix, Arizona, and Ryan K. Miltner of The Miltner Law Firm, LLC, New Knoxville, Ohio,

represent GH Dairy. Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represents the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator]. The parties agreed that this proceeding should be decided on the basis of the formal rulemaking record upon which the contested Final Decision and Final Rule are based, with both parties filing briefs and an Appendix of excerpts of the formal rulemaking record.[2] In addition to the briefs filed by the parties, the International Dairy Foods Association [hereinafter IDFA], represented by Steven J. Rosenbaum, Covington & Burling, LLP, Washington, DC, and the National Milk Producers Federation [hereinafter NMPF] represented by Marvin Beshore, Harrisburg, Pennsylvania, filed an amici brief in opposition to GH Dairy's initial brief. GH Dairy filed, in addition to its initial brief, a brief in rebuttal of both the Administrator's brief and IDFA and NMPF's amici brief.

On October 5, 2011, Administrative Law Judge Victor W. Palmer [hereinafter ALJ Palmer] issued a Decision and Order: (1) concluding the Final Decision and Final Rule are in accordance with law and within the Secretary of Agriculture's authority under the AMAA, (2) concluding the Final Decision and Final Rule are supported by substantial

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[2]References to the transcript of the formal rulemaking hearing conducted by Administrative Law Judge Jill S. Clifton [hereinafter ALJ Clifton] in Cincinnati, Ohio, during the period May 4, 2009, through May 19, 2009, are designated "Tr." References to the Appendix of excerpts of the formal rulemaking record are designated as "App."

evidence of record, (3) concluding critical evidence was not excluded from the formal rulemaking record, (4) denying the relief sought by GH Dairy, and (5) dismissing GH Dairy's Petition.

On November 4, 2011, GH Dairy appealed ALJ Palmer's Decision and Order to, and requested oral argument before, the Judicial Officer. On November 25, 2011, IDFA and NMPF filed a motion for leave to file an amicus brief in opposition to GH Dairy's appeal to the Judicial Officer, which I granted.[3] On December 8, 2011, the Administrator filed Respondent's Opposition to the Petitioner's Appeal Petition. On December 16, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt, with minor changes, ALJ Palmer's findings of fact, conclusions of law, and order. A discussion of the issues raised in GH Dairy's appeal of ALJ Palmer's Decision and Order precedes the findings of fact, conclusions of law, and order.

GH Dairy's Request for Oral Argument

GH Dairy's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[4] is refused because GH Dairy, the

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[3]Ruling Granting IDFA and NMPF's Motion for Leave to File Amicus Brief (Mar. 19, 2012).

[4]7 C.F.R. § 900.65(b)(1).

Administrator, IDFA, and NMPF have thoroughly briefed the issues. Thus, oral argument would serve no useful purpose.

Regulatory Framework

> The two distinctive and essential phenomena of the milk industry are a basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.
>
> Milk has essentially two end uses: as a fluid staple of daily consumer diet, and as an ingredient in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a premium price, even though it is of no higher quality than milk used for manufacture. . . . At the same time the milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant, sufficiently large herds must be maintained to supply winter needs. The result is oversupply in the more fruitful months.

Zuber v. Allen, 396 U.S. 168, 172-73 (1969). Prior to regulation, producers[5] intensely competed with one another to sell their milk to handlers[6] who would ultimately use the milk for the fluid milk market. Moreover, handlers would obtain bargains during glut periods.

Congress enacted the AMAA "to remove ruinous and self-defeating competition among the producers and permit all farmers to share the benefits of fluid milk profits according to the value of goods produced and services rendered." *Zuber v. Allen*, 396 U.S. 168, 180-81 (1969). Congress authorized the Secretary of Agriculture to issue

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[5]Generally, a "producer" is an entity that collects milk directly from the animals.

[6]Generally, a "handler" is an entity that takes the milk and turns it into an end product and resells the end product either to consumers or to manufacturers.

regulations, referred to as "orders," that regulate the handling of agricultural commodities (7 U.S.C. § 608c(3)-(4)). In the case of milk and milk products, the AMAA provides that orders shall contain one or more of the terms and conditions listed in 7 U.S.C. § 608c(5). One of the terms listed in 7 U.S.C. § 608c(5) provides for "[c]lassifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers or associations of producers" (7 U.S.C.§ 608c(5)(A)).

To achieve equality among producers, each federal milk marketing order creates a market-wide pricing pool for handlers. Federal milk marketing orders set minimum prices that the handlers must pay for classes of milk. Handlers who deal in the fluid milk market pay into a pool that is then drawn on by handlers who deal in manufactured milk products. Producers receive a uniform minimum price, referred to as the "blend price," from handlers irrespective of the use to which to which the milk is eventually put:

> [T]he [AMAA] authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use. Adjustments are then made among handlers so that each eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought.

