

Commissioners voted that the meeting be closed: Benjamin F. Baer, Jasper Clay, Jr., Vincent Fechtel, Jr., Carol Pavilack Getty, and Victor M.F. Reyes.

In Witness Whereof, I make this official record of the vote taken to close this meeting and authorize this record to be made available to the public.

Dated: December 5, 1990.

Benjamin F. Baer,

Chairman, U.S. Parole Commission.

[FR Doc. 90-29091 Filed 12-7-90; 11:19 am]

BILLING CODE 4410-01-M

SECURITIES AND EXCHANGE COMMISSION Agency Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of December 10, 1990.

A closed meeting will be held on Tuesday, December 11, 1990, at 2:30 p.m.

The Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Roberts, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, December 11, 1990, at 2:30 p.m., will be:

Institution of injunctive actions.

Institution of administrative proceedings of an enforcement nature.

Formal orders of investigation.

Settlement of administrative proceedings of an enforcement nature.

Administrative proceeding of an enforcement nature.

Settlement of injunctive actions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Jonathan Gottlieb at (202) 272-2200.

Dated: December 5, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90-29207 Filed 12-6-90; 4:37 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register

Vol. 55, No. 238

Tuesday, December 11, 1990

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirements Submitted to the Office of Management and Budget for Review

Correction

In notice document 90-28212 appearing on page 49703, in the issue of Friday, November 30, 1990, in the second column, under "OMB Number: 3060-0176", in the next line "Section 73.150," should read "Section 73.1510,".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-01-4212-13; IDI-23538]

Issuance of Land Exchange Conveyance Document; Idaho

Correction

In notice document 90-27045 appearing on page 47930 in the issue of Friday, November 16, 1990, make the following correction:

In the third column, under Boise Meridian, in "Sec. 15", at the end of the first line just before "NW 1/4" insert "E 1/2 NW 1/4,".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-01-4214-11; IDI-04319, IDI-014817, IDI-939]

Proposed Continuation of Withdrawals, Idaho

Correction

In notice document 90-27037 beginning on page 47935 in the issue of Friday,

November 16, 1990, make the following corrections:

1. On page 47935, in the second column, under Boise Meridian, in "Sec. 8", "and" should read "to".
2. On the same page and column, in "Sec. 32", "W 1/2 W 1/4" should read "W 1/2 W 1/2".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-01-4214-11; IDI-2291, et al.]

Proposed Continuation of Withdrawals, Idaho

Correction

In notice document 90-27038 beginning on page 47936 in the issue of Friday, November 16, 1990, make the following corrections:

1. On page 47936, in the second column, under "Hero Lake and Gnat Lake", in the second line, at "Sec. 21", the first part of the description (preceding "and") should read "S 1/2 S 1/2 S W 1/4 NW 1/4".
2. On the same page and column, under "Mudd Lake", in the second line of "Sec. 29" a comma should precede "N 1/2" and in the next line after the first "NE 1/4", the next description should read "E 1/2 NE 1/4 SE 1/4 NW 1/4".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-943-90-4214-11; IDI-07547, et al.]

Proposed Continuation of Withdrawals, Idaho

Correction

In notice document 90-27040 appearing on page 47938 in the issue of Friday, November 16, 1990, make the following correction:

In the second column in the fifth line from the bottom, the first half of the description (preceding "and") should read "NW 1/4 SE 1/4 NW 1/4"

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Employment and Training Administration

Job Training Partnership Act: Migrant and Seasonal Farmworker Programs; Preapplications for Federal Assistance, and Solicitation for Grant Application

Correction

In notice document 90-28186 beginning on page 49846, in the issue of Friday, November 30, 1990, make the following corrections:

1. On page 49849, in the third column, the last signatory (preceding the Appendix), should read "Roberts T. Jones,".
2. On the same page, in the same column, in the Appendix, the first entry of the second column should read "890,819".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 27

[Docket No. 26352; Notice No. 90-24]

RIN 2120-AC68

Airworthiness Standards; Crash Resistant Fuel Systems in Normal and Transport Category Rotorcraft

Correction

In proposed rule document 90-23594 beginning on page 41000, in the issue of Friday, October 5, 1990, make the following correction:

§ 27.952 [Corrected]

On page 41010, in the third column, in § 27.952(e)(1)(v), in the third line, after "must" insert "not".

BILLING CODE 1505-01-D

Best Great Federal Reporter

**Tuesday
December 11, 1990**

Part II

Department of Agriculture

Agricultural Marketing Service

**7 CFR Parts 1001, 1002, and 1004
Milk in the New England, New York-New
Jersey and Middle Atlantic Marketing
Areas; Decision on Proposed
Amendments to Marketing Agreements
and to Orders; Proposed Rule**

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1001, 1002 and 1004

[Docket Nos. AO-14-A62 and AO-14-A62-RO1, AO-71-A77 and AO-71-A77-RO1, and AO-160-A65 and AO-160-A65-RO1; AMS-88-105 and DA-89-028]

Milk in the New England, New York-New Jersey and Middle Atlantic Marketing Areas; Decision on Proposed Amendments to Marketing Agreements and to Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This decision adopts changes in the New England, New York-New Jersey, and Middle Atlantic Federal milk orders. For all three orders, the decision adopts 3-class pricing provisions that are uniform among the three northeast orders and between these orders and other Federal milk orders, and the same method of determining Class II prices that are used in other orders. These changes will assure greater equity in intermarket sales of milk.

For the New England order (Order 1), changes allow producer-handlers to receive diverted producer milk from pooled handlers and eliminate the postmark date as a basis for determining whether late payment charges are due on handler payments to the producer-settlement fund.

Changes in the New York-New Jersey order (Order 2) establish minimum Class I utilization requirements for pool plants and bulk tank units, and adopt proposals dealing with the qualification of producer milk for pooling. Amendments that adjust Order 2 transportation allowances to more closely relate the location value of milk to the costs incurred in transporting milk from farms and country plants to the market's major consumption centers are also adopted.

A change to the Middle Atlantic milk order (Order 4) prices diverted milk at the location to which it is diverted.

The changes being made to the three orders are based on industry proposals considered at a public hearing held June 27-July 21, 1988; continued November 14-16, 1988; and re-opened August 22, 1989. The amendments are necessary to reflect current marketing conditions and to maintain orderly marketing in the New England, New York-New Jersey and Middle Atlantic marketing areas.

Approval of the New York-New Jersey orders will be determined by a referendum of dairy farmers who were

producers under the order during May 1990. Cooperative associations representing producers pooled under the New England and Middle Atlantic orders during May 1990 will be polled to determine approval.

FOR FURTHER INFORMATION CONTACT:

Constance M. Brenner, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-7183.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12291.

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 action will not have a significant economic impact on a substantial number of small entities. The amended order will promote more orderly marketing of milk by producers and regulated handlers.

Prior documents in the proceeding: Notice of Hearing: Issued June 7, 1988; published June 10, 1988 (53 FR 21825).

Supplemental Notice of Hearing: Issued September 29, 1988; published October 4, 1988 (53 FR 38963).

Notice of re-opened Hearing: Issued August 10, 1989; published August 16, 1989 (54 FR 33709). (To consider changes in Class II pricing for 40 orders.)

Partial Recommended Decision: Issued September 20, 1989; published September 26, 1989 (54 FR 39377).

Partial Final Decision: Issued December 12, 1989; published December 18, 1989 (54 FR 51749).

Order Amending the New York-New Jersey Order: Issued January 25, 1990; published January 31, 1990 (55 FR 3198).

Recommended Decision: Issued May 18, 1990; published May 25, 1990 (55 FR 21556).

Extension of Time for Filing Exceptions to the Recommended Decision: Issued July 10, 1990; published July 16, 1990 (55 FR 28918).

Preliminary Statement

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the New England, New York-New Jersey and Middle Atlantic marketing areas. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-

674), and the applicable rules of practice (7 CFR part 900), at Syracuse, New York, on June 27-July 1, July 5-8 and July 18-21, 1988; at Manchester, New Hampshire, on July 11-14, 1988; at Philadelphia, Pennsylvania, on November 14-16, 1988; and at Alexandria, Virginia, on August 22, 1989, pursuant to a notice of hearing issued June 7, 1988 (53 FR 21825), a supplemental notice of hearing issued September 29, 1988 (53 FR 38963), and a notice of re-opened hearing issued August 10, 1989 (54 FR 33709).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Administrator, Agricultural Marketing Service, on May 18, 1990, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein, subject to the following modifications:

1. Under the heading "1a. Adoption of 3-Class (uniform) classification.", seventeen paragraphs are added after paragraph 37, three paragraphs are added after paragraph 39, and two paragraphs are added after paragraph 41.

2. Under the heading "1b. Class I and the fluid milk product definition.", paragraphs 2, 7, 8 and 17 are revised, one paragraph is added after paragraph 8, two paragraphs are added after paragraph 17, and three paragraphs are added after paragraph 18.

3. Under the heading "1c. Fluid cream product definition.", two paragraphs are added after paragraph 4.

4. Under the heading "1d. Class II price.", the last paragraph is revised.

5. Under the heading "1e. Seasonal price adjusters.", 4 paragraphs are added at the end of the section.

6. Under the heading "2b. Minimum shipping requirements." one paragraph is added after paragraph 36, five paragraphs are added after paragraph 42, one paragraph is added after paragraph 62, and five paragraphs are added at the end of the section.

7. Under the heading "3. Seasonal payment plans.", six paragraphs are added after paragraph 43.

8. Under the heading "4a. Location pricing, zone pricing and transportation credits.", twenty-one paragraphs are added after paragraph 28, seven paragraphs are added after paragraph 42, nine paragraphs are added after paragraph 49, eight paragraphs are

added after paragraph 52, and three paragraphs are added after paragraph 60.

Modifications have also been made to the following order language:

1. In § 1001.7 Pool plant, a section reference is corrected in paragraph (b)(2)(ii).

2. In § 1001.30 Reports of receipts and utilization, a phrase is added to the beginning of paragraph (d).

3. In § 1001.40 Classes of utilization, a new paragraph (a)(2) is added, a phrase is added in (b)(1), and phrases are deleted in (b)(4)(i), (c)(2) and (c)(6).

4. In § 1001.41 Shrinkage, a phrase is added to paragraph (b)(6).

5. In § 1001.44 Classification of producer milk, a new paragraph (a)(2)(iii) is added. Corresponding references are changed.

6. In § 1001.45 Market administrator's reports and announcements concerning classification, introductory text is added.

7. In § 1001.50 Class prices, the words "Class III" are changed to "basic formula" in paragraph (b).

8. In § 1001.73 Payments to producers, two words are changed.

9. In § 1002.41 Classes of utilization, a new paragraph (a)(2) is added, a reference in (a)(3) is changed, a phrase is added in (c)(1), and phrases are deleted in (c)(4)(i), (d)(2) and (d)(5).

10. In § 1002.42 Shrinkage, the introductory text is modified.

11. In § 1002.45 Allocation of skim milk and butterfat classified, a new paragraph (a)(4) is added, (a)(4) through (a)(19) are re-numbered as (a)(5) through (a)(20), and re-numbered paragraph (a)(9) is modified. References to these paragraphs are changed throughout the order.

12. In § 1002.50 Class prices, the words "Class III" are changed to "basic formula" in paragraph (c).

13. In § 1002.52 Transportation differentials, 5 zones are added in paragraph (c) and the instruction at the end of the paragraph is deleted.

14. In § 1002.56 Announcement of class prices and butterfat differential, a phrase is added to paragraph (b).

15. In § 1002.60 Net pool obligation of handlers, (d)(5) is removed.

16. In § 1004.40 Classes of utilization, a new paragraph (a)(2) is added, a phrase is added in (b)(1), and phrases are deleted in (b)(4)(i) and (c)(2).

17. In § 1004.44 Classification of producer milk, a new paragraph (a)(4) is added, (a)(4) through (a)(14) are re-numbered as (a)(5) through (a)(15), and a phrase is added to re-numbered paragraph (8)(v). References to these paragraphs are changed throughout the order.

18. In § 1004.50 Class prices, the words "Class III" are changed to "basic formula" in paragraph (b).

19. In § 1004.60 Handler's value of milk for computing uniform prices, a section reference is corrected in paragraph (e) and paragraph (g) is deleted.

20. In all three orders, language has been changed where needed to eliminate gender-specific pronouns without changing the orders' substance.

21. In all three orders, the language of § .51, Basic formula prices, has been changed to reflect the changes adopted in the national butterfat differential decision, issued November 9, 1990 and published November 19, 1990 (55 FR 48112).

The material issues on the record of the hearing relate to: Proposals to amend all three orders

1. Classes of utilization.

a. Adoption of 3-Class (uniform) classification.

b. Class I and the fluid milk product definition.

c. Fluid cream product definition

d. Class II price.

e. Seasonal price adjusters.

f. Uniform announcement of class prices and butterfat differential.

g. Conforming changes.

Proposals to amend Orders 1 and 2

2. Pooling standards.

a. Health authority approval.

b. Minimum shipping requirements.

c. Qualification of producer milk for pooling.

3. Seasonal payment plans.

4. Location pricing, zone pricing and transportation credits.

a. Order 2.

b. Order 1.

Proposals to amend Order 1 only

5. Producer-handler receipts of pool milk.

6. Charges on overdue accounts.

Proposals to amend Order 2 only

7. Partial payments to producers and to cooperatives, and the dates by which certain reports, announcements and payments should be made to accelerate payments to producers and accommodate economic conditions resulting from Pennsylvania and New York State law.

Proposals to amend Orders 2 and 4 only

8. Partial payments to producers and to cooperatives, and the dates by which certain reports, announcements and payments should be made for the purpose of further accelerating payments to producers.

Proposal to amend Order 4 only

9. Pricing diverted producer milk.

Issues Nos. 7 and 8 were dealt with in a partial recommended decision issued September 20, 1989 (54 FR 39377), a partial final decision issued December 12, 1989 (54 FR 51749), and a final order issued January 25, 1990 (55 FR 3198). Only Issues Nos. 1 through 6 and Issue No. 9 are addressed in this decision.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Classes of utilization.

a. *Adoption of 3-Class (uniform) classification.* Each of the three orders under consideration in this proceeding should provide for the same basic classification plan that exists in most other Federal order markets. As adopted herein, each order would provide for three classes of utilization, with the milk uses included in each class being the same for each order. As far as possible, and consistent with the idiosyncrasies of the orders, the same basic procedure would be used under each order for classifying milk transferred or diverted from pool plants to other plants, and for allocating a handler's receipts to the handler's utilization to determine the classification of producer milk. Each order would use the same Class II and Class III price formulas, with Class III prices adjusted by each order's present seasonal adjusters. The classification provisions adopted in this decision were, with some minor differences, adopted for 39 Federal orders in 1974, and have been incorporated in a number of other orders during the intervening period.

The present classification provisions of the three orders provide for two classes of use, while nearly all of the other Federal milk orders classify milk in three classes. In the Northeast orders, as in other orders, Class I is composed primarily of fluid milk products, which are defined in part "b." under this issue. Under the New England, New York-New Jersey and Middle Atlantic orders (Orders 1, 2 and 4), all soft and hard manufactured products are grouped together in Class II. Under most other orders, however, cream products and soft manufactured products such as yogurt, cottage cheese and ice cream are considered Class II, while butter, milk powder and hard cheeses are classified as Class III.

The Northeast orders' Class I prices are determined, as are other orders' Class I prices, by adding a Class I price

differential to the basic formula price for the second preceding month. The Class II prices for Orders 1, 2 and 4 currently are determined by adjusting the basic formula price for the month by seasonal adjusters, which range in value from a minus 12 cents to a plus 12 cents. In other orders, Class III prices are the same as the basic formula price, with no seasonal adjustment. Class II prices in other orders are computed pursuant to a formula intended to result in a Class II price that exceeds the Class III price level by an average of 10 cents. The computation of Class II prices for the Northeast orders will be discussed later under this issue in part "d". Class III prices for the three orders will be the same as the present Class II prices.

A group of cooperative associations that represent a majority of the producers whose milk is pooled under the New England and Middle Atlantic orders, and a substantial number of producers whose milk is pooled under the New York-New Jersey order, proposed that the classification provisions of the three orders be changed to incorporate three classes of use instead of two. Proponents of a three-class pricing system argued that the products currently classified as Class II under Orders 1, 2 and 4 do not all have the same time and form utility, and therefore should not have the same value. The cooperatives did not, however, agree on the appropriate classification of some products.

A witness representing Eastern Milk Producers, a cooperative association representing 3,400 northeast dairy farmers who supply milk to five Federal order markets; eight cooperative associations affiliated with Eastern; and Agri-Mark, Inc., the principal cooperative association representing producers whose milk is pooled under Order 1; testified as proponent of a three-class pricing system consistent with the uniform classification provisions in most other orders. The Eastern/Agri-Mark witness stated that 36 of the 43 Federal milk orders in effect at the time of the hearing classify milk as proposed by Eastern/Agri-Mark. According to the witness, the uniform classification provisions should also be incorporated into the three Northeast orders to assure competitive equity between the Northeast marketing areas and other Federal order marketing areas. The witness explained that the local character of the Northeast milk markets disappeared long ago, as intermarket and interregional distribution of nonfluid dairy products became common. He said that even soft manufactured products, which had been

locally distributed, now compete with products classified and priced under other orders at a higher price.

The Eastern/Agri-Mark representative testified that milk used in the following products should be classified as Class II: Fluid cream products, any product with 6 percent nonmilk fat that resembles fluid cream products, and packaged inventory of those products; yogurt, cottage cheese, milkshake and ice cream mixes containing 20 percent total solids, and frozen dessert mixes containing 20 percent solids; sour cream products, concentrated milk in bulk fluid form, infant or dietary formulas packaged in hermetically sealed or aseptic containers, custard, puddings, pancake mixes and buttermilk biscuit mixes; and bulk milk and cream disposed of to commercial food processing establishments. The witness explained that handlers demand high-quality milk on a regular basis for use in these manufactured products. Typically, he stated, these products are processed at fluid milk plants or in specialized plants distinct from those at which hard products are manufactured, and therefore should bear part of the cost necessary to attract an adequate supply of milk. The Eastern/Agri-Mark witness testified that there is little relationship between the amount of reserve milk on the market and the quantity of milk used to produce such products, due to the products' limited storage life and the need to process them on a regular basis.

The uses of milk proposed by Eastern/Agri-Mark for Class III are also the same as in most other Federal orders. These products and uses are: Cheese, butter, dry milk, concentrated milk used to produce Class III products, evaporated or condensed milk, inventories, livestock feed, dumped milk and shrinkage. The witness testified that the hard manufactured products absorb milk supplies produced for, or in excess of, the needs of the fluid market. Further, he stated, the products can be stored for long periods and therefore do not need to be made uniformly throughout the year. The Eastern/Agri-Mark representative concluded that, because the hard manufactured products compete on a national basis with similar products made from unregulated milk supplies, the price of milk used to make those products should be closely aligned with prices paid by processors of manufacturing grade milk.

A representative of Pennmarva, a federation of cooperative associations representing a majority of the producers whose milk is pooled under the Middle Atlantic order, testified that three-class pricing will recognize current marketing

conditions in the Northeast and promote orderly marketing by providing a reasonable Class II differential to producers. In general, he stated, producer milk used to produce products that are relatively more perishable and less storable would tend to have a higher value under the proposed classification plans. The witness added that products that can be stored are more likely to compete over a greater geographical area, while products in liquid form or in consumer packages have more value than products in solid or bulk form.

The Pennmarva witness testified that, rather than follow the uniform classification provisions of most other orders, the three Northeast orders should classify only butter, nonfat dry milk and natural cheddar cheese as Class III. He explained that these products are eligible for open-ended purchases by the Commodity Credit Corporation (CCC) under the price support program, and described the products as balancing and providing an outlet for the reserve supplies of Orders 1, 2 and 4. The witness explained that adoption of Pennmarva's proposal would recognize that soft cheeses, Italian cheeses and whole milk powder have a greater value than the residual uses of milk, and should be priced in the new intermediate Class II. The Pennmarva witness justified such classification by noting that many of the products proposed for a new intermediate class are perishable, and that their production is much less seasonal than that of the market's truly residual products. Further, the witness argued, the classification and pricing provisions in other Federal orders were not implemented to address current marketing conditions in the Northeast milk marketing areas, and they do not address those conditions.

Two other proposals dealing with the classification of milk in the three Northeastern orders were contained in the hearing notice. One, from the Eastern Connecticut Dairy Committee, was similar to the Pennmarva proposal, and was not supported by any testimony. The other, by Oak Tree Farm Dairy, a proprietary distributing plant operator, was similar to the Eastern/Agri-Mark proposal, with the exception of classifying milk used in candy as Class III rather than Class II. There was no testimony from proponent supporting the proposal.

The proposals to adopt a three-class pricing system for the three Northeast marketing orders were supported by several handler representatives and witnesses representing dairy farmer

interests. A witness for Dean Foods, which operates manufacturing plants that receive milk from producers regulated under Order 2 and Order 4, testified that Dean competes with New York handlers for sales of cottage cheese and sour cream in the areas around its plants in Illinois, Kentucky, Indiana, Michigan, Florida and Tennessee, which are subject to the intermediate Class II price under their local orders. He conceded that the existence of two-class pricing in the three Northeast orders may not create disorderly marketing conditions in the Northeast, but asserted that it certainly does so in areas where local handlers are subject to higher costs for milk than are their competitors from the Northeast. The witness stated that any changes in the uniform classification provisions should be made on a nationwide basis, and not just in one region.

Several producers and a cooperative association representative testified in favor of a three-class pricing system, primarily because it would have the effect of enhancing producer income. Because adoption of the Pennmarva proposal would increase the classification and pool value of a large portion of the market's current Class II use, thereby increasing returns to producers to a greater degree than would the Eastern/Agri-Mark proposal, the producers generally favored the Pennmarva proposal. The cooperative association witness testified that adoption of the Pennmarva proposal should not cause competitive inequities between handlers manufacturing Italian cheeses in the Northeast and in other parts of the U.S. The witness pointed out that in April 1988 Italian cheese manufacturers in Wisconsin were paying 64 cents over the Minnesota-Wisconsin price (M-W), to buy milk while manufacturers in Minnesota were paying 51 cents over the M-W. He stated that a Class II 10-cent differential over the Class III price in the Northeast therefore would not unduly increase the cost of manufacturing Italian cheese in the Northeast over the cost of making such products elsewhere.

Representatives of Leprino Foods Company and Sorrento Cheese both supported adoption of a three-class pricing system that would be consistent with those of other orders, but opposed the classification proposals that would include soft cheeses and Italian cheese in Class II instead of Class III. Both witnesses testified that, contrary to the Pennmarva witness' testimony, the Leprino and Sorrento cheese plants experience wide variations in the supply

of milk available to them, both seasonally and during the week. The Sorrento witness stated that Sorrento receives 60-70 percent of its milk supplies on weekends when demand for milk by fluid handlers is low, and purchases significantly increased amounts of milk during the spring flush. The Leprino representative testified that Leprino's plants experience a dramatic monthly variation in milk supply, with a seasonal low of 72.5 percent capacity and a seasonal high of 133.1 percent, and serve a major balancing role for the market.

Both of the cheese manufacturers' witnesses emphasized that their companies sell a large percentage of their output in areas of the U.S. outside the Northeast, and must compete with handlers who are subject to other orders' lowest class price (Class III). The Sorrento representative stated that 80 percent of the cheese manufactured by Sorrento is sold in 28 other states, including Florida and California. He pointed out that if the Pennmarva classification proposal were adopted Sorrento would be paying more for milk used in Mozzarella cheese than would any of its national competitors.

Witnesses representing Hershey Chocolate, U.S.A., and Nestle Company testified that three-class pricing for the Northeast orders should not be adopted if whole milk powder and milk used in the manufacture of milk chocolate were to be classified as Class II, rather than being left in the lowest-price classification, as those uses are at present. The witness for Hershey argued that in a three-class pricing system milk used to make milk chocolate should be classified as Class III because that use has characteristics of other products in the lowest use class. He stated that the manufacture of milk chocolate plays a significant role in balancing the market. Further, he explained, the seasonality of milk purchases for use in candy does not reflect seasonal consumer demand, milk chocolate is not produced near the market's consumption center, and intermediate products manufactured from milk, sugar and cocoa can be stored for more than one year before being manufactured into finished products. The Hershey representative testified that milk receipts used in the manufacture of milk chocolate must be classified with other hard products, such as nonfat dry milk and cheese, if the use of fluid milk in the manufacture of milk chocolate is to remain viable in the Northeast. He stated that such classification is necessary to maintain a competitive balance among milk chocolate and whole milk powder

manufacturers, observing that milk chocolate is produced primarily in areas where the milk used to produce it is priced in the lowest class. The Hershey witness proposed amending the proposal to adopt the uniform classification provisions to include milk used to make milk chocolate in Class III instead of Class II, but testified that Hershey would prefer to retain the two-class pricing system in the Northeast.

A witness representing Nestle also testified in favor of a two-class pricing system, and stated that Nestle would be adversely affected by the adoption of either of the three-class proposals. The witness explained that an increase in the cost of the company's raw product would result in a competitive disadvantage because all but one of its competitors (Hershey), use dry milk powder in the manufacture of milk chocolate. A witness testifying on behalf of H.P. Hood agreed that milk used in candy manufacture should be classified in Class III because it competes with butter and milk powder for that use.

Representatives of a number of handlers, including two cooperative associations, opposed adoption of a three-class pricing system. A spokesman for Dairyalea, a large Order 2 cooperative association, testified that there is a long tradition of two-class pricing in the Northeast and that milk handlers have planned their operations accordingly. He observed that the blend price enhancement resulting from three-class pricing would be minimal, and that it is more important to assure continued outlets for producer milk in the large regional soft products industry. The witness estimated that the Eastern/Agri-Mark proposal would increase producer returns by only 2 cents, while handler costs would increase by 8 cents per hundredweight. The Dairyalea witness testified that if a three-class pricing system is to be adopted for the three Northeast orders, the Pennmarva proposal would be more appropriate to the region since milk purchases by cheddar cheese manufacturers are more seasonal than milk production, while purchases by Italian cheese manufacturers are less seasonal. A dairy farmer member of Lowville Milk Producers Dairy Cooperative testified that the three-class proposals for the Northeast orders should not be adopted because classified pricing is outdated and has outlived its usefulness.

Witnesses representing two distributing plant operators and the New Jersey Milk Dealers Association opposed the proposals to adopt three-class pricing. However, in the event of the adoption of three-class pricing, two

of the witnesses favored the Pennmarva proposal. A witness for Crowley Foods, Inc., a handler operating two distributing plants and two manufacturing plants regulated under Order 2, stated that the effect of three-class pricing on the blend price paid to producers would be minimal. He also observed that the proposed Class II price computation has caused wide variations that he characterized as unacceptable in Class II prices under other orders. The witness stated that such price volatility would make it impossible for Federal order manufacturing plant operators to compete with handlers regulated under the two-class New York State order. The Crowley witness testified that of the two proposed three-class pricing proposals, the Pennmarva proposal would better enhance dairy farmers' income, and would put all cheese other than cheddar, which is market-clearing, in one category.

The president of Weeks Dairy Foods, a fluid milk handler located in Concord, New Hampshire, and pooled under Order 1, testified that three-class pricing would increase Weeks' costs of manufacturing ice cream and impair its competitive ability. The witness explained that two of its principal competitors in the ice cream business are located in the State of Maine and unregulated by both the Federal order and the Maine State order. He expressed concern that one or both of these competitors might gain a competitive advantage if Weeks Dairy were required to pay a higher intermediate Class II price for the milk and cream supply it needs for ice cream. The witness described the ice cream business as a seasonal use of milk, with significantly more sales in the months of May through September than during the rest of the year.

A witness representing the New Jersey Milk Dealers Association opposed the adoption of three-class pricing on the basis that it is unnecessary and would not improve milk marketing in the Northeast. He asserted that there is no need for the Northeast orders to adopt a three-class pricing system just because it has been incorporated in the other Federal orders. The Association's witness based most of his opposition to adoption of the uniform classification provisions on the difficulties surrounding announcement of the Class II price during 1987 for the orders with uniform classification provisions. The witness testified that if three-class pricing were adopted, the Pennmarva proposal would be preferable to the Eastern/Agri-Mark

proposal because the production and sales of Italian and soft cheeses more nearly follow production and sales patterns of cottage cheese, yogurt and sour cream than those of the market's truly surplus products. He described the Italian and soft cheeses as a very substantial part of the market that performs a very limited balancing function.

Witnesses representing four manufacturing plant operators opposed the proposals to adopt a three-class pricing plan for the Northeast orders. All four of the witnesses stressed the wide variations in the Class II formula price effective in the uniform classification markets as a major reason for opposing the proposals. The determination of an appropriate Class II price is discussed at length later under this issue in section "d."

A representative of Empire Cheese, Inc., a subsidiary of the H. P. Hood Company that operates manufacturing plants pooled under Orders 1 and 2, testified that Empire Cheese distributes Italian cheese nationally, competing with manufacturers located in the Upper Midwest and on the West Coast. The witness explained that pricing Italian cheeses in an intermediate Class II under the Northeast orders would seriously impair the ability of Empire Cheese to compete with handlers regulated under other orders, which price such products in Class III. He also expressed his opposition to three-class pricing on the basis that the Hood Company, which operates several distributing and manufacturing plants regulated under Order 1, produces ice cream mix and cottage cheese that would be subject to the proposed intermediate Class II price.

A witness representing Dietrich's Dairy testified that Dietrich's operates two Pennsylvania manufacturing plants that use reserve milk from Federal Orders 2 and 4 to make speciality whole milk powders that are used in the manufacture of milk chocolate. The witness opposed adoption of a three-class pricing system on the basis that it could be used by producer organizations to impose premiums on milk used in the proposed intermediate class in the same way that premiums currently are collected on milk used in Class I. He also asserted that provisions uniform with those of other orders should not be incorporated into the Northeast orders solely for the sake of uniformity, and that the unique marketing conditions of the local or regional market, such as farm point pricing under Order 2, should be considered.

The Dietrich's Dairy witness argued that if three-class pricing is adopted for the three Northeast orders, the Eastern/Agri-Mark proposal would be less onerous than the Pennmarva proposal, which would classify whole milk powder in the proposed intermediate Class II. The witness objected that the Pennmarva proposal would give skim milk powder manufacturers preferential price treatment over whole milk powder manufacturers despite the physical similarities of the two products and the fact that other orders price them in the same class. He also observed that Dietrich's use of much larger volumes of milk in the spring season of flush production and during the winter holidays than at times when milk supplies are scarcer is an indication that whole milk powder is one of the reserve uses of the market.

A representative of Friendship Dairies, Inc. (Friendship), testified that the Eastern/Agri-Mark proposal would be preferable to the Pennmarva proposal, but that both are completely unsuitable for the markets. He explained that in Federal Order 2, the manufacture of cottage cheese, sour cream and yogurt traditionally have balanced the market in the same way the proposed Class III products have, and should be priced in the same class. The witness stated that Friendship would be placed at a disadvantage in competing not only with non-federally regulated handlers, such as those pooled under the Western New York State order, but with handlers regulated under other Federal orders. He explained that the protein content of milk produced in the southern tier of counties in New York is inferior to other areas, and that the resulting yields of products such as cottage cheese would not allow the manufacturer to recover the increased costs associated with pricing the milk used in such products in the proposed higher intermediate Class II.

A witness representing Kraft, Inc., testified that Kraft produces cottage cheese, ice cream, yogurt, sour cream and cream cheese at its plants in the Northeast, and markets these products outside the region, as well as inside. According to the witness, two-thirds of the cottage cheese produced by Kraft at three plants in the Northeast is marketed outside the region. The witness stated that the purpose of the long tradition of only two classes in the Northeast orders has been to maintain a competitive manufacturing industry that assures a viable outlet for dairy farmers' milk. He stated that adoption of three-class pricing will place Northeast dairy product manufacturers at a competitive

disadvantage with handlers regulated under the Western New York State order. He also observed that competitors from outside the region already compete effectively with Northeast handlers for sales in the Northeast. If the cost of manufacturing the proposed intermediate Class II products is increased, the witness testified, Northeast handlers would be operating at a competitive disadvantage compared to handlers in other regions.

The Kraft representative explained that the costs of accommodating seasonality of supply are higher in the Northeast than in the Upper Midwest because of the necessity of operating plants at less than capacity when production is tight. The Kraft witness also described milk produced in the Northeast as having a lower protein content than milk produced elsewhere, and stated that the greater product yield enjoyed by handlers in other regions would enable them to move their products great distances to compete with Kraft's products without using up that advantage. A further factor that operates to place Northeast handlers at a competitive disadvantage with other regions, he stated, are hauling costs. The witness explained that handlers transporting dairy products out of the Northeast have a freight disadvantage compared to handlers in other regions in addition to having to pay hauling subsidies in order to procure the milk of Order 2 producers.

Although both of the 3-class pricing proposals would classify milk used in buttermilk biscuit mix in Class II, an alternative proposal by a witness for the H. P. Hood Company, Inc., would classify milk used in such products as Class III. The witness explained that Class III would be the appropriate classification because dry milk powder could be used instead of fresh buttermilk to make biscuits.

The classification plans of the three Northeast Federal milk orders should be changed to better reflect changes that have taken place in the marketing of milk and dairy products since these orders were promulgated. When the three Northeast orders were promulgated, the classification plans adopted reflected the marketing conditions and practices prevailing in each of the local areas at the time the provisions were adopted. Because local conditions and practices differed somewhat between the three Northeast markets and between these markets and other Federal order markets at the times the orders were promulgated, the classification plans in the three orders differ from each other to some extent,

and from the rest of the Federal milk orders to a greater extent. As long as the Northeast markets remained relatively isolated from other Federal order markets, marketing problems resulting from the differences in the various classification plans were minimal.

The record of this proceeding shows clearly that the "local" character of the Northeast milk markets has changed greatly. Movements of large volumes of dairy products between the three Northeast markets, and between these markets and others, have become commonplace as handlers and producers seek additional sources and outlets for milk. Such milk movements have been encouraged or facilitated by such developments as inspection reciprocity between health jurisdictions, improved highway networks and transportation equipment, conversion from can hauling to farm bulk tanks, development of regional cooperatives, new processing and packaging techniques, and concentration of processing and packaging operations in large specialized facilities. There are numerous examples in the record of handlers in one marketing area procuring milk supplies from producers in another, and of handlers selling their finished products not only throughout the Northeast, but throughout the United States.

Uniformity of classification and pricing provisions between milk orders is a valid reason for changing the classification provisions of the three Northeast orders. The purpose of such uniformity is to assure orderly marketing conditions through equity in intermarket competition between handlers and not uniformity for its own sake, as charged by several witnesses opposing adoption of the uniform classification provisions.

Handlers that are regulated under different orders that contain differing provisions for the classification and pricing of milk used in the production of dairy products distributed across a broad area in which the handlers all compete are certain to be given either a competitive advantage or disadvantage by those differing provisions. A situation in which all of the other Federal milk orders that classify milk used in manufactured dairy products do so in a uniform manner that differs from the Northeast orders is unacceptable.

Handlers that will be affected by the amended classification provisions expressed concern that paying a higher price than their unregulated competitors pay for milk used in cream products, ice cream and cottage cheese would disadvantage them competitively. The

record contains no evidence of any large volume of unregulated milk in the Northeast available to allow unregulated competitors a significant competitive advantage. In fact, the record does reflect a level of competition between handlers for milk supplies that would make it very difficult for any unregulated handler to obtain an adequate supply of milk at a price lower than the order price. Similar concerns were expressed about competition with handlers regulated under the Western New York State order. As in the case of competition with unregulated handlers, it is likely that handlers regulated under the State order would find their supply of milk vulnerable if they did not pay a price for milk equivalent to that paid by Federal order handlers. In any case, the provisions appropriate for three Federal orders regulating milk used in manufactured products that are distributed over large portions of the United States should not be determined by the provisions of a State order effective over a limited area and regulating only a small fraction of the amount of milk regulated by the three Northeast Federal orders.

Opponents of uniform classification for the Northeast also complained that they would be disadvantaged in competition with handlers in the Midwest because of the relatively lower protein content of milk produced in the Northeast. Although the protein content of producer milk affects the amount of product yielded by the manufacturing process, the quality of the milk influences the ability of its protein content to increase product yield. There is some testimony in the record that the quality of milk in the Northeast is higher than in the Midwest. Further, the study that shows differences by region in the percentages of protein in producer milk also indicated that there are differences in protein content between areas of the Midwest. Presumably, these differences within the Midwest affect handlers who are close competitors, but who pay the same prices for milk used in the same products. However, there was no indication that such differences in the protein content of producer milk between the Midwest areas result in any competitive disruption.

In addition to equalizing intermarket competition, a primary reason for adopting the uniform classification provisions is that they better reflect the differing values for dairy products in terms of time and form utility. The findings and conclusions of the decisions adopting the uniform classification provisions for 39 Federal

milk orders in 1974 were noticed officially during this proceeding, and are incorporated in full in this decision.

Class I milk is that disposed of in the form of fluid products used as beverages. These products have the shortest shelf life of all dairy products, and therefore must be processed and distributed on a fairly constant basis. An adequate supply of high-quality milk must be available for the processing of fluid products at all times in order to assure that consumers' demand for these products can be met. These qualities of the fluid milk market require that milk used in fluid milk products be priced at a higher level than other uses of milk.

Generally, the "soft" products, such as cream products, yogurt, ice cream and cottage cheese, are more perishable than the "hard" manufactured products such as butter, cheese and dry milk, and cannot be stored for long periods of time. For these reasons, the products to be classified in the intermediate Class II generally are distributed over a smaller geographical area than are the market's residual, or surplus, products. It is reasonable to recognize the higher value associated with the "soft" manufactured products because handlers require a more constant and generally higher-quality supply of milk for use in Class II or "soft" manufactured products than they do for the manufacture of Class III or "hard" manufactured dairy products.

Comments on the recommended decision filed by the New York State Grange and on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc., opposed adoption of 3-class pricing. The Grange's comments stated that such a pricing plan would provide no benefits to producers in the long run. As explained above, the primary reason for adopting a uniform 3-class pricing plan is to assure handler equity between orders. In addition, producer prices should be enhanced slightly. The addition of an intermediate-priced class certainly would not cause producer returns to decline, either in the short run or the long run.

The exceptions filed on behalf of Kraft, Pollio and Friendship challenged the findings of the recommended decision on a number of points. The exceptions stated that the recommended decision, in adopting 3-class pricing, failed to consider adequately marketing conditions peculiar to the northeast which are not consistent with conditions described in the 1974 uniform classification decisions, and the effects on Order 2 handlers of competition with handlers regulated under the Western New York State order. Further, the

exceptions stated that the Administrator failed to consider adequately the pricing standards of 7 U.S.C. 608c(18) and the requirements of 7 U.S.C. 608(c)(11)(c) which direct the Secretary to recognize differences in production and marketing conditions in prescribing differing terms to be applicable to different production areas or marketing areas.

The exceptors argued that the northeast markets cannot accurately be characterized as having been isolated from the uniform classification markets in 1974 because soft products from the northeast have been distributed in a southwesterly direction for some time. The exceptions further challenged the Administrator's findings that northeast soft product manufacturers enjoy a significant and disruptive competitive advantage over processors in other federally-regulated regions on the basis that the findings were based only on differences in minimum order class prices.

In additional exceptions to the adoption of 3-class pricing for the northeast markets, exceptors argued that milk used to produce soft products in the northeast is not of higher value than milk used to produce the market's surplus hard products because the hearing record shows that handlers in the northeast do not pay more for milk used to make soft products than for milk used to make hard products, as they were described as doing in the 1974 uniform classification decisions. The exceptions stated that a general finding of the uniform classification decisions that describes soft product manufacturing facilities as located with or near fluid milk plants in the urban market centers is supported only by testimony and not by evidence in this record, and is contradicted in the case of some major cottage cheese manufacturing plants.

