

**7 CFR Part 1011**

[DA-95-02]

**Milk in the Tennessee Valley Marketing Area; Temporary Revision of Certain Provisions of the Order****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Revision of rule.

**SUMMARY:** This document reduces the supply plant shipping requirement of the Tennessee Valley Federal milk order (Order 11) for the months of March through July 1995. The proposed action was requested by Armour Food Ingredients Company (Armour), which operates a proprietary supply plant pooled under Order 11. Armour contends the action is necessary to prevent the uneconomical movement of milk and to ensure that producer milk associated with the market in the fall will continue to be pooled in the spring and summer months.

**EFFECTIVE DATE:** March 1, 1995, through July 31, 1995.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Memoli, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 690-1932.

**SUPPLEMENTARY INFORMATION:** The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule lessens the regulatory impact of the order on certain milk handlers and tends to ensure that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

The Department is issuing this final rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may

file with the Secretary a petition stating that the order, any provisions of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This temporary revision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the provisions of § 1011.7(b) of the Tennessee Valley order.

Notice of proposed rulemaking was issued on November 1, 1994, and published in the **Federal Register** on November 7, 1994 (59 FR 55377), concerning a proposed relaxation of the supply plant shipping requirement. The public was afforded the opportunity to comment on the proposed notice by submitting written data, views and arguments by December 7, 1994. One comment letter was received.

**Statement of Consideration**

The temporary revision reduces the supply plant shipping requirement from 40 to 30 percent for the period of March through July 1995. The Tennessee Valley order requires that a supply plant ship a minimum of 60 percent of the total quantity of milk physically received at the supply plant during the months of August through November, January, and February, and 40 percent in each of the other months. The order also provides authority for the Director of the Dairy Division to increase or decrease this supply plant shipping requirement by up to 10 percentage points if such a revision is necessary to obtain needed shipments of milk or to prevent uneconomical shipments.

Armour Food Ingredients states that it would have to make uneconomical shipments of milk from its Springfield, Kentucky, supply plant to meet the 40 percent shipping standard required for pool status under Order 11 during the months of March through July. Additionally, it states that the 40 percent requirement could jeopardize the continued association of producers who have supplied the Order 11 market in the fall.

At a hearing held in Charlotte, North Carolina, on January 4, 1995, Armour

proposed an amendment to the Tennessee Valley order that would provide automatic pooling status for a supply plant during the months of March through July if the plant met the order's shipping requirements during the preceding months of August through February. There was no opposition to this proposal at the hearing.

Purity Dairies, Inc., a Nashville, Tennessee, handler that is regulated under the Georgia order (Order 7), filed a comment opposing the proposed revision. Purity states that it cannot procure milk from its traditional supply area in central Kentucky in competition with Armour and other Order 11 handlers because its blend price in Nashville is no longer competitive with the Order 11 blend price. It states that Armour is attracting more milk than is needed and that "this practice of hoarding milk supplies should not be tolerated."

There was no testimony on the record of the recently-concluded hearing to suggest that Armour is hoarding milk supplies. None of the plants which receive milk from Armour indicated that Armour was not shipping enough milk. In fact, the record showed that Armour consistently exceeded the order's 60-percent shipping requirement and that during certain short production months Armour shipped in excess of 90 percent of its milk to distributing plants.

While it is true that Purity's blend price under Order 7 and former<sup>1</sup> Order 98 (Nashville, Tennessee) was frequently close to or below the Order 11 blend price during the period from December 1993 through April 1994, data introduced into the record of the Charlotte hearing indicate that since July 1994 the Nashville-Springfield price relationship has returned to a more normal pattern, as shown in Table 1.

**TABLE 1.—COMPARISON OF BLEND PRICES: JANUARY 1992–NOVEMBER 1994, NASHVILLE, TN (ORDER 98/7)—SPRINGFIELD, KY (ORDER 11)**

	Average blend price at Nashville, TN, under order 98/7 <sup>1</sup>	Average blend price at Springfield, KY, under order 11	Difference
1/92–1/93	13.85	13.58	.26
12/93–/94	14.22	14.33	–.11
5/94–1/94	14.01	13.72	.28

<sup>1</sup> The Nashville, Tennessee, order was terminated effective July 31, 1993.

If Purity has difficulty in attracting a milk supply, it should direct its concern