Lehigh Valley Coop. Farmers, Inc. v. United States, 370 U.S. 76, 79-80 (1962).

The effect of a pricing pool has been succinctly illustrated, as follows:

> Suppose Handler A purchases 100 units of Class I (fluid) milk from Producer A at the minimum value of $3.00 per unit. Assume further that Handler B purchases 100 units of Class II (soft milk products) milk from Producer B at the minimum value of $2.00 per unit, and that Handler C purchases 100 units of Class III (hard milk products) milk from Producer C at $1.00 per unit. Assuming that this constitutes the entire milk market for a regulatory district, during this period the total price paid for milk is $600.00, making the average price per unit of milk $2.00. Thus, under the regulatory scheme, Producers A, B, and C all receive $200.00 for the milk they supplied, irrespective of the use to which it was put. However, Handler A must, in addition to the $200.00 that it must tender to Producer A, pay $100.00 into the settlement fund because the value of the milk it purchased exceeded the regulatory average price. Along the same vein, Handler C will receive $100.00 from the settlement fund because it will pay Producer C more than the milk it received was worth. The pool achieves equality among producers, and uniformity in price paid by handlers.

Stew Leonard's v. Glickman, 199 F.R.D. 48, 50 (D. Conn. 2001).

Historically, the Secretary of Agriculture has chosen not to require those entities that both produce and handle their own milk, referred to as "producer-handlers," to make payments into the pricing pool. Each federal milk marketing order has its own definition of the term "producer-handler" so as to exempt milk handled by a producer-handler from the pricing and pooling regulations of the order in slightly different ways. Typically, a producer-handler conducts a small family-type operation, processing, bottling, and distributing only his own farm production. The rationale for the producer-handler exemption is that producer-handlers are so small that they have little or no effect on the pool. *Stew Leonard's v. Glickman*, 199 F.R.D. 48, 50 (D. Conn. 2001) (quoting Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders,

25 Fed. Reg. 7819, 7825 (Aug. 16, 1960)). Nonetheless, for many years, the various definitions of the term "producer-handler" did not include limits on the size of producer-handlers exempt from the pooling and pricing regulations of federal milk marketing orders. The Final Rule limits 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 in all federal milk marketing orders.

GH Dairy's Appeal Petition

GH Dairy raises 12 issues in its "Appeal to the Judicial Officer and Request for Oral Argument" [hereinafter Appeal Petition]. First, GH Dairy contends ALJ Palmer erroneously concluded the Secretary of Agriculture is authorized under the AMAA to regulate producer-handlers who do not purchase milk. GH Dairy contends the plain language of the AMAA only authorizes the Secretary of Agriculture to regulate handlers who purchase milk from producers. (Appeal Pet. at 2-6 ¶ 2a.)

The AMAA authorizes the Secretary of Agriculture to issue federal milk marketing orders which classify milk in accordance with the form or purpose of its use, and fix "minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers or associations of producers" (7 U.S.C.§ 608c(5)(A)).

This provision is the "plain language" of the AMAA upon which GH Dairy relies. But this language was found by the Supreme Court to require interpretation within the full

context of the AMAA and the legislative intent underlying the enactment of the AMAA. When so interpreted, the word "purchased" has the meaning stated by the Supreme Court in its decision holding the AMAA, and federal milk marketing orders issued under the AMAA, to be constitutional. *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939).

Rock Royal rejected a challenge asserting that the plain meaning of "purchased," as used in the AMAA, precluded the application of a federal milk marketing 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 H.R. Rep. No. 74-1241 (1935); S. Rep. No. 74-1011 (1935)]. 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. With this we agree. As here used the word 'purchased' means 'acquired for marketing.'

United States v. Rock Royal Co-op, 307 U.S. 533, 579-80 (1939) (footnotes omitted).

GH Dairy argues "acquired for marketing" is limited to milk handled by cooperatives acting as intermediaries and it does not apply to milk produced by producer-handlers (Appeal Pet. at 2-3 ¶ 2a). However, in *Ideal Farms, Inc. v. Benson,*

288 F.2d 608 (3d 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 the lower court had correctly concluded:

> '* * * that the provisions of [the federal milk marketing order] are fully in accord with the enabling statute and that the refusal of the Secretary to exempt the [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.'

Ideal Farms, Inc. v. Benson, 288 F.2d 608, 618 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963).