Exceptors also included a reiteration of the regional difference in protein content between the northeast and the midwest. The comments stated that handlers in the midwest pay variable premiums based on protein or solids content, and therefore are not competitively disadvantaged in relation to each other by paying the same class prices, as northeast handlers would be in relation to handlers in the midwest.

The primary reasons given for the adoption of 3-class pricing in the 1974 uniform classification decisions (as determined by the relative prominence given the reasons in the decisions) included the observation that the local character of the marketing areas was changing. Some of the trends cited in those decisions as observable elsewhere in the nation in 1974, such as the

declining effect of local health jurisdictions as barriers to widespread commerce in dairy products and the conversions from can handling to farm bulk tanks, have been apparent in the northeast only in recent years. Evidence in the record establishes that the State of New York maintained a restrictive licensing policy until 1987, and the Order 2 market administrator's statistics show declining numbers of producers whose milk is delivered in cans.

The 1974 decisions also cited growing distribution of products throughout multi-state regions from centralized processing facilities and resulting disruptive competitive relationships between handlers based on inter-order price differences as primary reasons for the adoption of a uniform 3-class pricing plan. Although it is not clear from the record of this proceeding how long the large centralized processing facilities operated by exceptors have been in operation, there is ample testimony in the record that soft products manufactured in the northeast are distributed along the entire length of the east coast and throughout the area east of the Mississippi. At the same time, the record is clear that intermarket competition for the sale of these products operates, with one or two minor exceptions, only in one direction—from the northeast to the south and southwest. If other order handlers market their soft manufactured products over areas comparable in extent with those over which northeast handlers market such products, northeast handlers must be competing with handlers regulated under most of the Federal milk orders in the United States. All of the other federally-regulated handlers are subject to a minimum class price for the milk they use in such products that exceeds by 10 cents per hundredweight the minimum class price paid by northeast handlers.

The success of northeast handlers in competing in distant marketing areas, coupled with the fact that handlers in other marketing areas do not (or have not been able to) compete for sales of soft manufactured products within the 3 northeast marketing areas, makes inescapable the conclusion that northeast handlers do have a competitive advantage in the basic cost of their raw milk supply which is unnecessary and should be eliminated. Record evidence about differences between actual prices paid for milk used to manufacture soft products in the northeast and midwest indicate that midwest handlers also pay significantly higher over-order prices for such milk.

Another principal reason for the adoption of 3-class pricing under the uniform classification decision, which was supported by testimony in this hearing record, is the need of handlers for adequate supplies of high-quality producer milk to be available at their plants at all times. "Although yogurt can be made from cream and nonfat dry milk, processors prefer milk. Since yogurt has a relatively limited shelf life, it is made on a continuing basis, thus requiring a regular supply of milk at all times. As in the case of cottage cheese, these conditions warrant that producer milk in yogurt be priced at a level above the price for milk disposed of through the traditional residual uses for surplus milk." (39 FR 9020, March 7, 1974).

This reason is clearly related to the requirement of the Agricultural Marketing Agreement Act of 1937 that milk and its products be priced according to their form and use. Clearly, in the northeast as elsewhere in the United States, products such as cottage cheese, yogurt, ice cream and cream products represent an intermediate use between fluid milk products and the market's truly surplus products in terms of handlers' ability to make the products when milk is available as opposed to when consumers wish to use them.

The uniform classification decisions recognized that "Although some cottage cheese is made in specialized country plants, as the economics of location would suggest, cottage cheese production is commonly an integral part of the processing operations of fluid milk distributing plants. Such plants are usually located in or near the populated centers of the market. This entails a greater hauling expense for producers than when the reserve milk is processed in the production area, as is generally the case with respect to butter, nonfat dry milk and hard cheese manufacture." (39 FR 9020, March 7, 1974).

Despite the fact that cottage cheese is manufactured at large processing plants in outlying locations of the Order 2 marketing area, testimony in the record of this proceeding indicates that much of the market's soft products manufacture takes place at city fluid processing plants. In addition, it is clear from market statistics that a large share of the milk produced in zones close to the market's principal consumption areas is used in products other than fluid milk. Given the scarcity of manufacturing plants inside the 201-210 mile zone, it is most likely that the milk is used to make soft Class II products at the fluid milk processing plants to which it is customarily delivered.

A study included in the hearing record shows producer milk in some production

areas of the northeast has a lower protein content than in most areas of the midwest. However, protein content has not been, and should not be, a basis for justifying different basic class prices paid under Federal orders by competing handlers for their supplies of raw milk unless actual differences in prices paid are directly related to specific variations in the components of milk and are reflected in payments to producers that also have a direct relationship between the level of producer milk components and the value of the components to handlers. Exceptors' citation of varying protein premiums between midwest handlers as a means of minimizing the effects of uneven levels of protein content within the midwest also could operate to equalize differences in value of milk related to unpriced components between the northeast and midwest. The testimony in the record relating to premiums paid for protein in the midwest indicates that midwest handlers are already paying for any extra protein or nonfat solids that may be contained in the milk they buy from producers.

Exceptions based on the price advantage expected to be enjoyed by Western New York State-regulated handlers in competing with Federally-regulated northeast handlers for sales of soft products stated that such competition is intense, and that product price is a significant factor of market share even under current levels of raw milk prices. Exceptors complain that competition for sales of soft manufactured products between northeast Federally-regulated handlers and Western New York State-regulated handlers is much more significant than is competition between Federally-regulated handlers in the northeast and other areas of the eastern U.S. because the Western New York manufacturers have plant location similar to Order 2 manufacturers in relation to the major city markets of New York.

As stated above, the Western New York State order covers a very limited area and regulates only a small fraction of the amount of milk regulated by the northeast Federal orders. Testimony in the hearing record describes how easily the price paid to producers whose milk is pooled under the State order can be manipulated by shifting relatively small amounts of milk between the State order and Order 2. Aside from limitations of plant capacity, the ability of handlers regulated under the State order to increase their sales of soft manufactured products at the expense of Federally-regulated handlers will be severely restricted by the effect that the addition of significant amounts of Class II use to

the State pool would have on blend prices to producers.

In addition, several witnesses testified to the relative ease and speed with which the State order could be amended to reflect the price structure of the Federal order. Although it is possible that the cooperative association participants in that market would prefer to maintain a slight price advantage in the manufacture of soft products, the major Order 2 cooperative association that has a presence in the State market may find it necessary to initiate a corresponding pricing structure in the State order.

With regard to the legal requirements of the Act cited by exceptors, the Secretary considers, for these orders, the benefits of assuring competitive equity between handlers regulated under different orders and reflecting the greater value of milk used to produce soft manufactured products, as described above, to outweigh any purported or actual differences in production and marketing conditions between these and other marketing areas.

Proposals to adopt modified uniform classification provisions that would price Italian and soft cheeses and whole milk powder as Class II instead of Class III, and price milk used in the production of milk chocolate as Class III instead of Class II, should be denied. Regardless of some rather persuasive arguments that Italian and soft cheeses and whole milk powder are more perishable and have a greater value than butter, American cheese and nonfat dry milk which the Commodity Credit Corporation (CCC) purchases to operate the dairy price support program, these products compete in a national market. Therefore, the milk used to make such products in the Northeast should not be priced at a higher level than under all of the other Federal orders in the U.S. If such changes to the uniform classification provisions were to be made they should be made uniformly in all orders, not just on a regional basis.

The record of this proceeding does not support making an exception from the uniform classification provisions of milk disposed of to a commercial food processing establishment. The candy manufacturers who testified advocated Class III classification of milk used to make milk chocolate, rather than the Class II classification of the uniform provisions. Although the witnesses stated that nonfat dry milk and butter, which would be Class III products, may be used in candy-making instead of fresh whole milk, thereby eliminating a market for producers' milk, the

witnesses overlooked the costs of manufacturing butter and dry milk powder from fresh milk. Those costs would have to be recovered by the manufacturers of the butter and powder, and would nearly always exceed the average difference between the Class II and Class III prices. Therefore, the candy manufacturers would be subject to lower costs if they continue to use fresh whole milk priced as an intermediate Class II product in the manufacture of milk chocolate than they would if they bought butter and nonfat dry milk for that purpose. Because Order 2 has some pool handlers who would be considered commercial food processors under other orders, it will be necessary to specify in the order's Class II definition that milk used to make candy, soup or other food items in pool plants will be Class II.

Hershey Chocolate U.S.A. (Hershey) filed an exception to the classification of fluid milk used to make milk chocolate as Class II rather than Class III. Hershey's comments cited testimony in the record stating that whole milk powder can be obtained at prices competitive with the current price of fluid milk plus manufacturing costs, giving users of fluid milk a substantial incentive to switch to supplies of whole milk powder. Also cited was testimony that milk chocolate manufacturers currently using fluid milk would be placed at a competitive disadvantage with other chocolate manufacturers who use only whole milk powder. Finally, the comments reiterated that milk used to produce milk chocolate shares the characteristics of Class III products on the basis of its significant role in balancing the market, and because the demand for milk to produce milk chocolate does not reflect consumer demand.

Although testimony was received that indicated that whole milk powder is available at the same price as an equivalent volume of fluid milk at the lowest class price, it is not reasonable to expect that a handler is able, on a sustained basis, to buy fluid milk at the lowest class price, manufacture it into powder, maintain a profit margin, and still be able to sell the powder to a candy manufacturer at a price equivalent to the value of the raw milk ingredient used to produce the powder. If Hershey is able to buy whole milk powder at the same price as the equivalent volume of fluid Class III milk would cost and is indifferent as to the use of either product in its candy-making operation, the handler should probably buy the powder. Class III classification of milk used to produce

milk chocolate would make producers indifferent as to whether their milk was used to make whole milk powder or candy.

The argument that milk used to make milk chocolate has many of the characteristics traditionally associated with Class III products is more compelling, but in this case the factor of uniformity between orders outweighs such a consideration. Other chocolate makers who use milk pooled under other orders (or milk powder made from milk pooled under other orders) are subject to the same classification provisions that are adopted in this decision. Since the market for milk chocolate encompasses an area larger than Order 2, it is necessary that the milk used to produce the products is priced uniformly between the respective orders.

Skim milk and butterfat used to make buttermilk biscuit mix should likewise be classified as Class II rather than Class III. As in the case of dry milk powder used to make candy, the manufacture of dry milk from fresh milk classified as Class III for the purpose of making buttermilk biscuits would also involve a cost additional to the cost of the Class III milk. Although fast food restaurants of the kind that use buttermilk biscuit mix are not considered commercial food processors, their use of a milk product as an ingredient in making other food items is similar. Therefore, milk used in buttermilk biscuit mix should be classified as Class II.

Because of the large volume and variety of manufactured products produced in Order 2 pool plants, the list of products named in the Class II classification provision includes some products not listed in the "uniform" classification provisions. The classification of these additional products, however, will be no different under the three Northeast orders than it would be under a "uniform classification" order.

An exception filed on behalf of Kraft, Inc., Pollio Dairy Products Company, and Friendship Dairies, Inc., argued that "pot cheese" and "farmers cheese" should not be named as Class II products in the northeast orders because there is no indication that these products compete with identical products manufactured in other regions. In addition, the comments stated, milk used to manufacture such products would be classified as Class III in other orders where it is not specifically classified as Class II.

Some testimony in the hearing record argued that these products are very similar to cottage cheese and that milk

used to produce them should be classified in the same class as cottage cheese. There was also evidence that the manufacture of these products is demand-driven, rather than made on the basis of when surplus milk is available. However, exceptors are correct in stating that milk used to manufacture these products under uniform classification orders would be classified as Class III. As stated in the exceptions, there is no indication that these products compete with similar products manufactured under other orders. Therefore, classification in Class II presumably would not result in any disruptive competition. In the interests of uniformity, however, the classification of milk used under the 3 northeast orders should not differ from classification under other orders.

b. *Class I and the fluid milk product definition.* Class I milk under the three Northeast Federal orders should include all products designated as "fluid milk products." The fluid milk product definitions of the orders should include all skim milk and butterfat disposed of in the form of milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and milk shake and ice milk mixes containing less than 20 percent total solids. Skim milk and butterfat disposed of in any such product that is flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted likewise should be classified as Class I milk. Such classification should apply whether the products are disposed of in fluid or frozen form.

In addition, Class I milk should include all skim milk and butterfat disposed of in the form of any other fluid or frozen milk product (if not specifically designated as a Class II or Class III use) that contains 6.5 percent nonfat milk solids and less than 10 percent butterfat. All flavored milk beverages, regardless of total solids content, should be considered fluid milk products under the language adopted for the three northeast orders in this decision.

Skim milk disposed of in any product described above that is modified by the addition of nonfat milk solids should be Class I milk only to the extent of the weight of the skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

Class I milk should not include skim milk or butterfat disposed of in the form of evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use that are packaged in

hermetically sealed glass or all-metal containers, any products that contain by weight less than 6.5 percent nonfat milk solids, or whey.

Class I milk should also include any skim milk and butterfat not specifically accounted for in Class II or Class III, other than shrinkage permitted a Class III classification.

Adoption of a uniform fluid milk product definition will not result in any significant changes in classification in the three Northeast orders. Most of the products listed above for inclusion in Class I are now included in the fluid milk product definitions under all three orders. However, Order 2 currently excludes "sterilized milk products in hermetically-sealed containers" from the fluid milk product definition, and therefore classifies ultra-high temperature (UHT) milk packaged in foil-lined containers as Class II. Under the fluid milk product definition adopted herein, UHT milk would be included in Class I.

Under the uniform classification plan as proposed to be adopted in the recommended decision, ending inventories of packaged fluid milk products would be Class III. As a result, such inventories would be subject in the following month to reclassification in a higher class, as determined through the allocation of a handler's receipts to its utilization. A charge to the handler at the difference between the Class III price for the preceding month and the Class I price for the current month would apply to any reclassified inventory.

An exception to the recommended change in classification of ending inventories of packaged fluid milk products was filed on behalf of Eastern Milk Producers Cooperative Association, Inc. (Eastern). Eastern argued that the current procedure for classifying ending inventories of packaged fluid milk products in Class I avoids the necessity for subsequent reclassification and is a more efficient, less confusing and more acceptable procedure.

Because it is not expected that maintaining the Class I classification of packaged fluid milk products in inventory will cause any disruptive competition with the handlers of other orders under which such inventories are classified as Class III, it is not necessary to change the Class I inventory classification to which northeast handlers are accustomed to Class III. Class I classification of inventories of packaged fluid milk products will not require adjustments from one month to the next as would Class III classification of such inventories. For these reasons,

the amended orders should classify packaged fluid milk products in inventory as Class I.

Proposals to amend the orders' fluid milk product definitions included a proposal by the marketing areas' principal cooperative associations to adopt the fluid milk product definition common to most other orders. The witness for the cooperatives testified that several products are classified differently between the three Northeast orders, creating competitive difficulties for the handlers regulated under one order but competing for sales with handlers regulated under another of the Northeast orders, or with handlers regulated under other Federal orders outside of the region. The cooperatives' spokesman stated that the form in which and purpose for which milk products are distributed is the most important consideration in determining their classification. The witness observed that additional criteria might be included in the definition to assure that products such as a lowfat (four percent butterfat) product resembling sour cream would be classified as a Class II product rather than Class I.

Several other proposals to amend the orders' fluid milk product definition were included in the hearing notice. Two of the proposals were not supported by any testimony, and will not be considered further. A proposal by Farmland Dairies, Inc., would include UHT milk, cream in consumer packages, and ice cream and milkshake mix in the Order 2 fluid milk product definition. The witness testifying on behalf of Farmland stated that these products are closer to fluid than not, and are not produced from reserve supplies. He pointed out that a product called "shake-ups", which would not fall within the uniform fluid milk product definition, is produced for fluid consumption, and should therefore be Class I.

Friendship Dairies, Inc., proposed that the Order 2 fluid milk product definition be amended to include products with a "ph" greater than 4.6. The Friendship witness testified that classifying products by the use of scientific means such as a test for acidity would allow and encourage the sale of new and innovative sour milk products without uncertainties about their classification. He stated that products intended to substitute for conventional Class I products should be classified as Class I. The witness explained that Friendship's proposal would result in changes in uniform classification of buttermilk from Class I to Class II, and of half-and-half from Class II to Class I.

Alternatives to the proposed uniform fluid milk product definition were suggested by a witness representing the H. P. Hood Company, a large handler regulated under the New England order. The alternatives would exclude lowfat sour cream, light (or lowfat) eggnog, and "shake-ups" from the fluid milk product definition. A brief filed by Hood supported the goal of uniformity in classification, observing that its lack has resulted in disorderly marketing conditions.

A brief filed on behalf of the Grocery and Specialty Products Division of Borden, Inc., stated that Borden processes ultra-high temperature (UHT) milk and packages it in hermetically sealed foil-lined paper containers. The handler is regulated under Order 2, where UHT milk is not considered a fluid milk product. The brief stated that UHT milk should not be considered a fluid milk product because it is storable, and therefore does not conform to the same "time utility" that characterizes fluid milk products. The brief further stated that the argument that UHT milk be considered fluid because it competes as a beverage with fluid milk products is invalid because formulas especially prepared for infant feeding or dietary use, milkshake and low-solids products are specifically excluded from the fluid milk product definition but also compete as beverages with fluid milk products.

Adoption of the Farmland proposal would place Northeast processors of soft manufactured products at a disadvantage with their competitors in other marketing areas. Ice cream mix and milkshake mixes containing 20 percent or more total solids generally are not considered fluid milk products and do not compete as beverages with the products typically classified as Class I. Therefore, they should not be included in the fluid milk product definitions of the Northeast orders.

Although the Friendship Dairy proposal would adopt the scientific means of a "ph" test to define fluid milk products, it also eliminates the scientific criteria of butterfat and solids nonfat content that are included in the proposal for a uniform fluid milk product definition. The Friendship witness' concern about the time-consuming procedure required for USDA to consider appeals to the classification of a new product in Class I should be alleviated by specifying that fluid milk products be fluid. Those who testified relative to the proposal to include a product's "ph" factor in the criteria for defining fluid milk products agreed that a low "ph" (or high acidity) corresponds with a product that is semi-solid, rather

than a beverage. However, buttermilk, which clearly is a liquid, apparently would be excluded from the fluid milk product definition on the basis of its "ph" factor.

If a milk product containing less than 20 percent solids and 10 percent butterfat is sold to be consumed as a beverage it can be considered to be in competition with other fluid milk products, and should be priced in the same class. Buttermilk, therefore, should continue to be considered a fluid milk product. Proponent's speculation that reducing the classification and price of buttermilk would help revive the product's consumption is not persuasive. The price reduction on a quart of buttermilk that would likely result from such a reduction in classification would be approximately 5 cents.

The alternatives to the uniform fluid milk product definition proposed by the Hood witness should be adopted in a modified form. Under the definition adopted herein, lowfat sour cream will be included in a description of products to be included in the intermediate Class II. "Shake-ups", according to the composition of the product described by the Hood witness, will exceed the order's maximum limit of 20 percent total solids in milkshake products, and therefore would be classified in Class II rather than Class I. Lowfat eggnog or eggnog drink, however, does not meet the description of a manufactured eggnog. It is a flavored milk drink, and should be classified as a fluid milk product, as are other flavored milk drinks.

An exception to the recommended decision filed by H. P. Hood, Inc., objected to the classification of lowfat eggnog as a Class I product. The comments stated that the lowfat eggnog processed by Hood differs from Class II manufactured eggnog only in its butterfat content. The handler differentiated between lowfat eggnog and eggnog drink by describing the lowfat eggnog as having a higher solids content (over 20 percent) and being consumed in smaller serving sizes than eggnog drink. Hood's comments argued further that a change in the classification of its lowfat eggnog (which currently is considered a Class II product) during the eggnog season of January through Easter would be disruptive, and that if such a change is made it should be delayed until after Easter.

While eggnog is excluded specifically from the fluid milk product definition, the lowfat eggnog produced by Hood does not meet the 6-percent minimum butterfat specification in the Food and Drug Administration's description of

eggnog. Therefore, lowfat eggnog is classified under the uniform classification decisions as a fluid milk product, regardless of its solids content, and would be so classified in any of the marketing areas in which Hood might be competing with other handlers for sales of such a product. There is no basis on which to classify lowfat eggnog differently in the three orders affected by this decision than it would be classified in any other order. There is also no basis for waiting until mid-1991 to make the classification provisions of the amended order effective. Handlers affected by the provisions should be aware of the probable classification of their products well in advance of January 1991. Hood should have no need to change the pricing of its lowfat eggnog product part way through the coming eggnog season.

Although the proposed fluid milk product definition excludes milk "aseptically packaged and hermetically sealed in foil-lined paper containers", UHT milk should be included in the fluid milk product definition. The sterilization of fluid milk products may change their "time utility", but does not change the form or purpose of such products. As in the case of the unsterilized fluid milk products which they resemble, such sterilized products are disposed of in fluid form for consumption as beverages. They are generally intended for use in place of their unsterilized counterparts and are thus competing for the same customers.

Borden, Inc., excepted to the Class I classification of UHT milk on the basis that a change in its classification under Order 2 was not supported by any substantial evidence in the record. Borden's comments stated that if the classification of UHT milk is changed to Class I, the Department ought to "lock" the plant producing such products into regulation under the order for the marketing area in which the milk is obtained from producers, as has been done in two other orders. Such action would, according to Borden, avoid the plant's changing regulation each month depending on the area in which the bulk of its sales are distributed.

The testimony supporting uniformity of classification between milk orders is the basis for including UHT milk in the fluid milk product definition. Because sterilized and aseptically packaged milk products typically are sold over a wide geographical area (as indicated in Borden's comments), it is very likely that the UHT milk packaged by Borden under Order 2 will be sold in competition with similar products sold by plants regulated under other orders. Therefore, it should be priced in the

same class as is milk used in UHT products in other marketing areas.

There is no testimony or evidence in the record of the hearing to support "locking in" the Borden plant under Order 2 regulation. In both of the other orders cited by Borden's comments in which such action has been taken, it resulted from hearings called to consider that specific issue. However, it is doubtful that a failure to "lock in" the Borden plant under Order 2 will result in its being regulated under any other order. In the first place, full regulation under nearly all Federal milk orders requires that a plant's route dispositions in the marketing area represent at least 10 percent of the plant's receipts, and a greater volume than the plant's dispositions in any other marketing area. Borden is most likely to distribute more of its UHT products in the Order 2 area than in any other order area, and would probably not distribute as great a volume as 10 percent of its receipts in any other order area. Secondly, as long as milk distributed within the marketing area has been priced under another order, all Federal orders except Orders 1 and 2 allow the handler to offset such sales with purchases of milk pooled under the other Federal order so as to incur no obligation as a partially regulated handler. Therefore, it is unlikely that a "lock-in" provision would be needed to keep an Order 2 UHT plant pooled under Order 2.

c. Fluid cream product definition. As proposed by Agri-Mark and Eastern Milk Producers, cooperative associations that represent a substantial number of producers whose milk is pooled under the three Northeast orders, the orders should include a fluid cream product definition, as is contained in most other Federal milk orders. "Fluid cream product" would mean cream (other than plastic cream or frozen cream) or a mixture of cream and milk or skim milk containing 10 percent or more butterfat. The definition will help to assure that classification of such products is uniform between the three Northeast marketing areas and between these marketing areas and others regulated by other Federal orders.

The fluid cream definition proposed by proponents varies in some details from the uniform fluid cream product definition. Some of the items listed in the proposed definition are also listed in the description of the products proposed to be included in Class II milk, but are not included in the fluid cream product definitions of other orders. Although these products will not be included in the fluid cream definition, they will be listed as Class II uses. Because of

particular reporting and accounting requirements connected with the products listed in the fluid cream product definition, the definition adopted for the three Northeast orders will not include some of the products normally listed in the uniform fluid cream product definition. All of the products included in the proposed fluid cream product definition and in the uniform fluid cream product definition will be classified as Class II in the amended orders.

A brief filed by the H. P. Hood Company, Inc. supported the goal of uniformity and suggested that the fluid cream product definition include a reference to "skim milk and butterfat used to produce other products which resemble" the items specified as fluid cream products. A brief filed on behalf of Kraft, Inc., Pollio Dairy Products Corporation and Friendship Dairies, Inc., noted that the substitution of new artificial fat products for butterfat in products intended to compete with cream products should not result in those products being considered "fluid milk products."

It is unnecessary to add to the fluid cream product definition any language that would include in the definition products that resemble fluid cream products but contain a fat substitute. Such products would be included in Class II as products "containing 6 percent or more nonmilk fat (or oil) that resemble a fluid cream product."

An exception filed on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc., argued that milk used in products resembling fluid cream products but containing fat substitutes that are made from egg and milk proteins should be classified the same as the skim milk and butterfat contained in the dairy products they resemble and for which they are intended to substitute. Further, the exception stated, the products in question would be made with a fat substitute rather than a nonmilk fat, and could not be considered "products containing 6 percent or more nonmilk fat or oil."

The intent of the recommended decision clearly was to classify the milk used to produce such products in Class II. The order language of the recommended decision describing as Class II used-to-produce items that are semi-solid products resembling a Class II product and containing less than 10 percent butterfat, with the addition of a few words to the order language describing Class II dispositions, should remedy any perceived deficiency.

d. *Class II price.* The price applied to milk classified in the intermediate Class II classification adopted for the

Northeast orders in this decision should be the same as in almost all of the other orders, as recently amended. The Class II price for each month would be announced on or before the 15th day of the preceding month. The Class II price would be computed on the basis of a formula designed to result in an average price level 10 cents above the Class III, or basic formula, price.

The cooperative association proponents of three-class pricing (Eastern Milk Producers Association, Agri-Mark and the Pennmarva Federation), proposed that the provisions for determining the Class II price under the three Northeast orders be the same as the Class II price provisions for 36 other Federal orders. The provisions proposed at the time of the initial hearing would provide a procedure for determining a tentative Class II price for the month and announcing it on the 15th day of the previous month. To ensure that the Class II price is not less than the Class III price for that month, the procedure provides for an upward adjustment of the tentative Class II price to the level of the Class III price, if necessary, on the 5th day after the pricing month, when the Class III price is announced. The witnesses for the cooperatives testified that adoption of Class II price provisions that are uniform between orders is necessary to provide price alignment between marketing areas because the products to be priced are distributed over a number of Federal marketing order areas. The cooperative witnesses observed that the uniform Class II pricing provisions have resulted in prices that have exceeded significantly their intended differential of 10 cents over the Class III price. A witness representing Agri-Mark and Eastern testified that the cooperatives would not object to a Class II price determined by simply adding 10 cents to the basic formula price, or Minnesota-Wisconsin (M-W) price, and eliminating the advance announcement feature of the price. In the post-hearing brief filed by Pennmarva, the Order 4 cooperative federation also advocated a Class II price determined by adding 10 cents to the Class III price.

Two proposals to increase the level of Class II prices were included in the notice of hearing for this proceeding. The Eastern Connecticut Dairy Committee proposed that Class II prices be increased to more accurately reflect their true value to processors, but did not propose any specific price level or differential over the Class III price. There was no testimony supporting the Committee's proposal, and it will not be considered further in this decision. A

proposal by Oak Tree Dairy would have provided for a Class II differential over the Class III price of at least 50 cents, but not more than 60 cents. The Dairy's witness explained that processors obtain a higher product yield in soft cheeses than in hard cheeses, and that the value of the additional product represents at least 40 cents per hundredweight of the milk used to produce it.

Many of the milk handlers that are regulated under the three Northeast orders protested that adoption of the uniform Class II pricing provisions would incorporate the same extreme variations from the M-W, and resulting adjustments to the tentative Class II price, in the three Northeast orders that have been experienced by other Federal orders. Handler representatives testified that the advantage of announcing the Class II price in advance of the month for which it is effective is outweighed by the unpredictability of the changes to the tentative Class II price when the M-W is changing rapidly.

A dairy farmer supported the proposal to increase the Class II differential to 50-60 cents over the Class III price on the basis that it would enhance returns to producers. A dairy plant operator opposed adoption of the proposal because it would misalign the prices of milk used in Class II products under the Northeast orders and under other Federal orders.

This proceeding to amend the three Northeast orders was reopened to include these orders in a proceeding that considered proposed changes to the uniform Class II pricing provisions of nearly all Federal orders. The hearing to consider industry proposals was held August 22, 1989, at Alexandria, Virginia. Most of the witnesses testified that some form of a proposal by the Milk Industry Foundation (MIF) and International Ice Cream Association (IICA) should be adopted in order to eliminate the upward revision of the tentative Class II price in months when the Class III price would otherwise exceed the Class II price. MIF is a national trade association representing some 1,000 dairy processing plants nationwide and accounts for about 80 percent of the fluid milk and related products produced in the United States. IICA is a trade association that represents about 210 member companies who distribute about 85 percent of the ice cream and related frozen desserts consumed in the United States.

The MIF/IICA witness stated that his testimony on the need for the proposed amendments did not refer to the three Northeast orders. However, a witness

testifying on behalf of Agri-Mark, Dairyalea and Eastern Milk Producers Association, cooperative associations that represent about 9,000 of the approximately 26,400 producers whose milk is pooled under Orders 1, 2 and 4, stated that amendments to the uniform Class II price provisions of the other 37 orders should be included in the three Northeast orders. The cooperatives' representative testified that it is necessary for the three Northeast orders to have the same Class II price provisions that exist in the other Federal orders for the purpose of achieving and maintaining competitive equity among all of the handlers marketing Class II manufactured dairy products over an area comprising a number of Federal milk marketing order areas.

The witness for the northeast cooperatives and a representative of the National Milk Producers' Federation, an organization representing most of the dairy farmer cooperatives in the United States, proposed a modification of the MIF/IICA proposal. The modification would include the entire difference between the announced Class II price and the Class III price for the month in the computation of the next Class II price to be determined. This modification was intended to minimize any impact upon producer returns that might result from elimination of the final Class II price announcement. With this change, there would be minimal delay in returning to producers the full value of their milk at the prescribed Class II price level. Both the NMPF and Agri-Mark, et al., supported adoption of the MIF/IICA proposal if it was modified as they suggested.

A witness for Morningstar Foods, which operates a number of dairy plants including, at the time of the hearing, two distributing plants regulated under Order 4, testified in favor of the proposed change. A spokesman for the National Farmers Organization (NFO) stated that the proposal to amend the uniform Class II pricing provisions would result in Class II prices below Class III prices in some months, and advocated a higher level of Class II prices. A brief filed on behalf of Kraft, Inc., Pollio Dairy Products Corporation, Sorrento Cheese and Friendship Dairies, Inc., manufacturing plant operators under Order 2, stated that periods of substantial deviation from the Class II target level of the M-W price plus 10 cents would place Federal order handlers at a severe disadvantage to handlers regulated under the Western New York State order with respect to milk procurement, milk sales, or both. The brief argues that an advance Class

II pricing formula should not be included in the three Northeast orders even if three-class pricing is adopted. A brief filed by Ready Food Products of Philadelphia, Pennsylvania, a partially regulated handler that processes cream products and obtains milk supplies from handlers fully regulated under Order 4, supported adoption of the MIF proposal.

The MIF/IICA proposal, as proposed to be modified by the National Milk Producers Federation, was adopted for 36 Federal orders in a recommended decision issued October 31, 1989 (54 FR 46904), a tentative decision issued November 8, 1989 (54 FR 47527) and an interim final order issued November 28, 1989 (54 FR 49955). A final decision was issued for the 36 orders on March 23, 1990 (55 FR 11599). The amended orders are now awaiting final producer approval. The same Class II pricing provisions should be incorporated in the three Northeast orders in order to assure milk handlers who compete between regions of the United States that they are paying the same price as their competitors for the raw milk used to produce their products. Although handlers regulated under the Western New York State order may be subject to lower prices for milk used in some products, it is not reasonable to allow the provisions of a local order that prices only three-fourths of a billion pounds of Class II milk per year to dictate the provisions of three Federal orders that annually price more than 12½ billion pounds of Class II milk that is distributed throughout the eastern one-third of the U.S.

The Class II pricing method adopted herein will place the same value on milk used in the new intermediate Class II under the three Northeast orders as Class II milk has under other orders. The Class II price will eliminate retroactive Class II milk pricing, but not, as many Northeast handlers feared, at the cost of having to adjust a tentative announced price to the level of the announced M-W price. The intended 10-cent average Class II differential over the average level of the Class III price should be achieved more consistently under the adopted Class II price provisions than under those originally proposed for the three orders. Because the seasonal adjusters to the Class III price in the three northeast areas will cause that price to vary around the level of the basic formula price, adjustments to the Class II price should be based on its relationship to the basic formula price rather than the Class III price. Use of the basic formula price in adjusting the Class II price will also maintain Class II price equity with other orders.

e. Seasonal price adjusters. The seasonal adjusters currently applied to Class II prices for producer milk should be retained, but only to adjust Class III prices. These price adjusters range from a minus 12 cents in May to a plus 10 cents in August in the New England and New York-New Jersey milk orders, and from a minus 10 cents in May to a plus 12 cents in August in the Middle Atlantic order. The seasonal price adjusters are intended to encourage manufacturing plant operators to buy more milk to use in making the market's surplus dairy products during the spring months when milk supplies are plentiful. The adjusters also encourage manufacturers to buy less milk, thereby releasing it for fluid use, during the fall months when milk production is seasonally low and demand for fluid products is high.

For the most part, those hearing participants who addressed the issue of seasonal price adjusters favored retaining them, but only on the lowest-priced class. The Pennmarva witness, however, proposed that the adjusters be applied to both the Class II and Class III prices on the basis that they should continue to be used to encourage the use of milk for other than fluid use in spring, rather than fall. He also noted that if the seasonal adjusters were used to adjust only Class III prices, the difference between Class II and Class III prices would widen in the spring and narrow in the fall.

Representatives of Eastern Milk Producers, Dairyalea Cooperative, Inc., and Dietrich's Dairy favored the application of the seasonal adjusters only to the Class III price. The Eastern witness testified that the seasonal adjustments to the lowest-class price are necessary to encourage the appropriate use of seasonal variations in supply, and to complement the seasonality in producer prices to encourage supply patterns to conform to the fluid needs of the market. The witness explained that the seasonal price adjusters have been an integral part of the nonfluid price structure of the market for many years, and should be retained. The Eastern representative testified that the adjusters should apply only to the Class III price because the proposed Class II products do not balance the market's milk supply. The Dairyalea witness testified that while it is logical to retain the seasonal adjustments to the Class III price because of the market-balancing nature of the proposed Class III products, production of the proposed Class II products reflects about the same seasonal pattern as milk production and

therefore should not be subject to seasonal price adjustments.

Witnesses favoring elimination of the seasonal price adjusters testified on behalf of the National Farmers Organization (NFO), a cooperative association representing producers whose milk is pooled on all three orders; the New Jersey Milk Industry Association, an organization representing a number of New Jersey distributing plants; and Leprino Cheese, a manufacturing plant operator. The NFO representative pointed out that the adjusters do not exist in any other Federal orders and observed that the seasonality of supply and demand is a factor in determining the Minnesota-Wisconsin price, upon which Federal order prices are based. He also stated that the adjusters reduce total returns to producers. The Leprino Cheese representative supported elimination of the adjusters for the purpose of competitive consistency between orders. A witness for Hershey Chocolate, U.S.A., found no fault with the existence of seasonal price adjusters in the order as long as the value of the affected class of milk is not altered over the course of the year.

A brief filed on behalf of Morningstar Foods, a handler that operated two pool distributing plants regulated under Order 4 at the time of the hearing, observed that the seasonal adjustments to the present Order 4 Class II price result in a price that is 2 cents higher all year than the Order 1 and Order 2 Class II prices. The brief characterized as absurd a change in the order for the purpose of making it uniform while leaving in place non-uniform prices for the lowest class of use.

The seasonal price adjusters should continue to apply to the markets' lowest-class price. The products classified in Class III under the uniform classification provisions are storable enough to allow their manufacture during the markets' seasons of surplus production and their sale during seasons when production is lower. The rates of adjustment are designed to average out over the course of a year so that the actual value of milk used in the markets' surplus products over the year is unchanged. For this reason, the seasonal adjusters do not reduce returns to producers by any significant amount over the course of a year. During 1987, for instance, the seasonal adjustments to the Order 2 Class II price reduced producer returns by sixteen one-hundredths of one cent.

If applied only to the proposed Class III products, the seasonal adjusters should have little, if any, effect on intermarket competition. The price of milk used in such products will, over the

course of a year, be no different than the price manufacturers in other orders pay for milk used in the same products.

Manufacturing plant operators in the Northeast will continue to be encouraged to use milk when supplies are abundant, and release it for use in the fluid market when milk production is seasonally low. Because of the relative perishability of the proposed Class II products, however, processors of those products must have a regular supply of milk and do not have the flexibility to make cottage cheese, for example, in May and sell it in October. Therefore, the seasonal price adjusters should not apply to Class II prices under the amended orders.

The current levels of seasonal adjustments in the three Northeast orders should be unchanged. The differences in seasonal adjustments between Orders 2 and 4 are longstanding, not having been amended since 1971. There is no testimony in the record of this proceeding to explain why the amounts of seasonal adjustment are not entirely uniform between the orders or to describe any marketing problems that have resulted from the differences. Because a number of products now included in the lowest-priced class will be reduced, it can be expected that the impact of the minor difference in seasonal adjustments will be reduced accordingly.

Comments were filed in response to the recommended decision by Dietrich's Milk Products and on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc. Dietrich's comments observed that the application of seasonal adjusters to Class III prices only will result in differences between Class II and Class III prices being wider than 10 cents. Computing the Class II price on the basis of the basic formula price rather than on the (seasonally adjusted) Class III price should result in a Class II price that will average, over the course of the year, a level approximately 10 cents above the average level of the Class III price.

The exceptions filed on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc., stated that, contrary to the findings of the recommended decision, intermarket competition would not be significantly affected by maintaining seasonal price adjustments for soft products as well as for hard manufactured products. The comments argued that, as with seasonally adjusted Class III prices, seasonally adjusted Class II prices would not differ from those in other orders over the course of a year. Exceptors stated that seasonal price adjustments are intended to encourage

seasonal purchases of milk from producers rather than the storage of manufactured products over a period of months, and that soft product manufacturers tailor their production and sales promotions to meet milk supplies.

As stated above, processors of soft manufactured products must use producer milk to make their products when consumer demand for those products is high. Although some of the peak production months for these products coincide with the months of negative seasonal price adjustments, the later summer months of July and August, which are also months in which many of these products are produced heavily, are months in which seasonal price adjustments are positive. These products cannot be stored for months, as the hard manufactured products customarily are. Therefore, although it may be reasonable to consider the average Class III price level over the course of a year when comparing prices between different marketing areas, it would not be appropriate to consider annual average Class II price levels when comparing relative Class II prices between markets. The short time frame within which Class II products must be sold to consumers after being produced would make such comparisons meaningless. The average price over the course of a year could not be considered to apply to them.

Exceptors' motives for wanting to maintain the current seasonal price adjusters on milk used to produce Class II products is completely understandable. During some of the months of peak production and consumption of soft manufactured products, the price paid by northeast handlers for milk used in such products is less than the price paid by handlers regulated under other Federal orders by amounts ranging from 9 to 12 cents per hundredweight. This price advantage is equivalent, and additional to, the price advantage currently enjoyed by northeast handlers in the class price difference that exists because of the current 2-class pricing system of the 3 northeast orders. The seasonal adjustments applicable to prices for milk used in soft manufactured products should therefore be eliminated for some of the same reasons that 3-class pricing should be adopted for these markets.

f. Uniform announcement of class prices and butterfat differential. As proposed by Pennmarva Milk Producers Federation and supported by the witness representing Eastern Milk Producers Cooperative Association, Inc., and Agri-Mark, Inc., the three Northeast

orders should contain uniform provisions instructing the market administrator to announce class prices and the butterfat differential. The announcement requirements would be the same as those in other orders to assure uniformity. There was very little testimony regarding the cooperatives' proposal, and none opposing it. In addition to including the announcement requirements for class prices and the butterfat differential in a separate new section under the New York-New Jersey order, the new section should also include the announcement requirements for product prices currently contained in the order. The announcement requirements for the uniform price should also be moved to a new section of the New York-New Jersey order, following the section describing computation of the uniform price. These changes will assist any persons dealing with all three orders to find these various price announcement provisions in a standard location.

g. Conforming changes. Adoption of the uniform classification provisions for the three northeast orders will require a number of conforming changes that were neither proposed nor specifically discussed in the record of this proceeding. However, a proposal by USDA to make any changes necessary to implement amendments resulting from the proceeding was included in the hearing record, and addressed at the hearing. The conforming changes necessary to implement uniform classification provisions in these orders vary significantly between the three orders involved, depending on the structure of the orders' provisions at the time of the hearing. In all three of the orders, provisions dealing with shrinkage and the classification of transfers and diversions were amended. These changes were necessary in order to accommodate 3-class pricing, and were part of the original uniform classification decisions. In addition, the allocation or assignment provisions of all three orders needed to be changed in accordance with 3-class pricing. Reporting provisions and price computation procedures were also changed as necessary to incorporate uniform classification.

