

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

In re:

Milk in the Northeast and Other Marketing
Areas

7 CFR Parts 1000 *et seq.*

Docket No. 23-J-0067;
AMS-DA-23-0031

**OBJECTION TO USDA DECISION TO EXCLUDE PRICE RELATED PROPOSALS
SUBMITTED BY
MILK INNOVATION GROUP**

Your honor, I rise at the outset of this proceeding to lodge critical objections. My name is Chip English and together with Ashley Vulin (participating today remotely) and Grace Bulger, we at Davis Wright Tremaine represent the Milk Innovation Group. I am submitting a complete version of this objection as an exhibit and will omit as I am presenting live some case citations to expedite things.

Pursuant to 7 U.S.C. § 608c(15), MIG objects to USDA's decision to exclude two of its pricing-related proposals as being not in accordance with law. We request a modification of the matters open for hearing and/or reversal of the decision to exclude MIG Proposals 5 (addressing ESL Shrink) and 6 (a partial exemption from FMMOs pricing regulations of certified organic milk). USDA's decision to exclude MIG's price-related proposals is not in accordance with the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.*, or USDA's obligations under the Administrative Procedure Act. As I discuss a little later, there is U.S. District Court of the District of Columbia squarely on our side. **This Objection is Timely.**

As a preliminary matter I want to explain why I raise this objection now and to explain why this objection is timely. Pursuant to USDA’s rules governing procedures for the hearing, specifically 7 C.F.R. § 900.16, implementing 5 U.S.C.A. § 557(d)(1), once USDA issues a Hearing Notice, *ex parte* rules apply to any communications regarding the substance of this proceeding. Given that we were not aware that USDA had applied an arbitrary and capricious methodology in this proceeding until that Hearing Notice, the first moment to raise this objection in compliance with *ex parte* rules is today, on the record. Thus our objection is not only timely, it is perfectly timed for this morning.

A. USDA invited interested parties to submit pricing-related proposals.

On June 1, 2023, USDA issued an invitation “providing the opportunity for interested parties to submit additional proposals regarding potential amendments to the current pricing provisions applicable to all FMMOs.” (emphasis added). The invitation instructed that “[e]ach pricing related proposal should be accompanied by a comprehensive explanation on the need for and potential impacts of the proposed change(s), how the proposed change(s) facilitates more orderly marketing, and any other relevant information.” (emphasis added).

In its Action Plan, issued on the same day, USDA stated it was “considering initiation of a rulemaking proceeding that would include a public hearing to collect evidence regarding proposed changes to pricing provisions effective in all eleven FMMOs.” (emphasis added).

Accordingly MIG submitted six proposals, including the two pricing related proposals raised here: an extended shelf-life shrinkage pricing proposal (MIG’s Proposal 5) and an organic milk pricing exemption proposal (MIG’s Proposal 6).

B. USDA excluded MIG’s price related proposals.

In its July 24, 2023 response to MIG, USDA based its refusal to hear both MIG’s extended shelf-life shrinkage proposal (MIG’s Proposal 5) and MIG’s organic milk exemption proposal

(MIG’s Proposal 6) because each proposed price related change “does not seek to amend the uniform FMMO pricing formulas” and therefore “does not fall within the scope of this hearing.”

USDA excluded each proposal because the proposal “does not seek to amend the uniform FMMO pricing *formulas*.” Note your honor the difference between what USDA invited June 1 and now what it asserts was the limitation – for the first time USDA says “pricing formulas” implying 7 C.F.R. Section 1000.50 only. But that is not what USDA said June 1. The invitation for additional proposals was not limited only to proposals which directly sought to amend the uniform pricing formulas. Instead, USDA invited additional “pricing related” proposals “regarding potential amendments to the current pricing provisions applicable to all FMMOs.” USDA likely had to define the hearing in such broad terms if it intended to accept every single one of NMPF’s five disparate proposals that prompted the start of this proceeding. The only unifying umbrella for National Milk’s five proposals is “pricing.” And contrary to USDA’s later and belated assertion, both the extended shelf-life shrinkage proposal and the organic milk exemption are pricing related and are directly responsive to the potential amendments proposed by other entities to the current pricing provisions applicable to all FMMOs.

1. The proposal to partially exempt organic milk from FMMO pricing and pooling provisions directly relates to current FMMO pricing provisions.

MIG Proposal 6 seeks to amend the pricing provisions so that they treat certified organic milk differently from conventional milk. The proposal expressly ties to pricing – that is, under MIG Proposal 6, certified organic milk would have to meet specific pricing constraints on a non-classified basis and then would be eligible for an exemption from pooling. While this Proposal requires harmonizing amendments in other sections of the regulatory code, its primary substance is found in Section 50.