In *Freeman v. Vance*, 319 F.2d 841 (5th Cir. 1963) (per curiam), the Fifth Circuit, relying on *Ideal Farms*, upheld a federal milk marketing order that made milk produced by a person, who also operated the plant in which the milk was processed and from which plant the milk was distributed as fluid milk, subject to pricing, pooling, and administrative assessment provisions of the order.

GH Dairy contends *Ideal Farms* and *Vance* are inapposite because they each dealt with handlers that purchased milk from other sources (Appeal Pet. at 3-4 ¶ 2a). However, the Court in *Ideal Farms* specifically addressed the issue of a handler, who is also the producer, as follows:

> 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 the 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*, [127 F.2d 920, 927 (1st Cir. 1942)]:
>
> '* * * 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.'
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> 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, 288 F.2d at 613.

GH Dairy contends a subsequent decision, *United States v. United Dairy Farmers Coop. Ass'n,* 611 F.2d 488 (3d Cir. 1979) (per curiam), limits the holding in *Ideal Farms* and *Vance* to handlers that purchase at least some milk produced by other parties (Appeal Pet. at 4 ¶ 2a). Although *United Dairy Farmers* alludes to the fact that the producers held subject to regulation as handlers in *Ideal Farms* dealt partially in milk produced at their

own facilities, there is nothing in *United Dairy Farmers* indicating any intent to narrow the Third Circuit's holding in *Ideal Farms*. *United Dairy Farmers* was limited to its affirmance of a lower court decision that had granted a summary judgment motion by the Secretary of Agriculture 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 7 U.S.C. § 608c(15)(A).

Moreover, there are more recent interpretations of the Secretary of Agriculture's authority to regulate an individual who performs both producer and handler functions when acting as a handler that follow and are consistent with *Ideal Farms*. *See Horne v. U.S. Dep't of Agric.*, Case No. 10-15270, 2012 WL 762997 (9th Cir. Mar. 12, 2012); *Dairylea Coop. v. Butz*, 504 F.2d 80, 83 n. 6 (2d Cir. 1974); *Stew Leonard's v. Glickman*, 199 F.R.D. 48 (D. Conn. 2001). *Horne* concerns 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. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.,* 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric*., 188 F.3d 1136, 1140 n. 5 (9th 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 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965, 83 S.Ct. 1087, 10 L.Ed.2d 128 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, 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.

Horne v. U.S. Dep't of Agric., Case No. 10-15270 slip op. at 4, 2012 WL 762997 (9th Cir. Mar. 12, 2012).

GH Dairy also argues that *Rock Royal* and *Ideal Farms* are old precedents that ALJ Palmer erroneously followed. GH Dairy, citing *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Rapanos v. United States*, 547 U.S. 715 (2006), contends ALJ Palmer erroneously failed to follow more recent Supreme Court precedent requiring that statutes be interpreted according to their plain meaning. (Appeal Pet. at 5-6 ¶ 2a.)

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 ALJ Palmer was, and I am now, free to disregard either the interpretation of the AMAA's language by the Supreme Court in *Rock Royal* or subsequent court decisions. As the Supreme Court cautioned in *Rodriguez de Quijas v. Shearson/American Express, Inc*., 490 U.S. 477, 484 (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, 764 (1998), *quoting Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (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").

Moreover, I find the plain meaning of the "purchased from producers" language of 7 U.S.C. § 608c(5)(A) to be less than obvious in light of 7 U.S.C. § 608c(5)(C):

> **§ 608c. Orders**
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> . . . .
>
> **(5) Terms—Milk and its products**
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> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> . . . .
>
> (C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, 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) of this subsection.

7 U.S.C. § 608c(5)(C). The "purchased from producers" language of 7 U.S.C. § 608c(5)(A) must necessarily be reconciled with that of 7 U.S.C. § 608c(5)(C) which

contemplates the regulation of producers who are handlers.[7] To do so, the legislative history of the AMAA must be consulted and deference given to administrative interpretations by the Secretary of Agriculture. Exactly what *Rock Royal* and *Ideal Farms* did, and what is still appropriate under *Chevron*.

Second, GH Dairy contends ALJ Palmer erroneously held the Final Rule does not conflict with a prior statement by the Secretary of Agriculture regarding his authority to regulate producer-handlers (Appeal Pet. at 6-7 ¶ 2b).

GH Dairy relies upon the following response by the Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], to a public comment in a formal rulemaking proceeding:

> 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 the 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

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[7]*See Dairylea Coop. v. Butz*, 504 F.2d 80, 83 n.6 (2d Cir. 1974) (stating "producers are exempted from regulation only in their capacities as producers" (7 U.S.C. § 608c(13)(B)); "[w]hen a producer acts as a handler he is not so exempted" (7 U.S.C. § 608c(5)(C))).

> 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.