The format of Order 4 is more easily adaptable to the uniform classification provisions than those of the other two orders, and conforming changes in Order 4 are therefore less extensive. The format of Order 1 is changed considerably in the attached order language. However, these changes are not intended to, and should not, result in any substantive changes, such as

changes in the regulatory status of market participants or in obligations to the pool, beyond those required by 3-class pricing.

The provisions of Order 2 differ considerably from those of the other two orders, and from all other Federal orders. In terms of the adoption of 3-class pricing, the particular provisions of Order 2 that inhibit adoption of uniform provisions and format are the division of Class I into Classes I-A and I-B, farm point pricing, and delivery of most producer milk in bulk tank units. The hearing record contains no testimony on the need to change any of these provisions, and 3-class pricing can be adopted for Order 2 without making any such changes. However, some Order 2 section numbers are changed for the purpose of closer alignment of the format of Order 2 with other orders, and to correct the enumeration of sections such as §§ 1002.50a and 1002.88a. If there is any desire to further modify the provisions of Order 2 to bring it into closer conformity with other Federal orders, another amendatory proceeding will be necessary at a later date.

2. Pooling Standards

(a) Health Authority Approval. The New York-New Jersey order (Order 2) should be amended to provide for suspending in a timely manner the designations of regular pool plants that have lost their health approval. The decision also adopts provisions that establish a procedure to suspend the designations of regular pool plants that discontinue operations.

Currently, Order 2 provides that pool plant designations be automatically suspended on August 1 each year for plants that on June 15 are not approved by the appropriate regulatory agency as a source of milk for the marketing area. The order does not provide a method to remove the designations of regular pool plants that discontinue operations (quit receiving milk and/or remove the processing equipment).

The procedural changes adopted herein were proposed by three cooperatives (Agri-Mark, Dairylea and Eastern) that furnish more than 30 percent of the milk for the Order 2 market. There was no opposition to the proposed changes. Only one person, other than the witness for proponents, testified regarding this matter and his suggested modification will be dealt with at the end of the findings on this issue.

Proponents testified that the changes are needed to expedite the suspension of a plant's designated pool status if the plant loses its health approval. They also contended that the order should

provide a procedure to remove pool plant designations for plants which are not functioning as milk plants on a current basis.

To demonstrate the need for its proposed changes, the witness for proponents cited the following two examples. The former Dairylea fluid milk plant at Goshen, New York, was closed for about two years before it was sold to Sorrento Cheese Company. The plant was used as a transfer station for several months after its processing operations were discontinued, but even those activities ceased prior to the sale of the property. When Dairylea sold the plant, it asked the New York State regulatory authorities to quit making inspections and the plant's health approval was terminated in December 1980. Since the plant did not have health approval on June 15, 1981, the plant's designated pool status was removed on August 1 of that year. However, since the plant's pool designation was not removed for quite some time after the plant had ceased operations, another person could have used the plant's designated status to operate as an Order 2 handler and qualify milk for pooling under the order.

Proponents' witness related a similar situation where a plant's designation for pool status was not removed even though the plant had gone out of business. Schepps Cheese Company bought a plant located at West Burlington, Pennsylvania, which had been operated as a milk receiving station. Although the plant was closed and the milk handling equipment had been removed several years earlier, the plant's pool designation was continued because its health approval had not been removed by the Commonwealth of Pennsylvania. Since the plant's pool designation had not been terminated, Schepps automatically became the operator of an Order 2 designated pool plant and was eligible to qualify milk for pooling under that order upon purchase of the plant.

Proponents were particularly concerned that small fluid milk operators could go out of business in the future and sell their plants to manufacturing processors who could use the designated pool status of such plants to qualify milk for pooling under Order 2. Proponent expressed the opinion that, although the order allows pool plant designations to be transferred from one person to another in certain circumstances, situations such as those identified in proponents' testimony could result in disorderly marketing. For these reasons, the cooperatives proposed that pool plant designations be

terminated when plants lose their health approval or quit operating as milk plants.

It is evident from the foregoing that the current Order 2 provisions lack sufficient guidelines in some cases with respect to removing the designations of regular pool plants. Although the adoption of minimum performance standards for Order 2 market suppliers, discussed under another issue in this decision, will resolve some of the concerns identified by proponents with respect to this issue, the proposal of Agri-Mark, DairyLea and Eastern to correct the deficiencies in the order's current provisions for removing the "regular pool plant" designation should be adopted. As proposed, such designations would be forfeited for any plant that fails to meet the order's plant definition, has not received pool milk during the immediately preceding 12 months, or does not have current health approval. Such changes will tend to assure a continuation of orderly marketing under Order 2.

Order 2 now allows 15 days' temporary lack of health authority approval as an exception to suspension of the regular pool plant designation in order to allow a handler time to correct temporary problems relating to health approval. This 15-day grace period was also included in proponents' proposal. A representative of Dietrich's Milk Products Company testified that 15 days is an inadequate period for regaining such approval. He cited the case of a load of unapproved milk that had lost its U.S. Public Health Service rating and therefore could not be received at his plant. The Dietrich's witness stated that it took almost 30 days to get the milk re-inspected and re-approved for marketing. Based on this experience, Dietrich suggested that handlers be allowed 30 days, rather than 15, to get health problems corrected and the plant re-inspected and re-approved as a source of milk for the marketing area. The Dietrich incident appears to concern the approval of milk produced by dairy farmers, which involves farm inspections, while the proposal by the three cooperatives relates to plant approvals. Since no testimony was presented to show that correcting temporary health problems in plants involves the same amount of time as rectifying similar farm problems, the record does not provide a basis to make the change advanced by Dietrich. Continuation of the shorter 15-day period should motivate handlers to correct health problems in their plants expeditiously.

(b) *Minimum shipping requirements.* Order 2 should be amended to require that handlers operating designated pool plants and bulk tank units dispose of minimum percentages of their associated milk supplies in Class I-A in the months of September through January in order to maintain their pooling designations. Specifically, such handlers would be required to dispose of 10 percent of their milk receipts for Class I purposes during each of the months of September through November and 5 percent in the months of December and January.

The proposal to establish uniform pooling standards for market suppliers under the New England order (Order 1) and Order 2 is denied, as is a proposal to lower the shipping standards for Order 1 supply plants. A related handler proposal that is designed to allow shipping handlers under Order 2 to recover their direct costs from receiving handlers when suppliers are making required shipments to fluid milk plants is also denied.

Under the terms of Order 1, in each of the months of August and December a supply plant is required to ship 15 percent of its receipts of milk from dairy farmers to pool distributing plants to qualify the supply plant as a pool plant. For each of the months of September through November, an Order 1 pool supply plant must ship 25 percent of its receipts to fluid milk plants. The order provides for unit pooling of supply plants whereby a group of plants may combine their operations for the purpose of meeting the applicable shipping percentages. It also includes a provision that permits cooperatives to operate supply/balancing plants that are located in the marketing area as pool plants without meeting monthly performance standards.

The qualification of milk for pool status under Order 2 differs significantly from Order 1 and from most other Federal milk orders. The milk produced by Order 2 dairy farmers is pooled primarily by designation rather than on the more traditional basis whereby plants qualify milk for pool status by meeting minimum monthly performance standards. The Order 2 milk supply is pooled by handlers who operate designated regular pool plants and declared pool units. Such designated plants and units are required to meet monthly performance standards for pooling only if the market administrator finds it necessary to establish temporary required Class I utilization percentages to assure that Order 2 handlers will supply sufficient quantities of bulk farm milk for the Class I fluid market. This

determination by the market administrator is referred to as a "call".

Plants located in New York, New Jersey and Pennsylvania are designated "regular pool plants" under Order 2 on the basis of their geographic location, and then only after meeting performance standards as "temporary pool plants" for 12 consecutive months. In each of the months of January through March and July through December, a "temporary pool plant" must have 25 percent or more of its milk receipts from dairy farmers (including units) classified as Class I-A in the marketing area or on the basis of transfers to pool plants. For the months of April through June, varying Class I utilization percentages must be met by such a plant. Once "regular pool plant" status is attained, designated regular pool plants are not required to meet monthly performance standards in order to pool milk.

With certain exceptions, bulk tank units may be operated and pooled by regular pool plant operators and qualified cooperatives. If the dairy farms of the producers included on the handler's declared pool unit are located in New York, New Jersey, Pennsylvania or certain counties in Massachusetts and Vermont, the primary production area for Order 2, the unit is not required to meet monthly performance standards.

The Dairy Industry Institute of New York (the Institute), an organization of 10 fluid milk processors and distributors located in the New York City metropolitan area, proposed that, as a condition of maintaining designated pool status, regular pool plants and declared bulk tank units be required to assure that minimum percentages of their milk supplies be classified as Class I-A in the months when milk supplies are short relative to Class I needs. The Institute's proposal would require such plants and units to dispose of 25 percent of their milk receipts from dairy farmers as Class I-A in each of the months of September through November, and 15 percent of such receipts in each of the months of August, December and January. The Institute's representative testified that performance standards are needed to assure the orderly movement of farm milk from pooled supply plants, manufacturing plants and bulk tank units to distributing plants for processing into Class I fluid milk products. The handlers were hopeful that incorporating performance standards in Order 2 would reduce the handling or "give-up" charges presently being paid by fluid processors and would improve the position of fluid milk processors in competing for milk supplies with manufacturing plant

operators whose payments for milk are subsidized with funds from the marketwide pool which are provided by fluid processors and, ultimately, by consumers.

Dellwood Foods, Inc., a member of the Institute, abandoned its hearing notice proposals to amend Order 2 by requiring handlers to comply with a 15-percent shipping standard and by eliminating the authority of the market administrator to require regular pool plants and pool units to meet specific Class I-A utilization percentages. Dellwood then supported the Institute's testimony and position on this issue.

Oak Tree Farm Dairy, Inc., an Order 2 handler whose fluid milk plant is located in the 1-10 mile zone, proposed performance standards that would apply year-round at higher percentage levels than those proposed by the Institute. Under the Oak Tree proposals, handlers operating regular pool plants, bulk tank units and temporary pool plants would be required to have 30 percent of their receipts from dairy farmers priced in Class I-A during the 3-month period of September through November, 20 percent in the months of January, February, July, August and December and 10 percent in the 4-month period of March through June. If the Class I-A utilization of the handler's dairy farmer receipts was 45 percent or more in the immediately preceding September through November period, the handler would not be required to meet the Class I utilization standard in the following months of March through June.

The Oak Tree witness testified that the handler has had problems buying milk at fair, reasonable and competitive prices for fluid packaging at his Long Island plant. The witness entered a recent billing invoice to show how much the handler had to pay to obtain milk. The witness expressed the handler's hope that the adoption of performance standards for Order 2 pool handlers would make more milk available to handlers who are packaging fluid milk products.

Several fluid milk processors supported the adoption of performance standards for Order 2 pool plants and bulk tank units. Spokesmen for the New Jersey Milk Industry Association, representing 16 distributing plant operators regulated under Orders 2 and 4, Dairylea Cooperative, Inc., and Farmland Dairies, Inc., supported the adoption of such standards. There was a consensus among the distributing plant operators that any handler which benefits from regulation under an order by receiving equalization payments from the producer-settlement fund, which are provided by Class I operators, should be

required to demonstrate its responsibility to the fluid market by making certain that the fluid needs of such operators are fully satisfied, especially during periods when the market's milk production is low relative to Class I demand.

Adoption of mandatory performance standards for pooling milk under Order 2 was opposed by four Order 2 producer groups (Allied Federated Cooperatives, Lowville Milk Producers Cooperative, National Farmers Organization and Oneida-Lewis Milk Producers Cooperative, Inc.) and an individual dairy farmer whose milk is marketed by the National Farmers Organization (NFO). These producer representatives were particularly concerned that requiring pool plants and units to meet minimum Class I utilization standards in the short milk production months would make it difficult for them to negotiate over-order prices for their shipments to fluid plants in those months.

An Oneida-Lewis representative testified that the cooperative would have difficulty meeting the proposed performance standards because its milk is supplied to a Class II processor. The Lowville Milk Producers Cooperative witness contended that the adoption of mandatory performance standards is an inefficient way of furnishing milk for the fluid market and would result in extra handling costs that must be paid by consumers.

NFO and Allied took the position that the market's Class I needs are being furnished under the order's present order provisions, which have worked effectively. A witness for NFO also contended that adoption of minimum Class I utilization standards for plants and units would result in uneconomic movements of milk from distant zones simply to qualify the milk for pooling. In addition, he stated, such standards would create inequities because many major fluid processors also have large Class II manufacturing operations. NFO took the position that handlers with both Class I and Class II operations want other parties to supply the fluid milk needs for their Class I operations so that they will be able to keep more of their own milk supplies for their own (more lucrative) manufacturing plants. A post-hearing brief filed by NFO stated that these handlers can meet their own milk supply needs and should do so without artificial assistance from the order.

Dietrich's Milk Products, Inc., Empire Cheese Inc., Friendship Dairies, Inc., Kraft Inc., Leprino Foods Company and Pollio Dairy Products Corporation, six Order 2 proprietary handlers who primarily are engaged in manufacturing

Class II dairy products, also testified in opposition to the adoption of mandatory performance standards for pooling milk under Order 2. The handlers took the position that Order 2 manufacturing handlers play a significant role of marketwide benefit by balancing the market's seasonal and weekend surpluses. They testified that such handlers receive unwanted excess milk at their manufacturing plants in the spring and provide supplemental milk to fluid milk plants in the fall.

Witnesses for the plant operators indicated that the present Order 2 pooling system of using plant and unit designations in conjunction with the provisions which authorize the market administrator to establish minimum Class I use standards is the most efficient method available to supply the market's fluid needs. Witnesses for the manufacturing plant operators testified that these provisions have served the market well over the years and that a continuation of such pooling procedures would be preferable to imposing mandatory performance requirements on handlers.

The manufacturing handlers contended that the performance levels proposed by the Institute and Oak Tree Farm Dairy exceed the market's needs and would therefore result in uneconomic milk handling practices. They also claimed that requiring market suppliers to meet minimum pooling standards would exert downward pressure on handling charges that suppliers would be able to pass on to fluid processors who buy supplemental milk, and that the proposed fixed mandatory performance requirements would not provide the necessary flexibility to meet the market's changing supply/demand conditions.

Some of the handlers advanced suggestions intended to improve any regulatory provisions concerning pooling standards that are adopted as a result of this hearing proceeding. The Dietrich witness suggested that the minimum standards apply only for the months of August through November. Representatives for Dietrich and Kraft also suggested that shipping percentages in the range of 5 to 8 percent would be more appropriate than 15 to 30 percent. Dietrich, Friendship and Kraft asked that groups of handlers be allowed to have their operations considered on a combined basis for the purpose of pool qualification. Witnesses for Dietrich and Kraft suggested that the market administrator or the Director of the Dairy Division be given the authority to adjust the performance standards if marketing conditions change.

In a post-hearing brief filed by Agri-Mark, the cooperative contended that the performance proposals advanced by the Institute and Oak Tree should be denied because proponents did not provide sufficient market evidence to justify the proposed changes. The cooperative claimed that proponents relied on decisions for the Chicago and Upper Midwest marketing areas, where proponents testified that shipping standards had replaced call provisions, to justify the proposed changes in Order 2. Agri-Mark also referred to proponents' testimony that the proposals were designed, at least in part, to eliminate differences between blend prices under the various orders in the northeast region by causing handlers to shift milk from regulation under Order 2 to Order 1. Such a shift would cause Order 2 producer prices to increase and Order 1 prices to producers to be reduced as a result of pooling some of the Order 2 surplus milk under Order 1. In Agri-Mark's opinion, these arguments advanced by proponents completely distort the purpose and justification for performance standards under Federal orders.

The New York-New Jersey order should be amended to require all handlers who operate designated pool plants and bulk tank units to dispose of minimum percentages of their receipts of milk from dairy farmers for Class I purposes in the months of short milk production (September through January). In addition, the market administrator would have the authority to "call" for a higher or lower level of shipments for Class I use if, on the basis of a handler meeting, the required percentages of Class I use were found to be inadequate or excessive for the purpose of supplying the market's fluid milk needs.

Under the order's current provisions, it is possible for manufacturing handlers to avoid providing any milk for Class I purposes unless the market administrator establishes temporary pooling standards for handlers by issuing a "call". A situation in which some pool plants and bulk tank units dispose of a percentage of their receipts from dairy farmers in Class I that significantly exceeds that marketwide average of Class I use while other pooled handlers do not have any of their milk associated with the Class I market is not an equitable arrangement for any of the market's participants. Distributing plant operators who must pay excessive handling or give-up charges to obtain supplemental milk to operate their plants are competitively disadvantaged relative to other distributing plant operators who are able to obtain

adequate milk supplies, often from their own manufacturing operations, at reasonable and customary prices.

In addition, manufacturing handlers who ship milk to fluid packaging plants may incur costs of unused manufacturing capacity and transportation costs not covered by the order that are not incurred by those who retain all of their milk supplies for processing. As a result, shipping handlers are disadvantaged relative to their non-shipping counterparts, not only because of such higher costs, but also in terms of their ability to attract and retain an adequate supply of producer milk. Because handlers who carry the burden of supplying milk to the fluid market have higher costs than those who do not, their ability to pay producers as high a price as non-shipping handlers are able to pay is impaired. This situation results in inequitable returns to dairy farmers. It is evident from the record of this proceeding that such unfavorable marketing circumstances are prevalent in the Order 2 market.

Therefore, in order to continue participating in the marketwide pool, maintain their designated pool status and thus subsidize their payments to dairy farmers with the Order 2 blend price, handlers who operate designated pool plants and units should demonstrate their willingness and ability to supply milk on a continuing basis for the higher-valued uses which generate the blend price. Although the cost of shipping milk to a fluid processing plant may exceed the returns for such shipments in some cases, it is not a proper basis to allow handlers and producers who have no association with the fluid market to enjoy the benefits of participating in the marketwide pool and receiving the blend price that is generated by fluid milk sales.

In addition to fostering equitable treatment under regulation, the adoption of minimum performance standards for pooling should remove doubts that distributing plant operators may have about whether the milk associated with manufacturing plants will be available for shipment to distributing plants in the months of short milk production. Also, the changes adopted herein will encourage the development of new supply relationships and/or cultivate and extend those already existing between designated pool handlers and fluid milk plants serving the Order 2 market.

Minimum Class I utilization standards for handlers should apply during the months of September through January. The record evidence fails to

demonstrate the need for year-round performance requirements, as proposed by Oak Tree Farm Dairy. The record does show, however, that milk supplies relative to the market's Class I needs are short during the months of September through January. Generally, the Class I utilization by Order 2 handlers in each of these five months exceeds the market's annual average Class I use and represents about 40 to 45 percent of the market's pooled milk.

For the months of February through August, information in the record shows that the Class I utilization by handlers is below the market's annual average Class I use and fluctuates generally in the range of 35 to 40 percent. Although both the Institute and Oak Tree Farm Dairy suggested that performance requirements apply in August, the market data do not demonstrate a need for imposing Class I requirements on handlers in August even though milk supplies may be somewhat tighter at the end of the month as the new school year begins. Actually, the percentage of pool milk used in Class I under Order 2 was greater in February than in August for each year of 1985-1988. In view of the foregoing, August is excluded from the performance period which most appropriately should be limited to the five months of September through January.

The evidence also shows that the market's supply/demand balance is tightest in the months of September through November, as witnesses for both Oak Tree and the Institute testified. For that reason, higher performance levels would apply in each of these three months. The required Class I use percentage for the months of September through November should be 10 percent, with a 5-percent requirement during the months of December and January. These levels of required shipments will assure that all milk suppliers in the New York-New Jersey market maintain some association with the market for fluid milk, but should not require large volumes of unnecessary and expensive shipments solely for the purpose of qualifying milk for pooling.

Some market suppliers contended that any performance standards adopted for this market should be established in terms of the percentage of a handler's milk that is shipped to fluid milk plants rather than as a percentage of a handler's receipts from dairy farmers that is used in Class I-A. They argued that since some handlers manufacture dairy products at their distributing plants in connection with their Class I operations, only part of the total amount of milk transferred to such plants would

be assigned to Class I. If some of a handler's shipments to a distributing plant are classified as other than Class I-A, handlers supplying the milk would have to ship more than the required percentages of their dairy farmer receipts to distributing plants to assure that they meet the order's Class I utilization standard.

However, to the extent that the receiving distributing plant has sufficient Class I use, the milk received at such plant from a pool plant or pool unit may be assigned to Class I by the plant operator. The current Order 2 allocation provisions concerning such transfers give the receiving plant operators considerable discretion in classifying milk receipts from units and plants. Such flexibility also gives shipping handlers an opportunity to lock in a Class I classification with the receiving distributing plant operator when the terms of the sale are decided and prior to the time the milk is actually moved.

The ability of shipping handlers to gain the agreement of receiving handlers that the milk they transfer to distributing plants will be assigned to Class I should allay the concerns of such handlers in dealing with the minimum Class I use standards adopted herein. The current Order 2 performance standards for temporary pool plants specify a given level of Class I use. Also, handlers are familiar with standards based on Class I use because the minimum standards for designated plants and units are announced on that basis when the market administrator issues a "call" for additional milk shipments.

Most of the arguments advanced by those opposing the adoption of performance standards focused on the principle of efficiency. Opponents argued that it is inefficient to move milk from distant zones for fluid use when there are nearby supplies of milk available to meet such needs. However, one of the more significant costs of supplying the fluid market, according to both proponents and opponents of performance standards, is the opportunity cost of the milk when it is not available for processing at the manufacturing plant because of its delivery to a fluid milk plant. In such cases, the manufacturing plant must operate at a lower capacity level, increasing the plant's cost per unit of output. Such so-called "give-up" costs that are associated with shipping milk to fluid milk plants fall as heavily on a manufacturing plant operator located near the New York City metropolitan area as they do on a handler whose manufacturing plant is located in

upstate New York and more than 350 miles from the city.

The transportation costs of moving such milk, of course, would be greater for the handler moving the milk from upstate New York. The changes adopted herein under issue 4, which increase the transportation rate for adjusting Class I prices for location, should enable handlers to recover more of the costs associated with transporting milk for Class I use. The increased transportation differential rate should ameliorate somewhat the differences in cost between furnishing milk to the plant of a fluid handler in New York City with milk from nearby sources and moving it to the city from more distant areas of the milkshed.

Opponents also argued that if manufacturing handlers are forced to ship milk to qualify it for pooling under Order 2, they will not be able to charge distributing plant operators as much for the milk that is shipped. Data in this record show that for the Class I milk purchased by Oak Tree Farm Dairy from Queensboro Farms, Inc., in January 1988, over-order charges (including handling and premiums) of \$2.12 per hundredweight were applicable. Evidence adduced at the 1987 call meetings, which is also part of this record, shows that Order 2 handlers had been paying up to \$2.50 per hundredweight in over-order charges for spot shipments of milk. However, handling charges effective in some other marketing areas, where handlers are required to meet performance standards, are not significantly lower. (Official notice is taken of the price data on Table 36 of Dairy Market Statistics 1988 Annual Summary.) This information would seem to imply that the existence of performance standards in a regulated market does not necessarily have the effect of depressing over-order handling charges.

Several handlers who testified against performance standards took the position that if pooling requirements are imposed on Order 2 handlers they should be allowed to combine their operations for the purpose of meeting the minimum standards. They stated that the order should give handlers the necessary flexibility to operate efficiently in marketing and pooling the milk of dairy farmers.

The flexibility afforded handlers under the bulk tank unit provisions of Order 2 will minimize most of the handling and hauling inefficiencies involved in requiring Order 2 handlers to meet minimum Class I utilization percentages. Nearly all of the Order 2 milk supply is pooled through bulk tank

units. Such milk is received by the responsible handler when it is picked up at the farm. The current bulk tank unit provisions provide considerable flexibility for handlers who wish to establish, maintain and be responsible for pooling the milk received by such units.

The need for regular pool plant and pool unit operators to have their operations considered on a combined basis for the purpose of meeting the required utilization percentage will not be as important to handlers as they stated in testimony because the required performance levels adopted herein are considerably below those proposed. For instance, meeting minimum Class I use standards of 5 and 10 percent for five months rather than 15 and 25 percent for six months should make it considerably easier for handlers to qualify their milk for pooling. However, the order would allow handlers operating bulk tank units to combine the units and operate them as one unit under the direction of one of the handlers. In this way, handlers could use a form of combination for the purpose of meeting pooling requirements.

In comments filed in response to the recommended decision, National Farmers Organization (NFO) and Dietrich's Milk Products asked that the decision clarify the ability of individual handlers that operate multiple bulk tank units to have those units be considered on a combined basis for qualification purposes. No amendments made to order language would affect handlers' ability to have their multiple bulk tank units considered on a combined basis, and no changes in such a practice were intended.

As proposed, the designated pool status of plants and bulk tank units would be canceled if they fail to meet the performance standards adopted herein. The rules that handlers must follow to get the milk of such plants and units reinstated for pooling purposes would be the same as those which currently apply if one or more plants or units fails to meet the minimum Class I utilization percentage announced by the market administrator under the terms of the current Order 2 provisions.

If a designated pool plant fails to meet the minimum Class I utilization standard in any month, the plant's designation would be canceled and the plant would not be eligible for pool plant status through the following June 30. On July 1, the plant would be eligible for pooling as a temporary pool plant. If such plant met the performance requirements as a temporary pool plant for twelve consecutive months, the handler could

apply to the market administrator to get the plant once again designated as a regular pool plant. Similarly, if a bulk tank unit fails to meet the minimum Class I utilization requirement the unit's pool designation would be canceled and the unit would be depooled through the following June 30. On July 1 the unit could be reinstated as a declared pool unit. During the period that the plant or bulk tank unit is depooled, any Class I milk of such plant or unit would be priced and equalized in accordance with the provisions relating to partial pool plants or partial pool units from the effective date of cancellation through the subsequent June 30.

The 5- and 10-percent levels of required Class I use by handlers adopted herein will assure that handlers will share more equitably the responsibility of furnishing milk for Class I purposes. At the same time, such percentages are not so high as to require that large volumes of milk be moved unnecessarily solely to qualify it for pooling.

It is evident from the hearing record that adoption of the minimum Class I use standards for handlers at the levels adopted herein will not provide adequate supplies of milk to the fluid market during the five qualifying months when more than 40 percent of the market's milk is normally needed for Class I purposes. However, much of the milk needed for fluid use is already controlled by the fluid milk processors who use the milk. In addition, it is expected that supply commitments between shippers and distributing plant operators will fill the gap between required and necessary shipments.

As a provision for occasions when such commitments do not assure needed levels of supply, the market administrator will retain the authority to issue a "call" for needed milk supplies. The authority for a "call", while effective for assuring that temporary needs for additional shipments are met, should not take the place of basic shipping requirements. The procedure for issuing a "call" requires the market administrator to hold meetings, usually on an urgent basis, involving all of the handlers in the market to determine the desirable utilization of all milk shipments. The use of this procedure on other than an irregular basis is unnecessarily burdensome and expensive. Adoption of minimal shipping requirements and the resulting relationships expected to form between suppliers and fluid processors should result in more orderly marketing conditions.

Dietrich and Kraft were concerned that adoption of mandatory performance

standards would not provide the necessary flexibility to deal with changing supply/demand conditions. They suggested that the market administrator or the Director of the Dairy Division be given the authority to revise the performance standards if marketing circumstances change. The current provisions of Order 2 that give the market administrator the authority to establish a desirable level of Class I use of milk received from dairy farmers also give the market administrator the authority and discretion he needs to respond to changing supply/demand conditions by raising or lowering the minimum Class I utilization percentages adopted herein if he finds that an adjustment is warranted.

Two producer groups (Oneida-Lewis Milk Producers Cooperative and National Farmers Organization) and the New York State Grange filed exceptions to the adoption of minimum shipping standards as a qualification for pooling under Order 2. National Farmers Organization (NFO) referred to arguments in its post-hearing brief that were considered in the recommended decision, including an assertion that there is no evidence in the record that additional supplies of milk are needed for fluid use. Oneida-Lewis reiterated arguments that the shipping requirement will reduce fluid milk handlers' willingness to pay premiums for milk for Class I use, and therefore will reduce returns to producers. The comments argued further that the order's current provisions have more flexibility to meet fluid needs than those adopted, and that there is no reason to have both a required shipping percentage and a call provision. Exceptors again cited costly and inefficient movements of milk that would be required from distant zones to meet the shipping requirements. Oneida-Lewis suggested that if minimum shipping percentages are incorporated into the order bargaining cooperatives that do not own plants should be exempt from the requirements, stating that fluid processors who also own manufacturing plants should be required to meet their own fluid needs.

Farmland Dairies, Inc., excepted to the low level of shipping standards proposed in the recommended decision, stating that the market needs flexible and innovative shipping standards that require handlers having low Class I use that are located nearest to the fluid market to be the first to provide milk to fluid processing plants.

There is ample testimony and evidence in the record of this proceeding from which to conclude that some handlers are evading their responsibility to provide milk to supply the fluid milk

market. The call meetings that were held in 1984 and 1985, a subsequent call for additional supplies of milk for fluid handlers, and the operations of an ad hoc group of Class II handlers that was formed to arrange for milk to be moved from suppliers to fluid handlers all reflect extra-ordinary steps that had to be taken to assure the market of adequate supplies of milk for fluid use.

The existence of fluid milk plant operators who control large supplies of producer milk for the purpose of supplying the needs of their fluid milk plants and auxiliary manufacturing operations does not relieve other handlers and producer groups of all responsibility for supplying the market's needs for fluid milk. Such handlers contribute their full share of milk for the market's Class I needs. Their use of milk for manufacturing uses should become a matter of concern only when the percentage of their milk supply used for Class I purposes falls below the marketwide average of Class I use.

All of the arguments included in the exceptions to the adoption of minimum shipping percentages were considered and responded to in the recommended decision. Because the existing call provisions of the order will be combined with very minimal required shipping percentages, Order 2 will have more flexibility in responding to the level of fluid processors' needs for milk supplies after the shipping requirements are incorporated than it had before. It will also have a measure of equity that has been lacking. A situation in which some handlers and producers are able to withhold their milk from the fluid market for their own, more profitable, uses and still expect to share fully in the benefits of the order's blend price, enhanced above the manufacturing milk price by the higher-valued fluid uses, is neither equitable nor orderly. The shipping requirements adopted in this decision are minimal, but will assure that all of the market's participants supply a small portion of the market's fluid needs in return for a share of the value of those sales.

It is not necessary to modify the required Class I utilization percentage for temporary pool plants to agree with the percentages adopted for regular pool plants, as proposed by Oak Tree. These temporary pool plant utilization percentages apply principally for an initial 12-month period during which handlers are qualifying their plants for designation as "regular pool plants". For that reason, the standards apply year-round at higher performance levels. The standards adopted in this decision apply during five months of each year only to

handlers operating designated pool plants and units. The standards serve the purpose of maintaining handlers' permanent pool designations, and are set at considerably lower performance levels than the temporary pool plant standards. It is not necessary for regular and temporary pool plants to be subject to the same required Class I use percentage. Therefore, no changes are needed in the current performance requirements for temporary pool plants.

One additional proposal related to the pooling standards for Order 2 market suppliers was considered at the hearing. Friendship Dairies, Inc., an Order 2 handler primarily engaged in manufacturing Class II products, proposed that a handler's pool designation for plants and/or bulk tank units not be subject to suspension or cancellation for failure to meet the minimum pooling requirements if the handler is able to convince the market administrator that fluid operators refused to buy milk because they consider the price too high. The handler explained that a fair price for milk deliveries to fluid processing plants could be significantly higher than the order's Class I price because it would include allowances for certain handling costs.

Proponent contended that supplying handlers should be permitted to recover the entire direct cost of making required shipments of milk to fluid milk plants. To accomplish this, the witness for Friendship contended that the order should establish a basic "floor price" under which shipping handlers would be excused from meeting the order's minimum operating requirements without jeopardizing their pool designations. As proposed, the floor price would reflect the location value of milk at the purchasing fluid milk plant plus the shipping handler's extra expenses associated with gathering the milk, premiums that are paid to producers or cooperatives, and transporting costs not paid for by producers.

In support of its proposal, Friendship testified that during the fall of 1984 and the winter of 1985, all of the milk it offered for sale was accepted by fluid plants. However, the prices Friendship received for such milk were only slightly above the Order 2 minimum Class I prices and did not begin to compensate the handler for the related costs involved in making such shipments.

Proponent further argued that fluid handlers are using the present order provisions to obtain supplemental milk supplies from market shippers at prices that are below the cost of shipping the milk. It was Friendship's contention that

fluid operators contract with suppliers for an amount of milk that will meet their absolute minimum needs during the spring months of high milk production and relatively low demand, and then depend on other handlers to balance their needs at times when more milk is needed. The witness stated that when the short milk production season occurs, fluid milk processors claim to have a supply shortage and ask the market administrator to impose Class I utilization requirements on handlers. He argued that fluid milk dealers tend to exaggerate their supply shortfalls, and that their estimates about how many loads of milk they will need far exceed what they actually buy. As a result, the Friendship representative stated, minimum performance standards for pooling are invoked, more milk becomes available, and fluid dealers are able to avoid high handling charges for their supplemental supplies.

Other than the information provided by Friendship, the testimony regarding this proposal is rather limited. Oneida-Lewis indicated its support for the proposal but provided no additional reasons why the changes are needed and identified no specific operational problems that the cooperative has encountered that would be corrected by the adoption of this proposal.

Although no one testified against the Friendship proposal at the hearing, several interested parties indicated their opposition to it in briefs. Those opposing the proposal generally contended that this proposal was an attempt on the part of a manufacturing handler to circumvent the intent of the performance requirements by avoiding shipments to fluid processors and reserving the handler's milk supply for processing at its own plant.

Several concerns about the adoption of such a proposal were identified at the hearing through cross examination of the proponent witness. One anticipated problem would result when handlers supplying the market determine the level of price at which a handler may avoid shipments based on his or her operating costs. In this case, other handlers would not offer to sell milk at any lower prices. There would be no reason for handlers to attempt to reduce their costs by operating more efficiently because the order would provide allowances to cover any costs incurred. It was generally agreed that prices at which supplemental milk would be offered in these circumstances would tend to gravitate to the level of the handler with the highest cost of operation.

The hearing participants also argued that adoption of the Friendship proposal would frustrate the intent of the pooling

requirements by, in effect, establishing price ceilings for milk shipments based on whatever marketing costs handlers are able to justify. The opponents of Friendship's proposal argued that if the mechanism were adopted for Order 2, it would be possible for all handlers to justify the prices at which they offer to sell milk to fluid processors without being required to ship.

The Friendship proposal is denied. There should be no recognition of the costs of such activities as assembling the milk and premiums paid to producers in determining the shipping requirements. The compensation for such activities is best left outside the scope of the order provisions and determined on the basis of competition in the marketplace or through negotiations between the buyers and sellers of milk.

In addition to the problems identified at the hearing, proponent admitted that the administration of the order would be more complicated if his proposal were adopted. However, the witness took the position that the proposal is workable and should be adopted. The determinations required by the market administrator in identifying, defining and quantifying the appropriateness of a handler's cost figures for the activities for which Friendship proposes shipping handlers be compensated would involve extensive time and effort. Any additional costs to administer these additional rules would have to be paid for by regulated handlers.

The costs of performing the activities for which Friendship proposes assured re-imbursement vary widely among and within regulated markets. A determination of whether such cost figures, which cover several various aspects of milk marketing, are reasonable and therefore appropriate would be almost impossible in view of the extent of their variability, both on an intra- and inter-market basis. Such determinations would be overly burdensome.

Proponent implies in his testimony that handlers are forced to ship their milk to the fluid market and are required to meet the order's minimum performance standards. They are in fact forced to do neither. The decision to ship milk is left with the market supplier. A handler must meet the minimum performance standard by demonstrating an association with the market's Class I sales only if the shipper wishes to participate in the marketwide pool and share in its Class I sales. Although Friendship may not recover all of its direct costs on the portion (about 15 percent) of its milk that is sold to the

fluid market, the benefits realized by the handler from being able to pool all of its milk and receiving credit for it at the Order 2 uniform prices should more than offset any losses associated with making shipments.

In addition to proposing that Order 2 handlers be required to meet performance requirements in certain months, the Institute submitted a corollary proposal that would provide uniform pooling standards for Order 1 and 2 market suppliers. To align the qualifying seasons under the two orders, the Institute modified its hearing notice proposal for Order 2 by dropping the month of January as a qualifying month. As modified, the same proposed qualifying season of August-December would apply to market suppliers under both Orders 1 and 2. Also, as proposed, the performance percentages under both orders would be identical: 15 percent in August and December and 25 percent for the months of September through November. The Institute asked that the Secretary review the record data and determine whether proponent's proposed performance levels were justified. Proponent requested that if the investigation shows that different percentage levels than those proposed appear to be more appropriate, identical percentages under both orders be adopted at levels different than those proposed.

A spokesman for the Institute argued that the performance requirements for Order 1 and 2 market shippers should be identical so that they will be more favorably aligned with the pooling requirements provided under the Middle Atlantic order, in addition to those included in other Federal milk orders. The witness also contended that these coordinating changes are needed to foster competition for milk supplies between Order 1 and 2 handlers in a procurement area that is common to both markets. Proponent claimed that the extensive overlap of the milk procurement areas for these two markets makes it very important that the performance requirements for all suppliers operating in the region be the same so that a shipper's decision to market the milk of dairy farmers under one order rather than the other would be based on economics rather than the relative ease of qualifying the milk for pool status under one market rather than the other.

Generally, the fluid milk processors identified in previous findings as supporters of the Institute's proposal to impose performance standards on Order 2 market suppliers also endorsed its proposal that shipping requirements in

Orders 1 and 2 be the same, and gave the same reasons advanced by the Institute. In addition, the fluid milk processors' representatives suggested that adoption of uniform standards for shippers supplying these two markets may provide the benefit of equalizing the blend prices for the two markets as Order 2 handlers operating manufacturing plants and having equal access to both markets can be expected to shift the regulation of their plants to Order 1 to improve their pay prices to producers.

The dairy farmers, cooperatives and proprietary manufacturing plant operators identified earlier as opposing the adoption of mandatory performance standards for Order 2 shippers did not specifically address the Institute's proposal to make shipping standards for Orders 1 and 2 uniform.

In a post-hearing brief, Agri-Mark, Inc., a cooperative association that controls about one-half of the supply of milk for the Order 1 market, objected to the uniform shipping standard proposal for both Order 1 and Order 2 advanced by the Institute. The cooperative's representative contended that the level of performance required of Order 2 handlers should be based solely on the amount of milk needed to supply the Class I needs of that market. He rejected the idea that the level of shipping performance required of Order 1 handlers be determined in any way by the performance standards required of Order 2 handlers. Agri-Mark contended that if the pooling provisions of Orders 1 and 2 are not tailored to fit the unique needs of the individual markets, the orders will not be capable of responding to marketing conditions in each market.