Moreover, a critical component of FMMO “pricing” is the payment of significant funds by Class I processors into the producer settlement fund – that is without doubt a significant portion of the “price” paid by organic handlers for milk – and one, by the way, that provides absolutely zero benefits to organic dairy farmers or organic processors. Certified organic milk commands a non-classified price premium that is higher than, and unrelated to the FMMO minimum prices.

Finally, NMPF proposes to amend the FMMO by raising the Class I differentials. A significant justification historically for the original base differential was the value provided by farmers of balancing the market and incentivizing service of the Class I market. USDA did accept a Proposal (Proposal 20) from MIG that addresses these very issues. MIG will explain how these justifications no longer exist in any circumstances, but they especially do not exist for organic milk. The fact that this proceeding will already be considering and addressing the issues of the treatment of the pricing of organic milk within this regulatory framework only further highlights the arbitrary nature of the line drawn by USDA to exclude a partial organic exemption that is essentially another alternative to the pending proposals.

To say now that USDA intended only to hear proposals directly linked to price formula mechanics of NMPF’s proposals is an after the fact justification for preventing our clients from being heard, when of course NMPF got all of its proposals noticed for hearing.

2. The proposal to increase the amount of allowable extended shelf-life shrinkage is pricing related and concerns the current pricing provisions applicable to all FMMOs.

MIG’s ESL Shrink provision is undoubtedly pricing related – it is a proposal about the price applicable to different levels of shrink. This proposal is designed to address the fact that USDA has long recognized that not all milk produced on a farm makes it to the bottle. Some milk is lost on the tanker and some is inevitably left behind in milk lines. ESL facilities face unique

challenges with respect to shrink and our proposal is designed to impact that – and it is pricing because the amount of milk that is legitimate shrink is subject to the month’s lowest price rather than the highest Class I price. MIG has prepared and is ready to present data that supports its contention that ESL shrink is uniformly different from other shrink, so should be priced differently. This proposal is undoubtedly about “pricing,” and should be considered.

USDA’s decision to prevent hearing MIG’s shrink proposal from consideration at the hearing is inconsistent with USDA’s decision to include in the Hearing Notice Select Milk Producers proposals on yield factors, including particularly Hearing Proposal 11 that directly addresses the same issue of shrink:

The proposal seeks to update the specified yield factors to reflect actual farm-to-plant shrink.

USDA did not limit the hearing to one section of the CFR, so cannot maintain that dairy farmers get to discuss shrink as to butterfat and protein because it is found in Section 50, but my clients cannot discuss shrink because it is found in a different section. Shrink is shrink, and pricing related no matter where it is found in the code. The Secretary has opened the door to discussing shrink as to other Classes, but proposes to keep the door closed as to Class I.

Likewise, USDA has previously stated this proposal needs to be considered at a national hearing, just as we have here. In a 2015 promulgation hearing in California, the Dairy Institute of California put forth a proposal to adjust shrink levels for ESL. In its recommended decision, USDA denied making the requested amendment on the basis that “amending provisions that are uniform throughout the FMMO system to allow an additional shrinkage allowance on ESL production should be evaluated on the basis of a separate national rulemaking proceeding.” 82 Fed. Reg. 10634. We are here, at that national proceeding, making the request just as USDA instructed, and yet are denied again.

C. USDA’s decision to exclude pricing related proposals is arbitrary and capricious.

USDA’s explanation for why the proposals were excluded is insufficient and unpersuasive. The AMS Administrator is “is required to make such an investigation and give such consideration that he deems warranted regarding a proposal, and to deny the application only if he concludes that:

. . . the proposed marketing order [or amendment] will not tend to effectuate the declared policy of the act, or that for other proper reasons a hearing should not be held on the proposal. . . .

7 C.F.R. § 900.3.” *National Farmers Organization, Inc. v. Lyng*, 695 F. Supp. 1207, 1211 (D. D.C. 1988). In the *NFO* case (I was not involved in the lawsuit but was involved in the FMMO hearing preceding the case), for then Orders 1, 2 and 4, payment dates for dairy farmers was open. Producers were then and are now paid twice a month. NFO proposed a third payment to accelerate some monies paid to dairy farmers. USDA excluded the proposal, but upon appeal to a federal district court by the proponent, USDA was ordered to reopen the hearing to include the proposal. In other words, the arbitrary exclusion of a relevant proposal at before the hearing even starts is a reversible error that can be appealed and result in nullification of the proceeding as to that portion – here that is the three Class I issues as Make Allowances are separate.