64 Fed. Reg. 16,026, 16,135 (Apr. 2, 1999). ALJ Palmer characterized AMS' response to the public comment as "inapt" and found the AMS response was "taken out of context" (ALJ Palmer's Decision at 15). I find the AMS response to the public comment is simply wrong. In any event, the AMS response to the public comment has no effect on the Secretary of Agriculture's actual authority under the AMAA to regulate producer-handlers. The Secretary of Agriculture's authority to regulate producer-handlers when they act as handlers has consistently been recognized by the courts, Congress and, but for the quoted response to a public comment, by the Secretary of Agriculture.

Third, GH Dairy contends ALJ Palmer's reference to the Milk Regulatory Equity Act of 2005 [hereinafter the MREA], as supporting the Secretary of Agriculture's power to regulate producer-handlers, is misplaced (Appeal Pet. at 7 ¶ 2c).

I agree with ALJ Palmer. Any doubt that the Secretary of Agriculture is empowered under the AMAA to regulate producer-handlers under a federal milk marketing order was clarified by Congress when it enacted the MREA, which amended the AMAA.[8] Congress specifically approved and adopted regulation of producer-handlers handling over 3,000,000 pounds of milk per month in Arizona.

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[8]The MREA is codified at 7 U.S.C. § 608c(5)(M)-(O).

Fourth, GH Dairy contends ALJ Palmer erroneously concluded the Final Rule is supported by substantial evidence (Appeal Pet. at 7-11 ¶ 2d).

When reviewing an agency action, the reviewer considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors.[9] There is no requirement, as GH Dairy asserts (Appeal Pet. at 8 ¶ 2d), for either ALJ Palmer or the Secretary of Agriculture to discuss evidence that competes with, or contradicts, the evidence that supports the Final Rule. GH Dairy has the burden of proof to establish that the record evidence does not support the Final Rule.[10] The existence of regulatory alternatives, even those which might be more persuasively reasonable is not cognizable on review as a reason to overturn the Final Rule.[11] It is not sufficient that the record

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[9]*Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995).

[10]*United States v. Rock Royal Co-op,* 307 U.S. 533, 567 (1939); *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969); *Boonville Farms Coop. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *Sterling Davis Dairy v. Freeman,* 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman,* 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd,* 350 F.2d 978 (3d Cir. 1965), *cert. denied,* 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones,* 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd,* 157 F.2d 87 (8th Cir.), *cert. denied,* 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard,* 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd,* 149 F.2d 860 (3d Cir. 1945).

[11]*Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 319 (3d Cir. 1968), *cert. denied*,

(continued...)

contain evidence supporting GH Dairy's position. On the contrary, GH Dairy must establish that the record cannot sustain the conclusion reached by the Secretary of Agriculture.

A review of the rulemaking record reveals that the Final Rule is supported by substantial evidence. ALJ Palmer accurately described the extensive evidence, as follows:

> 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.

ALJ Decision at 18. GH Dairy disagrees with the evidence supporting the Final Rule; however, GH Dairy's disagreement does not provide a basis for rejection of the Final Rule or a reversal of ALJ Palmer's Decision upholding the Final Rule. Based upon my review of the formal rulemaking record, I find the Secretary of Agriculture acted within the scope of his legal authority, the Secretary of Agriculture explained the Final Rule, the

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[11](...continued)
394 U.S. 929 (1969).

Secretary of Agriculture relied on facts that have a basis in the formal rulemaking record, and the Secretary of Agriculture considered the relevant factors.

Fifth, GH Dairy contends ALJ Palmer erroneously concluded the Final Rule does not violate the AMAA's prohibition on trade barriers. GH Dairy contends the Final Rule subjects it to compensatory payments prohibited by 7 U.S.C. § 608c(5)(G). (Appeal Pet. at 11-13 ¶ 2e.)

The AMAA provides that no federal milk marketing order may prohibit or limit the marketing in the marketing area of milk or milk products produced in any production area in the United States, as follows:

> **§ 608c. Orders**
>
> . . . .
> **(5) Terms—Milk and its products**
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> . . . .
>
> (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 area in the United States.

7 U.S.C. § 608c(5)(G). Courts have construed 7 U.S.C. § 608c(5)(G) as prohibiting the establishment of geographic economic trade barriers among and between milk marketing

areas.[12] The trade barrier provision in 7 U.S.C. § 608c(5)(G) prohibits compensatory payments on nonpool milk brought into an area covered by a federal milk marketing order that are so excessive as to constitute an economic barrier to milk being shipped into that area.