The proposal by the Institute to provide uniform pooling standards for Orders 1 and 2 should not be adopted for two reasons. First, proponent's intent cannot be accomplished by adopting the changes proposed. As already indicated, there are wide structural differences in the pooling provisions of these two orders. Under Order 2 most of the milk is pooled by handlers operating designated pool plants and bulk tank units that are not required to meet minimum performance standards. Under Order 1, plants and cooperatives generally must meet minimum performance standards to qualify their milk for pooling each month. Regardless, uniformity cannot be achieved by adopting the same minimum percentage for supply plant operators under Order 1 and handlers operating pool plants and bulk tank units under Order 2. Order 1 supply plants qualify on the basis of shipments to distributing plants while

Order 2 handlers generally are subject to minimum Class I utilization requirements only when the market administrator determines that fluid milk plants need more milk. Also, there are other pooling provisions in these two orders that affect the ability of market suppliers to qualify milk for pool status. There were no proposals considered at this hearing to eliminate these differences.

Furthermore, marketing conditions under these two orders do not justify uniform performance standards. The performance standards for market suppliers under a Federal milk order normally are dependent on the Class I utilization of producer milk. Usually, a market with a high percentage of Class I utilization has a relatively high shipping requirement for suppliers regulated under that order, while a market with a low percentage of Class I use has a lower minimum standard for such handlers. There is a significant difference in the percentage of Class I use of the milk produced by dairy farmers under these two orders. Record information shows that since 1984 the Class I utilization of pooled milk in Order 1 has been 12 to 15 percentage points higher than in Order 2, a situation which results in higher performance standards in Order 1 than in Order 2. Accordingly, the Institute's proposal for uniform performance standards for pool plants regulated under Orders 1 and 2 is denied.

The New Jersey Milk Industry Association and Dairy Lea Cooperative, Inc. filed exceptions to the Department's failure to adopt the same shipping requirements for Order 2 that are provided in Order 1. Both exceptors argued that pooling standards should be uniform between the orders to equalize the orders' utilization and blend prices. The Association stated that adoption of the Order 1 shipping requirements for Order 2 would guarantee an adequate supply of milk for fluid use under Order 2, and Dairy Lea asserted that Order 2 handlers are disadvantaged in relation to Order 1 handlers in buying milk for Class I use because of the blend price differences between the orders. The reasons for not adopting uniform pooling provisions for the two orders were thoroughly discussed in the recommended decision, and are repeated above. No reasons for adopting the proposal are given in the exceptions that have not been discussed.

The National Farmers Organization (NFO) proposed that the shipping standards for Order 1 supply plants be reduced. The cooperative modified its proposal at the hearing. Under the

modified proposal, supply plants would be required to ship 10 percent of their receipts from dairy farmers to pool distributing plants in the months of August through December to qualify the supply plants as pool plants. The proposed changes would lower the performance standards for such plants by 15 percentage points (from 25 to 10 percent) in the months of September through November and by 5 percentage points (from 15 to 10 percent) for the months of August and December. NFO also proposed that Order 1 be amended to give the Director of the Dairy Division or the market administrator the authority to return the shipping percentages to their present levels if he finds that marketing conditions warrant such changes.

NFO contended that marketing conditions have changed since the present pooling standards for Order 1 supply plants were adopted. Proponent testified that since there are only half as many distributing plants regulated under Order 1 as there were 10 years ago and 75 percent of the market's Class I sales are accounted for by eight large distributing plants, there is less opportunity for small supply organizations to qualify their milk for pool participation. To qualify all of its Order 1 milk for pooling, proponent witness testified, NFO has from time to time sold milk to distributing plants and then bought some of it back from the distributing plant operators. Such inefficient milk handling practices could be avoided, the NFO representative claimed, if the shipping standards were lowered as the cooperative proposed.

There was no testimony to support NFO's proposal to reduce the shipping standards for supply plants. There was, however, considerable opposition to such a change. Agri-Mark, Inc., and the Green Mountain Federation, two producer organizations that supply about three-fourths of the milk pooled under Order 1, opposed NFO's proposal as did Cumberland Farms and Marcus Dairy, two Order 1 distributing plant operators. The Dairy Industry Institute of New York, which proposed uniform performance standards for market suppliers under Orders 1 and 2, also opposed NFO's proposal.

Opponents argued that it would be inappropriate to lower the Order 1 performance standards for supply plants because of declining milk production in the region and increasing Class I utilization of pool milk by handlers. They also contended that the proposed changes could jeopardize the ability of fluid milk operators to obtain an

adequate supply of milk for fluid packaging.

The NFO proposal should not be adopted. As indicated by the opponents of such changes, the market's supply/demand situation does not support a reduction in the performance standards for supply plants at this time. Market data show that the annual average Class I use of pool milk by Order 1 handlers increased by one percentage point (from 52 percent) each year during the four-year period of 1985-1988. These data do not justify a reduction in the performance standards, and therefore the NFO proposal should be denied.

Since NFO's proposal to reduce the shipping standards for Order 1 supply plants is denied, the cooperative's complementary proposal to give the market administrator or the Director of the Dairy Division the discretionary authority to raise the shipping performance standards to the level of those currently in effect requires no further discussion or consideration.

A market's minimum pooling standards are not established to assure that all handlers are operating above the minimum levels. They represent the minimum levels at which handlers must operate if they wish to participate in the marketwide pool and share in the market's Class I sales. The minimum levels will affect the market's handlers differently. Some will operate far above the order's minimum requirements and others will have difficulty meeting the minimum levels. However, the inability of a single handler to meet the market's minimum standard does not automatically justify a reduction of the pooling standard. The order is not intended to guarantee handlers a market for their milk or participation in the marketwide pool. Rather, the minimum levels of performance establish standards which handlers must achieve to pool their milk. It is only when handlers choose to participate in the marketwide pool that they must meet the order's minimum performance standards.

Comments submitted by the National Farmers Organization (NFO) in response to the recommended decision excepted to the Administrator's failure to adopt NFO's proposed reduction in supply plant shipping percentages. NFO's comments stated that the recommended decision ignored data on the structural needs of the market in requiring supply plants to ship 25 percent of their receipts to pool distributing plants when only 12 percent of the milk so shipped is used in Class I.

The cooperative association reiterated its argument that many of the required

shipments made by NFO are not needed, and must be repurchased by the cooperative and delivered elsewhere. NFO's exceptions asserted that the recommended decision was based solely on marketwide Class I use, and on a "hand count" of entrenched dominant Order 1 interests which wish to maintain barriers to pooling milk on Order 1 for the purpose of keeping the Order 1 blend price above the Order 2 blend. According to NFO's exceptions, consideration of marketwide Class I use is inappropriate for determining supply plant shipping percentages because those percentages should be determined only on the basis of the amount of milk needed from those plants rather than the amount of milk needed for Class I use for the whole market.

Supply plant shipments to distributing plants have been displaced in importance to some extent by direct shipments from producers' farms, as NFO states. However, the current provisions of the order allow such direct shipments by cooperative associations to be included with their qualifying shipments from supply plants for the purpose of determining pool plant qualification. This structural change in Order 1 marketing conditions should not affect any cooperative's ability to assure the pool status of its supply plants, although it certainly could cause the percentage of milk priced in Class I to be reduced in the zones in which supply plants are located.

Although the percentage of milk from supply plants allocated to Class I has clearly declined over the 10 years preceding the hearing, that percentage still exceeds the 10-percent level of qualification proposed by NFO. In addition, contrary to NFO's assertion that only milk needed for Class I use should be required to be shipped to distributing plants, some of the Class II use at distributing plants is unavoidable. Shrinkage, standardization of producer milk to a lower butterfat content, and the necessity of offering a full line of fluid products that includes fluid cream products, require that distributing plants receive at least 5 percentage points more of total producer milk than they use in Class I.

In a market such as the New England market, where the percentage of milk needed for Class I use clearly is increasing, however gradually, there is no justification for reducing the percentage of a cooperative association's milk supplies that must be delivered to fluid processing plants if the cooperative member producers are to share fully in the benefits of the blend price derived from the market's Class I

sales. The 25-percent qualifying standard is effective only for the months of September through November, and that percentage is reduced to 15 percent for the months of December through August. There are no pool supply plant shipping standards for other months of the year if these percentages are met during the fall months when demand for fluid milk is strongest in comparison with the supply of producer milk. It is difficult to see these percentage requirements as excessive in a market in which nearly sixty percent of the milk produced is needed for Class I use in some months.

(c) *Qualification of producer milk for pooling.* Order 2 should be amended by replacing the requirement that each producer's milk be delivered to a pool plant or a plant from which Class I-A milk is distributed in the marketing area on one day during the first month the producer's milk is pooled with a requirement that each producer produces milk approved for fluid consumption by a duly constituted regulatory agency. A handler proposal which was neither supported by the proponent nor testified to by any other participant at the hearing, to include in the Order 2 pool any milk that does not qualify for pooling under another Federal order, is not considered further. A proposal by NFO to increase the amount of milk that may be moved directly from producers' farms to manufacturing plants and retain pool status under Order 1 is denied.

Order 2 currently requires that when a bulk tank handler adds a new producer to his or her pooled unit he or she must deliver the milk of that producer to a pool plant or a plant that has Class I-A route distribution in the marketing area on one day during the first month that the new producer's milk is pooled by the unit operator. This "touch-base" requirement also applies to producers who shift from one handler to another even though the dairy farmer's milk was pooled previously under Order 2 by a handler who was so regulated.

The changes relating to delivery requirements by milk producers were proposed by Agri-Mark, Dairyalea and Eastern, three dairy farmer cooperatives that represent more than 30 percent of the producers whose milk is pooled under Order 2. Proponents testified that the producer delivery requirement should be deleted from the provisions relating to bulk tank units. At the same time, they stated, the producer definition should be expanded to include only the milk of dairy farmers that is approved for fluid consumption by a duly constituted regulatory agency, and the

pool milk definition should be revised to exclude any milk that is not approved by such a regulatory authority. Proponents contended that the proposed changes will allow handlers to operate more efficiently by eliminating many uneconomic milk movements while accomplishing the objective served by the "touch-base" provision.

The hearing testimony on this issue is rather limited. Brief statements in support of the proposals were made at the hearing by three Order 2 handlers (NFO, Conesus Milk Producers Cooperative Association, Inc., and Empire Cheese, Inc.). These handlers testified in favor of the elimination of the touch-base requirement and contended that such action will give Order 2 handlers the flexibility to operate more efficiently. Several other interested parties supported the proposed changes in briefs filed after the hearing. There was no opposition to the proposals.

Proponents' witness, a Dairyalea representative, testified that the touch-base requirement was included in Order 2 to demonstrate that a dairy farmer's milk had the necessary health approval to be sold and used in the marketing area for fluid purposes. He also indicated that the state regulations covering milk inspections have changed dramatically over the years and that now before a handler picks up a dairy farmer's milk the producer's milk must be approved by the regulatory agency which has jurisdiction over milk quality issues. Proponents contended that in certain cases the producer delivery requirement has caused economic hardships for Order 2 handlers. The cooperatives' witness cited two examples to indicate the types of economic problems marketing organizations have encountered because of the requirement.

In one example given by the witness, when Dairyalea wishes to add to its bulk tank unit a new producer who is situated near its nonpool manufacturing plant at Adams, New York, the cooperative must deliver the milk of that dairy farmer on one day of the first month to its fluid processing plant in Syracuse or to some other pool plant. If the cooperative fails to do this, the producer's milk is not eligible for pooling. Such movements cost the association money both in terms of the time and extra hauling that is involved. In addition, failure to deliver the producer's milk to a pool plant in the first month the producer is on the market would be costly to the cooperative because Dairyalea would lose the difference between the Order 2

blend price and the Class II price on the amount of milk that is not eligible for pooling.

The witness also testified that Dairyalea has incurred similar losses because of this requirement when one of its affiliated member cooperatives, whose milk is reported to the market administrator and pooled by Dairyalea, takes on a new producer but fails to notify the cooperative who is the responsible handler. Here again, Dairyalea either loses the difference in the amount of money it costs to haul the producer's milk to a pool plant instead of a nearby manufacturing plant on one day during the first month, or loses the equalization payment on the milk that is not eligible for pool status if the producer's milk is not delivered to a pool plant during the month. Proponents hope to avoid such losses with the adoption of their proposed amendments.

The record shows that there are extensive State and Federal regulations in place to determine whether a dairy farmer's milk is eligible for fluid consumption and thus eligible to be pooled under Order 2. It shows that the States of New York, New Jersey, and Pennsylvania, which comprise most of the Order 2 procurement area, have extensive regulations to assure that only high-quality milk is being produced and shipped to the fluid market. All three states follow the Pasteurized Milk Ordinance issued by the U.S. Public Health Service (USPHS). Also, each of the states has a training program for its milk inspectors. Only after the successful completion of the training program are such persons certified as licensed milk inspectors for the respective state.

Another evaluation of the area's milk quality is done by the USPHS. These ratings are performed routinely about once every 18 months and may be performed randomly at any time. The milk regulations covering the three-state area also require that advance notice be given to the appropriate regulatory authorities if a producer shifts deliveries from one handler to another. In New York, the appropriate regulatory authorities must be notified at least 72 hours before a change in marketing agents occurs so that the responsible agency has enough time to complete its investigation. Pennsylvania and New Jersey only require 24-hour advance notice be given to the appropriate health authorities because they accept the health ratings issued by the other two states.

The evidence supporting the changes proposed by the cooperatives is overwhelming and those changes are

adopted herein. As proponents contended, removal of the producer delivery requirement will eliminate the need for handlers to incur extra hauling costs merely to satisfy the producer touch-base requirement. Furthermore, the two corollary changes proposed by Agri-Mark, DairyLea and Eastern in the definitions of pool milk and producer will accomplish the intent of the touch-base requirement in that such changes will insure that only milk which meets the quality requirements of a duly constituted regulatory agency will be eligible for pooling under Order 2.

NFO proposed that Order 1 handlers be permitted to move a greater percentage of their milk supplies than is currently allowed under the order's producer milk definition directly from producers' farms to manufacturing plants. Specifically, the cooperative proposed that the percentage of a handler's receipts that may be delivered directly to nonpool plants be increased by 15 percentage points each month (from 35 to 50 percent in the months of September through November and from 45 to 60 percent during the months of December through August).

NFO testified that its proposal to increase the amount that handlers may ship directly from the farm to manufacturing plants is a complementary change to its proposal to decrease the shipping standards for Order 1 supply plants. The cooperative's witness testified that the order's present diversion limits are overly restrictive and cause market inefficiencies. To assure that all of its milk is eligible for pooling each month, the witness stated, NFO receives at its pool supply plants milk from dairy farmers that is ultimately destined for manufacturing plants. Proponent indicated that many, if not all, of such uneconomic movements and milk handling practices could be eliminated if the diversion allowances were increased as proposed by NFO.

As was the case with NFO's supply plant proposal, there was no support for the cooperative's proposal to increase the diversion allowances for Order 1 producer milk. The interested parties who opposed lower shipping requirements (Agri-Mark, the Green Mountain Federation, Cumberland Farms and Marcus Dairy) also opposed higher diversion allowances, primarily because such a change could jeopardize the availability of milk supplies at fluid plants.

Opponents to NFO's proposal stated that the current supply of milk in the New England market does not assure pooled handlers of all the milk they want, and that relaxation of diversion limits could create problems in assuring

an adequate supply for the fluid milk market. Given the market's Class I utilization percentage of around 60 percent during the market's months of low production and relatively high demand for Class I use, it would not be reasonable to allow diversions of 50 percent of the market's milk supply to be diverted to nonpool manufacturing plants during the months of September through November.

Since marketing conditions in New England do not justify any increase in the limits on diversions of producer milk to nonpool plants and NFO's complementary proposal to reduce supply plant shipping requirements is denied earlier in this decision, the proposal to increase diversion limits is also denied.

3. Seasonal payment plans. No change should be made in the seasonal incentive plans for paying producers supplying the New England (Order 1) and New York-New Jersey (Order 2) markets on the basis of this record.

Presently, Orders 1 and 2 provide identical "Louisville", or "take-out pay-back", seasonal payment plans. Under these plans money is withheld from payments to producers supplying the markets during the relatively high production months through deductions in the computation of uniform prices. In both orders, the amounts deducted are 20 cents per hundredweight in March, 30 cents in April and 40 cents during May and June. The funds withheld for the months of March through June are returned to dairy farmers supplying the markets by means of additions to the marketwide pools during the months of relatively lower milk production. Twenty-five percent of the aggregate amount of money withheld is returned in August, 30 percent in September and October and the remaining funds plus accrued interest are paid back to dairy farmers in November. The plans were adopted under the two orders to encourage level milk production throughout the year.

Agri-Mark, Inc., DairyLea, Inc., and Eastern Milk Producers, Inc., three cooperatives whose members supply a large portion of the milk pooled under Orders 1 and 2, proposed that the current seasonal incentive plans for paying producers under the orders be replaced with seasonal base-excess plans. The cooperatives' spokesman testified that this change is needed because a seasonal base-excess plan would be more effective than the current payment plan in moderating seasonal variations in milk production in the two markets. The proposals considered at the hearing included detailed provisions to implement seasonal payment plans

under the two orders. The proposals would establish August-November as the base-forming months and the other eight months as base-paying months, and define excess milk deliveries by individual dairy farmers. The proposals provide a method to compute bases for individual dairy farmers whose milk was received by pool handlers, by plants that become pool plants during or after the beginning of the base-forming period, and by handlers regulated under more than one of the three northeast orders. They also provide for a minimum base allocation for producers without established bases, and for those whose amount of higher-valued base milk would be greater if computed by using the minimum percentage allocation than by using their established bases.

Under the proposed seasonal base plan, a blended or uniform price would be computed by dividing the total value of the pool by the hundredweight of producer milk pooled. The excess price would then be determined by subtracting \$1.00 from the blended or uniform price, and the value of excess milk in the pool would be calculated by multiplying the hundredweight of excess milk by the excess price. The base price would then be calculated by dividing the difference between the value of all of the producer milk in the pool at the blended or uniform price and the value of excess milk in the pool by the hundredweight of base milk. Accordingly, producers having a higher than average percentage of base milk would receive a higher price per hundredweight for their production than producers with a lower than average percentage of base milk.

The proposed base-excess payment plans also include various rules that relate to the establishment and transfer of bases. Briefly stated, an average daily base would be computed for a producer on the basis of milk deliveries to the market during the months of August through November. This base would be used to make payments to the dairy farmers during the months of January through July and December of the next year. For milk deliveries up to the amount of the average daily base computed for a dairy farmer, the producer would receive the higher uniform price for base milk. For deliveries in excess of assigned bases, producers would receive a lower uniform price.

In addition to proponents' basic contention that the proposed base-excess plans would be more effective than the current Louisville plans in leveling seasonal variations in milk production under Orders 1 and 2, the

witness for proponent cooperatives offered several other reasons for supporting the proposals. He testified that since there is less milk available in these markets now, it is more important that the milk produced be made available for the highest class of use by providing a monetary incentive for dairy farmers to produce milk when the fluid demand for it is greatest. According to the witness, such an adjustment by producers would alleviate the problems Class I handlers have experienced in obtaining milk during the fall months. Proponent also claimed that leveling the seasonality of milk production would match more closely the amount of milk produced by dairy farmers with the amount demanded by processors, and thereby make the entire industry more efficient by lowering the cost of procuring additional supplies in the fall and disposing of surplus milk in the spring.

The proponent witness further argued that shifting production from spring to fall would increase the total income of dairy farmers because they would produce more milk in the fall, when milk prices are highest. In addition, he stated, by eliminating the current "take-out" from the uniform price computation in the spring, farmers' cash flow positions would be improved when farming expenses are greatest.

The spokesman for the three proponent cooperatives acknowledged that milk production for the New England market has leveled off considerably under the payment provisions of the current Louisville plan. He insisted, however, that the base-excess plan is needed in Order 1 as a maintenance program to assure that the market's milk production will continue its relatively level pattern rather than revert to a more seasonal pattern.

In a post-hearing brief filed by Agri-Mark, the cooperative argued that base-excess plans are needed more when milk supplies are scarce, as they are now, than when they are more than adequate, in order to distribute the available supplies evenly throughout the year.

The three cooperatives' base-excess proposals for Orders 1 and 2 were supported at the hearing by only one other producer group (Pennmarva Dairyman's Federation). Pennmarva consists of four individual cooperative associations: Atlantic Dairy Cooperative; Dairyman, Inc.; Maryland and Virginia Milk Producers Cooperative Association; and Valley of Virginia Milk Producers Association. These four cooperatives market most of their members' milk under the Middle Atlantic order (Order 4).

None of the Pennmarva cooperatives markets milk under Order 1, and only one of the member-cooperatives (Atlantic) markets a small amount of producer milk on Order 2 each month. For that reason, the Pennmarva spokesman limited his support to adoption of a base plan under Order 2. Pennmarva's witness testified that Order 4 producers have operated under a base-excess program since March 1971. He testified that the plan has been effective in leveling milk production throughout the year and by so doing has ensured orderly marketing. The witness contended that the same results would be achieved if the proposed base-excess plan were provided for Order 2 producers.

The National Farmers Organization (NFO), a national cooperative association which represents about 320 dairy farmers who supply 18 million pounds of milk per month for the Order 2 market and about 250 producers who supply 14 million pounds of milk per month to the Order 1 market, also testified with respect to the proposed base plan.

NFO agreed in principle that base-excess plans should be designed to encourage level milk deliveries by producers throughout the year, but objected to using such plans to penalize dairy farmers for producing too much milk. For these reasons, NFO testified that it could support the base plans proposed for Orders 1 and 2 only if two modifications were incorporated into the amendatory language. First of all, NFO proposed that handlers pay a 15-cent surcharge on all class uses of milk to be paid to producers for their base milk deliveries. NFO claimed that producers need this additional money to cover some of the expenses associated with gearing their dairy herds toward fall milk production.

Secondly, the cooperative proposed that new milk production units be assigned market average bases and that producers who have been delivering their milk to other markets be assigned full bases from their prior production histories rather than paying such producers on the basis of fixed percentages that vary by month. A New York dairy farmer whose milk is marketed by NFO testified in support of the Order 2 base plan proposal as modified by his association.

Another New York dairy farmer speaking on behalf of Canajoharie Milk Producers, Inc. (Canajoharie), which represents 70 family farmers who supply about 4 million pounds of milk per month for the Order 2 market, opposed the proposals to provide base-excess plans under Orders 1 and 2 and testified

that replacing the present payment plans with base-excess plans would represent a dramatic change for producers covered under the two orders. He claimed that it would be inappropriate to change payment plans now and pay lower prices to producers for milk deliveries in excess of their assigned bases because such changes would tend to aggravate the deficit milk supply situation the region is experiencing.

The producer argued that a change to base-excess payment plans in these two markets would: (1) Impose extensive computational duties on the market administrator and thereby increase the cost to handlers of administering the order; (2) increase the breeding and feeding expenses of dairy farmers who attempt to increase fall production; (3) reduce or eliminate the present practice of handlers who pay premiums to dairy farmers for fall deliveries to attract greater volumes of milk; and (4) be the first step of a supply management system that ultimately would result in some type of quota program for the Northeast.

As an alternative to shifting from the present Louisville plans to base-excess plans in paying producers under Orders 1 and 2, the Canajoharie witness proposed that the current plans be updated so that the "take-out" rates reflect the same percentage of the blend prices now as they did when the rates were established at their present levels. In connection with its proposals, the cooperative witness suggested that the take-out rates be increased to the updated levels gradually over the next five years. At such time, he stated, the effectiveness of such modifications could be reviewed and the continuation of the programs evaluated at a public hearing.

A spokesman for Allied Federated Co-ops, Inc. (Allied), a federation of 22 individual cooperatives including Canajoharie that market the milk of some 1400 New York dairy farmers whose milk is pooled primarily under Order 2, also presented testimony opposing the proposed base-excess plans. He stated that there are no marketing problems associated with the present payment plans and that the supply/demand balance in these two markets has improved considerably since the present seasonal incentive plans were adopted. The Allied spokesman took the position that it would be inappropriate to adopt payment plans that would penalize dairy farmers for increasing production at a time when additional milk supplies are needed to furnish the fluid requirements of the markets' distributing

plants. For these reasons, the witness supported Canajoharie's proposal to update the current payment plans by increasing the take-out rates.

Three other members of Allied (South New Berlin Milk Cooperative, Inc., Northern New York Bulk Milk Producers Cooperative, Inc., and Preble Milk Cooperative Association, Inc.) supported the testimony presented by Canajoharie.

A witness for Lowville Producers Dairy Cooperative, Inc. (Lowville), an independent New York cooperative representing about 287 dairy farmers who pool 23 million pounds of milk under Order 2 each month, testified in opposition to the base plan proposal of the three cooperatives and to the Canajoharie proposals to modify the present payment plan. Since Lowville's milk is marketed under Order 2, the witness' testimony focused on the changes proposed for that market. The cooperative opposed the changes because the rewards to its member dairy farmers would not be sufficient to offset the higher costs associated with trying to obtain greater fall milk production from their dairy herds. The Lowville witness took the position that the present payment plan has operated to promote seasonally level milk deliveries, and that handlers who need more milk in the fall months of the year may obtain it by offering premium prices to dairy farmers.

Another independent New York cooperative association, Oneida-Lewis Milk Producers Cooperative, Inc., which pools about 2.5 million pounds of milk per month produced by its 24 member dairy farmers under Order 2, also opposed the proposed changes in the current payment provisions of Order 2. The cooperative was primarily concerned with the proposals to amend Order 2 because Oneida-Lewis markets its milk under that order. The cooperative's witness gave several reasons for opposing the base plan. He contended that the proponent cooperatives did not educate producers adequately about the effect of the base program on their monetary returns. It was his opinion that dairy farmers should understand how a base plan works before they are paid under such a program. He also claimed that the cost to farmers who manage their herds to produce greater milk deliveries in the fall would be greater than the benefits they would receive by doing so. In that regard, he estimated that a typical Northeast dairy farmer who sells one million pounds of milk annually and whose marketings vary seasonally could

lose as much as \$1700 to \$2000 a year under the proposed base-excess plan.

He argued that the three proponent cooperatives represent less than half of the producers supplying the two markets and contended that if any one of proponent cooperatives wants to reduce the seasonal variation of its members' milk production, the cooperative may operate its own base-excess plan without imposing such a program on all dairy farmers covered under the order. The Oneida-Lewis representative testified that the current payment plan has reduced the market's seasonal variation significantly over the years. He also indicated that in certain cases processors have paid premiums to dairy farmers in the fall months of the year to attract any additional milk they may need. The witness contended that the current payment plan supplemented with the optional payment practices that are available to handlers have served the market well in the past and should be adequate in the future. For these reasons, the Oneida-Lewis spokesman asked that the current payment provisions of Order 2 be continued without change.

A dairy farmer whose milk is marketed by Oneida-Lewis also testified on this issue at the hearing. Although she did not oppose the base plan specifically, she found no need for such a payment plan in Order 2. The witness took the position that New York dairy farmers need greater pooled values for their milk deliveries rather than a new method to divide the same amount of money. She was particularly concerned that processors might quit paying fall premiums to producers if the base-excess plan were adopted for the Order 2 market.

With respect to the New England market, the president of the Green Mountain Federation, which consists of four individual cooperatives (Cabot Farmers' Cooperative Creamery Company, Independent Dairywomen's Cooperative Association, Massachusetts Cooperative Milk Producers Federation and St. Albans Cooperative Creamery) that market the milk of about 1200 dairy farmers whose milk is pooled under Order 1, presented the Federation's overall position with respect to the proposed base-excess plan for that market. In addition, spokesmen for three of the Federation's member cooperatives testified individually. Essentially, they opposed the proposals to replace the Louisville plan with a seasonal base-excess plan and the Canajoharie proposal to update the order's present payment plan. The Federation's witness asked that the current payment

provisions continue to be used in paying Order 1 dairy farmers.

The Federation's witness testified that the order's present payment plan has been effective in leveling the market's milk production and that no changes in the payment provisions are necessary at this time. He testified that adoption of a base program for the Order 1 market would be an unwarranted extension of Federal regulation and would result in higher administrative costs to handlers. He contended that since this program would not increase the amount of milk produced, it would not be appropriate to adopt such a program for this particular market at the present time because supplies have been barely adequate to meet the needs of processors. The Federation opposed the Canajoharie proposal because such action would cause cash-flow problems for dairy farmers in the spring months of the year when farming expenses are higher and milk prices are lower.

Three witnesses representing St. Albans Cooperative, one of the Federation's member cooperatives, also testified in opposition to the proposed changes to the current payment provisions of Order 1. One witness testified that additional milk supplies are needed by Order 1 processors on a year-round basis to meet the market's increasing demand and contended that monetary incentives are needed now to encourage dairy farmers to produce more milk for the Order 1 market rather than applying lower prices to the excess milk deliveries of producers, as proposed.

A St. Albans' spokesman argued that this is not an appropriate time to adopt a base plan for the Order 1 market. The witness contended that since the proposed plan does not increase the market's pooled value of milk, it is ill-conceived because it provides no additional money to cover the extra breeding and feeding costs that dairy farmers would incur in gearing their herds toward greater milk production in the fall months of the year. Because of the higher costs that would be required, he stated, the net returns of some producers actually would be lower under the proposed base-excess plan than they would be if the present payment plan were continued. The cooperative spokesman contended that level milk production benefits manufacturing processors more than it does fluid milk operators. Since dairy farmers cannot make a profit producing milk at the lowest class price level, he explained, they actually would be better off if less of the market's milk supply were used for manufacturing purposes

because the blend prices they receive would be higher.

A St. Albans' witness further claimed that base plans can be operated more effectively if cooperative associations run their own programs because each cooperative can tailor its payment program to address the unique marketing conditions facing the organization. The witness stated that if the base plan is provided under the order, all of the market's producers would be included in its operation, even though individual cooperatives may face different operational problems. He also argued that it is much easier and faster for the cooperative to revise its own base plan at a board meeting in response to changes in marketing conditions than it is to amend the order's base-excess provisions under the required formal rulemaking procedures.

According to a St. Albans' witness, the cooperative adopted its own so-called "double Louisville" payment plan in 1979 to supplement the plan in the order. Under the supplemental plan, the cooperative deducted one dollar per hundredweight from payments to producers for the months of April through June, and about one-fourth of the total amount deducted was added back in paying producers during each of the following months of August through November. According to the witness, the cooperative discontinued its payment plan in 1987 to enhance the cash flow of its members during the spring months and to encourage additional milk production to meet the market's expanding demand. The witness stated that increasing the take-out amounts under the present Louisville plan, as Canajoharie proposed, would only discourage any potential increases in milk production and therefore should be denied.

A representative of Cabot Farmers' Cooperative Creamery Company opposed the base plan proposal for Order 1 and testified that the payment practices of handlers (cooperative and proprietary) in that market have created sufficient incentives to result in seasonally level milk production. He stated that these regulated parties have the ability to create and promote favorable marketing circumstances in the future. The witness contended that Order 1's existing Louisville payment plan, in conjunction with the payment practices of handlers, has established a stable regulatory environment for producers and handlers, and that the market's present supply-demand conditions do not warrant changing to the proposed base-excess plan advanced by the three proponent

cooperatives or the higher take-out rates proposed by Canajoharie.

The representative of Massachusetts Cooperative Milk Producers Federation also opposed the base-excess plan and took the position that its adoption would force milk producers out of business. The cooperative primarily objected to the application of the one dollar penalty on excess milk and claimed that its application would result in lower overall prices to farmers, who would then decide to quit milking cows.

Four handlers (Cumberland Farms, Dietrich's Milk Products, Farmland Dairies and Marcus Dairy) who are regulated under Orders 1 and 2 testified with respect to the proposals to replace the present seasonal incentive plans in those markets with base-excess plans. For the most part, the handlers took the position that since these proposals affect returns to dairy farmers and do not affect the cost of milk to handlers, the viewpoints of milk producers are more relevant than those of processors.

Cumberland Farms operates distributing plants regulated under both Order 1 and Order 2, and opposed the proposals for a seasonal base-excess plan. The handler expressed concern primarily with the provision of the proposed base plan that penalizes dairy farmers one dollar per hundredweight for deliveries over their assigned bases and reduces their income in the months of the year when their expenses are highest. He contended that a lower net income in such months could ultimately force many producers out of business and jeopardize the handler's ability to attract and retain adequate milk supplies for his plants. He further claimed that since milk supplies under Orders 1 and 2 have not been excessive during the Spring months in any of the past four years there is no reason to penalize dairy farmers for producing more milk in such months.

A Dietrich's Milk Products witness testified that Orders 1 and 2 should provide strong seasonal incentive plans. The handler operates two manufacturing outlets, one of which is pooled under Order 2, that are used regularly to dispose of the reserve milk supplies associated with the Order 2 and Order 4 markets. The Dietrich's witness supported the base-excess plan proposed by the three cooperatives because the plan's eight month base-paying period would complement the payment program the handler uses. He stated that the proposed base plans are designed to allow dairy farmers to increase production during the base-forming months by paying producers the market's blended prices rather than

base and excess prices in such months. The Dietrich's spokesman also supported, as an alternative, the Canajoharie proposal to update the take-out amounts under the present Louisville plans for the two markets if the Department found that such a change would be more effective than the base-excess plans in promoting level producer milk deliveries throughout the year.

Farmland Dairies, the operator of an Order 2 fluid milk plant at Wallington, New Jersey, did not take a position at the hearing either for or against the proposals to change the present payment plans under Orders 1 and 2. In a post-hearing brief, however, the handler cited the testimony of several dairy farmers and contended that the record shows that base-excess plans are not needed in these markets. The brief argued that if any changes in the present payment plans are found to be necessary, modification of the present Louisville plans should be adequate. The handler's brief stated that the record of this proceeding shows that the difficulties and expenses incurred by dairy farmers in attempting to increase milk production in the fall months of the year were underestimated by proponents, and that the proponent cooperatives did not adequately inform producers about the proposals and their impacts on dairy farmers.

A witness for Marcus Dairy, the operator of an Order 1 distributing plant, testified in support of some type of seasonal incentive plan to level out milk production. He claimed that adoption of a base-excess plan would complicate the mechanics of computing his producer payroll because numerous additional mathematical calculations would be involved. Since fewer such tasks are required under the Louisville plan, the Marcus witness favored the alternative proposal, advanced by Canajoharie, to update the take-out and pay-back amounts under the present Louisville plans for the two markets.

The evidence adduced at the hearing clearly indicates that there are wide differences of opinion among interested parties regarding the proposals to revise the producer payment provisions of Orders 1 and 2, either by replacing the Louisville plans with base-excess plans, or by updating the take-out amounts of the current Louisville plans in the orders. With the exception of the evidence presented by the three proponent cooperatives to support a change to seasonal base-excess plans for Orders 1 and 2, a number of interested parties, including individual dairy farmers, cooperatives and milk

dealers, testified in opposition to such a change for numerous varying reasons, described above.

Both types of seasonal payment plans (Louisville and base-excess) provide incentives to attain a desired level pattern of milk production. Both types of payment plans are specifically authorized by the Agricultural Marketing Agreement Act. However, there is no conclusive evidence in the record of this proceeding from which to conclude that one plan would be more effective than the other in leveling out seasonal variations in milk deliveries under these two orders. In the final analysis, the question of which seasonal plan should be used must be decided primarily on the basis of the wishes of the producers affected. It is evident from the record that neither the base-excess plans proposed by the three cooperatives nor the alternate Canajoharie proposal revise the present Louisville plans is favored by an overwhelming majority of the producers supplying these markets. The three cooperatives proposing the change from the Louisville plans to the seasonal base-excess plans in these two markets represent less than 50 percent of the Order 1 market and only slightly more than 30 percent of the Order 2 market.

While the base plan opponents did not represent all of the remaining producers they represent a sizable percentage of the producers supplying each of the two markets. The Green Mountain Federation, which represents about one-fourth of the dairy farmers supplying the Order 1 market, opposed the change proposed by the three cooperatives for that market and Allied Federated Cooperatives, which represents about 10 percent of the Order 2 producers, opposed the change for that market. Although the degree of opposition to the base plan from Order 2 producers may not be enough to justify denying the base-excess proposal for Order 2, there is enough opposition from Order 1 producers to justify denying the proposal for that order. Given the overlapping procurement areas for the two orders and the competition for milk supplies between Order 1 and Order 2 handlers, the proposed base-excess plan should not be adopted for either order if it is not adopted for both.

The record of this proceeding does not support proponents' claim that the Order 4 seasonal base-excess plan is the cause of lower seasonal variations in milk production in the Middle Atlantic market than in the Order 1 and Order 2 markets. Although the degree of seasonal variation in the Middle Atlantic market is less than in the New

England and New York-New Jersey markets, that difference existed before the adoption of either the Order 4 seasonal base-excess plan or the current rates of take-out in the Order 1 and Order 2 Louisville plans. In fact, as several witnesses opposing the proposed seasonal base-excess plans in these markets contended and the record establishes, the variations in seasonal production patterns in the Order 1 and Order 2 markets have declined markedly since the take-out rates were increased to the present level in 1972. The demonstrably lower degree of seasonal variation in Order 4, however, is as likely as not to be a result of institutional factors that were not considered in the analysis of this record or in the development of proponents' testimony. In any case, the record does not support a conclusion that a seasonal base-excess payment plan for Order 1 and Order 2 would be more effective in reducing seasonal production variations than the current Louisville payment plan.

The Canajoharie proposal to increase the take-out amounts under the current Louisville plans would cause cash-flow problems for dairy farmers in the spring months of the year when farming expenses are high, as several witnesses who objected to such proposed changes pointed out. If the take-out rates were adjusted to reflect the same percentage of present blend prices in these markets as they did when the rates became effective, the rates would have to be doubled because blend prices under these orders generally are about twice what they were in 1972.

Deductions of these magnitudes from payments to producers in certain months could be expected to cause cash-flow problems for some dairy farmers.

Also, such changes would create price alignment problems between Orders 1, 2 and 4 and the Eastern Ohio-Western Pennsylvania Order (Order 36). This issue has long been of great concern to both handlers and producers. Numerous hearings, including this one, have addressed the problem of interorder price alignment and its effect on orderly marketing through the shifting of producers between the three northeastern markets. Doubling the take-out and pay-back rates under the payment plans of Orders 1 and 2 would cause specific alignment problems in producer pay prices among neighboring dairy farmers in overlapping procurement areas involving the Middle Atlantic, New York-New Jersey and Eastern Ohio-Western Pennsylvania Federal orders. Also, if blend prices are

reduced by 80 cents per hundredweight in May and June, blend prices paid to producers located in outlying zones of the Order 2 market could be less than the market's lowest class price.

For the reasons stated herein, it is concluded that the current seasonal payment plans under Orders 1 and 2 should not be revised. The proposals to replace the present Louisville plans with base-excess plans and to increase the Louisville payment plan "take-out" rates are hereby denied.

Agri-Mark, Inc., Dairyalea, Inc., and Eastern Milk Producers Association filed exceptions to the Department's failure to adopt the proposed base-excess payment plan, and Pennmarva Dairymen's Federation expressed regret that the plan was not adopted. The comments argued that a majority of Order 1 producers favored the plan, while less than 25 percent opposed it. In addition, exceptors stated, opponents of the plan ship their milk primarily to manufacturing plant operators, who experience less impact from seasonal variations in production than fluid handlers, and do not serve the fluid market to the same extent as do proponents. Proponent's comments argued that the base-excess plan should be adopted for Order 2 even if it is not adopted for Order 1, citing the different payment plans existing in Order 2 and Order 4 even though those orders have a significant overlap in production areas. The cooperative(s) indicated that they had submitted substantial evidence on the effectiveness of the plan in distributing supplies more evenly throughout the year.

There is no question that more Order 1 producers were represented at the hearing in support of the proposed base-excess plan than in opposition to it. However, the twenty-five percent who did oppose it represent a very significant minority of dairy farmers whose concerns should be considered in determining the appropriate method of distributing pool returns to producers. The issue of whether leveling out seasonal production variations is more advantageous to distributing plant operators or to manufacturing handlers is less clear. In any event, the orders provide a means of assuring that fluid milk plants will get a certain level of milk shipments to fill their needs, especially during the short production season, by incorporating minimum shipping percentages and "call" provisions.