Here, both the extended shelf-life shrinkage proposal and organic exemption proposal are related to pricing and USDA fails to explain a proper reason that the proposals should not be heard. USDA’s arbitrary exclusion of these proposals means that it is keeping certain proponents from even being heard. Not only does this put the Class I only portion of this proceeding at risk for later reversal, but it certainly does not reflect the type of open and fair process that our clients deserve. And our clients are not the only losers if that happens – so are consumers. MIG’s rejected proposals sought to have the real economics of FMMOs considered and likely would result in

decreases in the cost of milk to fluid milk processors. From a public policy consideration, if the economics do not justify current prices, then a failure to address that reality by this agency is really a failure for consumers.

This issue is not academic or within the agency's discretion. The *NFO* case applies and you, your honor, can cure this today.

Agency decisions related to federal marketing orders are subject to judicial review and are invalid if arbitrary and capricious. See *Marketing Assistance Program, Inc. v. Bergland*, 562 F.2d 1305, 1307 (D.C. Cir. 1977) ("While the Secretary's marketing regulations are referred to as 'orders,' they are really instances of notice and comment rulemaking."); see also *National Farmers Organization, Inc. v. Lyng*, 695 F. Supp. 1207, 1211 (D. D.C. 1988) (finding review of decision to exclude additional proposal from FMMO hearing proper because "both the present statute itself and the regulation promulgated thereunder provide clear parameters within which the Secretary must exercise lawful discretion and require reasoned decisionmaking."). An agency action may be arbitrary and capricious "if the agency has not really taken a 'hard look' at the salient problems and has not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (footnote omitted), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2233 (1971); see also *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992).

Therefore, USDA is required to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239 (1962)). Thus, the agency "must cogently explain why it has exercised its discretion in a given manner" so as to enable a court on judicial review "to conclude that the agency's action was the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 48, 52, 103 S. Ct. 2856.

At best, USDA's decision to exclude MIG's proposals suggests a decision to change the scope of the hearing, specifically related to the meaning of "pricing related" and "regarding proposed changes to pricing provisions effective in all eleven FMMOs." USDA fails, though, to provide the required explanation as to the difference between the proposals USDA invited and those accepted for the hearing. If USDA made its determination to change the scope of the hearing permissibly under the AMAA and APA standards, USDA's response to MIG and other interested parties excluding proposals fails to provide reasonable explanation as to the change in scope, and is thus not in accordance with the law. *See Rodway v. United States Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975) (the purpose of the APA is to cause agencies to respond to comments in a reasoned manner and explain how the agency resolved problems); *see also American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980) (APA's procedural safeguards are meant to ensure that government agencies are accountable and their decisions are reasoned).

D. Consequences of inaction.

USDA's failure to include proposals properly submitted within the scope of the invitation risks invalidating any final Class I pricing decisions resulting from the FMMO hearing. To be validly promulgated, a final agency rule must be a "logical outgrowth" of the proposed rule on which the public had the opportunity to comment. *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 421 (D.C. Cir. 1994). To be very clear, our clients object to the fact that not all Class I proposals are being heard; tellingly except for my clients' Proposal 20, the Class I proposals all increase Class I prices, by some estimates as much as \$1 Billion annually. Obviously this proceeding can and will consider proposals that could increase the Class I price and MIG has no objection to non-Class I proposals found in Issues II and III. But if this proceeding is to address Class I pricing, it is a premature merits determination to exclude nearly all relevant Class I pricing proposals. We believe we are correct here and if the notice deficiency is not cured, the Secretary risks a successful

15(A) or 15(B) proceeding at some point where a court may well determine long after the fact that any Class I price increases were improvidently granted. In past litigations, huge fights have then erupted over refunds to those persons from whom money was redistributed by USDA. *Zuber v. Allen*, 396 U.S. 168, 90 S. Ct. 314 (1969).

Let me say here and now to USDA and NMPF that everyone is on notice that this risk of retroactive refunds is on the table. No one down the road will be credibly permitted to make an equitable argument to the contrary.

Right now the hearing notice exclusions reinforce a perception that Class I fluid milk handlers are at best third class participants in the FMMOs after dairy farmers and handlers that can voluntarily pool or not their milk. Class I fluid milk sales are the only segment of the industry quite literally on life support. Class I fluid milk processors are the only segment who cannot exit the FMMO system – non-class I handlers can choose not to pool, farmers can vote out an order, but fluid milk processors are stuck. And it is Class I that essentially funds this program – certainly the producer settlement funds. All handlers pay assessments to fund USDA's operations. Yet despite all of this, Class I processors cannot even get their own proposals heard by the Secretary. MIG's proposals (including others not noticed for hearing) are designed to take a hard look at the reality of the economic situations before us and how USDA and this industry might actually try something new and different to spur innovation in Class I rather than running it into the ground. Now is the moment in time to fix it, and there is no way USDA can do so unless it hears from those on the front lines.

We respectfully urge you as the presiding officer to provide us with the real opportunity to be heard on MIG Proposals 5 and 6.