The charges GH Dairy seeks to avoid are not compensatory payments assessed on nonpool milk GH Dairy handles. They are, instead, charges GH Dairy must pay under the federal milk marketing order where GH Dairy is regulated as a handler of pool milk. As is presently the case for any other handler regulated by a federal milk marketing order disposing its milk as Class I, GH Dairy is required to pay the difference between the federal milk marketing order's Class I price and the blend price whenever the milk it handles goes to Class I fluid milk outlets. Such payments are not "compensatory payments" assessed upon nonpool milk brought into a federal milk marketing order area

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[12] *See Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 379 (1964) (stating the AMAA prevents the Secretary of Agriculture from establishing trade barriers to the importation of milk from other production areas in the United States); *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76, 97 (1962) (explaining that 7 U.S.C. § 608c(5)(G) is intended to prevent the Secretary of Agriculture from establishing any kind of economic trade barriers); *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 20 (D.C. Cir. 1979) (stating 7 U.S.C. § 608c(5)(G) is addressed primarily to obstacles to the marketing in one area of milk and milk products produced in another area); *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 315 (3d Cir. 1968) (observing that 7 U.S.C. § 608c(5)(G) evolved out of the congressional intent to restrain the Secretary of Agriculture from imposing regulations which would burden the free flow of milk and milk products in commerce), *cert. denied*, 394 U.S. 929 (1969); *Lanco Dairy Farms Coop. v. Secretary of Agriculture*, 572 F. Supp.2d 633, 637-38 (D. Md. 2008) (stating 7 U.S.C. § 608c(5)(G) has been construed as a prohibition on the enactment of economic trade barriers among and between milk marketing areas).

from sources outside the market, as were the payments that were the subject of the two cases relied upon by GH Dairy, *Lehigh Valley Coop. Farmers, Inc. v. United States*, 370 U.S. 76 (1962), and *Sani-Dairy, a Div. of Penn Traffic Co. v. Espy*, 939 F. Supp. 410 (W.D. Pa 1993), *aff'd*, 91 F.3d 15 (3d Cir. 1996). GH Dairy is subject to the federal milk marketing 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 federal milk marketing order's pricing and pooling provisions which are identical for all pool milk handlers. Therefore, I affirm ALJ Palmer's conclusion that the Final Rule does not violate 7 U.S.C. § 608c(5)(G).

Sixth, GH Dairy contends ALJ Palmer erroneously failed to address GH Dairy's claim that the pool payments from producer-handlers required by the Final Rule do not comply with 7 U.S.C. § 608c(5)(C) because the required pool payments result in producer-handlers bearing mandatory minimum prices far in excess of the fixed Class I prices (Appeal Pet. at 13 ¶ 2e).

I disagree with GH Dairy that ALJ Palmer failed to address GH Dairy's claim that the pool payments from producer-handlers required by the Final Rule do not comply with 7 U.S.C. § 608c(5)(C). ALJ Palmer specifically addressed the issue of non-uniform pricing and found no merit in GH Dairy's claim (ALJ Palmer's Decision at 33-34). Moreover, I find no merit in GH Dairy's claim that eliminating the exemption from pooling for large producer-handlers violates the requirement of uniform minimum prices

among handlers in 7 U.S.C. § 608c(5)(C). GH Dairy is subject to the same minimum class prices as all pool handlers. The fact that GH Dairy could have an actual cost that is higher than the regulated minimum prices is immaterial. Federal milk marketing order class prices are minimum prices and GH Dairy's cost above those minimum prices has no legal significance.

Seventh, GH Dairy contends ALJ Palmer erroneously upheld ALJ Clifton's exclusion of Jeff Sapp's proffered declaration and attached exhibits during the May 2009 formal rulemaking hearing upon which the challenged Final Decision and Final Rule are based (Appeal Pet. at 13-14 ¶ 2f).

During the May 2009 formal rulemaking hearing, Mr. Sapp's attorney advised ALJ Clifton that Mr. Sapp was unable to attend the formal rulemaking hearing and moved for the admission into evidence of Mr. Sapp's written declaration with attached exhibits. ALJ Clifton denied the motion, but ordered the declaration marked as Exhibit 92 and the exhibits attached to the declaration marked as Exhibit 93, both of which ALJ Clifton ordered to be placed under seal (Tr. 3263-94). On July 23, 2009, ALJ Clifton issued rulings denying motions to reverse the exclusion of Mr. Sapp's declaration and attached exhibits.

The Rules of Practice and Procedure Governing Proceedings To Formulate Marketing Agreements and Marketing Orders (7 C.F.R. §§ 900.1-.18) require actual testimony that is subject to cross-examination, as follows:

§ 900.8 Conduct of the hearing.