Although it is true that Order 2 and Order 4 have different producer payment plans and overlapping procurement areas, the record gives no

indication that the degree of competition for supplies of producer milk that exists between Order 1 and Order 2 handlers is even approached between Order 2 and Order 4 handlers. On the other hand, there is abundant testimony about the difficulties experienced by Order 1 and Order 2 handlers who compete with each other in trying to maintain milk supplies in eastern New York State. Adoption of a base-excess payment plan for Order 2 under these competitive conditions would just add one more factor for producers to consider in determining where to ship their milk.

Finally, assertions as to the effectiveness of the proposed plan were by no means persuasive, nor was any significant problem of extreme seasonality of production shown to exist. A comparison of the three-year periods of 1968-1970 and 1985-1987 show that seasonality of production declined in Order 1 and Order 2 by 40 percent and 25 percent, respectively. During the same period, seasonal variability in Order 4 appears not to have changed at all.

In addition, it is unlikely that the proposed base plan would have the effect desired by proponents. Although producers initially might be impressed with the plan's \$1.00 per hundredweight penalty (\$1.00 less than the uniform price) for producing excess milk, they surely would realize quickly that the base "premium" would amount to no more than 22 cents over the market's uniform price.

According to calculations based on proponents' estimates and Order 2 market statistics, the average Order 2 producer would receive approximately 33 cents more per hundredweight under the proposed base-excess plan than under the current Louisville plan during the "take-out" months of March through June. In the fall "pay-back" months, however, such a producer would receive approximately 40 cents more per hundredweight under the Louisville payment plan than under the proposed base-excess plan. Given these differences, it is difficult to believe that producers would be more likely to shift their production from spring to fall under the proposed base-excess plan than they would under the current Louisville plan.

In connection with the base-excess plan proposals of Agri-Mark, Dairy-Link and Eastern, Pennmarva submitted a proposal to revise the method of computing bases for producers whose milk deliveries are split between Orders 2 and 4 during the base-forming period. Since the base-excess proposals are not adopted herein, Pennmarva's coordinating change is unnecessary and

no further action on the proposal is warranted.

The three proponent cooperatives also asked that the dates by which handlers must submit producer payrolls be advanced by five days under Orders 1 and 2. The primary reason for moving the reporting deadlines ahead was so that the market administrator would have the information to compute bases for individual dairy farmers. Since the base-excess plans are not adopted herein, there is no real need to advance the date by which handlers must submit their producer payrolls, and the proposal is hereby denied.

A proposal by Canajoharie to require Order 1 and Order 2 handlers who are paying producers to furnish them with the rate of deductions and subsequent additions in the payments for the months when the Louisville plan is in operation should also be denied. Although several hearing participants supported the proposal by stating that not all producers are fully aware of how their payments are affected by the Louisville plan, such a requirement would place an unnecessary and burdensome reporting requirement on handlers.

The impact of the Louisville plan on the blend or uniform price paid to producers is included in the market administrator's market information bulletins in both orders. Since the information is already available to all producers, there is no reason to require handlers to supply it.

4. Location pricing, zone pricing and transportation credits.

a. *Order 2. Modification of transportation allowances.* The New York-New Jersey order provisions providing transportation allowances should be adjusted to more closely relate the location value of milk under the order to the costs incurred in transporting milk from farms and country plants to distributing plants in the major consumption centers of the market. The present transportation differential rates of 2.2 cents per hundredweight for each "inside" 10-mile zone that is less distant than the 201-210 mile zone and 1.5 cents per hundredweight for each "outside" 10-mile zone that is more distant than the 201-210 mile zone should be changed to 2.5 cents per hundredweight for each 10-mile zone inside and outside the 201-210 mile zone. In addition, the 15-cent fixed transportation differential on Class I and uniform prices applicable within the 1-70 mile zone should be increased to 22 cents. The present Class II transportation differential rate of 1 cent per 25-mile zone should remain unchanged inside the 201-210 mile zone

and be eliminated outside the 201-210 mile zone. To compensate for the increased transportation allowance between the 201-210 mile zone and the New York City metropolitan area, the Class I price differential at the 201-210 mile zone should be reduced from \$2.55 to \$2.42.

A proposal that handlers located within the metropolitan New York City area be allowed a pool credit for Class I milk delivered to their plants for the purpose of defraying additional hauling charges should not be adopted.

A proposal by Kraft, Inc., to allow transportation credits to handlers who ship milk to fluid milk distributing plants was withdrawn by Kraft at the hearing, and was not supported by any testimony. The proposal will not be considered further in this decision.

Present transportation provisions. The order currently provides that milk from bulk tank producers (99.8 percent of the milk in the market) is priced essentially at the location of the farms where it is picked up in a tank truck (and thereby received) by handlers. Farms in each township are included in a price zone based on the distance, in 10-mile increments, between the township and the nearest of several basing points in the metropolitan New York City area. For pooling, accounting and pricing purposes, handlers establish farms in bulk tank units. Milk transferred from a bulk tank unit is classified in the unit according to its use at the plants to which it is transferred during the month. The handler operating the bulk tank unit accounts for the milk in the unit at its classified use value for the location of the unit. The price zone location of the unit is the weighted average zone location of the volume of milk received from farms in the unit.

Separate transportation differential rates apply to Class I and Class II prices. Prices are adjusted from the 201-210 mile base zone. The Class I milk price is increased 2.2 cents for each 10-mile zone less distant than the 201-210 mile zone and reduced 1.5 cents for each 10-mile zone more distant than the 201-210 mile zone. The Class II milk price is increased 1 cent for each 25-mile zone less distant than the 201-210 mile zone and decreased 1 cent for each 25-mile zone more distant than the 201-225 mile zone, with the adjustment limited to minus 8 cents for all locations in the 401 and over mile zone. The uniform price to producers is adjusted the same as the Class I milk price.

In addition to the zone transportation differentials, a fixed transportation differential of 15 cents per hundredweight is applicable to milk

received from farms in the 1-10 mile zone through the 61-70 mile zone, and to Class I milk received at plants in the 1-70 mile zone.

Transportation allowances are provided under the order for farm-to-first plant hauling of bulk tank milk. A pool transportation credit to handlers of 15 cents per hundredweight is provided on milk received by a handler in a bulk tank unit. Also, handlers are permitted to charge producers or their cooperatives a tank truck service charge for any farm-to-first plant hauling costs not recovered through other transportation allowances. Such a charge must be reduced by the amount that the class use location value of the milk at the plant of first receipt exceeds its class use location value at the location of the producer's bulk tank unit.

Summary of hearing proposals. Several proposals to adopt provisions that would relate more closely the location value of milk under the order to the actual cost of hauling milk, and allow handlers to more fully recover the cost of moving milk to city locations, were considered at the hearing. A witness for Friendship Dairies, Inc. (Friendship), a proprietary handler operating a manufacturing plant in the 301-310 mile zone, proposed that transportation differential rates to handlers for Class I milk be increased to 3.3 cents per hundredweight per 10-mile zone both inside and outside the 201-210 mile zone. He also proposed that the rates of adjustment to the uniform price paid to producers remain at 2.2 cents per hundredweight per 10-mile zone inside the 201-210 mile zone, and 1.5 cents outside the 201-210 mile zone. The witness testified that the 3.3-cent rate is derived from a price quotation given Friendship by a contract hauler for hauling milk from the 301-310 mile zone to the metropolitan New York City area. He emphasized that it is important for the order's transportation allowances to cover the handler's cost of hauling milk in order to assure that an adequate supply of milk can be brought into the metropolitan area. However, he stated, there is no need to change the relative value of producer milk in different zones. The witness noted that an increase in the transportation differentials applied to producers' uniform prices would result in a reduction in prices paid to producers located in zones remote from the center of the market's population.

The Friendship witness testified that the handler's proposal would have the effect of increasing the Class I price at the 1-10 mile zone by 22 cents per hundredweight, an amount that he

conceded might misalign Class I prices between Order 2 and the New England and Middle Atlantic milk order markets (Orders 1 and 4). However, he stated, he did not believe that a 22-cent difference would be substantial enough to cause alignment problems. The witness estimated that Friendship's proposal would cause a 1 cent per hundredweight increase in the uniform price paid to producers. He contrasted that result with the effect of using the same schedule of transportation differentials for both handlers and producers by stating that if Class I and uniform prices are adjusted by the same rates, the uniform price paid to near-in producers would increase, but by less than the net reduction in uniform prices to farther-out producers.

The witness commented that Friendship favors retention of the present zone adjustments on Class II milk. He stated that the plus differentials within the 201-210 mile zone enhance producer returns and create a disincentive for close-in handlers to manufacture Class II products. The witness also testified that the minus Class II differentials outside the 201-210 mile zone assist handlers in moving milk to the city from distant country locations, and that their removal would cause problems for Friendship in competing for sales of Class II products with plants regulated under the Western New York State order, which maintains its Class II price at 5 cents per hundredweight below the level of the Minnesota-Wisconsin price. Currently, the Class II price in the zone in which Friendship Dairy is located is 1 cent per hundredweight higher than the Western New York State order price.

Friendship Dairy proposed that the order be amended to require the market administrator to adjust annually the transportation differential rates applied to Class I milk to reflect the actual cost of shipping milk from farm locations to fluid milk plants, as that cost changes over time. The handler also proposed that the Class I price be announced at the city, or 1-10 mile zone, location rather than at the 201-210 mile zone. Friendship's witness stated that such a change would reduce confusion caused by pricing milk at the 201-210 mile zone under Order 2 while other orders price milk at the principal cities in the marketing area.

The New Jersey Milk Industry Association, Inc. (the Association), proposed changes to the order's location adjustment provisions that would increase the zone adjustment to 2.5 cents per hundredweight both inside and outside the 201-210 mile zone,

eliminate zone differentials on Class II milk, and increase the fixed transportation differential from 15 cents to 22 cents, moving the effective area of the differential to the 1-150 mile zone. The Association is a trade association of handlers who distribute approximately 85 percent of the fluid milk consumed in New Jersey, and a substantial amount in Pennsylvania and New York State under Orders 2 and 4.

The witness representing the Association testified that the present location adjustment structure of Order 2 causes price disparities between Orders 1 and 2 that make it possible for Order 1 handlers to pay the same Class I prices for milk that Order 2 handlers pay while paying higher blend prices to producers located fairly close to metropolitan fluid milk consumption centers in Order 2. As a result of this misalignment between Order 1 and Order 2 pay prices, the witness stated, Order 2 handlers are forced to pay premiums over the minimum order prices to obtain a milk supply traditionally associated with Order 2.

The Association witness supported the proposed increase in the location adjustment rate to 2.5 cents per hundredweight per 10 miles by pointing out that it is slightly less than the actual variable hauling cost of 2.63 cents plus 25.87 cents per hundredweight fixed cost, as determined by the market administrator's office. Furthermore, he stated, extending the 2.5-cent rate beyond the 201-210 mile zone would align the location adjustment rates for Class I milk under Order 2 with those contained in Order 1 for the same area. The witness supported the Association's proposal that the fixed transportation differential be increased from 15 cents to 22 cents and be effective at all locations within the 1-150 mile zone rather than the 1-70 mile zone by stating that such a structure would be similar to the 22-cent break between the 131-140 and 141-150 mile zones under Order 1. He also testified that as a result of such a change, blend prices to Order 2 producers located within the 150-mile zone would increase, and be better aligned with blend prices paid to Order 1 producers in the same area. The witness stated that increasing the extent of the fixed transportation differential zone and the prices applicable to producers located within it would enable Order 2 fluid milk handlers to improve their procurement and maintenance of close-in sources of milk.

The Association witness supported the elimination of zone price differentials on Class II milk by observing that milk used for

manufacturing in zones beyond the 201-210 mile zone is priced more attractively to handlers under Order 2 than milk located similarly but priced under Order 1 or Order 4. The witness stated that the minus differential on Class II milk may attract to the pool and retain some handlers operating manufacturing plants who otherwise might be regulated under another order.

The Dairy Institute of New York (the Institute), which consists of fluid milk processors and distributors with business interests centered in metropolitan New York City, proposed a pool credit to handlers on Class I milk delivered to locations within the metropolitan New York City area. The witness for the Institute testified that a credit would be appropriate because of additional transportation and other costs, such as labor, taxes and insurance, that are incurred in moving milk into some parts of the 1-10 mile zone because of that area's heavily populated and congested nature. The witness described the area inside the 1-10 mile zone as about 40 by 100 miles, delineated by the 10 basing points which define the inner edge of the 1-10 mile zone. He stated that handlers at locations to which milk is delivered over the George Washington and Tappan Zee Bridges must pay 3 cents per hundredweight over the 1-10 mile zone price to cover transportation costs. In addition, he said, milk delivered to Queens, Brooklyn and Long Island incurs an additional 4-cent per hundredweight expense. According to the Institute's witness, these additional expenses, when combined with the costs of hauling milk past the 1-10 mile zone basing points to the locations of metro-area handlers' plants, should result in larger credits than those proposed by the Institute in the hearing notice. Instead of the proposed credits of 5 cents for locations in the Bronx and Westchester County, 10 cents for the rest of New York City and Nassau County, and 15 cents for Suffolk County locations, the witness advocated that the credits adopted for the respective areas be 7.5, 15 and 25 cents.

The Institute representative argued that because handlers whose plants are located in the inner metropolitan area currently pay over-order prices to cover the greater cost of hauling milk to their plants, a credit from the pool is needed to offset those additional hauling charges. The witness stated that competition from nearby handlers who are able to obtain milk supplies at lower cost makes such a pool credit necessary so that the metropolitan handlers' costs of procuring milk can be covered

without being passed on to consumers. He explained that a change to less-restricted licensing of handlers allowed to sell milk in New York City has changed competitive relationships between handlers within the metropolitan area and those located just outside of the City. The witness estimated that the blend price paid to producers would be reduced by 2 cents per hundredweight if the originally-proposed pool credits were adopted, or by 3 cents if the amounts of pool credits proposed at the hearing were adopted.

Friendship Dairy's proposal to announce Class I and blend prices at the 1-10 mile zone instead of at the 201-210 mile zone was supported by a witness representing Oneida-Lewis Milk Producers, a small cooperative association whose members' milk is pooled under the order. The cooperative's witness stated that announcing the prices effective at the market's population center rather than where the milk is produced would make Order 2 more like other Federal orders, and would make Order 2 prices more easily comparable to prices announced under other orders. No other support for or opposition to the proposal was expressed.

Although prices under most Federal orders are announced at the location of the markets' population centers, the New York-New Jersey and New England orders have long been exceptions to that practice. Participants in both of these neighboring northeast markets are accustomed to seeing prices announced at the 201-210 mile zone (Zone 21 in New England), and comparing those prices rather than the prices effective at New York City and Boston. Given the overlapping nature of the two markets' supply areas, the present system makes it easier for producers to determine which order offers them the higher price (after considering the Order 2 15-cent transportation credit), and enables handlers to more readily compare the prices they are paying to producers with their competitors' pay prices. A change in the location for which prices are announced was proposed only for the New York-New Jersey order, and not for the New England order. Because these two marketing areas continue to share a large production area, it would not be reasonable to change the basis for announcing prices for one market without changing the other. In addition, market participants in the New York-New Jersey area have long been accustomed to having Order 2 prices announced at the 201-210 mile zone. Under these circumstances, a change of the base zone to the 1-10 mile zone

would probably be more confusing than the present system, and should not be adopted at this time.

Friendship's proposal to update location adjustment rates on prices applicable to Class I milk to 3.3 cents per 10-mile zone while leaving the present adjustment rates on blend prices to producers at their present levels should not be adopted. The proposal was supported by witnesses representing Oneida-Lewis Milk Producers and the National Farmers Organization (NFO), cooperative associations representing dairy farmers whose milk is pooled under the order; and Kraft, Inc., a proprietary cheese plant operator with nonmember producers. The NFO witness expressed his organization's opposition to any proposal that would change farm zone prices in Order 2, and supported additional transportation allowances between handler locations for the purpose of recovering actual costs of moving milk to fluid processing plants. However, he stated, when the 15-cent hauling credit on all milk is considered, the proposed 3.3-cent location adjustment rate is too high. The Kraft witness supported the concept of increasing the adjustment rates to the Class I price without changing location adjustments on producer milk because such a change would facilitate the movement of milk directly from farms to the fluid market without changing historical producer price relationships.

A witness representing Farmland Dairies, Inc., opposed Friendship's proposal to amend the order's location adjustment provisions. The Farmland witness stated that Friendship's location pricing proposals would create an advantage for manufacturing plants to obtain milk from locations nearer the city than they currently do, and would require fluid plants to go to more remote locations to obtain adequate supplies of milk. He asserted that the allowed hauling deductions would be inadequate to reimburse the fluid handler for the negative economics of the situation.

The rates used to adjust Class I and uniform prices for location should be the same. In both instances, the location adjustment rate is used to approximate the cost of hauling milk and thereby reflect its relative value at different locations. There is no testimony or data in the record of this proceeding that suggests any economic basis for establishing different rates for adjusting the values of milk at handlers' and producers' locations. The only reason given for such differentiation was that updating adjustments to blend prices, as well as to Class I prices, would reduce

prices paid to producers located far outside the market's consumption centers and thereby change historical producer price relationships. However, changes in the order's location adjustment rates are intended to reflect current costs of getting milk from farms to the fluid market, not to actually change those costs. Therefore, increases in the costs of marketing have already changed the relative location values of milk. Failure to reflect those changes by adjusting both prices paid by handlers and prices paid to producers would result in an inequitable redistribution of pool proceeds to producers distant from the market's center.

Friendship's proposed increase of the Class I location adjustment rate to 3.3 cents per hundredweight was supported by the witness representing Oneida-Lewis Milk Producers and opposed by the NFO witness. The NFO witness stated that the 3.3-cent rate is too high when the 15-cent hauling credit on all milk is considered. The witness expressed misgivings that, in some cases, location adjustments based on a 3.3-cent rate would exceed the actual hauling cost. The Kraft witness also characterized the proposed 3.3-cent rate as too high.

Order modifications. The 2.5-cent rate proposed by the New Jersey Milk Industry Association is much closer than Friendship's proposed rate to actual hauling costs as determined by the market administrator's office, and should be adopted. The market administrator's witness cited a 1984 study of hauling costs for the New York-New Jersey marketing area that showed a variable hauling cost of 2.63 cents per hundredweight per 10 miles, and a fixed hauling cost of 25.87 cents per hundredweight. The witness explained that hauling costs had not changed substantially between 1984 and 1988. A location adjustment rate increase from 2.2 cents to 2.5 cents per 10 miles, with an increase in the fixed transportation differential from 15 cents to 22 cents will cover most of the cost of hauling producer milk without overcompensating handlers for such movements. In addition, the increased rates will provide a more uniform impact on Order 2 and Order 1 producers relative to their distance from the consumption centers of their markets.

The 2.5-cent adjustment rate adopted for zones inside the 201-210 mile zone should be continued outside the 201-210 mile zone as well. Continuation of the full adjustment rate beyond the 201-210 mile zone was opposed by many of the persons and organizations represented

at the hearing. Those witnesses opposing increased negative adjustments to producer blend prices represented Oneida-Lewis Milk Producers, Conesus Producers Cooperative, Lowville Producers Cooperative, Allied Federated Cooperatives, the Hood Company (Empire Cheese), Dietrich's Dairy, Kraft, Inc., and Friendship Dairies, Inc. These cooperative associations and proprietary handlers have members and producers located in the zones in which blend prices would be reduced. Most of the milk produced beyond the 201-210 mile zone is used in manufacturing plants and classified in the market's lowest class of use. However, marketwide statistics show that in 1987, 20 percent of the producer milk pooled in units located outside the 201-210 mile zone was used in Class I. The supply of milk pooled on units located within 200 miles of New York City could fulfill all of the Class I needs of the market, but it is apparent from the marketwide statistics that considerably less than all of the milk produced in the close-in zones is used in Class I. In fact, less than half of the milk pooled in units within 100 miles of the 1-10 mile zone is used in fluid milk.

There is no indication in the record of this proceeding that hauling costs decline outside the 201-210 mile zone, or beyond 400 miles. Milk clearly is customarily hauled from distant zones for fluid use, and the order currently fails to allow for the full cost of such hauling. Given the difficulty, documented in the hearing record, that distributing plants in the market have experienced in obtaining needed supplies of milk for fluid use, it is important to ensure that all of the provisions of the order that are intended to encourage the movement of milk to the fluid market will have that effect. Assuring that location adjustment rates from distant zones to the market's center are adequate to cover hauling costs will become imperative when shipping requirements for pool eligibility are adopted.

Although the impact on producer returns of increasing minus location adjustments outside the 201-210 mile zone will probably be negative, it is very unlikely that returns to producers located in the distant zones would decline as sharply as some witnesses testified. One producer, who indicated that the present adjustment at the location of his pool unit is -13 cents, stated that if a higher negative rate were adopted the adjustment to his blend price would increase to -30 cents. In fact, the change in negative zone

adjustments would cause such a producer's adjustment to change from -13.5 cents to -22.5 cents, or a reduction of 9 cents in his blend price. At the same time, however, the amount of the allowable hauling charge that may be deducted from the producer's payout at the blend price would be reduced by 16 cents if his milk were delivered to a plant in the 1-10 mile zone.

A witness for Dietrich's Dairy testified against increasing the minus location adjustment rate outside the 201-210 mile zone on the basis that such an increase would cause a misalignment of blend prices paid to producers pooled under Order 2, and under Orders 1 and 36. The hearing record indicates that handlers regulated under Order 1 and Order 2 compete actively for milk supplies. Very little testimony was offered in reference to procurement competition between Order 2 and Order 36, and there is no evidence that Order 2 and Order 36 handlers obtain their supplies from milksheds that are intermingled to the degree the Order 1 and Order 2 milksheds are intermingled. Location adjustments are not an appropriate device to achieve equality of blend prices. However, between Order 2 and Order 1, blend price adjustments that depend on distance from the markets' consumption centers should be uniformly applied to assure that the order under which producer milk is pooled is the order under which it has the greater value. Producer prices under Order 1 have for some time been adjusted at the same rate per zone (2.5 cents) outside Zone 21 as have prices inside Zone 21. If the effect on producer prices of distance from the market center is to be uniform between the two adjoining orders, Order 2 should be amended to provide generally the same location adjustment schedule as the one that exists in Order 1.

Exceptions to the recommended decision filed by Eastern Milk Producers Cooperative Association, Inc., and Dietrich's Milk Products, Inc., stated that the location adjustment table in the amended order should not include a continuation of minus location adjustments beyond the 401-410 mile zone. The comments argued that there was no evidence in the record to support such a change, and that extension of the schedule would permit milk from distant areas to be moved to Order 2 pool plants at the expense of the pool. The note at the bottom of the schedule should be removed as exceptors suggest. In fact, the note is redundant because a later paragraph of the current

"Transportation differentials" section of the order accomplishes the same end.

Strenuous exceptions to an increase in the zone adjustment rate outside the 201-210 mile zone were received from and on behalf of dairy farmer cooperatives with members in the affected area (Oneida-Lewis Milk Producers Cooperative and 16 other Order 2 cooperative associations), over 300 individual producers, the New York State Grange, and from Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc. The comments all deplored a reduction in producer returns and predicted that dairy farming in the outer zones of the Order 2 marketing area would become economically unrewarding.

In addition, two of the exceptions, those filed on behalf of 16 Order 2 cooperative associations and on behalf of Kraft, Inc., Pollio Dairy Products Company, Friendship Dairies, Inc., and 301 of those handlers' producers challenged the factual, economic and legal bases of the recommended decision. The comments argued that the principal reason given in the decision for increasing the minus location adjustment rates was the difficulty of city distributing plants in obtaining adequate supplies of milk for fluid use testified to by witnesses who would not or could not be specific about shortages of milk or alleged excessive prices charged for the supplies of milk that were obtained. The comments further stated that in addition to being unsupported by data, much of the testimony about milk shortages and unreasonable prices was exaggerated. Exceptors pointed to testimony that no request for milk supplies for Class I use went unfilled during the 1987-88 season of short production, and that one load was even rejected, as evidence that city distributing plants have no difficulty in obtaining adequate supplies of milk. The comments argued that fluid milk distributors exacerbated their own supply situation by using some of their milk supply for Class II use and then expecting other handlers to ship milk for Class I use.

One of the exceptions complained that the recommended decision failed to discuss the weight given to relative levels of premiums paid by fluid milk processors and manufacturing plant operators in formulating the decision. Exceptors apparently find this issue relevant because fluid processors claimed that manufacturing handlers pay higher premiums than fluid processors, while data gathered by the market administrator showed fluid milk processors generally paying higher

producer premiums than manufacturing handlers.

The issue of interorder alignment was addressed in exceptions. One exception described the recommended decision as claiming to improve price alignment between Orders 1 and 2, and stated that market misalignment is furthered by the proposed changes. The exception continued by describing changes caused by the proposed order amendments in differences in producer prices under the two orders at specific manufacturing plants located in distant zones. Changes in the differences in Class I prices at some of the locations were also described. Exceptions further addressed alleged inequity between Order 2 and Orders 4 and 36 because Orders 4 and 36 would retain their 1.5-cent location adjustment rate. The exceptions stated that the transportation differential rates in other orders also should be examined if alignment of rates were a goal of the decision, and observed a lack of competition between distant-zoned distributing plants in different orders.

Further comments on the issue of alignment noted that the record contains no documentation of any competitive disruption between Orders 2 and 4 that would be caused in New Jersey as a result of increased Order 2 Class I prices at the 1-10 mile zone, and noted that Order 2 handlers receive the benefit of a 15-cent credit on some milk receipts, which Order 4 handlers do not. If there were any possibility of competitive inequities arising from an increase in Order 2 Class I prices to handlers located in the 1-10 mile zone, the exception observed, there would not have been proposals from New Jersey handlers to increase such prices.

One of the exceptions argued that milk from distant zones does not have to be shipped to city locations for fluid use, but is instead delivered to reload plants and fluid plants in distant zones. The exception pointed to testimony by a fluid handler that city handlers find that it does not make economic sense for them to develop milk supplies in the distant areas of the milkshed, and testimony from a witness representing a manufacturing plant operator that handlers who provide milk for Class I use in the city try to ship it from locations as near-in as possible. The comments observed further that it is not necessary to reduce prices on all of the milk produced in distant zones to enable the small percentage of such milk that is needed in the city for fluid use to move there.

The exceptions complained that the recommended decision did not address the intent of some proponents of the

proposal to increase rates of transportation differentials for the purpose of removing some of the Order 2 market's distant milk supply. Exceptors claimed that this purpose would be accomplished by reducing distant producers' returns for their milk production to a level which would cause them to associate their milk with another Federal order, and stated that the goals of removing milk from the market and establishing incentives for producers and handlers to ship milk to the city from distant zones are incompatible.

Several fluid milk handlers who operate fluid milk processing plants in the market's 1-10 mile zone complained that they had experienced difficulties in obtaining adequate supplies of milk at reasonable prices. The accuracy of these reports was supported by the fact that "call" meetings were held in September and December 1987 to consider the need for mandatory shipment percentages by country manufacturing plants. In addition, the need for market participants to form an ad hoc group and enlist the services of a middleman to assure fluid milk handlers of an adequate milk supply is beyond the ordinary. The record clearly shows that the actions of this specially-formed group and the people who worked with them, rather than the provisions of the order, assured that no request for milk supplies went unfilled during the period of short production and relatively high Class I use that preceded the hearing.

Class II use by fluid milk handlers of some of their own milk supplies should not make them unentitled to supplementary supplies of milk from manufacturing plant operators and their suppliers. Manufacturing plant operators should not forget that it is the Class I price paid into the pool by fluid processors that generates the uniform price they depend upon to enhance payments to their producers. The "right" such handlers and producers have to share in the market's Class I sales derives from their at-least-occasional participation in supplying milk for fluid use. Assurance that the costs of transporting milk from production areas to consuming centers are reflected in the order's transportation differentials is necessary to make such movements possible.

Exceptors' arguments that fluid handlers testified that they cannot economically procure milk from the market's distant zones, and that handlers try to ship milk to the city from locations as near-in as possible, ignore the fact that inadequate transportation differential rates are a major factor in

making long-distance movements of milk uneconomical. When the combination of milk prices at country locations and hauling costs to city processing plants significantly exceed the value of the milk at city locations under order prices, there can be no question that the procurement of distant supplies of milk is made uneconomical by the terms of the order. The higher premiums to which fluid handlers are subject in order to obtain adequate supplies of milk in the absence of adequate transportation differentials can only serve to create or exacerbate competitive problems. In applying unequally to fluid handlers similarly located, the high premium levels result in unequal costs to handlers who are close competitors.

The alignment of blend prices among orders is not intended to be a function of transportation differentials, and the recommended decision did not claim to have such a goal. However, in view of the active competition for supplies of producer milk between handlers regulated under Orders 1 and 2, it is important that neither of these orders convey inaccurate economic signals to producers regarding the relative value of their milk in the two markets on the basis of location. Therefore, the relative distance from New York City and Boston of the location at which a producer's milk is received by a handler should be reflected in equivalent transportation differentials for these two markets. Those wishing to compare prices paid to producers under Order 1 and Order 2 should bear in mind that the published Order 2 uniform price understates returns to producers by the amount of the 15-cent transportation credit.

The interorder alignment of Class I prices is an appropriate concern in formulating transportation differentials. Under the provisions adopted in this decision, the Class I price difference under Orders 1 and 2 at Pierrepont Manor, the only location used by exceptors as an example of interorder price misalignment at which milk is reloaded and transferred for Class I use, will be reduced by 8 cents. In the discussion of interorder alignment of Class I prices in New Jersey, the example of differing Class I prices under Orders 2 and 4 in the near-in zones referred to the 21-30 mile zone in New Jersey rather than the 1-10 mile zone. Although it is impossible to cite documentation of marketing disruption that has not yet occurred, the heavily populated nature of this primary consuming center and the fact that it is supplied by handlers regulated under

both orders strongly suggests that a 13-cent Class I price difference would result in a loss of sales by Order 2 handlers to Order 4 handlers. The proposals by New Jersey handlers that would have resulted in Class I price increases in the 1-10 mile zone would have affected only those handlers processing fluid milk products in New York City, not their competitors located in New Jersey.

The "benefit" of the 15-cent credit to Order 2 handlers on some milk receipts cited by exceptors shows a basic lack of understanding of the workings of Order 2. Although New York-New Jersey handlers do receive a 15-cent credit in the computation of their net pool obligation, that credit is passed through to producers when they are paid. Therefore, the credit to handlers results in absolutely no reduction in their total obligations to the pool and their producers. The exceptions also indicate that exceptors apparently fail to understand the combined effect of the order provisions for determining handlers' pool obligations and payments to producers. Handlers pay for the total amount of Class I milk they use at the Class I price adjusted for the handlers' locations.

The 1.5-cent location adjustment rate effective under Orders 4 and 36 is irrelevant in determining the appropriate rate of transportation differentials for Order 2. There was no testimony in the record upon which this decision is based to indicate that handlers in Philadelphia (or in Pittsburgh or Cleveland, to whom this proceeding did not apply) have experienced any difficulty in obtaining adequate supplies of milk for fluid use under their orders' current location adjustment provisions.

The recommended decision did not address motives of proponents in proposing increased rates of transportation differentials because they were not considered appropriate bases for the adoption or rejection of the proposals. The increase in transportation differential rates is necessary to reflect the cost of moving milk from the distant zones of the market to the primary consumption center. The uniform prices paid to producers are a result of the Class I prices effective at the locations at which Class I milk is used and the percentage of Class I use in the market. Reductions in uniform prices paid to producers in those distant zones may occur as a result of the increased transportation differential rates, but that effect is not the purpose of the increase.

An exception filed on behalf of the 16 cooperative associations stated that the

recommended decision was faulty in not adopting the Friendship proposal to apply different rates to prices paid by handlers and to producers for the purpose of adjusting the value of milk in accordance with the location at which delivery of the milk is made. The cooperatives' comments stated that the proposal would facilitate movements of milk for Class I use while avoiding drastic impact upon producers, and should have received more careful consideration. The comments also argue that there is no economic imperative in the statute (presumably the Agricultural Marketing Agreement Act of 1937) or in the Federal order system that demands that producer blend prices and handler Class I prices must be priced in equivalent zones. Other comments included the observation that the Administrator had adopted a sweeping remedy instead of a more refined one (i.e., the Friendship proposal).

As stated in the recommended decision, the record contains no economic justification for adopting different location adjustment rates for prices paid by handlers and to producers. The value of milk delivered to city consumption centers for fluid use is enhanced in proportion to the distance over which the milk must be moved. Therefore, the rate of adjustment, for both handlers and producers, should be directly related to the cost of moving the milk. At the same time, the value of milk delivered by producers should be adjusted according to the location to which it is delivered in proportion to the cost of moving the milk to that specific location.

Failure to adjust prices to producers at the same rate at which handler prices are adjusted will result in an inequitable transfer of the pool proceeds generated by high-valued fluid uses at city locations from the producers whose milk is delivered to city locations to producers whose milk is delivered to nearby country manufacturing plants at a lower hauling cost. The location adjustments in the order serve the purpose of compensating or rewarding producers and handlers for providing an economic service of benefit to handlers (delivery of milk to city locations). In the interests of equity, the producers who actually provide the service to handlers and to the market are the producers who should receive the compensation or reward for doing so.

The exception filed on behalf of Kraft, et al., cited several of the Department's decisions regarding location pricing in other marketing areas, and concluded that the recommended decision failed to follow principles of location pricing

expressed in those decisions. Official notice was taken of none of the decisions cited by exceptors. The only one of the cited decisions referred to in exceptors' brief in this proceeding was used to support arguments other than those made in exceptions. In any case, the marketing conditions existing in other marketing areas at other times cannot be used as the basis for a decision in this proceeding.

Finally, exceptors attacked the adoption of increased rates of minus transportation differentials because the analysis and findings required under 7 U.S.C. 608c(18) for the purpose of establishing prices were not performed on the basis of the record of this proceeding. Amendments to the transportation differential rates of Federal milk orders customarily are done, and were formulated under this proceeding, under the authority of section 608c(5) of the Agricultural Marketing Agreement Act of 1937, which clearly authorizes adjustments to prices paid to producers and charged to handlers on the basis of the locations at which delivery of milk is made to handlers, and not under section 608c(18).

The order should not be amended to require the market administrator to adjust the transportation differential rates annually, as Friendship proposed. If such adjustments were to be made without corresponding changes in the Class I price differential at the 201-210 mile zone, Class I price misalignment between the major consumption centers of Orders 1, 2 and 4 could create serious disorderly marketing conditions. Changes affecting price levels should be considered at public hearings, where all market participants have an opportunity to air their views.

The New Jersey Milk Industry Association's proposal to increase the amount of the 15-cent fixed transportation differential to 22 cents should be adopted. However, the Association's proposal to change the effective area of the differential from 70 miles to 150 miles from the basing points should not be adopted. The reasons given by proponent for increasing the rate and extending the area over which it is effective were improvements in the alignment of blend prices under Order 2 with those paid to producers under Orders 1 and 4, and in the resulting success of Order 2 fluid milk handlers in procuring supplies of milk.

The proposal to increase the Order 2 fixed transportation differential and expand the area over which it is effective was opposed by witnesses representing Marcus Dairy, an Order 1 pool distributing plant operator, and the National Farmers Organization (NFO), a

cooperative association with members whose milk is pooled under Order 2. The Marcus Dairy witness opposed the Association proposal because it would attract milk supplies currently pooled under Order 1 to Order 2. He stated that such a result would be counter to the purpose of the order, which is to attract milk to the fluid market. The NFO representative explained that the cooperative would not object to an increase in the fixed transportation differential if it were paid only to dairy farmers actually shipping milk into the 1-150 mile zone for Class I use, but that not all producers merely located within 150 miles of the market's center should receive the benefit of the proposed increase.

The purpose of the present fixed transportation differential is to reflect the fixed cost of transportation in the Class I price for both direct-shipped and reloaded milk. The hauling cost analysis described by the market administrator's representative resulted in a fixed hauling cost of 25.87 cents. Therefore, an increase in the allowance for this component of total hauling costs to 22 cents will better enable milk to move from distant locations to the metropolitan area for use in fluid milk products. The fixed transportation differential should remain at a level slightly below the actual fixed hauling cost, however, to avoid encouragement of any unnecessary movements of milk. The 22-cent rate will also result in similar transportation allowances for producer milk moved from the common production areas of Order 1 and Order 2 to the consumption centers of those markets.

The area over which the fixed transportation differential is applicable should not be expanded to cover all of the area within 150 miles of the market's basing points. Contrary to proponent's testimony, there is no evidence that such an expansion would encourage greater Class I use of milk produced within the 1-150 mile zones. Producers located within 71-150 miles of metropolitan New York City would receive a higher blend price, but if they shipped milk to plants within the 0-70 mile zone they could be charged a like additional amount for hauling since the fixed hauling reflected in the Class I and blend prices would be moved out to 150 miles rather than at 70 miles.

In addition to failing to have the desired effect of attracting nearby supplies of producer milk, adoption of the proposed expansion of the area covered by the fixed transportation differential would have a deleterious impact on Class I price alignment between fluid milk handlers regulated

under Order 2. Under the present location adjustment structure, fluid milk handlers included in the area covered by the fixed transportation differential are located at least 70 miles from the nearest fluid processing plant that is outside the 1-70 mile zone. The plants in the 11-20 and 31-40 mile zones are located in New Jersey, or south of the metropolitan area, while the next plant distant from the basing points is in the 71-80 mile zone directly north of metropolitan New York City at Kingston, New York. The fluid milk plants nearest to Kingston and inside the 1-70 mile zone, then, are in the 1-10 mile zone, or at least 66 miles away. The existence of the fixed transportation differential at the 70-mile zone apparently has worked well since the order was last amended in 1981.

Establishing a significant price difference at 150 miles, instead of 70 miles from the basing points would create a much different competitive situation. Fluid processing plants at Menands and Albany, New York, are located in the 131-140 mile zone, or inside the proposed effective area of the 22-cent fixed transportation differential. Processing plants located in Saratoga Springs and Amsterdam, New York, are located in the 161-170 mile zone, outside of the area proposed to be affected by the fixed transportation differential, but only about 30 miles from their probable competitors in the 131-140 mile zone. The Class I price difference between these locations that would result from the Association's proposal would be 29.5 cents per hundredweight, or almost 1 cent per mile. A price difference of nearly 30 cents over such a short distance clearly would lead to an unfair competitive situation and result in disorderly marketing. Therefore, the fixed transportation differential should not be moved to 150 miles from the basing points.

At the hearing, the Dairylea witness proposed that the fixed transportation differential be incorporated in the location adjustment schedule at 180 miles from the basing points. He supported the proposal by stating that while the 140-mile distance from Boston of the fixed transportation differential under Order 1 is appropriate for that market, a 180-mile distance from the Order 2 market's consumption center would include most fluid handlers and cover most of the area in which both Order 1 and Order 2 handlers procure milk. In addition, he stated, most of the Order 2 reloading facilities are located beyond 180 miles from the basing points.

The Dairylea modification of the New Jersey Milk Industry Association's

proposal to increase the distance over which the fixed transportation differential is effective suffers from the same defect as the original proposal. The record shows that there are 7 fluid milk processing plants located outside the 171-180-mile zone, and some of these plants are located near enough to fluid processing plants in the 151-170-mile zones to result in competitive inequities due to Class I price differences. For instance, the distance from Amsterdam, New York, to Utica, New York, is 62 miles. Given a 22-cent fixed transportation differential in addition to the 5-zone difference in location at 2.5 cents per zone, there would be a 34.5-cent price difference between these two locations, or a transportation allowance of more than 5.5 cents per 10 miles.

The distance between Binghamton, New York, and Syracuse, New York, is 73 miles. There are 8 zones difference between the two locations, which would make a 20-cent difference in their applicable Class I prices when the 2.5-cents per 10-mile rate is applied. When added to a 22-cent fixed transportation differential, the Class I price difference between the two locations would become 42 cents, or a transportation allowance rate of approximately 5.75 cents per hundredweight per 10 miles.

Imposition of a 22-cent fixed transportation differential at 180 miles from the basing points would result in price differences at these actual pool plant locations that would cover more than twice the variable hauling cost of milk, and would almost certainly cause competitive disruptions for handlers whose plants are located just inside and just outside of the price break.

Under both the New England and New York-New Jersey orders, the fixed transportation differentials serve the same purpose of encouraging producer milk to move to fluid milk processing plants for use in the higher-valued Class I products. However, the differing structures of the two markets are bound to frustrate any attempt to incorporate the Order 1 location pricing structure in Order 2. In the New England marketing area, all of the distributing plants are located within the first 14 zones and most of the supply plants are located outside Zone 14. Therefore, any producer milk delivered to plants located within the first 14 zones, where the 22-cent fixed transportation differential is applicable, is delivered for use primarily in fluid milk processing plants.

In the New York-New Jersey marketing area, fluid milk processing plants are located throughout the marketing area, from the 1-10 mile zone

to the 231-240 mile zone. Manufacturing plants and transferring plants are located between the 121-130 mile zone and the 361-370 mile zone. There is no clearcut dividing line between the two types of plants, as there is in New England. Because producers pooled under Order 2 are paid on the basis of the zone location of their bulk tank units (farm-point pricing) rather than according to the location at which their milk is delivered, placement of the 22-cent fixed transportation differential at any zone inside of which there are manufacturing plants would tend to offset the incentive for producer milk to be moved to fluid processing plants in the market's center. As noted earlier, placement of the differential at just about any zone other than its present location would cause severe competitive disruptions between fluid milk handlers in nearby zones. The only other effect of changing the fixed transportation differential to 150 or 180 miles from the basing points would be to enhance by 22 cents per hundredweight the prices paid to producers located within 70-150 or 70-180 miles of the basing points. If the 150-mile distance were selected, the value of over 17 percent of the producer milk pooled under the order would be enhanced. If the differential were moved to 180 miles from the basing points, the value of 33 percent of the producer milk in Order 2 would be subject to a 22-cent higher price. Since the total value of the pool would be unlikely to change very much, the value of producer milk located farther from the metropolitan area would decline by a comparable amount.

Therefore, because an expansion of the area affected by the fixed transportation differential would not provide any incentives to increase the flow of milk to fluid processing plants and would unnecessarily reduce payments to producers located outside the proposed area, the differential should remain effective within the 1-70 mile zones, at its new higher rate.

Comments on the recommended decision filed by the New Jersey Milk Industry Association and Dairyalea Cooperative, Inc., included exceptions to the Department's failure to change the effective area of the fixed transportation differential from 70 miles to 150 or 180 miles from the basing points. The Association based its argument on the need to attract milk supplies to the New York City metropolitan area. The Association's comments also stated that the plants in Amsterdam and Saratoga that are just outside the 150-mile zone are either of little competitive consequence or part of a vertically integrated operation, and therefore would suffer little "disadvantage."

There is no guarantee that the extra 22 cents paid to producers located within the 1-150 mile zones would cause them to deliver their milk to a city distributing plant instead of to a nearby manufacturing plant. The farm-point pricing aspect of the New York-New Jersey order tends to make producers indifferent to the destination of their milk, but not to the amount of hauling costs that may be deducted for transportation.

Adoption of the proposal would, however, cause a significant transfer of income from producers located outside the 141-150 mile zone to producers located inside its outer limit. The cost to producers located more than 150 miles from the basing points of providing an additional 22 cents per hundredweight to producers located in the 71-150 mile zones would be approximately 5 cents per hundredweight. If the fixed transportation differential were established at the 171-180 mile zone, the cost to producers in the outer zones of providing an additional 22 cents to producers in the 71-180 mile zones of the basing points would be 11-12 cents. While the increase in the zone differential rate in the more distant location adjustment zones is an equitable reflection of the relative location value of milk produced in those zones, the extra reduction in price to distant producers for the purpose of distributing more money from the pool to closer-in producers would be unwarranted.

In addition, fluid milk processors located just outside the 150-mile zone would enjoy a significant competitive advantage in comparison with nearby plants subject to a 22-cent fixed transportation differential in addition to 2.5 cents per zone. While handlers located in New Jersey may not view such a price difference between close competitors located 150 miles from New Jersey as any cause for alarm, it is likely that the handlers affected would be more concerned.

Dairyalea's exceptions argued that the hearing record furnished an adequate basis for expanding the application of the fixed transportation differential for the purpose of improving the alignment of producer pay prices under Orders 1 and 2. The comments urged that instead of setting the fixed transportation differential at a specific mileage zone, the differential be associated with particular southeastern New York counties in a zone pricing structure similar to that in the New England marketing area. Dairyalea stated that the very limited movement of packaged fluid milk products between central and

eastern New York State would eliminate the problem of competition between nearby handlers on opposite sides of the fixed transportation differential demarkation line. The comments explained that bringing the Albany/Capital District area into the fixed transportation differential area would affect all of the Order 2 producers supplying the substantial fluid market that exists in eastern New York State outside of the 70-mile zone, and thereby improve producer blend price alignment in the common supply area for Orders 1 and 2. Dairylea's exceptions also argued that use of the Order 1 zone 14 as a demarkation line ignores the existence of cooperative manufacturing plants in West Springfield, Massachusetts, and Newington, Connecticut, as well as nonpool fluid plants beyond Zone 14.

While there may be some merit in Dairylea's suggestion, a proposal for such a major restructuring of Order 2 transportation differentials should not be considered without other market participants having an opportunity to provide input. Also, a proposal for the type of zone pricing that exists in the New England market may be more appropriate for an order in which the determination of prices to producers is based on the locations of the plants to which their milk is delivered rather than the locations of the farms on which the milk is produced. The farm-point pricing provisions of Order 2 provide no incentive for a producer or cooperative association to deliver milk to fluid processing plants rather than to manufacturing plants. The order's provisions that require a handler to apply a credit to the producer's hauling deduction based on the difference in zones between the farm and the plant of first receipt only serve to assure that there is no disincentive to deliver milk to city locations for fluid use.

Although there is one pool manufacturing plant inside Zone 14 in Order 1, the structure of location adjustments in that order reflect the service provided by producers located at some distance from the market center in delivering milk inside Zone 14 better than a similar structure in Order 2 would do. The existence of nonpool fluid plants beyond Zone 14 should have no effect on the location adjustment structure of the order. There is no need to assure supplies of pool milk to such handlers. Also, since these handlers currently must have less than 10 percent of their receipts of milk delivered on routes within the marketing area, it is unlikely that they would represent a significant source of competition to pool distributing plants.

Although the New Jersey Milk Industry Association proposed that adjustments to Class II prices on the basis of location be eliminated, only the minus Class II location adjustments should be removed from the order.

(References to Class II location adjustments in this discussion also refer to Class III under the amended order). The Association's witness stated that the minus Class II location adjustments allow manufacturing plant operators outside the 201-210 mile zone a regulated price advantage on the milk they use to make Class II products, and cause the pool to return to producers less than the full value of their milk. Furthermore, he stated, elimination of the zone differentials on Class II milk will result in better price alignment with Orders 1 and 4. In the event 3-class pricing were to be adopted for the New York-New Jersey order, the witness testified, there should be no zone differentials on either Class II or Class III milk.

The Association's proposal to eliminate Class II location differentials from the order was supported by Oneida-Lewis Milk Producers, Leprino Foods Company and Dietrich's Milk Products, Inc. The witnesses supporting the proposal testified that milk used in manufactured dairy products should be priced uniformly between orders to maintain inter-order competitive equity.

Elimination of the Class II location differentials was opposed by Dairylea Cooperative, Inc., Kraft, Inc., and Friendship Dairies, Inc. The Kraft, Inc., witness stated that the purpose of the Class II location differentials is to encourage manufacturing handlers to locate their plants in the market's outer zones and encourage milk produced in the inner zones to move to fluid processing plants. He testified that without minus Class II location differentials, manufacturing plant operators would experience a competitive disadvantage compared to close-in manufacturing plants because the Class II price difference between zones helps to cover the transportation cost of manufactured products.

The witness representing Friendship Dairies, Inc., opposed elimination of the Class II location differentials on the basis that such an action would enable fluid milk handlers to use supplies of milk close to the market's center for manufactured products while reaching further into the milkshed for Class I milk. The Dairylea representative stated that elimination of the Class II location differentials would disrupt the alignment of Class II milk prices between Order 2 and Order 4. As a remedy, he suggested

that the 6-cent Order 4 direct delivery differential, applicable to all producer milk delivered to locations within 55 miles of Philadelphia, Pennsylvania, be changed to apply only to milk delivered for Class I use.

Most of the concerns relating to elimination of the Class II location differentials can be addressed by eliminating only the minus adjustments. Since the price of Class II (and Class III) milk used inside the 201-210 mile zone would still increase for locations closer to the metropolitan area, manufacturing plant operators would still have an incentive to locate their operations in the market's outer zones. At the same time, maintaining plus location differentials on Class II and Class III milk used inside the 201-210 mile zone will encourage the use of close-in supplies in fluid products instead of manufactured products. The plus Class II and Class III location adjustments will also assure price alignment between Orders 2 and 4 for milk used in manufactured products. The notice of hearing contained no proposal to amend the Order 4 direct delivery differential to apply only to milk used in Class I, and there is no information in the record of this proceeding upon which to base such a change. Therefore, it is appropriate to retain the portion of the Order 2 location adjustment schedule that assures that prices for Class II (and Class III) milk used at plants in the vicinities of New York City and Philadelphia will not place the handlers of either order at a competitive advantage or disadvantage with handlers regulated under the other order.

The argument that the minus Class II location differentials are necessary to maintain competitive equity between manufacturing operations in the areas outside the 201-210 mile zone and those inside the 201-210 mile zone is not persuasive. Locations inside the 201-210 mile zone will still be subject to higher prices for milk used in Class II and Class III. At any rate, Class II and Class III products are generally distributed over a much wider geographical area than are fluid milk products. The national nature of competition between handlers manufacturing Class III products, and the regional nature of competition between handlers manufacturing Class II products, dictates that milk used in those products be subject to comparable prices.

Although Class II prices under the nearby Western New York Marketing Area are currently 5 cents lower than Order 2 Class II prices, this difference should not result in any severe competitive problems for Order 2

handlers. The volume of milk pooled under the Western New York order is only slightly more than 10 percent of the volume pooled under Order 2, with a corresponding percentage of milk used in Class II. Determining the provisions of Order 2 on the basis of the provisions of an order regulating marketing within a much smaller marketing area would be unreasonable.

An exception to the elimination of minus Class II transportation differentials was filed on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc. The comments argued that plants manufacturing cottage cheese and other soft products in Order 2 are located in the milkshed, and must pay for the transportation of their products over the distance between the plants and the market's consumption center. In other markets, the comments stated, cottage cheese and other soft products are located in or near the market centers, and do not have to be moved there after being processed. The exceptions claimed that the market-wide transportation savings obtained from processing milk at country plants benefits producers and the industry in general, and that the elimination of the minus differentials on Class II milk compounds the economic burden incurred by the adoption of 3-class pricing and the elimination of seasonal Class II price adjustments.

There is no justification for maintaining minus transportation differentials for milk used to produce manufactured products in the distant zones of the market. The location of cottage cheese and other soft product manufacturing plants in the milkshed benefits the operators of such plants at least as much as producers are saved in transportation costs. The manufacture of products such as cottage cheese has the effect of condensing the volume of producer milk that must be transported to the city. The supplies of milk for manufacturing such products in the market's distant zones are cheaper for handlers to obtain than in the near-in zones because the milk does not have to be moved as great a distance before it's volume has been reduced in the manufacturing process. Because the cost of hauling products such as cottage cheese to the market's primary consumption center after the milk's volume has been reduced is less than the cost of hauling the raw milk there to manufacture such products, manufacturing handlers in the distant zones should have an economic advantage over city handlers even without the minus adjustments.

In addition to their advantage in raw product costs, the plants manufacturing soft products in zones distant from the market's center are better-situated than their city counterparts for selling products across a broad geographical area. Contrary to exceptors' claim that producers are benefitted by the minus Class II transportation differentials, elimination of the minus adjustment will result in an increase of approximately 1 cent per hundredweight in the uniform price.

Exceptions filed on behalf of Kraft, Inc., and Pollio Dairy Products Company, and by the New Jersey Milk Industry Association and Dietrich's Milk Products stated that the plus Class II transportation differentials inside the 201-210 mile zone should not be retained if the minus Class II differentials are eliminated. One exception asserted that there is no need to assure inter-market competitive equity between plants regulated under Orders 2 and 4 in zones close to the centers of the marketing areas because there is no evidence of any such competition, and the record shows that there is little soft product manufacture near the city. The exception stated that because the Order 4 6-cent direct delivery differential is effective only within 55 miles of Philadelphia, the Order 2 plus adjustment should not apply outside the 70-mile zone without equivalent charges on milk received by manufacturers located at comparable distances from Philadelphia, Pittsburgh and Boston.

The Association commented that the recommended decision would leave Order 2 with provisions different from those elsewhere in the country, and that the principal Class II and Class III products produced in the affected area between Order 2 and Order 4 would be Class III products, with no effect on any significant amount of Class II products. Dietrich's stated that the plus Class II transportation differential had been removed from Order 1 long ago, and should also be removed from Order 2.

The record of this proceeding does not support the elimination of the plus transportation differentials on Class II and III milk used in the market's close-in zones. The market's statistics indicate that a significant percentage of the milk used in the near-in zones is used in fluid cream products and soft manufactured products in city plants. Testimony in the record places the volume of such use at approximately 20 million pounds of milk per month. In addition, the record shows that there is a nonpool manufacturing plant located in the 41-50 mile zone of

the market that uses an equivalent volume of milk for nonfluid products.

The very minor transportation differential rate of 1 cent per hundredweight per 25 miles, which has not been updated for some years, should encourage handlers to move milk to the New York City metropolitan area only for Class I use and maintain manufacturing operations in the market's distant zones. At the same time, the small difference in Class II and Class III prices between the 1-10 and 201-210 mile zones will cover a token percentage of the variable cost of moving milk for unavoidable Class II uses at city plants.

There is no reason to change the location pricing structures of the Order 1, Order 4 or Order 36 marketing areas to match the structure of Order 2. The relative locations of milk supplies and consumption centers in those markets are not at all the same as the juxtaposition of and distances between production and consumption in the New York-New Jersey area. The gradual increase in the Class II and Class III price adjustment from the 201-210 mile zone will assure that there are no significant price differences between handlers located near each other who may be competing for producer milk supplies or for sales of manufactured products. It is not possible on the basis of the record of this proceeding to eliminate all Order 2 provisions that differ from other orders.

The Order 2 manufacturing plants located in the 71-200 mile zones are located nowhere near Boston or Pittsburgh. Consequently, there is no reason to consider Class II and Class III price alignment at the 71-200 mile zones with those markets. Order 2 manufacturing plants are, however, located near (and in) the Middle Atlantic market, and price alignment between handlers producing fluid cream products and soft manufactured products under Orders 2 and 4 should be maintained. The record shows only two Order 2 pool manufacturing plants located inside the 201-210 mile zone that are subject to the plus Class II and III transportation differentials. One is located in the 191-200 mile zone, and would be subject to only a 1-cent adjustment. The other is located either just inside or just outside the Order 4 6-cent differential zone and is subject to a 3-cent adjustment under Order 2. Elimination of the plus differential in this case clearly would not improve inter-order alignment.

The addition of 13 cents to the Class I price difference between the 201-210 and 1-10 mile zones would result in a

\$3.27 Class I price at the 1-10 mile zone instead of the current \$3.14 Class I price unless the Class I price differential at the 201-210 mile zone is changed. Because it is important that the Class I price at the 1-10 mile zone not disrupt price alignment between Order 2 and Order 4, the Order 2 Class I price differential at the 201-210 mile zone should be reduced from \$2.55 to \$2.42.

The current Class I price differential effective to handlers located within 55 miles of Philadelphia and regulated under Order 4 is \$3.09, including the 6-cent direct delivery differential under that order. The nearest Order 2 basing point to Philadelphia is Elizabeth, New Jersey, 76 miles from Philadelphia. If the Order 2 Class I price differential were not reduced to compensate for the increased transportation allowance, the Order 2 Class I price differential at the 21-30 mile zone would be \$3.22. The same location 21 miles south of Elizabeth, New Jersey, would be within 55 miles of Philadelphia, and subject to a \$3.09 Class I price differential under Order 4. A 13-cent Class I price difference certainly would affect competitive relationships between handlers similarly located, and could cause fluid milk handlers to adopt changes in their operations that would assure them regulation under Order 4 rather than under Order 2. The loss of handlers with large volumes of Class I sales would have a significant negative impact on the blend prices paid to producers whose milk is pooled under Order 2.

A reduction of 13 cents in the Class I differential at the 201-210 mile zone will result in maintaining the present Class I price differential of \$3.14 at the 1-10 mile zone. In addition, the Class I price differential at the 21-30 mile zone would be \$3.09, or the same price that would be effective at a similar location under Order 4. A 10-cent increase in the Order 1 Class I differential was proposed by an Agri-Mark witness to assure continued alignment between Order 1 and Order 2. Failure to increase the Class I price level at the Order 2 1-10 mile zone would make unnecessary any change in the Order 1 Class I price differential.

A number of exceptions to the proposed 13-cent adjustment to the Class I price at the 201-210 mile zone were received. Agri-Mark, Inc., Eastern Milk Producers Cooperative Association, Inc., Dietrich's Milk Products and the 16 Order 2 cooperative associations protested that resulting reductions in producer blend prices in the distant zones of the market would worsen blend price misalignment

between Orders 1 and 2. Agri-Mark's comments suggested that instead of adjusting Order 2 Class I price levels downward from the 1-10 mile zone, Class I prices at Boston and Philadelphia be increased by 13 cents, and Dietrich's proposed that the 201-210 mile zone Class I differential be reduced by only 6 cents so that consumers and producers would bear equal burdens of the increased rate of transportation differentials. Comments filed by Dairy Lea Cooperative, Inc., stated that the recommended decision's changes in transportation differential rates do nothing to enhance producer blend prices while reducing returns to producers located outside the 201-210 mile zone by a combination of the 13-cent reduction in the 201-210 mile zone Class I differential and the increased minus rate of adjustment in transportation differential.

Exceptions filed on behalf of the 16 Order 2 cooperative associations and on behalf of Kraft, Inc., Pollio Dairy Products Company, Friendship Dairies, Inc., and 302 individual dairy farmers who ship milk to those handlers challenged the recommended decision on the basis of other Federal order decisions, lack of notice, and legal requirements of the Agricultural Marketing Agreement Act of 1937 (the "A"). The exceptions noted that location adjustments must reflect and be based on economic service of benefit to handlers, and cited a decision in the Texas market in which increases in the difference between the relative values of milk in production and consumption areas resulted in a price increase in the consumption area, rather than a price reduction in the production area.

The comments stated that the notice of hearing contained no proposals to reduce the Order 2 Class I price, and that the Department refused to hear proposals to increase the Class I price differential. The exceptions further took issue with the failure of the recommended decision to conduct an analysis of the factors required to be considered under section 608c(18) of the Act in any change in the level of prices determined by the order. The comments observed that the legal requirement of the Act to explain the changed marketing conditions that required a reduction in the level of the market's Class I price would be difficult in view of the tight supply-demand situation demonstrated in the hearing record.

The appropriate zone to be considered as the basis of the Class I price is the 1-10 mile zone. According to testimony in the record, the 1-10 mile zone is the location at which 80 percent of the Class

I milk in the New York-New Jersey market is priced. The U.S. Congress, in revising Class I differentials in a number of different marketing areas in the Food Security Act of 1985, revised the Order 2 Class I differential at the 1-10 mile zone, not at the 201-210 mile zone. Therefore, the 13-cent adjustment of the 201-210 mile Class I price represents only a change in order language necessary to implement the increased rates of transportation differentials adopted in this decision. A similar change was included in a decision updating the Order 2 transportation differential rates in a 1981 decision (46 FR 33008).

The record of this proceeding does not establish any basis for increasing the market's Class I price level. The "tight" milk supply referred to by exceptors resulted in less than 45 percent of the milk pooled under the order during the peak shipping season of September, October and November 1987 being used in Class I. The record shows instead that ample supplies of milk are produced in the marketing area, generated by a blend price that is based on the \$3.14 Class I price differential effective at the 1-10 mile zone. The solution to the tight supply of milk for Class I use is not to increase returns to producers, but instead to assure that producers and handlers of milk produced in the more distant zones of the market will find it economically possible to ship milk to the city, either directly from farms or from plants transferring bulk loads of milk.

A Class I price increase in the highest priced locations of all three northeast orders, as suggested by Agri-Mark, would result in a 6-cent per hundred-weight increase in returns to producers pooled under the three orders. Such an increase is completely unnecessary. During October, the 1987 month of highest Class I use as a percentage of producer milk for all three orders combined, the percentage of producer milk used in Class I under the three orders was 51.4 percent.

Exceptors' estimates of the impact of the changes in zone transportation differentials are, for the most part, exaggerated. Several of the comments reflect the belief that the entire 13-cent change in the Class I price at the 201-210 mile zone would be passed through as a 13-cent reduction in the blend price to producers in that zone. Other comments refer to a 5-cent change resulting from the Class I price adjustment. The change in uniform prices to producers located in the 201-210 mile zone attributable solely to the 13-cent adjustment in the Class I price differential for that zone will be approximately 5 cents.

However, approximately 3 cents of the impact on uniform prices at the 201-210 mile zone will be offset by the increase in plus zone adjustments on Class I milk and the elimination of minus adjustments on Class II milk outside the 201-210 mile zone, resulting in a net difference in blend prices to producers of approximately 2 cents. This amount represents less than .2 percent of the average uniform price to producers in 1987. During 1987, the basic formula price, upon which both the Class I and Class II prices are based, varied by 70 cents, or 6 percent of its average. Considering the much greater movements in the basic formula price, which reflects national supply and demand conditions for milk, any attempt to determine the effect of a 2-cent difference in blend prices on supply/demand conditions in the New York-New Jersey market would be an exercise in minutiae.

The attempt by exceptors to relate the findings and conclusions of this decision to the market structure and facts of the hearing record of another Federal order market is pointless. The Texas market is composed of several large and widely-dispersed consumption centers located at various distances from the market's primary production areas. The Texas market has limited manufacturing outlets, and a relatively high percentage of Class I use. The situation addressed in the decision referred to in exceptions is very different from the New York-New Jersey market, where one principal consumption center is located at a significant distance from the bulk of the milk supply, and numerous manufacturing plants are distributed throughout the production area. It is not reasonable to expect the Department to reach the same conclusions on two different records setting forth very different marketing conditions.

A proposal by the Dairy Institute of New York to allow pool transportation credits to handlers located inside the 1-10 mile zone should not be adopted. The proposal would allow transportation credits to be paid out of the pool to handlers in metropolitan New York City to compensate them for additional transportation and other costs the Institute's witness stated are incurred in moving milk into the 1-10 mile zone. The amounts of the proposed credits, as modified at the hearing, are 7.5 cents for locations in the Bronx and Westchester County, 15 cents in the rest of New York City and Nassau County, and 25 cents in Suffolk County. The witness described these areas as heavily populated and congested, and stated that the cost of hauling milk within the areas proposed

to be affected by pool credits is inflated by additional costs for insurance, taxes, labor, distribution costs and bridge tolls. He complained that handlers in the inner metropolitan area are currently paying over-order prices for hauling charges and transportation subsidies and therefore experience a competitive disadvantage in comparison with nearby handlers also located within the 1-10 mile zone but subject to lower costs in procuring milk.

The pool transportation credit was opposed by a number of handlers and an individual dairy farmer. Most of those commenting opposed the addition of such credits on the basis that they would reduce the blend price paid to producers. In addition, witnesses for Marcus Dairy, a distributing plant operator regulated under Order 1, and Farmland Dairies, Inc., an Order 2 handler, commented that adoption of the credits would create a trade barrier in the metropolitan area by reducing the cost of milk to metro-area handlers but not to their competitors located just outside the area over which pool credits would be effective. The Farmland witness added that deliveries of milk to northern New Jersey locations also involve unique transportation costs, since that area is highly congested, there are detours for bridges under repair, and toll costs apply in moving milk into northern New Jersey as well as into New York City. He also pointed out that producers would pay not only once for transporting milk to the metropolitan area, but would pay a second time through the reduction of their blend prices as a result of the proposed pool credit. The witness proposed that a direct delivery charge be imposed on all milk received at the locations specified in proponents' proposal, at the same rates proposed by proponent. Witnesses for Dietrich's Milk Products, Inc., and National Farmers Organization also commented that if higher costs are incurred in supplying a particular area of the market, those extra costs should be reflected in addition to the Class I price paid by handlers located in that area instead of being reduced through deductions from producer returns.

A witness representing Friendship Dairies, Inc., pointed out that the proposed pool credits would not benefit the producers who actually bear the cost of hauling. The handler also testified that some products such as concentrated fruit juices and liquid sugars may be back-hauled to outlying locations from the metropolitan area to defray the cost of transporting milk into the city. A dairy farmer who testified stated that additional costs to handlers should be

covered by the marketplace, and not by producers.

Witnesses for two cooperative associations, Dairylea Cooperative, Inc., and Oneida-Lewis Milk Producers, testified that the proposed pool transportation credit had merit and should be considered. The Dairylea witness noted that the order currently ignores the extra cost of moving milk beyond the basing points, and that those extra costs should be considered. The Oneida-Lewis Milk Producers witness observed that cooperatives selling milk to the metropolitan area would benefit from such sales, while cooperatives which do not move their milk into the city for fluid use would still have to bear some of the cost of supplying the fluid market.

The proposed metropolitan-area pool transportation credit should not be incorporated in the New York-New Jersey milk order. Establishing such a credit on the additional costs of moving bulk milk inside the basing points of the metropolitan area would not be appropriate. If the order were to be changed to incorporate additional transportation costs to handlers located within a particular area, such a change would more logically be made by increasing transportation allowances between the market's production areas and those destinations with which the higher costs are associated.

Proponents' assertion that they are competitively disadvantaged by having to pay the same price for Class I milk as other handlers located within the 1-10 mile zone is not credible. The extra costs incurred in moving packaged milk into the metropolitan area by handlers located just outside the proposed pool credit zones would be the same extra costs referred to by proponents in support of the proposed pool transportation credit. Furthermore, the cost of moving packaged milk is generally higher than the cost of moving bulk milk and therefore would cause proponent's competitors to be subject to higher costs than proponents' for milk distributed within the metropolitan area.

The additional costs cited by proponents that exceed increased transportation costs, such as higher costs of labor and insurance at metropolitan locations, are not expenses that should be deducted from producer returns. Such costs are part of a handler's expense of continuing in business at a particular location and would more appropriately be recovered in prices charged to consumers for processed milk.

Although proponent's arguments and data in support of a pool credit would

justify increases in the transportation differentials effective at locations within the New York City metropolitan area, the record does not reflect just what those increases should be. Proponent witness amended the original proposal by increasing the proposed rates of the pool transportation credit significantly (by at least 50 percent). Aside from the costs of bridge tolls and mileage from Hackensack (the basing point characterized as the nearest to the milkshed for the metropolitan area), it is unclear just what costs are intended to be covered by the proposed pool credit. It is also unclear whether all bulk milk moves through the vicinity of Hackensack to reach metro-area handlers, or if the distance of the metropolitan plants from some other basing point(s) should also be considered. Accordingly, neither pool transportation credits nor additional transportation differentials for New York City locations should be adopted.

Exceptions to the recommended decision's proposed disposition of the Dairy Industry Institute's proposal were filed on behalf of the Institute and on behalf of Farmland Dairies, Inc. (Farmland). The Institute's comments asserted that in rejecting the Institute's proposal the recommended decision fails to relate the location value of milk to the costs incurred in transporting it to city locations, and that the minimum pool credit proposed was more than justified by the record evidence. Also, the comments stated, the record clearly shows that for the period prior to the hearing northern New Jersey handlers did not have access to the metropolitan New York segment of the market, and that New York City handlers had not been subject to competition with lower-cost milk from New Jersey. The exceptions urged the Secretary to adopt the pool credit rates originally proposed, and failed to mention the higher rates proposed at the hearing.

Farmland's exceptions stated that the recommended decision supports the adoption of plus adjustments to the Class I price at the city locations for which the Institute proposed pool credits. Farmland argued that the increased rate of transportation differentials adopted for the rest of the marketing area should also result in increased Class I prices at the proposed locations within the 1-10 mile zone.

As noted in the recommended decision, additional transportation costs would more logically (and equitably) be accommodated by increasing the order's transportation allowances effective within the metropolitan area. Adoption of a pool credit for metropolitan

handlers would, in effect, give them a cost advantage over other handlers located within the 1-10 mile zone at the expense of all of the producers whose milk is pooled. Also, the extra costs of delivering milk to the New York City metropolitan area apparently are not unique to that area. According to testimony by a Farmland witness, road and bridge tolls, detours caused by bridge construction, and traffic congestion add significantly to the cost of procuring milk supplies for the northern New Jersey portion of the 1-10 mile zone. In addition, extra costs in these portions of the 1-10 mile zone currently incurred by handlers apparently result in those handlers paying prices equivalent to those of a higher-priced zone, with the benefits accruing to the producers who actually deliver the milk. There appears to be no reason for the cost of milk in the New York City metropolitan area to be any less, or any more, than in northern New Jersey. As a result, no change should be made in the relative pricing between these two portions of the 1-10 mile zone.

b. *Order 1.* Proposals to change the zone designation of portions of Fairfield and New Haven Counties, Connecticut, should not be adopted. Marcus Dairy, a proprietary handler pooled under the New England milk order and located at Danbury, Connecticut, proposed that locations in Fairfield County, Connecticut, that are within 15 miles of the New York-Connecticut border and north of the towns of Wilton, Weston, Easton and Trumbull, be redesignated from Zone 5 to Zone 10. Such action would result in a 12.5-cent per hundredweight reduction in the price Marcus Dairy would be obligated to pay for producer milk used in Class I. The blend price paid to dairy farmers delivering milk to Marcus Dairy would also be reduced by 12.5 cents per hundredweight on all of their deliveries to Danbury.

The Marcus Dairy witness stated that the distance from Danbury, Connecticut, to Boston, Massachusetts, is 165 miles and that Danbury therefore should be in Zone 17 rather than Zone 5. He characterized the proposed change to Zone 10 as a compromise. The handler advocated adoption of the proposal on the basis that Danbury is not really close to any population centers, and must distribute packaged milk over a distance of 30 to 60 miles to reach the closest population areas. He testified that, in contrast, milk travels only a short distance of 80 miles or so from farms to reach the plant. The witness argued that because Danbury is located relatively close to its production area,

but not within a major population center, Danbury should be considered, and priced as, a country location. Further, the witness testified, earlier decisions that resulted in a Zone 5 designation for the Danbury location assumed that bulk milk moves solely from west to east. He stated that a lot of the milk pooled under Order 1 also moves from north to south.

The Marcus Dairy representative testified that approximately 50 percent of its producer milk receipts are from its own independent producers, located primarily in eastern New York State, with the other half of the handler's milk supply obtained from Eastern Milk Producers Association and the National Farmers Organization, two cooperative associations. He expressed little concern that reducing prices paid to producers by 12.5 cents per hundredweight would create any problems in attracting an adequate supply of milk to the Danbury location. The witness stated that the Order 1 blend prices paid by Marcus Dairy to its producers represent a premium over prices paid to Order 2 producers located in the same area as Marcus Dairy's producers. He indicated that it is possible that milk procured for the Danbury plant might continue to require payments in excess of the Order 2 price if the Order 1 price at Danbury were reduced, but stated that the existence of such premiums depends on variable supply and demand conditions.

Opposition to the Marcus Dairy proposal was widespread. The National Farmers Organization representative opposed the proposal because of its negative impact on prices paid to producers. A witness for Agri-Mark stated that adoption of the proposal would have an adverse effect on price alignment between handlers regulated under Order 1. A Dairy-USA witness stated that the same Class I price should prevail at Danbury under both Order 1 and Order 2 to assure price alignment since Marcus Dairy is soliciting customers in the Hudson Valley in competition with Order 2 handlers. A witness for Farmland argued that adoption of the proposal would distort price alignment between Order 1 and Order 2 handlers by reducing the cost of milk to Order 1 handlers competing with Order 2 handlers. A brief filed on behalf of the New York Dairy Industry Institute noted that, contrary to claims by the Marcus witness that the plant location is more of a country location than a city location, Danbury is part of the New York Metropolitan Area designated by the Census Bureau, and should be

considered as part of that contiguous heavily populated area.

As in the previous instances in which representatives of Marcus Dairy have argued that Danbury, Connecticut, belongs in a lower-priced zone, the proposal to change the zoning of a very small portion of Fairfield County from Zone 5 to Zone 10 should be denied. Proponent has produced no new arguments or evidence that would warrant changing a decision that was issued in 1981 and re-examined in 1983 (in decisions of which official notice was taken in the record of this proceeding). Contrary to proponent's assertion that the previous decisions did not recognize that a large share of the market's producer milk moves from north to south, as well as from west to east, that fact is a prominent feature of both prior decisions. Before 1978, all of Connecticut, Massachusetts (except Berkshire County) and Rhode Island were included in a single price zone. A key finding in a 1978 decision on location pricing in Order 1 was that New York State (west of Boston/Providence) was becoming a significant source of production pooled under the New England order, in addition to production from Vermont (north of Boston/Providence). The decision concluded that the shift in the market's production area should be reflected in price adjustments westward as well as northward.

According to the 1983 decisions, which incorporated part of the 1978 decision, "Western Connecticut was established as a lower-priced zone than Boston/Providence because 'as the market shifts to greater dependence on supplies of milk from New York, it will become increasingly important to maintain a high enough price in the eastern consumption areas to attract this milk from beyond the consumption centers in the western portions of Connecticut and Massachusetts' (43 FR 45523). Greater downward price adjustments were found necessary for western Massachusetts as that area was closer than western Connecticut to the Vermont production area, as well as being much nearer than Boston/Providence to New York. There is no evidence in the present record to support a conclusion that the price difference between western Connecticut and Boston/Providence is not great enough to attract needed supplies of milk from beyond western Connecticut and Massachusetts to Boston/Providence." (48 FR 29528)

Although the percentage of milk produced in New York and pooled under the New England order has increased

since 1981, the source of the New York milk in Order 1 has continued to shift to the north and west. Order 1 milk production from the eastern tier of counties on the border of New York State with Connecticut and Massachusetts declined by 23 percent from 1981 to 1987. At the same time, the amount of milk produced in New York counties located west of the eastern tier of counties and north of Delaware, Greene and Columbia Counties, and pooled under the New England order was 3 times greater in December 1987 than in December 1981. It is apparent from this shift in the production area for Order 1 that the New York State milk supply for New England handlers is increasingly coming from greater distances to the north and west of the New England market. Also during the time period of 1981 to 1987, milk production declined in every Connecticut county, for the state as a whole, and as a percentage of the total production pooled under Order 1.

These trends of declining production in the areas nearest Danbury make the argument that Danbury is a "country" location in the midst of a major milk-producing area even less persuasive than it has been in earlier proceedings dealing with this issue. As stated in the 1983 decision on this issue, "In prior decisions, Hartford, which is approximately 60 miles from Danbury, has been described as a population center in the sense of being the largest city in the heavily populated area of southwestern Connecticut. Hartford is, however, not located in the center of the area, but at its northeast corner. According to the 1980 Census, Fairfield County, in which Danbury is located, is the second most populous Connecticut county, after Hartford County, by only a very small margin. New Haven County, located between Fairfield and Hartford Counties, falls in third place by less than 50,000 people. Southwestern Connecticut is, as one witness described it, a fairly contiguous metropolitan area, and plants throughout southwestern Connecticut must compete for milk supplies produced in 'country' locations in Vermont and New York where the bulk of the market's milk supply is produced." (48 FR 29528)

A proposal by the Dairy Institute of New York to increase the Class I price at locations in the Connecticut counties of Fairfield and New Haven by changing the zone designation from Zone 5 to Zone 4 also should not be adopted. The Institute's witness predicated support for the proposal upon adoption of a proposed amendment to the Order 2 location adjustment schedule. As

proposed, that amendment would have resulted in a nearly 12-cent increase in the Order 2 Class I price at the Danbury, Connecticut location. This increase would have caused a significant change in the Class I price relationships of Order 1 and Order 2 at Danbury. However, the Institute's proposal did not take into account the need to reduce the Order 2 Class I differential at the 201-210 mile zone in order to maintain inter-order price alignment between New York City, Philadelphia and Boston. Because the Class I differential at the 201-210 mile zone would be reduced as a result of this decision in order to avoid significant Class I price increases under Order 2 at the 1-10 mile zone, the Class I price differential for the Order 2 41-50 mile zone will not be increased by 11.8 cents, but will be reduced by 1.2 cents. The amount of this change in the difference between the Order 1 and Order 2 Class I price differentials in western Connecticut should result in no significant price misalignment. Therefore, the proposal to change the currently designated Zone 5 to Zone 4 is denied.

Two technical corrections of amendments made as a result of a 1981 decision concerning the location pricing provisions of Order 1 should be made at this time. The 1981 decision stated that "The zone location of any plant located outside the specific zones previously listed should be determined on the basis of its highway mileage from Boston. In general, this area encompasses the territory north and west of the zones specified. Since plants located outside the specified zones are generally on a direct line between the major production and consumption areas, they should be zoned on a straight mileage basis" (46 FR 55876). However, the order language accompanying that decision failed to implement completely the intent of the decision. Therefore, the language in § 1001.52 providing for the computation of location adjustments at Massachusetts plants located outside the designated zones on the basis of their mileage from Boston should be included at this time.

The January 1, 1982, amendments also omitted Warren Township in Worcester County, Massachusetts, from the definition of Zone 5. Geographically, Warren Township is situated in the middle of the Zone 5 territory in Massachusetts. There are no milk plants in Warren Township that would be affected by inclusion in Zone 5, but the territory obviously should be included in that zone. Therefore, the definition of Zone 5 is amended to include Warren Township.

5. *Producer-handler receipts of pool milk.* The New England order (Order 1) should be amended to allow producer-handlers to buy milk that is diverted to their plants directly from the farms of producers by cooperative association bulk tank handlers or by pool plant operators.

Generally, producer-handlers have been granted an exemption from the pricing and pooling provisions of Federal milk orders at least partially on the basis that they not purchase milk from other dairy farmers. Under the present Order 1 provisions, producer-handlers may supplement the milk produced on their own farms only with receipts of fluid milk products that are transferred to them from pool plants. This limitation on receipts by producer-handlers, which has been in effect under Order 1 since the inception of the merged order for the New England market on April 1, 1976, was provided to insure the integrity of regulation. Small producer-handlers (producing or distributing less than 4,300 pounds of milk per day) may buy unlimited amounts from pool plants. Purchases by larger operators may not exceed 2 percent of the milk produced on their own farms.

The proposal to allow producer-handlers to buy direct-shipped milk by diversion from pool handlers was advanced by Brookside Farm Dairy (Brookside), a small Order 1 producer-handler who is located in the vicinity of Westminister, Massachusetts. The Brookside spokesman modified his proposal as published in the hearing notice to allow cooperative associations and pool plant operators to divert producer milk to the plants of producer-handlers. He testified that allowing such handlers to deliver milk to producer-handlers directly from the farms of producers, rather than requiring the milk to be received at pool plants and then transferred to the plants of the producer-handlers, would eliminate costly plant handling and uneconomic milk movements.