> . . . .
>
> (b) *Appearances*—(1) *Right to appear*. At the hearing, any interested person shall be given an opportunity to appear, either in person or through his authorized counsel or representative, and to be heard with respect to matters relevant and material to the proceeding. Any interested person who desires to be heard in person at any hearing under these rules shall, before proceeding to testify, state his name, address, and occupation. If any such person is appearing through a counsel or representative, such person or such counsel or representative shall, before proceeding to testify or otherwise to participate in the hearing, state for the record the authority to act as such counsel or representative, and the names and addresses and occupations of such person and such counsel or representative. Any such person or such counsel or representative shall give such other information respecting his appearance as the judge may request.
>
> . . . .
>
> (d) *Evidence*—(1) *In general*. The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.
>
> (i) Every witness shall, before proceeding to testify, be sworn or make affirmation. Cross-examination shall be permitted to the extent required for a full and true disclosure of the facts.

7 C.F.R. § 900.8(b)(1), (d)(1)(i). Therefore, I agree with ALJ Palmer's conclusion that ALJ Clifton's exclusion of Mr. Sapp's written declaration and attached exhibits was not error.

Moreover, I have reviewed Mr. Sapp's declaration and the attached exhibits (App. M) and find them to be inconsequential to the challenged Final Decision and Final Rule. Mr. Sapp's company, Nature's Dairy, is a producer-handler whose operation, according to his declaration, has less than 3,000,000 pounds of monthly milk distribution and, as such, remains exempt from federal milk marketing order regulation. The

declaration and the exhibits Mr. Sapp sought to have introduced concerned the economic disadvantages that a small producer-handler can experience in competing with large handlers. Although GH Dairy is a producer-handler, it is not a small producer-handler. Mr. Sapp's declaration, if received, would have no relevance to GH Dairy or to any other of the large producer-handlers that are no longer exempt from federal milk marketing orders. Even if I were to find ALJ Clifton's exclusion of Mr. Sapp's declaration and the attached exhibits error (which I do not so find), I would find the error to be harmless error that does not merit setting aside the Final Decision and the Final Rule or reopening the record upon which Final Decision and the Final Rule are based for the receipt of Mr. Sapp's declaration and attached exhibits.

Eighth, GH Dairy contends ALJ Palmer erroneously concluded that the Final Decision and Final Rule comply with the Regulatory Flexibility Act (Appeal Pet. at 13-15 ¶ 2f).

The Notice of Hearing applicable to the challenged Final Decision and Final Rule includes an initial Regulatory Flexibility Act analysis (74 Fed. Reg. 16,296 (Apr. 9, 2009)). The Final Decision certified that the "proposed rule will not have a significant economic impact on a substantial number of small entities" (75 Fed. Reg. 10,122 (Mar. 4, 2010)) and provides a statement of the factual basis for the certification, as required by 5 U.S.C. § 605(b). The statement is in the form of findings that demonstrate that all essential elements had been considered and provides a rational explanation of the choices

made together with their anticipated effects on various industry members large and small. (75 Fed. Reg. 10,122, 10,122-24 (Mar. 4, 2010).) Based upon my review of the Regulatory Flexibility Act analyses conducted in connection with the Final Decision and the Final Rule, I conclude ALJ Palmer correctly found that the Secretary of Agriculture complied with the Regulatory Flexibility Act.

Ninth, GH Dairy asserts ALJ Palmer erroneously failed to address the Secretary of Agriculture's decision to depart from the prior position that producer-handlers were to be classified by their size as handlers, rather than by their size as producers (Appeal Pet. at 14 ¶ 2f). However, GH Dairy fails to explain the relevance of the Regulatory Flexibility Act analyses used in previous rulemaking proceedings and fails to cite any basis for its contention that a change in position, without explanation, renders a Regulatory Flexibility Act analysis flawed. I do not find the Regulatory Flexibility Act analyses used in previous rulemaking proceedings relevant to the challenged Final Decision and Final Rule; therefore, I reject GH Dairy's contention that ALJ Palmer's failure to address previous rulemaking proceedings, is error.

Tenth, GH Dairy contends ALJ Palmer's adoption of the argument that dairy farm size is the appropriate measurement for distinguishing small producer-handlers from large producer-handlers, is error (Appeal Pet. at 14-15 ¶ 2f).

The Final Decision explains the reason for the use of a producer-handler's dairy farm operation to distinguish producer-handlers that are small from producer-handlers that are large, as follows:

> Producer-handlers are persons who operate dairy farms and generally process and sell only 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.

75 Fed. Reg. 10,122, 10,147 (Mar. 4, 2010). Based upon the foregoing explanation, I find dairy farm size is a reasonable method by which to distinguish small producer-handlers from large producer-handlers; therefore, I reject GH Dairy's contention that ALJ Palmer's adoption of the argument that dairy farm size is an appropriate measurement for distinguishing small producer-handlers from large producer-handlers, is error.