Brookside's witness testified that certain aspects of marketing milk under Order 1 have changed over the years. In the past, he stated, milk picked up and delivered in cans from producers' farms was received at numerous country receiving and transfer plants that were used to assemble distant milk supplies for shipment to city bottling plants. The witness testified that milk needed to be moved in this way to establish accurate weights and butterfat tests for payment purposes. According to the witness, the widespread use of farm tank calibration charts and on-farm sampling have made

it possible to establish weights and tests for each farmer's milk at the farm. In addition, he said, bulk tank hauling has resulted in the closure of many of the smaller country plants where milk was assembled and reloaded. The witness contended that the closure of these plants, combined with the trend toward fewer and larger processing plants, has limited his access to supplemental fluid milk products which he occasionally needs to satisfy his customers' demand in excess of his production.

The witness testified that, in effect, there is now only one plant from which he may buy supplemental milk. To so do, he said, he must pay to have small amounts of milk moved 75 miles, even though at least three milk trucks picking up the milk of individual farmers go by his farm each week. The witness stated that he is charged about \$.70-\$1.00 per hundredweight more for his supplemental milk receipts because they must be moved through transfer plants where the milk is unloaded, received and reloaded before it may be shipped to his plant. According to Brookside's witness, moving the milk through a transfer plant also causes the milk's quality to deteriorate because it takes longer to deliver the milk and the milk is pumped two more times than it would be if it were delivered directly to his plant.

The record evidence on this issue was limited to the information presented at the hearing by proponent (Brookside) and a statement of support for the proposal by Agri-Mark, a cooperative that supplies approximately half of the producer milk for the Order 1 market. There was no opposition to the proposed change.

The changes proposed by Brookside to allow producer-handlers to receive their supplemental milk needs by transfer or diversion should be adopted. These changes should eliminate costly plant handling and uneconomic milk movements without changing the total amounts of milk that such operators may buy.

Changing the way in which Order 1 handlers may supply supplemental milk to producer-handlers will not affect the marketplace pool because the milk will be classified in Class I regardless of whether it is moved by diversion or by transfer. Classifying all such milk movements in Class I compensates producers for carrying the necessary reserve milk supplies associated with such deliveries. Accordingly, it is appropriate to allow producer-handlers to receive milk that is moved directly from the farms of producers by pool plant operators or by cooperatives

handling bulk tank milk up to the applicable limits specified on such purchases under Order 1.

6. *Charges on overdue accounts.* The New England order (Order 1) should be amended to eliminate the postmark date as a basis for determining whether handler payments to the producer-settlement fund have been made on time and thus are not subject to late payment charges.

Order 1 currently provides that handler payments which are received by the market administrator after the 20th day of the month in envelopes that are postmarked on or before the 18th day of such month shall be deemed to have been received by the 20th and paid on time. Therefore, payments mailed and postmarked by the 18th are not subject to late-payment fees regardless of when they are received by the market administrator.

The proposal to eliminate use of the postmark date for the purpose of making such determinations was advanced by Agri-Mark, Inc. (Agri-Mark), a cooperative association of dairy farmers who supply nearly half of the producer milk for the Order 1 market. A spokesman for the proponent cooperative testified that unless the market administrator has received all of the money due from handlers to pay their obligations to the producer-settlement fund by the 20th, he is unable to carry out certain of his assigned administrative duties. First, he is unable to effectuate marketplace pooling by making the required payments due to handlers from the producer-settlement fund on the 20th because he cannot be sure when moneys will be paid into the fund by the handlers from whom moneys are due. Second, he is not certain that payments which have not been received by the 20th will be considered past due and subject to late-payment charges, because they may have been mailed on the 18th but not received by the 20th.

The Order 1 market administrator supported the Agri-Mark proposal. He testified that the postmark deadline causes him administrative problems that are associated with clearing the pool. He also claimed that the mailing deadline causes enforcement problems that are unnecessarily burdensome in determining whether a handler's payment is late and thus subject to late-payment charges. He claimed that elimination of the mailing deadline, as Agri-Mark proposed, would greatly ease the performance of his administrative duties.

The market administrator further testified that when the mailing deadline

was adopted under Order 1, it was reasonable to expect first-class mail to be delivered to the market administrator in two days from any location within the marketing area. Because of this, the administrative problems associated with enforcing the late-payment provisions and clearing the pool essentially were non-existent. He took the position that since two-day mail delivery can no longer be counted on, and faster and more efficient methods of payment are available to handlers, the postmark deadline should be deleted from the order provisions.

The record evidence on this issue was limited to the testimony offered by a witness for proponent and a supporting statement by the market administrator. There were no opposing views presented at the hearing or in briefs.

The uncontested Agri-Mark proposal to cease consideration of the postmark date in deciding whether handlers have made their producer-settlement fund payments on time should be adopted. This change will facilitate the administration of the order along the lines that were specifically addressed in testimony presented by proponent and the market administrator.

Elimination of the postmark date should encourage handlers to pay their pool obligations, which are due and payable by the 18th and subject to late charges if they are not received by the market administrator by the 20th, more promptly. To assure that their payments are received on time and not subject to late charges, handlers are likely to rely more often on the latest technology in making their payments (electronic bank transfers of money). These changes should speed up the flow of money to the producer-settlement fund and enable the market administrator to make the required payments from the producer-settlement fund by the specified deadline on the 20th. It also should make it easier for the market administrator to enforce the late payment provisions by removing the need to check postmark dates on envelopes containing handler payments.

Under the amended Order 1 provisions concerning late payments, handlers will be required to pay their producer-settlement fund obligations for the month, in addition to any adjustments resulting from the verification of their reports and payments for prior months, on or before the 18th day of the month. If these payments have not been received by the market administrator by the close of business on the 20th, they will be subject to late charges. Any such unpaid handler balances will be increased by 1 percent on that date and on the same

day of each succeeding month until they are paid. The 1 percent increases in ensuing months will apply to unpaid account balances of handlers at close of business on the 20th, and will include any previously assessed late payment fees.

9. *Pricing diverted producer milk.* The Middle Atlantic order (Order 4) should be amended to provide that producer milk diverted from a pool plant to another plant (pool or nonpool) should be priced at the location of the plant where the milk being priced is received.

Under the current provisions of Order 4, diverted producer milk is priced at the location of the plant from which the milk is diverted, and where it is normally received. However, if lower adjusted prices apply at the location of the plants where the diverted producer milk is actually received, the milk is priced at the location of the plant to which diverted and the lower location values for such milk are credited to producers.

This pricing procedure for diverted milk has been provided under Order 4 since the inception of the Middle Atlantic order on August 1, 1970. It was adopted to discourage manufacturing plant handlers from associating as much milk as possible with city distributing plants and then regularly receiving the milk at the manufacturing plants as diverted milk. When the milk is priced at the city plant from which the milk is diverted, distant producers receive the uniform prices that apply at city plants when in fact their milk usually is moving to a nearby manufacturing plant. The current pricing technique of assigning the lower of the prices applicable at the divertor or divertor plant to diversions of producer milk was provided to insure that the pool would not subsidize the costs of transporting milk when, in fact, such costs were not incurred.

Pennmarva Dairymen's Federation (Pennmarva), an organization of cooperative associations that supply about 90 percent of the market's milk, proposed that the present method of pricing Order 4 diverted producer milk be changed. The witness for proponent claimed that the change is needed because milk is diverted from pool plants in various lower-priced zones, resulting in non-uniform pricing of Order 4 diverted milk at a number of nonpool plants. By pricing diverted milk at the location of the nonpool plant where the milk is received as Pennmarva proposes, uniform prices for diverted producer milk will apply at a given nonpool plant location.

In support of its proposal, Pennmarva's witness cited examples in which different prices apply to diverted producer milk that is received at the

same nonpool plant. Under the current order provisions, producer milk that is diverted from a pool plant in Sunbury, Pennsylvania, subject to a location adjustment of minus 19.5 cents, to a nonpool plant at Reading, Pennsylvania, subject to a location adjustment of minus 9 cents, is priced at the plant from which diverted because the location value for milk at the divertor pool plant is lower than at the nonpool plant receiving the milk. Conversely, if the milk is diverted to the nonpool plant at Reading from a pool plant in the base zone at Fort Washington, Pennsylvania, the milk would be priced at the location of the nonpool plant to which the milk is diverted because a lower location value for milk applies at the receiving nonpool plant than at the diverting pool plant.

Pennmarva's witness contended that the order provisions for pricing diverted producer milk do not reflect current marketing conditions in the Order 4 market. In the past, he stated, the market's excess milk supplies associated with city distributing plants generally were disposed of at distant manufacturing plants in the market's outlying procurement areas, where lower location values for milk apply. However, the 1975 expansion of the Order 4 marketing area resulted in the full regulation of several fluid milk processing plants in the Harrisburg, York and Lancaster areas of Pennsylvania. The supplies of milk that are not needed for bottling purposes at these plants are sometimes disposed of at nearby manufacturing plants located closer to the Order 4 market center pricing points than the Class I plants from which the milk is diverted. Under the order's current location pricing provisions for diverted milk, the greater location values at the closer-in manufacturing plants where the milk is received are not reflected in the returns to dairy farmers. Pennmarva contended that such a pricing penalty does not facilitate the orderly disposition of the market's reserve milk supplies.

The Pennmarva proposal to price all milk diverted to nonpool plants at the location of the plant at which the milk is actually received should be adopted. There was no opposition to the proposed change, either at the hearing or in briefs. The testimony on this issue is limited to the data and arguments presented by proponent in support of its proposal at the hearing and in briefs. In addition, a statement was made at the hearing in support of the proposal by the operator of a nonpool manufacturing plant at Reading.

The Order 4 market structure and the operating practices of handlers have

changed considerably since 1970 when this method for pricing diversions was adopted. There are fewer but larger fluid milk plants. Also, the larger plant operators receive most of their milk needs during the mid-week days of Tuesday through Thursday. Because of these changes, greater reserve milk supplies are now associated with the Order 4 market. Therefore, it is even more important now than in the past that the order provisions facilitate the orderly disposition of the market's milk supplies which exceed the needs of such Class I bottlers.

The order's location pricing provisions recognize the greater value of milk at plants in or near the principal population centers in the marketing area than at other plant locations. In view of the location value of milk, it is inconsistent to assign several different location values to producer milk received at a single nonpool plant for manufacturing during the same month, depending on the location of the plant from which it is diverted.

Although the Pennmarva proposal addressed only the pricing of diversions from pool plants to nonpool plants, all diversions from a pool plant to another plant (pool or nonpool) should be priced at the location of the plant where the milk being priced is received. Under the present provisions of Order 4, the same location pricing provisions apply to diversions to pool plants and nonpool plants. As discussed earlier, the current method of pricing diverted milk can result in different Class I and uniform prices applying to producer milk diverted to the same pool plant from pool plants located in various lower-priced zones during the same month. The proposed amendment should be applied to diversions to pool plants as well as to diversions to nonpool plants to remove the possibility of any such pricing inconsistencies.

Pennmarva asked that its pricing proposal for diverted milk be dealt with on an expedited basis so that the decision on this matter would not be delayed until all of the more controversial and non-technical issues are decided. It is evident that the situation of non-uniform prices for producer milk diverted to pool and nonpool plants has existed for several years. Hence, there is no basis to conclude from the information presented on this record that the pricing inconsistencies are resulting in disorderly marketing to such an extent that this matter needs to be dealt with on an emergency basis. Accordingly, proponent's request for expedited action is denied.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the New England, New York-New Jersey and Middle Atlantic orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which hearings have been held.

Ruling on Motions

A motion submitted by counsel on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc., requested that the transcripts and exhibits of three "call" meetings held by the market administrator of Order 2 after the hearing in this proceeding and before

issuance of the recommended decision, and any related communications pertaining to the meetings and the desirability of mandated performance requirements, be placed in the public record as *ex parte* communications.

The motion is denied on the basis that the "call" meetings were held for the purpose of deciding whether to activate the "call" provisions of the New York-New Jersey order for a particular time period, and only for that purpose. The meetings, and whatever other communications occurred in the administration of the provisions of the order, were not intended to serve the purpose of amplifying the record and were not considered at all in developing the decision.

Rulings on Exceptions

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

In addition to the exceptions addressed in this decision, Farmland Dairies, Inc., requested that the Secretary reconsider his decision not to hear proposals concerning a merger of Orders 1, 2 and 4; and the comments filed on behalf of Kraft, Inc., Pollio Dairy Products Company and Friendship Dairies, Inc., included a suggestion that the hearing be re-opened or that a revised recommended decision be issued.

Proposals to merge the three northeastern orders were not included in the notice of hearing for this proceeding and cannot be considered on the basis of this record. The exceptions and comments filed in response to the recommended decision provide no basis for re-opening the hearing or issuing a revised recommended decision. The record of the proceeding supports the actions taken in this decision in denying or adopting the proposals considered at the hearing.

Marketing Agreement and Order

Annexed hereto and made a part hereof are two documents, a Marketing Agreement regulating the handling of milk, and an Order amending the orders regulating the handling of milk in the aforesaid marketing areas, which have been decided upon as the detailed and

appropriate means of effectuating the foregoing conclusions.

It is hereby ordered that this entire decision and the two documents annexed hereto be published in the Federal Register.

Determination of Producer Approval and Representative Period

May 1990 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the New England and Middle Atlantic marketing area is approved or favored by producers, as defined under the terms of the order (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

Referendum Order To Determine Producer Approval; Determination of Representative Period; and Designation of Referendum Agent

It is hereby directed that a referendum be conducted and completed on or before the 30th day from the date this decision is issued, in accordance with the procedure for the conduct of referenda (7 CFR 900.300-311), to determine whether the issuance of the attached order as amended and as hereby proposed to be amended, regulating the handling of milk in the New York-New Jersey marketing area is approved or favored by producers, as defined under the terms of the order, as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the aforesaid marketing area.

The representative period for the conduct of such referendum is hereby determined to be May 1990.

The agent of the Secretary to conduct such referendum is hereby designated to be Ronald C. Pearce.

List of Subjects in 7 CFR Parts 1001, 1002 and 1004

Milk marketing orders.

Signed at Washington, DC, on: November 30, 1990.

Jo Ann R. Smith,

Assistant Secretary, Marketing and Inspection Services.

Order Amending the Orders Regulating the Handling of Milk in the New England, New York-New Jersey and Middle Atlantic Marketing Areas

(This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and

procedure governing proceedings to formulate marketing agreements and marketing orders have been met.)

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings. Public hearings were held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the New England, New York-New Jersey and Middle Atlantic marketing areas. The hearings were held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure (7 CFR part 900).

Upon the basis of the evidence introduced at such hearings and the record thereof, it is found that:

(1) The said orders as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing areas; and the minimum prices specified in the orders as hereby amended are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said orders as hereby amended regulate the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered that on and after the effective date hereof, the handling of milk in the New England, New York-New Jersey and Middle Atlantic marketing areas shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Administrator, Agricultural Marketing Service, on May 18, 1990, and published

in the Federal Register on May 25, 1990, (55 FR 21556), shall be and are the terms and provisions of this order, amending the order, and are set forth in full herein.

1. The authority citation for 7 CFR parts 1001, 1002 and 1004 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

2. Section 1001.5 is revised to read as follows:

§ 1001.5 Distributing plant.

Distributing plant means a processing and packaging plant.

3. Section 1001.6 is revised to read as follows:

§ 1001.6 Supply plant.

Supply plant means a plant at which facilities are maintained and used for washing and sanitizing cans and to which milk is moved from dairy farmers' farms in cans and is there accepted, weighed or measured, sampled, and cooled, or it is a plant to which milk is moved from dairy farmers' farms in tank trucks.

4. Section 1001.7 is revised to read as follows:

§ 1001.7 Pool Plant.

Except as provided in paragraph (d) of this section, "pool plant" means:

(a) A distributing plant from which:

(1) Not less than 40 percent of its total receipts of fluid milk products (except filled milk) in any month, or in either of the 2 preceding months, are disposed of as Class I (except filled milk); and

(2) Route disposition (except filled milk) in the marketing area in the month:

(i) Is not less than 10 percent of its total receipts of fluid milk products (except filled milk);

(ii) Exceeds its route disposition in any other Federal marketing area; and

(iii) Exceeds 700 quarts on any day or a daily average of 300 quarts.

(b) A supply plant which meets the conditions specified in (1), (2), or (3) of this paragraph. Receipts and disposition of filled milk shall be excluded in determining whether a plant has met these conditions. For the purposes of this paragraph, milk received at a plant from a cooperative association in its capacity as a handler under § 1001.9(d) shall be considered as having been received at that plant from dairy farmers' farms.

(1) It is a plant from which in any month of August and December at least 15 percent, and in any month of September through November at least 25

percent, of its total receipts of milk from dairy farmers' farms is shipped as fluid milk products, other than as diverted milk, to pool distributing plants.

(2) For any month of August through December, it is one of a group of plants that meets the conditions specified in this paragraph.

(i) The handler's written request for continuation of pool supply plant status, which the plant held under the handler's operation in the preceding month, is received by the market administrator on or before the 16th day of the month.

(ii) The group of plants, considered as a unit, meets the shipping requirements specified in paragraph (b)(1) of this section.

(iii) To qualify as a pool supply plant under this paragraph in December of any year, the plant, considered individually, shall have shipped at least 5 percent of its total receipts of milk from dairy farmers' farms as fluid milk products, other than as diverted milk, to pool distributing plants in one of the months of August through December of that year.

(iv) In the event of the failure of a group of plants to meet fully the requirements of paragraph (b)(2)(ii) of this section, termination of pool supply plant status shall be limited to the least number of plants which will result in the remaining supply plants meeting the requirements of paragraph (b)(2)(ii) of this section. If such termination becomes necessary, the handler shall be permitted to designate which plants shall continue to have pool plant status for the month.

(v) For the purposes of this paragraph, any supply plant operated by a cooperative association that is also a handler under § 1001.9(d) may be considered as one of a group of plants. In that event, the group's total receipts of milk from dairy farmers' farms shall be the total of such receipts by the association other than at any of its plants that is not one of the group, and the group's qualifying shipments shall consist of the qualifying shipments from the plants in the group plus the quantity of milk moved by the association in its capacity as a handler under § 1001.9(d) from farms of its members to pool distributing plants.

(3) For any month of January through July, it is a plant from which at least 15 percent of its total receipts of milk from dairy farmers' farms is shipped as fluid milk products, other than as diverted milk, to pool distributing plants or it is a plant that meets the requirements for automatic pool plant status specified in this paragraph. The automatic pool plant status of a plant shall be revoked for any month for which the market

administrator has received the handler's written request for revocation on or before the 16th day of that month. In that event, the plant shall not have automatic pool plant status in any subsequent month of the current January through July period.

(i) The plant was a pool supply plant under this order in each of the preceding months of August through December; or

(ii) The plant was a pool supply plant under this order in at least two of the preceding months of August through December and would have been such a plant in all other months in that period had it not been a pool plant under the New York-New Jersey Federal order.

(4) No plant shall be a pool supply plant in any month in which it is operated as:

(i) A pool distributing plant; or

(ii) A regulated plant under another Federal order if its Class I disposition of fluid milk products, except filled milk, in the marketing area regulated by that order exceeds its shipments of fluid milk products, except filled milk, to pool distributing plants under this order.

(c) Each plant, other than a plant operated as a pool distributing plant or a pool supply plant, that is located in the marketing area and operated by a cooperative association shall be a pool plant in any month in which its route disposition does not exceed 2 percent of its total receipts of fluid milk products. Receipts and disposition of filled milk shall be excluded in determining whether a plant has met these conditions.

(d) The term "pool plant" shall not apply to the following plants:

(1) An exempt distributing plant under § 1001.8(e);

(2) The plant of a producer-handler under any Federal order;

(3) A plant designated as a regular pool plant under the New York-New Jersey Federal order; or

(4) Any plant for which the market administrator determines that a specified proportion or quantity of the receipts from dairy farmers and of milk from other sources handled at a plant is not available for Class I use because there is in force an unconditional contract for the plant to supply fluid milk products for Class II or Class III use, the plant shall not be a pool plant for the month in which the market administrator notifies the handler of the determination and for any subsequent month in which the contract is in force for any part of the month.

5. Section 1001.8 is revised to read as follows:

§ 1001.8 Nonpool plant.

Nonpool plant means a plant (except a pool plant) which receives milk from dairy farmers or is a milk or filled milk manufacturing, processing or bottling plant. The following categories of nonpool plants are further defined as follows:

(a) *Other order plant* means a pool plant under another Federal order or any other plant at which all fluid milk products handled become subject to the classification and pricing provisions of another Federal order.

(b) *Producer-handler plant* means a plant operated by a producer-handler as defined in any order (including this part) issued pursuant to the Act.

(c) *Partially regulated distributing plant* means a nonpool plant that is not a regulated plant under another Federal order, a producer-handler plant, or an exempt distributing plant, and from which there is route disposition in the marketing area during the month.

(d) *Unregulated supply plant* means a nonpool plant that is not an other order plant, a producer-handler plant, or an exempt distributing plant from which fluid milk products are shipped during the month to a pool plant.

(e) *Exempt distributing plant* means:

(1) A plant, other than a pool supply plant or a regulated plant under another Federal order, that meets all the requirements for status as a pool distributing plant, except that its route disposition (exclusive of filled milk) in the marketing area in the month does not exceed 700 quarts on any day or a daily average of 300 quarts.

(2) A plant that is operated by a governmental agency and from which there is route disposition in the marketing area.

6. Section 1001.9 is amended by revising paragraph (d) to read as follows:

§ 1001.9 Handler.

* * * * *

(d) Any cooperative association with respect to the milk that is moved from farms in tank trucks operated by, or under contract to, the association to pool plants or as diverted milk to nonpool plants for the account of, and at the direction of, the association. The association shall be considered as the handler who received the milk from the dairy farmers. However, the cooperative association shall not be the handler with respect to the milk moved from any farm if the association and the operator of the pool plant to which milk from such farm is moved both submit a request in writing, on or before the due date for filing the monthly reports of receipts and

utilization, that the operator of the pool plant be considered as the handler who received the milk from the dairy farmer, and the pool plant operator's request states that he is purchasing the milk from such farm on the basis of the farm bulk tank measurement readings and the butterfat tests of samples of the milk taken from the farm bulk tank.

7. Section 1001.10 is revised to read as follows:

§ 1001.10 Producer-handler.

Producer-handler means any person who, during the month, is both a dairy farmer and a handler and who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

(b) The person's own route disposition constitutes the majority of the route disposition from the plant.

(c) The quantity of route disposition in the marketing area from the person's plant is greater than in any other Federal marketing area.

(d) The producer-handler receives no fluid milk products except from such handler's own production and from pool handlers, either by transfer or diversion pursuant to § 1001.15. If the producer-handler's receipts from own production and the total route disposition from the producer-handler's plant each exceed 4,300 pounds per day for the month, the producer-handler's receipts from pool plants are not in excess of 2 percent of receipts from own production. For the purposes of this paragraph, the producer-handler's receipts of fluid milk products shall include receipts from plants of other persons at all retail and wholesale outlets that are located in a Federal marketing area and operated by the producer-handler, an affiliate, or any person who controls or is controlled by the producer-handler.

8. Section 1001.12 is amended by revising paragraphs (e) and (f) to read as follows:

§ 1001.12 Producer.

(e) A dairy farmer who is a governmental agency that is operating an exempt distributing plant under § 1001.8(e)(2);

(f) A dairy farmer with respect to salvage product assigned under § 1001.44(a)(7)(ii);

9. Section 1001.14 is revised to read as follows:

§ 1001.14 Other source milk.

Other source milk means all skim milk and butterfat contained in or represented by:

(a) Receipts of fluid milk products and bulk products specified in § 1001.40(b)(1) from any source other than producers, handlers described in § 1001.9(d), or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1001.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1001.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1001.40(b)(1)) for which the handler fails to establish a disposition.

10. Section 1001.15 is amended by revising the first sentence of the introductory text of paragraph (a) and the first sentence of the introductory text of paragraph (b) to read as follows:

§ 1001.15 Diverted milk.

(a) Milk that a handler in its capacity as the operator of a pool plant reports as having been moved from a dairy farmer's farm to the pool plant, but which the handler caused to be moved from the farm to another plant, if the handler specifically reports such movement to the other plant as a movement of diverted milk, and the conditions of paragraph (a) (1) or (2) of this section have been met. * * *

(b) Milk that a cooperative association is its capacity as a handler under § 1001.9(d) caused to be moved from a dairy farmer's farm to a nonpool plant if the association specifically reports the movement to such plant as a movement of diverted milk, and the conditions of paragraph (b) (1) or (2) of this section have been met. * * *

11. In § 1001.16, paragraphs (a) and (b) are revised to read as follows:

§ 1001.16 Exempt milk.

(a) Fluid milk products received at a pool plant in bulk from a nonpool plant to be processed and packaged, for which an equivalent quantity of packaged fluid milk products is returned to the operator of the nonpool plant during the same month, if the receipt of bulk fluid milk products and return of packaged fluid milk products occur during an interval in which the facilities of the nonpool plant

at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm, or similar extraordinary circumstances completely beyond the nonpool plant operator's control;

(b) Packaged fluid milk products received at a pool plant from a nonpool plant in return for an equivalent quantity of bulk fluid milk products moved from a pool plant for processing and packaging during the same month, if the movement of bulk fluid milk products and receipt of packaged fluid milk products occur during an interval in which the facilities of the pool plant at which the fluid milk products are usually processed and packaged are temporarily unusable because of fire, flood, storm, or similar extraordinary circumstances completely beyond the pool plant operator's control;

12. Section 1001.17 is revised to read as follows:

§ 1001.17 Fluid milk product.

(a) Except as provided in paragraph (b) of this section "fluid milk product" means any of the following products in fluid or frozen form: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and milkshake and ice milk mixes containing less than 20 percent total solids, including any such products that are flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted.

(b) The term "fluid milk product" shall not include:

(1) Evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers or aseptically packaged and hermetically sealed in foil-lined paper containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

13. Section 1001.18 is revised to read as follows:

§ 1001.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream) or a mixture of cream and milk or skim milk containing 10 percent or

more butterfat, with or without the addition of other ingredients.

14. A new § 1001.21 is added to read as follows:

§ 1001.21 Product prices.

The prices specified in this section as computed and published by the Director of the Dairy Division, Agricultural Marketing Service, shall be used in calculating the basic Class II formula price pursuant to § 1001.51(b), and the term "work-day" as used herein shall mean each Monday through Friday that is not a national holiday.

(a) *Butter price* means the simple average of the prices per pound of approved (92-score) butter on the Chicago Mercantile Exchange for the work-days during the first 15 days of the month, using the price reported each week as the price for the day of the report, and for each succeeding work-day until the next price is reported.

(b) *Cheddar cheese price* means the simple average for the work-days during the first 15 days of the month, of the prices per pound of cheddar cheese in 40-pound blocks on the National Cheese Exchange (Green Bay, WI). The price reported for each week shall be used as the price for the day on which reported, and for each succeeding work-day until the next price is reported.

(c) *Nonfat dry milk price* means the simple average of the prices per pound of nonfat dry milk for the work-days during the first 15 days of the month computed as follows:

(1) Use the prices (using the midpoint of any price range as one price) reported each week for high heat, low heat and approved nonfat dry milk, respectively, for the Central States production area;

(2) Compute a simple average of the weekly prices for the three types of nonfat dry milk in paragraph (c)(1) of this section. Such average shall be the daily price for the day on which the prices were reported and for each preceding work-day until the day such prices were previously reported; and

(3) Add the prices determined in paragraph (c)(2) of this section for the work-days during the first 15 days of the month and compute the simple average thereof.

(d) *Edible whey price* means the simple average of the prices per pound of edible whey powder for the Central States production area for the work-days during the first 15 days of the month. The prices used shall be the price (using the midpoint of any price range as one price) reported each week as the daily price for the day on which reported, and for each preceding work-day until the day such price was previously reported.

15. Section 1001.30 is revised to read as follows:

§ 1001.30 Reports of receipts and utilization.

On or before the 8th day after the end of each month, or not later than the 10th day if the report is delivered in person to the office of the market administrator, each handler shall report for such month to the market administrator, in the detail and on the forms prescribed by the market administrator, as follows:

(a) Each handler, with respect to each of the handler's pool plants, shall report the quantities of skim milk and butterfat contained in or represented by:

(1) Receipts of producer milk (including the specific quantities of diverted milk and receipts from the handler's own production);

(2) Receipts of milk from cooperative associations in their capacity as handlers under § 1001.9(d);

(3) Receipts of fluid milk products and bulk fluid cream products from other pool plants;

(4) Receipts of other source milk;

(5) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1001.40(b)(1);

(6) The utilization or disposition of all milk, filled milk, and milk products required to be reported pursuant to this paragraph.

(b) Each handler operating a partially regulated distributing plant shall report with respect to such plant in the same manner as prescribed for reports required by paragraph (a) of this section. Receipts of milk that would have been producer milk if the plant had been fully regulated shall be reported in lieu of producer milk. Such report shall show also the quantity of any reconstituted skim milk in route disposition in the marketing area.

(c) Each handler described in § 1001.9(d) shall report:

(1) The quantities of all skim milk and butterfat contained in receipts of milk from producers; and

(2) The utilization or disposition of all such receipts.

(d) Each handler shall report bulk milk received at a handler's pool plant from a cooperative association in its capacity as the operator of a pool plant or as a handler under § 1001.9(d), if such milk was rejected by the handler subsequent to such handler's receipt of the milk on the basis that it was not of marketable quality at the time the milk was delivered to the handler's plant, and such milk was removed from the plant in bulk form by the cooperative association and was replaced with other milk from the association. Except for purposes of this paragraph and § 1001.31(b), such

milk that was so removed from the handler's plant shall be treated for all other purposes of the order as though it had not been delivered to and received at the handler's plant.

(e) Each handler not specified in paragraphs (a) through (c) of this section shall report with respect to the handler's receipts and utilization of milk, filled milk, and milk products in such manner as the market administrator may prescribe.

16. Section 1001.31 is revised to read as follows:

§ 1001.31 Other reports of receipts and utilization.

(a) Each handler who dumps fluid milk products at a pool plant shall:

(1) Give the market administrator, at the request and in accordance with instructions of the market administrator, advance notice of the handler's intention to dump such products and the quantities involved; and

(2) Submit to the market administrator to the time and in the manner prescribed by the market administrator such detailed reports of dumpage as the market administrator requests.

(b) Each handler who intends to have a receipt of unmarketable milk replaced with other milk in the manner described under § 1001.30(d) shall give the market administrator, at the request and in accordance with instructions of the market administrator, advance notice of the handler's intention to have such milk replaced.

(c) In addition to the reports required pursuant to paragraphs (a) and (b) of this section and §§ 1001.30 and 1001.32, each handler shall report such other information as the market administrator deems necessary to verify or establish such handler's obligation under the order.

17. Section 1001.40 is revised to read as follows:

§ 1001.40 Classes of utilization.

Except as provided in § 1001.42, all skim milk and butterfat required to be reported by a handler pursuant to § 1001.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraph (b) and (c) of this section;

(2) In packaged inventory of fluid milk products at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product, eggnog, and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product or eggnog, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of to any commercial food processing establishment (other than a milk or filled milk plant) at which food products (other than milk products and filled milk) are processed and from which there is no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages; and

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, and their by-products (whey);

(ii) Milkshake and ice milk mixes (or bases) containing 20 percent or more total solids, frozen desserts, and frozen dessert mixes;

(iii) Any concentrated milk product in bulk fluid form other than that specified in paragraph (c)(1)(iv) of this section;

(iv) Plastic cream, frozen cream, anhydrous milkfat, aerated cream, sour cream and sour half and half, and sour cream mixtures containing nonmilk items;

(v) Custards, puddings, pancake mixes and buttermilk biscuit mixes, yogurt and any other semi-solid product resembling a Class II product and containing less than 10 percent butterfat;

(vi) Formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers; and

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cheese (other than cottage cheese, lowfat cottage cheese, and dry curd cottage cheese) and its by-products (whey);

(ii) Butter;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(vi) Any product not otherwise specified in this section.

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and products specified in paragraph (b)(1) of this section that are dumped by a handler if the market administrator is notified of such dumping in advance and is given the opportunity to verify such disposition;

(5) In fluid milk products or in any product specified in paragraph (b)(1) of this section that is destroyed or lost under extraordinary circumstances;

(6) In skim milk in any modified fluid milk product that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1001.17; and

(7) In shrinkage assigned pursuant to § 1001.41(a) to the receipts specified in § 1001.41(a)(2) and in shrinkage specified in § 1001.41 (b) and (c).

18. Section 1001.41 is revised to read as follows:

§ 1001.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1001.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraphs; and

(2) In other source milk not specified in paragraphs (b) (1) through (6) of this section which was received in the form of a bulk fluid milk product or a bulk fluid cream product;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1001.9(d));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1001.9(d) and in milk diverted to such

plant from another pool plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in receipts from dairy farmers for other markets and in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b) (1), (2), (4), (5), and (6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1001.9(d), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

19. Section 1001.42 is revised to read as follows:

§ 1001.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers or diversions shall be subject to the following conditions:

(1) The skim milk and butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant or divertor-plant after the computations pursuant to § 1001.44(a)(12) and the corresponding step of § 1001.44(b).

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1001.44(a)(7) or the corresponding step of § 1001.44(b), the skim milk or butterfat so transferred or diverted shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1001.44(a)(11) or (12) or the corresponding steps of § 1001.44(b), the skim milk or butterfat so transferred or diverted, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant or divertor-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to an other order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b) (1), (2), or (3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the

conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1001.40.

(c) *Transfers and diversions to producer-handlers and to exempt distributing plants.* Skim milk or butterfat in the following forms that is transferred or diverted from a pool plant to a producer-handler under this or any other Federal order or to an exempt distributing plant shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant, a producer-handler plant, or an exempt distributing plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i) (A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2) (ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1001.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of milk for such nonpool plant; and

(B) To such nonpool plant's receipts of milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class III utilization, and then to Class II utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class III utilization, then to any remaining Class II utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

20. Section 1001.43 is revised to read as follows:

§ 1001.43 General classification rules.

In determining the classification of producer milk pursuant to § 1001.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1001.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1001.9(d) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1001.40, 1001.41, and 1001.42;

(b) If any of the water contained in the milk from which a product is made is

removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1001.9(d) shall be determined separately from the operations of any pool plant operated by such cooperative; and

(d) If receipts from more than one pool plant are to be assigned, the receipts shall be assigned in sequence according to the zone locations of the plants, beginning with the plant in the lowest-numbered zone for assignments to Class I milk and beginning with the plant in the highest numbered zone for assignments to Class III milk; and

(e) Receipts of other source milk from more than one plant shall be assigned in sequence according to the zone locations of the plants, beginning with the plant in the lowest-numbered zone for assignments to Class I milk and beginning with the plant in the highest-numbered zone for assignments to Class III milk.

21. Section 1001.44 is revised to read as follows:

§ 1001.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1001.9(a) for each of the handler's pool plants separately and of each handler described in § 1001.9(d) by allocating the handler's receipts of skim milk and butterfat to the handler's utilization pursuant to paragraphs (a) through (c) of this section.

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1001.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(ii) Receipts of exempt milk;

(iii) Packaged fluid milk products in inventory at the beginning of the month.

This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from another order plant, except that to be subtracted pursuant to paragraph (a)(7)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1001.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(5) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1001.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(5) or comparable provisions of another Federal milk order in the immediately preceding month;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1001.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(7) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(5) of this section applies, packaged inventory at the beginning of the month of products specified in § 1001.40(b)(1) that was not subtracted pursuant to paragraphs (a)(4), (5), and (6) of this section;

(ii) Receipts from dairy farmers of fluid milk products which are rejected and segregated in the handler's normal operation for receiving milk, and which receipts are accepted and disposed of by the handler as salvage product rather than as milk;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products from a producer-handler as defined under this or any other Federal milk order and from an exempt distributing plant;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2)(i) of this section;

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant;

(vii) Receipts of fluid milk products (other than exempt milk) from a local or State government which has elected nonproducer status for the month pursuant to § 1001.16(c); and

(viii) Receipts of fluid milk products from dairy farmers for other markets;

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i) and (7)(v) of this section for which the handler requests a classification other than Class I, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (7)(v), and (8)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(8)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount;

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this

allocation step (exclusive of transfers between pool plants of the same handler) at all pool plants of the handler;

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(7)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from another order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(7)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(9) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1001.40(b)(1), in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a)(2)(iii), (a)(5) and (7)(i) of this section;

(10) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(11) Subject to the provisions of paragraphs (a)(11) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2)(i), (7)(v) and (8)(i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received:

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(11) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(12) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(7)(vi) and (8)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(12)(ii), (iii) and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class, as announced for the month pursuant to § 1001.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of

utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(12)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II) to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(12)(ii) of this section, should the computations pursuant to paragraph (a)(12) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(13) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from other pool plants according to the classification of such products pursuant to § 1001.42(a); and

(14) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk and in receipts from handlers under § 1001.9(d), subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(14) of this section and the corresponding step of paragraph (b) of this section.

22. Section 1001.45 is revised to read as follows:

§ 1001.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from a regulated plant or handler under another Federal order pursuant to § 1001.44(a)(12) and the corresponding step of § 1001.44(b), estimate and publicly announce the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose.

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1001.44 on the basis of such report, and, thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

(c) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to an other order plant the class to which such shipments were allocated by the market administrator of the other order on the basis of the report by the receiving handler, and, as necessary, any changes in such allocation arising from the verification of such report.

§§ 1001.46, 1001.47 and 1001.48 [Removed and Reserved]

23. Sections 1001.46, 1001.47 and 1001.48 are removed and reserved.

24. Section 1001.50 is revised to read as follows:

§ 1001.50 Class prices.

Subject to the provisions of § 1001.52, the class prices per hundredweight of milk for the month shall be as follows:

(a) *Class I price.* The Class I price in Zone 21 shall be the basic formula price for the second preceding month plus \$2.52. The differential value for Zone 1 shall be \$3.24.

(b) *Class II price.* The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1001.51(b) for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (b)(2) of this section, was less than the basic formula price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1001.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1001.51(b).

(c) *Class III price.* Subject to the adjustment set forth below for the applicable month, the Class III price shall be the basic formula price for the month.

Month	Amount
January.....	+\$0.03
February.....	+.02
March.....	-.05
April.....	-.09
May.....	-.12
June.....	-.11
July.....	+.03
August.....	+.10
September.....	+.06
October.....	+.06
November.....	+.06
December.....	+.06

25. Section 1001.51 is revised to read as follows:

§ 1001.51 Basic formula prices.

(a) The "basic formula price" shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1001.76(b) shall be used.

(b) The "basic Class II formula price" for the month shall be the basic formula price for the second preceding month plus or minus the amount computed pursuant to paragraphs (b)(1) through (4) of this section.

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1001.21 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(i) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(A) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(B) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(C) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(ii) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(A) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(B) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(2) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(3) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2)

of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (b)(3)(i) and (ii) of this section:

(i) Combine the total production of American cheese for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

26. Section 1001.52 is amended by revising paragraph (a)(4)(ii) and adding a new paragraph (d) to read as follows:

§ 1001.52 Plant location adjustments.

(a) * * *

(4) * * *

(ii) The Massachusetts counties of Hampden (only the townships of Brimfield, Holland, Monson, Palmer and Wales), Hampshire (only the township of Ware) and Worcester (only the townships of Brookfield, East Brookfield, Hardwick, New Braintree, North Brookfield, Oakham, Spencer, Sturbridge, Warren and West Brookfield).

(d) The zone location of each plant in the State of Massachusetts (except Berkshire County) that is outside the areas specified in paragraph (a) of this section shall be based upon its highway mileage distance to Boston, Massachusetts. The distance for each plant shall be the mileage between Boston, Massachusetts, and the named point nearest to the plant, measured to the greatest extent possible over roads designated as principal roads, on the road maps specified in paragraph (e) of this section.

* * *

27. Section 1001.53 is amended by revising the introductory text, removing and reserving paragraph (e), and revising paragraphs (f), (g), and (h)(1) to read as follows:

§ 1001.53 Determination of applicable zone locations for pricing purposes.