Eleventh, GH Dairy contends ALJ Palmer erroneously dismissed the Regulatory Flexibility Act as merely procedural and devoid of substantive requirements. GH Dairy contends the Regulatory Flexibility Act requires analysis; not merely rote recitation of compliance. (Appeal Pet. at 15 ¶ 2f.)

A number of courts have characterized the Regulatory Flexibility Act as procedural;[13] however, ALJ Palmer did not conclude that a mere recitation of compliance was all that was required, as GH Dairy contends. Instead, ALJ Palmer explicitly found that the Final Decision and the Final Rule fully complied with the requirements of the Regulatory Flexibility Act, as follows:

> 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.

ALJ Palmer's Decision at 30. Therefore, I reject GH Dairy's contention that ALJ Palmer erroneously dismissed the Regulatory Flexibility Act as merely requiring a "rote recitation of compliance."

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[13] *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1101 (9th Cir. 2005) (stating the Regulatory Flexibility Act imposes no substantive requirements on an agency; rather, its requirements are purely procedural in nature); *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003) (stating, like the notice and comment process required in administrative rulemaking by the Administrative Procedure Act, the analyses required by the Regulatory Flexibility Act are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit), *cert. denied*, 541 U.S. 1085 (2004); *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) (characterizing the Regulatory Flexibility Act requirement that an agency file a final regulatory flexibility analysis as purely procedural requiring only that the agency demonstrate a reasonable good-faith effort to carry out the Regulatory Flexibility Act's mandate).

Twelfth, GH Dairy contends ALJ Palmer erroneously concluded that the Final Rule complies with the "only practical means" requirement in 7 U.S.C. § 608c(9)(B). GH Dairy contends the "only practical means" requirement of the AMAA "is a mandate to do an act of analysis; not merely recite a purported justification." (Appeal Pet. at 13, 15-16 ¶ 2f.)

The AMAA authorizes the Secretary of Agriculture to 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:

> **§ 608c. Orders**
>
> . . . .
> **(9) Orders with or without marketing agreement**
>
> . . . .
> (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 such 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)(A)-(B).

The Final Rule explicitly addressed the "only practical means" requirement in 7 U.S.C. § 608c(9)(B), as follows:

(c) Determinations

It is hereby determined that:

(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.

75 Fed. Reg. 21,157, 21,160 (Apr. 23, 2010).

The seminal judicial decision addressing the "only practical means" requirement in 7 U.S.C. § 608c(9)(B) held the determination whether the requirement is satisfied is entrusted to the Secretary of Agriculture's discretion, requires no further factual showing beyond the findings that the order tends to effectuate the purposes of the AMAA, and is not, with limited exceptions, subject to review, as follows:

> 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 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.

Suntex Dairy v. Block, 666 F.2d 158, 164-65 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982).

Therefore, I agree with ALJ Palmer that the explicit determination in the Final Rule that "[t]he 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" (75 Fed. Reg. 21,157, 21,160 (Apr. 23, 2010)) satisfies the "only practical means" requirement in 7 U.S.C. § 608c(9)(B). I reject GH Dairy's contention that the "only practical means" requirement in 7 U.S.C. § 608c(9)(B) requires additional discussion or analysis in the Final Rule.

GH Dairy correctly points out that *Suntex Dairy* is not a "blanket holding of unreviewability" (Appeal Pet. at 16 ¶ 2f). The Fifth Circuit states that a "necessity" determination may be challenged to the extent that: (1) the agency lacked jurisdiction; (2) the agency determination was occasioned by impermissible influence, such as fraud or bribery; or (3) the decision violates a constitutional, statutory, or regulatory command. *Suntex Dairy v. Block*, 666 F.2d 158, 166 (5th Cir.), *cert. denied*, 459 U.S. 826 (1982). GH Dairy challenges the Secretary of Agriculture's authority to issue the Final Rule; however, as discussed in this Decision and Order, *supra*, I reject that challenge.

Findings of Fact

1. Producer-handlers are dairy farmers who produce and handle milk of their own production. Prior to April 2009, each federal milk marketing order had its own definition of the term "producer-handler." Each milk marketing 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. For many years, the various definitions of the term "producer-handler" did not include limits on the size of the producer-handlers exempt from the pooling and pricing regulations of federal milk marketing orders.

2. On February 24, 2006, the Secretary of Agriculture issued a final rule that changed the definition of an exempted producer-handler under the Arizona-Las Vegas milk marketing order and the Pacific Northwest milk marketing order. The February 24, 2006, final rule limited the exemption from the pooling and pricing regulations of the

Arizona-Las Vegas milk marketing order and the Pacific Northwest milk marketing order to producer-handlers that have Class I milk route distribution of 3,000,000 pounds or less per month (71 Fed. Reg. 9430 (Feb. 24, 2006)).

3. On April 11, 2006, Congress enacted the MREA. The MREA's stated intent is 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." The MREA approved the Secretary of Agriculture's determination in the February 24, 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 with respect to producer-handlers operating within Nevada. In addition, the MREA 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 marketing order that sells to States not subject to a federal milk marketing order (7 U.S.C. § 608c(5)(M)(ii)). On May 1, 2006, the Secretary of Agriculture issued an order implementing the instructions in the MREA (71 Fed. Reg. 25,495 (May 1, 2006)). The MREA also states:

§ 608c. Orders

. . . .

(5) Terms—Milk and is products

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

. . . .

(O) RULE OF CONSTRUCTION REGARDING PRODUCER-HANDLERS.—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.

7 U.S.C. § 608c(5)(O).

4. On April 9, 2009, AMS published 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 (74 Fed. Reg. 16,296 (Apr. 9, 2009)). The Notice of Hearing was in response to requests from NMPF and IDFA to hold a hearing to address problems in the federal milk marketing order system caused by the exemption of producer-handlers from regulation by federal milk marketing orders.

5. AMS, pursuant to its April 9, 2009, Notice of Hearing, held the formal rulemaking hearing during the period May 4 through May 19, 2009, at which transcribed testimony was taken and multiple exhibits were received regarding 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, could not travel to the hearing and give his testimony in person. The presiding administrative law judge, Administrative Law Judge Jill S. Clifton, denied a motion to include Mr. Sapp's proffered declaration and supporting exhibits as part of the record evidence because Mr. Sapp was unavailable in person, as required by the Rules of Practice and Procedure Governing Proceedings To Formulate Marketing Agreements and Marketing Orders.

6. After the filing of proposed findings and conclusions by industry members, the issuance of a recommended decision (74 Fed. Reg. 54,384 (Oct. 21, 2009)), and the filing and consideration of exceptions, the Secretary of Agriculture issued the Final Decision (75 Fed. Reg. 10,122 (Mar. 4, 2010)) that was implemented by the Final Rule that became effective June 1, 2010 (75 Fed. Reg. 21,157 (Apr. 23, 2010)). 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 3,000,000 pounds or less during a month.

7. GH Dairy distributes in excess of 3,000,000 pounds of packaged fluid milk products per month (Pet. at 2 ¶ 3). Accordingly, the plant facilities of GH Dairy's integrated operation are regulated, pursuant to the Final Rule, as a fully-regulated distributing plant, and its dairy farm facilities are deemed a "producer" under an applicable federal milk marketing order (Pet. at 5-6 ¶ 21). As a result, GH Dairy is

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 of Law

1. The Final Decision and the Final Rule are with the authority conferred on the Secretary of Agriculture by the AMAA.

2. The Final Decision and Final Rule are not contrary to binding practices and interpretations by the Secretary of Agriculture, as ratified by Congress.

3. The Final Decision and the Final Rule are supported by substantial record evidence and are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

4. The Final Decision and the Final Rule are based on a hearing record that did not exclude critical evidence.

5. The Final Decision and Final Rule did not violate the Regulatory Flexibility Act.

6. The Final Rule meets the AMAA's "only practical means" standard.

7. The Final Rule does not impose a prohibited form of milk pricing.

8. The Final Rule does not create a trade barrier.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Secretary of Agriculture's Final Decision (75 Fed. Reg. 10,122 (Mar. 4, 2010)) and the Secretary of Agriculture's implementing Final Rule (75 Fed. Reg. 21,157 (Apr. 23, 2010)) are in accordance with law; therefore, the Final Decision and Final Rule are not modified and GH Dairy is not exempted from the regulatory effects of the Final Decision and the Final Rule.

2. The relief GH Dairy seeks in the Petition, filed May 19, 2010, is denied.

3. GH Dairy's Petition, filed May 19, 2010, is dismissed.

This Order is effective upon service on GH Dairy.

RIGHT TO JUDICIAL REVIEW

GH Dairy has the right to obtain review of the Order in this Decision and Order in any district court of the United States in which GH Dairy has its principal place of business. GH Dairy must file a bill in equity for the purpose of review of the Order in this Decision and Order within 20 days from the date of entry of the Order in this

Decision and Order. Service of process in any such proceeding may be had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[14] The date of entry of the Order in this Decision and Order is April 24, 2012.

Done at Washington, DC

April 24, 2012

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William G. Jenson
Judicial Officer

[14] 7 U.S.C. § 608c(15)(B).