In computing the value of fluid milk products at class prices under §§ 1001.60 and 1001.61, the handlers' producer-settlement fund debits and credits under § 1001.71, the minimum amounts payable to producers under § 1001.73, and the minimum amounts payable to cooperative associations under § 1001.74, the location adjustments specified in § 1001.52 for the zone location of the plant for which the computation is being made shall be used except that for the following items the adjustments for the zone locations specified shall be used:

* * *

(e) [Reserved]

(f) For receipts from unregulated supply plants assigned to Class I milk, the zone location of the plant from which the product was received;

(g) For any excess of beginning inventory assigned to Class I milk under § 1001.44(a)(2)(iii), (a)(5), (a)(7)(i), or (a)(9) over the quantities of producer milk and of milk from cooperative associations in their capacity as handlers under § 1001.9(d) assigned to Class II and Class III milk in the preceding month, the zone location of the pool plants from which an equivalent quantity of receipts of fluid milk products were assigned to Class II or Class III milk in the preceding month in sequence beginning with the plant in the lowest-numbered zone; and

(h) * * *

(1) After the allocation step of § 1001.44(a)(12) for the transferee-plant, multiply the remaining pounds of Class I skim milk by 110 percent and the remaining pounds of Class I butterfat by 150 percent;

* * *

28. Section 1001.54 is revised to read as follows:

§ 1001.54 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month and the Class III price for the preceding month, and on or before the 15th day of each month the Class II price for the following month computed pursuant to § 1001.50(b).

29. Section 1001.60 is revised to read as follows:

§ 1001.60 Handler's value of milk for computing basic blended price.

For the purpose of computing the basic blended price, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants, and of each handler described in § 1001.9(d) with respect to milk that was not received at a pool plant, as directed in this section. The prices used shall be those for the applicable zone locations as determined under § 1001.53.

(a) Multiply the pounds of producer milk and milk received from a handler described in § 1001.9(d) that were classified in each class as determined pursuant to § 1001.44 by the applicable class prices and add the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage subtracted from each class pursuant to § 1001.44(a)(14) and the corresponding step of § 1001.44(b) by the respective class prices, as adjusted by the butterfat differential specified in § 1001.74, that are applicable at the location of the pool plant;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1001.44(a)(9) and the corresponding step of § 1001.44(b).

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1001.44(a)(7)(i) through (iv), (vii), and (viii) and the corresponding step of § 1001.44(b), excluding receipts of bulk fluid cream products from an other order plant;

(e) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1001.44(a)(7)(v) and (vi) and the corresponding step of § 1001.44(b);

(f) Add the amount obtained from multiplying the Class I price applicable at the location of the nearest unregulated supply plants from which an equivalent volume was received by the pounds of skim milk and butterfat subtracted from Class I pursuant to § 1001.44(a)(11) and the corresponding

step of § 1001.44(b), excluding such skim milk and butterfat in receipts of bulk fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order;

(g) For the first month that this paragraph is effective:

(1) Subtract the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class II price, both for the preceding month, by the hundredweight of skim milk and butterfat in any bulk fluid milk products or products specified in § 1001.40(b) that was included in the handler's inventory at the end of the preceding month and classified and priced as Class I milk; and

(2) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class II price, both for the preceding month, by the hundredweight of skim milk and butterfat in packaged fluid milk products that were included in the handler's inventory at the end of the preceding month and classified and priced as Class II milk.

30. Section 1001.62 is redesignated as § 1001.63, and revised; § 1001.61 is redesignated as § 1001.62 and revised; and a new § 1001.61 is added, to read as follows:

§ 1001.61 Partially regulated distributing plant operator's value of milk for computing basic blended price.

For the purpose of computing the basic blended price, the market administrator shall determine for each month the value of milk distributed as route disposition in the marketing area by the operator of a partially regulated distributing plant, as follows:

(a) Subtract from the quantity of route disposition distributed in the marketing area by the partially regulated distributing plant operator the quantity of fluid milk products (except those described in paragraph (b) of this section) received at the plant during the month that is classified and priced as Class I milk or the equivalent thereof under any marketwide pool Federal order and that is not used to offset route disposition in any other marketing area, and multiply the result by the applicable Class I price;

(b) Multiply by the difference between the applicable Class I price and the Class III price for the month the quantity

of filled milk distributed as route disposition in the marketing area from the partially regulated distributing plant which is not proved to have been made from other fresh fluid milk products; and

(c) Add the values determined pursuant to paragraphs (a) and (b) of this section.

§ 1001.62 Computation of basic blended price.

The market administrator shall compute the basic blended price per hundredweight applicable to milk received at plants located in zone 21 and containing 3.5 percent butterfat as follows:

(a) Combine into one total the values computed pursuant to §§ 1001.60 and 1001.61 for all handlers from whom the market administrator has received at the market administrator's office prior to the 11th day after the end of the month the reports for the month prescribed in § 1001.30 and the payments for the preceding month required under § 1001.72(a);

(b) Deduct the amount of the plus adjustments, and add the amount of the minus adjustments, that are applicable under §§ 1001.52 and 1001.53;

(c) Subtract for each of the months of March, April, May, and June an amount computed by multiplying the total hundredweight of producer milk included in these computations by 20 cents in March, 30 cents in April, and 40 cents in May and June;

(d) Add for the months of August, September, and October an amount representing 25 percent, 30 percent, and 30 percent, respectively, of the aggregate amount subtracted under paragraph (c) of this section for the prior period of March-June, and for November add the remainder of the amount subtracted under such paragraph (c) and the interest earned on the aggregate fund;

(e) Add an amount equal to not less than one-half of the unobligated balance of the producer-settlement fund at the close of business on the 10th day after the end of the month;

(f) Divide the resulting amount by the sum of the following for all handlers included in these computations:

- (1) The total hundredweight of producer milk;
- (2) The total hundredweight for which a value is computed pursuant to § 1001.60(f); and
- (3) The total hundredweight for which a value is computed pursuant to § 1001.61(a); and

(g) Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in the producer-settlement fund. The result

shall be the basic blended price for the month.

§ 1001.63 Announcement of blended prices and butterfat differential.

The market administrator shall announce publicly on or before:

(a) The fifth day after the end of each month the butterfat differential for such month; and

(b) The 13th day after the end of each month the zone blended prices resulting from the adjustment of the basic blended price for such month, as computed under § 1001.62, by the location adjustments set forth in § 1001.52.

§ 1001.70 [Amended]

31. Section 1001.70 is amended by changing all references to "§ 1001.61" to "§ 1001.62."

32. Section 1001.71 is amended by revising paragraphs (a)(1), (2), (3), and (4) to read as follows:

§ 1001.71 Handlers' producer-settlement fund debits and credits.

* * * *

(a) * * *

(1) Multiply the quantities of producer milk, the quantities of fluid milk products received at the pool plant from cooperative associations in their capacity as handlers under § 1001.9(d), the quantities of other source fluid milk receipts at pool plants that were allocated to Class I pursuant to § 1001.44, and the quantities of route disposition in the marketing area by partially regulated distributing plants for which a value was determined pursuant to § 1001.61(a) by the basic blended price computed under § 1001.62 adjusted by any location adjustments applicable under §§ 1001.52 and 1001.53.

(2) For any cooperative association in its capacity as a handler under § 1001.9(d), multiply the quantities of milk moved to each pool plant by the basic blended price computed under § 1001.62 adjusted by any location adjustments applicable under §§ 1001.52 and 1001.53; and to the result add the value determined under § 1001.60.

(3) If the value of fluid milk products, as determined under § 1001.60 for any pool plant, under § 1001.61 for any partially regulated distributing plant, or under paragraph (a)(2) of this section for any cooperative association in its capacity as a handler under § 1001.9(d), is greater than the credit as determined under paragraph (a)(1) of this section, the difference shall be the producer-settlement fund debit for the plant or the cooperative association in its capacity as a handler under § 1001.9(d).

(4) If the value of fluid milk products, as determined under §§ 1001.60 or

1001.61 for any plant, or as determined under paragraph (a)(2) of this section for any cooperative association in its capacity as a handler under § 1001.9(d), is less than the credit as determined under paragraph (a)(1) of this section, the difference shall be the producer-settlement fund credit for the plant or the cooperative association in its capacity as a handler under § 1001.9(d).

* * * *

§ 1001.73 [Amended]

33. In § 1001.73, paragraph (a) is amended by changing the words "Class II" to "Class III", and paragraph (b) is amended by changing the reference to "§ 1001.61" to "§ 1001.62."

§ 1006.74 [Amended]

34. In § 1001.74, paragraph (d)(1) is amended by changing the words "Class II" to "Class III", paragraph (d)(2) is amended by changing the reference to "§§ 1001.44 and 1001.47" to "§ 1001.44", and paragraph (d)(3) is amended by changing the reference to "§ 1001.61" to "§ 1001.62."

35. Section 1001.78 is revised to read as follows:

§ 1001.78 Charges on overdue accounts.

Any producer-settlement fund account balance due from or to a handler under § 1001.72, § 1001.77, or § 1001.78, for which remittance has not been received in or paid from the market administrator's office by the close of business on the 20th day of any month, shall be increased one percent effective the following day.

36. Section 1001.85 is amended by revising paragraph (c) to read as follows:

§ 1001.85 Assessment for order administration.

* * * *

(c) The quantity distributed as route disposition in the marketing area from a partially regulated distributing plant for which a value is determined under § 1001.61.

PART 1002—MILK IN THE NEW YORK-NEW JERSEY MARKETING AREA

37. Section 1002.6 is revised to read as follows:

§ 1002.6 Producer.

Producer means any dairy farmer who produces milk approved by a duly constituted regulatory agency for fluid consumption and who delivers pool milk as specified in § 1002.14 to a pool plant, a pool unit, a plant specified in § 1002.28 (f)(2) which is a partial pool plant, or a partial pool unit whose pool designation was canceled for failure to meet the

requirements specified in § 1002.26(a), except that it shall not include any such dairy farmer delivering to such partial pool plant or partial pool unit unless at least 50 percent of such dairy farmer's milk delivered to such plant or unit is pool milk pursuant to § 1002.14. Each dairy farmer delivering milk to a partial pool plant or a partial pool unit shall be considered to have delivered pool milk for such dairy farmer's proportionate share of total milk delivered by dairy farmers to such plant or unit.

38. Section 1002.14 is amended by revising paragraph (a) and adding paragraph (b) to read as follows:

§ 1002.14 Pool milk.

* * * *

(a) Milk first received at a pool plant which otherwise would be considered producer milk under an other order if all of such milk is assigned to Class II or Class III pursuant to § 1002.45(a)(9) and the corresponding step of § 1002.45(b).

(b) Milk not approved by a duly constituted regulatory agency for fluid consumption.

* * * *

39. Section 1002.15 is revised to read as follows:

§ 1002.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section "fluid milk product" means any of the following products in fluid or frozen form: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and milkshake and ice milk mixes containing less than 20 percent total solids, including any such products that are flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted.

(b) The term "fluid milk product" shall not include:

(1) Evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers, or aseptically packaged and hermetically sealed in foil-lined paper containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

40. A new § 1002.18 is added to read as follows:

§ 1002.18 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream) or a mixture of cream and milk or skim milk containing 10 percent or more butterfat, with or without the addition of other ingredients.

41. A new § 1002.19 is added to read as follows:

§ 1002.19 Product prices.

The prices specified in this section as computed and published by the Director of the Dairy Division, Agricultural Marketing Service, shall be used in calculating the basic Class II formula price pursuant to § 1002.51(b), and the term "work-day" as used herein shall mean each Monday through Friday that is not a national holiday.

(a) *Butter price* means the simple average of the prices per pound of approved (92-score) butter on the Chicago Mercantile Exchange for the work-days during the first 15 days of the month, using the price reported each week as the price for the day of the report, and for each succeeding work-day until the next price is reported.

(b) *Cheddar cheese price* means the simple average for the work-days during the first 15 days of the month, of the prices per pound of cheddar cheese in 40-pound blocks on the National Cheese Exchange (Green Bay, WI). The price reported for each week shall be used as the price for the day on which reported, and for each succeeding work-day until the next price is reported.

(c) *Nonfat dry milk price* means the simple average of the prices per pound of nonfat dry milk for the work-days during the first 15 days of the month computed as follows:

(1) Use the prices (using the midpoint of any price range as one price) reported each week for high heat, low heat and approved nonfat dry milk, respectively, for the Central States production area;

(2) Compute a simple average of the weekly prices for the three types of nonfat dry milk in paragraph (c)(1) of this section. Such average shall be the daily price for the day on which the prices were reported and for each preceding work-day until the day such prices were previously reported; and

(3) Add the prices determined in paragraph (c)(2) of this section for the work-days during the first 15 days of the month and compute the simple average thereof.

(d) *Edible whey price* means the simple average of the prices per pound of edible whey powder for the Central States production area for the work-days during the first 15 days of the month. The prices used shall be the price (using the midpoint of any price

range as one price) reported each week as the daily price for the day on which reported, and for each preceding work-day until the day such price was previously reported.

42. Section 1002.22 is revised to read as follows:

§ 1002.22 Additional duties of the market administrator.

In addition to the duties specified in § 1000.3(c) of this chapter, the market administrator shall perform the following duties:

(a) Maintain a main office and such branch offices as may be necessary;

(b) Promptly notify a handler, upon receipt of the handler's written request therefore, of the market administrator's determination: As to whether one or more plants exist at a specified location, as to whether any specified item constitutes a part of the handler's plant, or as to which plant a specified item is a part in the event that the particular premises in question constitutes more than one plant: *Provided*, That if the request of the handler is for revision or affirmation of a previous determination, there is set forth in the request a statement of what the handler believes to be the changed conditions which make a new determination necessary. If a handler has been notified in writing of a determination with respect to an establishment operated by him, any revision of such determination shall not be effective prior to the date on which such handler is notified of the revised determination;

(c) Place the sums deducted under § 1002.61(d) and retained pursuant to § 1002.70 in an interest-bearing account or accounts in a bank or banks duly approved as a Federal depository for such sums or invest them in short-term United States Government securities;

(d) For the purpose of allocating receipts from other Federal order plants under § 1002.45(a)(15) and the corresponding step of § 1002.45(b), publicly announce the market administrator's estimate of the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in pool milk of all handlers. Such estimate shall be final for such purpose.

§ 1002.25 [Amended]

43. Section 1002.25 is amended by changing the reference "§ 1002.51" in the introductory text to "§ 1002.52", changing all references to "§ 1002.89" in paragraphs (a)(2) and (a)(3) to "§ 1002.77", changing the reference "§ 1002.3" in paragraph (c)(5) to "§ 1002.30", changing the words "Class

II" in paragraph (k)(1) to "Class II and Class III", changing the reference "paragraph (c)(3)" in paragraph (l) to "paragraph (c)(2)", and revising paragraphs (c), (c)(1), and (h) to read as follows:

§ 1002.25 Bulk tank units.

(c) Except as set forth in paragraphs (c)(1) through (5) of this section, a handler may declare that a unit is to be operated as a pool unit and at any time may add a farm to a pool unit: *Provided*, That a handler pursuant to paragraph (a)(4) of this section may not add farms to a pool unit during the months of July through March unless such handler's Class I-A skim milk or butterfat utilization exceeds the total receipts of skim milk or butterfat, respectively, in milk from the pool unit, and in the latter case he may add only the smallest number of farms necessary to provide sufficient milk to cover such Class I-A utilization.

(1) If the unit is a declared nonpool unit or if the farm is a part of a declared nonpool unit of such handler, the unit or farm may be changed to a pool status, except as excluded from the pool milk definition pursuant to § 1002.14(d), only beginning the first day of a month upon notice to the market administrator by not later than the 10th day of such month. If the notice is filed after the 10th day of the month, the effective date shall be the first day of the following month except as specified in paragraph (c)(5) of this section.

(h) Each handler shall report by not later than the 10th day of the month any changes in units during the preceding month and as of the first day of such month.

44. Section 1002.26 is amended by revising paragraph (a) to read as follows:

§ 1002.26 Operating requirements.

(a) Be willing to dispose of as Class I-A milk in the marketing area milk received at the plant or on the unit from dairy farmers and agree that if a plant designation is canceled for failure to meet this requirement, the Class I-A and Class I-B milk of such plant through the partial pool plant and partial pool unit provisions shall be priced and equalized from the effective date of cancellation through the following June 30;

45. Section 1002.27 is amended by changing all references to "§ 1002.89" to "§ 1002.77", revising the language in

paragraph (b) before the proviso, redesignating paragraphs (c) through (j) as paragraphs (d) through (k), revising redesignated paragraphs (d), (h) introductory text, (h) (2) and (3) and (i), and adding new paragraphs (c) and (l) to read as follows:

§ 1002.27 Suspension and cancellation of designation.

(b) The designation of any plant which in any month is not approved by a health authority as a source of milk for the marketing area shall be automatically suspended at the beginning of the second month following the month that the handler receives notice that the plant does not have health approval as a source of milk for the marketing area unless the absence of health approval is a temporary condition covering a period of not more than 15 days: * * *

(c) The designation of a plant pursuant to § 1002.24 shall be suspended at the beginning of the second month following any consecutive 12-month period in which the plant failed to receive any pool milk or at the beginning of the second month following a month in which there is a failure to maintain the facilities and equipment that constitute a plant pursuant to § 1002.8(a).

(d) The designation of any plant or unit shall be suspended, effective no sooner than 10 days nor later than 20 days after the date of mailing of notice, by registered letter, to the handler, whenever the market administrator, subject to the limitations set forth in paragraphs (h) and (j) of this section, finds on the basis of available information that the handler operating the plant or unit is not meeting the requirements set forth in § 1002.26: *Provided*, That, if the handler operating the plant or unit is not a cooperative association qualified pursuant to § 1002.77, the market administrator shall notify any qualified cooperative association which has any members who deliver milk to such plant or unit, and shall also notify individually all producers delivering to such plant or unit who are not members of such qualified cooperative association, of such suspension of designation.

(h) No pool plant or pool unit designation shall be suspended for failure to meet the requirements of § 1002.26(a) except under the following conditions or pursuant to paragraph (1) of this section:

- (1) * * *
- (2) There has been issued by the market administrator, following such

meeting, and mailed to all handlers operating pool plants designated pursuant to § 1002.24 or pool units consisting of farms in the area specified in § 1002.25(e) the market administrator's determination of the desirable utilization of milk received from producers each month during all or a part of the period set forth in paragraph (h)(1) of this section. Such determination shall include a schedule setting forth, by months, the desired minimum percentage of pool milk received from producers to be utilized in specified classes. Such specified classes shall include Class I-A in the marketing area, and may include all or a part of other Class I-A and Class I-B.

(3) The market administrator finds on the basis of available information that the handler operating a plant or unit is not utilizing milk received from producers in accordance with the minimum percentage set forth in the determination of the market administrator previously announced pursuant to paragraph (h)(2) of this section: *Provided*, That the suspension of the designation of a plant or unit may be made effective during the months of November and December if the market administrator finds that the handler is utilizing any milk received from producers in classes other than those set forth in the determination of the market administrator announced pursuant to paragraph (h)(2) of this section.

(i) The cancellation of pool plant or pool unit designation for failure to meet the requirements of § 1002.26(a) shall be subject to the following conditions:

(1) No pool plant or pool unit designation shall be canceled if the handler operating the plant or unit utilized the milk received by the handler from producers during the month in which the suspension is made effective in accordance with the minimum percentage set forth in the determination of the market administrator announced pursuant to paragraph (h)(2) or paragraph (l) of this section.

(2) No pool plant or pool unit designation shall be canceled if the handler operating the plant or unit utilized in the specified classes set forth in the determination of the market administrator announced pursuant to paragraph (h)(2) of this section a percentage of the total milk received by such handler from producers during the month in which the suspension is made effective which is not less than the percentage of the total pool milk reported by all handlers for such month to have been used in the specified classes.

(3) In the event that all milk received from producers at a plant or unit is reported to the market administrator by a cooperative association qualified pursuant to § 1002.77 and such association pays the producer for such milk, the pool plant or pool unit designation shall not be canceled if a percentage of all milk reported by such cooperative association is utilized in accordance with the minimum percentage set forth in the determination of the market administrator announced pursuant to paragraph (h)(2) of this section, or in accordance with the percentage set forth in paragraph (i)(2) of this section.

(4) Cancellation of designations shall be limited to those plants or units necessary to result in a utilization of milk received at the remaining pool plants and pool units operated by the handler, or reported by the cooperative, as the case may be, in accordance with the minimum percentage set forth in paragraph (l) of this section, or in the determination of the market administrator announced pursuant to paragraph (h)(2) of this section.

(l) The designation of any pool plant pursuant to § 1002.24 or any pool unit pursuant to § 1002.25(e) shall be canceled unless 5 percent or more of the pool milk received from producers at such plant or by such unit during each of the months of December and January, and 10 percent during each of the months of September through November, is utilized as Class I-A milk unless the percentage has been revised pursuant to paragraph (h) of this section.

46. Section 1002.30 is amended by changing the reference "§ 1002.70" in paragraph (d) to "§ 1002.60", and by revising the first sentence of the introductory text and paragraph (b) to read as follows:

§ 1002.30 Reports of receipts and utilization.

Each handler, except a handler receiving own farm milk and not required to be listed pursuant either to § 1002.11 or 1002.12, shall report each month to the market administrator for the preceding month in the manner and on the forms prescribed by the market administrator with respect to each pool plant, partial pool plant, pool unit or partial pool unit operated by such person, the information set forth in paragraphs (a) through (d) of this section. * * *

(b) Inventories at the beginning and the end of the month of fluid milk

products and products specified in § 1002.41(c)(1);

47. Section 1002.41 is revised to read as follows:

§ 1002.41 Classes of utilization.

Subject to the conditions set forth in §§ 1002.42 through 1002.46, the classes of utilization shall be as follows:

(a) *Class I-A milk.* Class I-A milk shall be all skim milk and butterfat:

(1) Disposed of as a fluid milk product, except as otherwise provided in paragraphs (c) and (d) of this section:

- (i) Inside the marketing area;
- (ii) As route disposition in an other order marketing area;
- (iii) To an other order plant and assigned under such other order to Class I;

(iv) In packaged form to an other order plant if such product is not defined as a fluid milk product under such other order; and

(v) To a partially regulated plant under an other order and there applied as an offset to Class I sales in any other order market;

(2) In packaged inventory of fluid milk products at the end of the month;

(3) In shrinkage assigned to Class I-A pursuant to paragraph (d) of this section; and

(4) Not specifically accounted for as Class I-B, Class II or Class III milk.

(b) *Class I-B milk.* Class I-B milk shall be all skim milk and butterfat:

(1) Disposed of as a fluid milk product outside this or any other Federal order marketing area, except for:

(i) Milk moved to a partially regulated plant under an other order and there applied as an offset to Class I sales in any other order market; and

(ii) Inventory of packaged fluid milk products at nonpool plants that are not other order plants.

(2) In shrinkage assigned to Class I-B pursuant to § 1002.42(c).

(c) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product, eggnog, and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product or eggnog, except as otherwise provided in paragraph (d) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (c)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of to any commercial food processing establishment (other than a milk or filled milk plant) at which food products (other than milk products and filled milk) are processed and from which

there is no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages; and

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, and their by-products (whey);

(ii) Milkshake and ice milk mixes (or bases) containing 20 percent or more total solids, frozen desserts, and frozen dessert mixes;

(iii) Any concentrated milk product in bulk fluid form other than that specified in paragraph (d)(1)(iv) of this section;

(iv) Plastic cream, frozen cream, anhydrous milkfat, aerated cream, sour cream and sour half and half, and sour cream mixtures containing nonmilk items;

(v) Custards, puddings, pancake mixes and buttermilk biscuit mixes, yogurt and any other semi-solid product resembling a Class II product and containing less than 10 percent butterfat;

(vi) Formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers; and

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public.

(d) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cheese (other than cottage cheese, lowfat cottage cheese, and dry curd cottage cheese) and its by-products (whey);

(ii) Butter;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(vi) Any product not otherwise specified in this section.

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (c)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (c)(1) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and products specified in paragraph (c)(1) of this section that are dumped by a handler if the market administrator is notified of such dumping in advance and is given the opportunity to verify such disposition;

(5) In skim milk in any modified fluid milk product that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1002.15;

(6) Contained in fluid milk products and products specified in paragraph (c)(1) of this section that are destroyed or lost by a handler in a vehicular accident, flood, fire, or in a similar occurrence beyond the handler's control, to the extent that the quantities destroyed or lost can be verified from records satisfactory to the market administrator; and

(7) In shrinkage assigned pursuant to § 1002.42(a) to the receipts specified in § 1002.42(a)(2) and in shrinkage specified in § 1002.42 (b) and (c).

48. Section 1002.42 is revised to read as follows:

§ 1002.42 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1002.30, the following shall be determined:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b) (1) through (5) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraphs (b) (1) through (5) of this section, which was received in the form of a bulk fluid milk product or a bulk fluid cream product;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in pool milk received from producers, in milk received from pool units, and in milk received from units other than pool units, exclusive of the quantity for which Class II or Class III utilization was requested by the handler;

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in receipts of fluid milk products in bulk from other pool plants;

(3) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in receipts of

fluid milk products in bulk from plants other than those defined in § 1002.8 (b) or (d), excluding the quantity for which Class II or Class III classification is requested by the handler; and

(5) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b) (1) through (4) of this section; and

(c) Shrinkage in excess of the amounts assigned to Class III pursuant to paragraphs (a) and (b) of this section shall be assigned pro rata to Class I-A and Class I-B in accordance with the respective volumes of skim milk and butterfat actually accounted for in each such class.

49. Section 1002.44 is revised to read as follows:

§ 1002.44 Transfers.

(a) *Transfers to pool plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I-A milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers shall be subject to the following conditions:

(1) The skim milk or butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee plant after the computations pursuant to § 1002.45(a)(17) and the corresponding step of § 1002.45(b).

(2) If the transferor plant received during the month other source milk to be allocated pursuant to § 1002.45(a)(8) or the corresponding step of § 1002.45(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor handler received during the month other source milk to be allocated pursuant to § 1002.45(a) (13) or (15) or the corresponding steps of § 1002.45(b), the skim milk or butterfat so transferred, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee plant.

(b) *Transfers to other order plants.* Skim milk or butterfat transferred in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another order plant shall be classified in the following manner:

(1) If transferred as packaged fluid milk products, classification shall be in the classes (either Class I-A, II or III) to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both the transferor and the transferee plants so request in the reports of receipts and utilization filed with their respective market administrators, transfers in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I-A, subject to adjustment at a later date;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I-A milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to another order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1002.41.

(c) *Transfers to producer-handlers.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I-A milk, if transferred in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers to other nonpool plants.* Skim milk or butterfat transferred in the following forms from a pool plant to a nonpool plant that is not an other order

plant or a producer-handler plant shall be classified:

(1) As Class I-A milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I-A milk, if transferred in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) The transferring handler claims classification pursuant to the assignment set forth in paragraph (d)(3) of this section in the handler's report submitted to the market administrator pursuant to § 1002.30 for the month within which such transaction occurred;

(ii) The operator of such transferee plant maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available if requested by the market administrator for the purpose of verification;

(iii) In determining the nonpool plant's utilization for purposes of this section, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a second nonpool plant shall be classified pursuant to the same assignment procedure with respect to receipts and utilization at such second nonpool plant, except that classification of such transfers in Class I-A and I-B shall not be less than the quantities which would be assigned to those classes if the transfer of such products had been directly from a pool plant or pool unit.

(3) Skim milk and butterfat so transferred shall be classified on the basis of the following assignment of utilization at the transferee plant pursuant to paragraph (d)(2)(ii) of this section:

(i) Packaged receipts of fluid milk products from Federal order sources shall first be assigned to route disposition in Federal order marketing areas (assigning receipts to sales in the same market to the extent possible) and any residual shall be assigned to Class I-B route sales.

(ii) Such bulk transfers and other bulk receipts of fluid milk products at such transferee plant from pool plants and units and from other order plants shall next be assigned to any remaining route disposition in any Federal order marketing area. For this purpose receipts from each Federal order market shall first be assigned to remaining route sales in such marketing area and any remainder of such receipts shall be prorated with all Federal order receipts to remaining route disposition in all Federal order marketing areas.

(iii) Receipts from dairy farmers shall then be assigned to any remaining route sales in the marketing area.

(iv) Remaining receipts from dairy farmers and other unregulated other source receipts (excluding opening inventory) in the form of fluid milk products shall be assigned pro rata to Class I-B, Class II and Class III utilization at such plant to the extent of such utilization available at such plant and any remainder of such receipts shall be assigned pro rata to Class I-A bulk sales to plants regulated under this order and Class I bulk sales to plants regulated under other orders.

(v) Receipts of bulk fluid cream products from plants defined pursuant to § 1002.8(b) and (d) shall be assigned pro rata among such plants to any remaining Class II and Class III utilization on a pro rata basis, then to any remaining Class I-A disposition and finally any Class I-B disposition.

(vi) Any remaining receipts of fluid milk products or bulk fluid cream products being assigned pursuant to this paragraph shall be assigned pro rata with remaining receipts from other order plants, first to remaining Class I-A utilization, then to Class I-B utilization, then to Class II utilization, and finally to Class III utilization at such plant: *Provided*, That if on inspection of the books and records of such plant the market administrator finds that there is insufficient utilization to cover such receipts, the remainder shall be classified as Class I-A.

(vii) Any remaining Class I-A route disposition in any Federal marketing area shall be subject to the pricing specified in § 1002.60(d)(2).

50. Section 1002.45 is revised to read as follows:

§ 1002.45 Allocation of skim milk and butterfat classified.

The classification of milk received from producers at each pool plant or pool unit for each handler shall be determined each month pursuant to paragraphs (a), (b), and (c) of this section: *Provided*, That for the purpose of establishing the pool status of any plant with Class I-A route disposition in the marketing area which is not a pool plant pursuant to § 1002.24, skim milk and butterfat in milk received at such plant directly from dairy farmers or units up to an amount sufficient to qualify such plant as a pool plant pursuant to § 1002.28(a) or (b) shall be considered the source of such Class I-A route disposition of such plant and be subtracted from Class I-A prior to the application of the allocation sequence set forth in paragraphs (a) and (b) of this section, unless at the time of filing the

handler's report pursuant to § 1002.30 the handler elects not to have it so allocated.

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk classified as Class III pursuant to § 1002.42(b);

(2) Subtract the pounds of skim milk received in packaged form from a producer-handler for marketing as certified fluid milk products from the total pounds of skim milk in Class I-A and Class I-B milk, respectively, in accordance with its proportionate disposition in such classes;

(3) Subtract from the remaining pounds of skim milk in Class III, 2 percent of the pounds of skim milk in packaged fluid milk products received from other order plants, and subtract the balance from Class I-A;

(4) Subtract from the remaining pounds of skim milk in Class I-A the pounds of skim milk in packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(4) or comparable provisions of another Federal milk order in the immediately preceding month;

(5) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1002.41(c)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1002.41(c)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(6) or comparable provisions of another Federal milk order in the immediately preceding month;

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in 1002.41(c), but not in excess of the pounds of skim milk remaining in Class II;

(8) Subtract in the order specified below from the pounds of skim milk remaining in Class I-A, Class II and Class III milk, in series beginning with Class III, the pounds of skim milk in:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1002.41(c)(1) that was not subtracted pursuant to paragraphs (a) (5), (6) and (7) of this section;

(ii) Receipts of fluid milk products not approved by a duly constituted health authority which are excepted from the pool milk definition pursuant to § 1002.14(b);

(iii) Receipts of fluid milk products from a producer-handler pursuant to an other order or a producer-handler defined pursuant to § 1002.12 (except pool milk designated in the preamble of § 1002.14).

(iv) Receipts of fluid milk products from a handler's plant at which milk is excepted from the pool milk definition pursuant to § 1002.14(h).

(v) Receipts of fluid milk products from a handler with own farm milk, which milk is excepted from the pool milk definition pursuant to § 1002.14(i).

(9) Subtract in series beginning with Class III from the pounds of skim milk remaining in Class II and Class III milk the pounds of skim milk in receipts of other source milk in the form of fluid milk products from plants other than those defined in § 1002.8 (b) or (d) and units other than pool units for which the handler requests a Class II or Class III classification, but not in any case to exceed the pounds of skim milk remaining in such class;

(10) Subtract from the remaining pounds of skim milk in Class II or Class III milk the pounds of skim milk in bulk receipts of fluid milk products from other order plants not previously assigned and for which a Class II or Class III classification is requested by both the transferor and transferee handler in filing reports of receipts and utilization for the month with their respective market administrators, but not in any case to exceed the pounds of skim milk remaining in such class;

(11) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1002.41(c)(1), in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a) (4), (6) and (8)(i) of this section;

(12) Add to the remaining pounds of skim milk in Class III the pounds subtracted pursuant to paragraph (a)(1) of this section;

(13)(i) Subtract pro rata from the pounds of skim milk remaining in Class I-B, Class II and Class III milk the

remaining pounds of skim milk in receipts of other source milk in the form of fluid milk products from plants not defined pursuant to § 1002.8 (b) or (d) and from units other than pool units: *Provided*, That if the pounds of skim milk to be assigned pursuant to this paragraph (a)(13)(i) exceed the available pounds of skim milk in Class I-B, Class II, and Class III the handler shall designate the priority of sources to be assigned to such classes;

(ii) No assignment shall be made pursuant to this paragraph with respect to milk received from a plant not defined pursuant to § 1002.8 (b) or (d) in the 401 miles and over freight zone at a plant from which 50 percent or more of the gross receipts of skim milk and butterfat leaves the plant in the form of fluid milk products in consumer packages or dispenser inserts and is classified as Class I-A;

(14) Subtract pro rata from the remaining pounds of skim milk in each class the pounds of skim milk in receipts from dairy farmers and from the handler's own farm which are excepted from the pool milk definition pursuant to § 1002.14 (h) and (i);

(15) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products from other order plants not previously assigned pursuant to paragraph (a) (3) and (10) of this section:

(i) Subject to the provisions of this paragraph, such subtraction shall be pro rata to the pounds of skim milk in each class with respect to whichever of the following quantities represents the higher proportion of Class II and Class III milk combined:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1002.22(d); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(15)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I-A milk and Class I-B milk after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(15)(ii) of this section, should the computations pursuant to paragraph (a)(15) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I-A milk and Class I-B milk combined shall be decreased by a like amount, pro rata to remaining utilization in each such class. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(15)(ii) of this section, should the computations pursuant to paragraph (a)(15) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I-A milk or Class I-B milk that exceeds the pounds of skim milk remaining in that class, the pounds of skim milk in such class shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount in sequence beginning with the nearest other pool plant of such handler at which Class I-A or Class I-B utilization is available;

(16) If the plant at which assignment is being made is a plant from which 50 percent or more of the gross receipts of skim milk and butterfat in the form of fluid milk products left the plant in the form of fluid milk products in consumer packages or dispenser inserts and was classified as Class I-A, subtract pro rata from the remaining pounds of skim milk in each class the pounds of skim milk in receipts of fluid milk products from plants in the 401 miles and over freight zone, not defined pursuant to § 1002.8 (b) or (d);

(17) Subtract from the remaining pounds of skim milk in Class I-A milk the pounds of skim milk in remaining receipts from plants (except other order plants) or units the pool status of which

has not yet been established and which receipts have not previously been assigned pursuant to paragraph (a) (13) and (16) of this section;

(18) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk received in the form of fluid milk products and bulk fluid cream products from other pool plants and from pool units (not previously assigned pursuant to the preamble of this section), in accordance with the classification assigned by the transferee handler subject to the conditions of paragraph (a)(18) (i) through (iii) of this section:

(i) The skim milk so assigned to any class of utilization shall be limited to the amount thereof remaining in such class in the transferee plant;

(ii) If the transferor plant received during the month other source milk to be allocated pursuant to paragraph (a)(7) of this section the skim milk so transferred shall be classified so as to allocate the least possible Class I-A or I-B utilization to such other source milk; and

(iii) If the transferor handler received during the month other source milk to be allocated pursuant to paragraph (a)(13) of this section, the skim milk so transferred shall not be classified as Class I-A or I-B to a greater extent than would be applicable to a like quantity of such other source milk received at the transferee plant;

(19) Add to the remaining pounds of skim milk in Class I-A the pounds of skim milk received directly from dairy farmers or units which was deducted pursuant to the proviso in the preamble of this section;

(20) If the pounds of skim milk remaining in all classes exceeds the pounds of skim milk in receipts from producers subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) Combine the amounts of skim milk and butterfat determined pursuant to paragraphs (a) and (b) of this section into one total for each class.

51. Section 1002.51 is redesignated as § 1002.52, § 1002.50 is redesignated as § 1002.51, and § 1002.50a is redesignated as § 1002.50.

52. Section 1002.50 is revised to read as follows:

§ 1002.50 Class prices.

For pool milk received during each month from dairy farmers or cooperative

associations of producers, each handler shall pay per hundredweight not less than the prices set forth in this section, subject to the differentials and adjustments in §§ 1002.52 and 1002.81. Any handler who purchases or receives milk during any month from a cooperative association of producers but does not operate the plant or unit receiving this milk from producers shall pay the cooperative association on or before 2 days before the last day of the month if paid by check, or the last day of the month if paid in cash or cash equivalent, at not less than the lowest class price pursuant to this section for the preceding month for milk received from such cooperative during the first 15 days of the month, and shall pay the cooperative association on or before the 15th day of the following month the balance due for milk received during the month from such cooperative at not less than the class prices pursuant to this section subject to the differentials and adjustments set forth in §§ 1002.52 and 1002.81 applicable at the plant at which the milk is first received from the cooperative association. Such payments to a cooperative association shall be deemed not to have been made until the payments have been received by the cooperative association.

(a) *Class I-A price.* For Class I-A milk the Class I price in the 201-210 mile freight zone shall be the basic formula price for the second preceding month plus \$2.42. The differential value in the 1-10 mile freight zone shall be \$3.14.

(b) *Class I-B price.* For Class I-B milk the price shall be the price for Class I-A milk.

(c) *Class II price.* For Class II milk, the price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1002.51(b) for the month plus the amount that the value computed pursuant to paragraph (c)(1) of this section exceeds the value computed pursuant to paragraph (c)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (c)(1) and (c)(2) of this section, was less than the basic formula price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1002.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (c)(1) of this section the simple average (rounded

to the nearest cent) of the basic Class II formula prices computed pursuant to § 1002.51(b).

(d) *Class III price.* Subject to the adjustment set forth below for the applicable month, the Class III price shall be the basic formula price for the month.

Month	Amount
January.....	+ .03
February.....	+ .02
March.....	- .05
April.....	- .09
May.....	- .12
June.....	- .11
July.....	+ .03
August.....	+ .10
September.....	+ .06
October.....	+ .06
November.....	+ .06
December.....	+ .06

53. Section 1002.51 is revised to read as follows:

§ 1002.51 Basic formula prices.

(a) The "basic formula price" shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1002.81 shall be used.

(b) The "basic Class II formula price" for the month shall be the basic formula price for the second preceding month plus or minus the amount computed pursuant to paragraphs (b) (1) through (4) of this section.

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1002.19 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(i) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(A) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(B) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(C) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey

and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(ii) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(A) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(B) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(2) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(3) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (b)(3) (i) and (ii) of this section:

(i) Combine the total production of American cheese for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

54. Newly redesignated Section 1002.52 is amended by changing the reference "§ 1002.50a" in the introductory text to "§ 1002.50", changing the word "0.1" in paragraph (d) to "0.5", changing the words "Class I" in paragraph (e) to "Class III", and

revising paragraph (c) to read as follows:

§ 1002.52 Transportation differentials.

(c) The differential rates applicable at plants shall be as set forth in the following schedule:

Freight zone Miles	Cents per cwt.	
	Classes I-A and I-B	Classes II and III
1-10.....	+ 72.0	+ 8
11-20.....	+ 69.5	+ 8
21-25.....	+ 67.0	+ 8
26-30.....	+ 67.0	+ 7
31-40.....	+ 64.5	+ 7
41-50.....	+ 62.0	+ 7
51-60.....	+ 59.5	+ 6
61-70.....	+ 57.0	+ 6
71-75.....	+ 32.5	+ 6
76-80.....	+ 32.5	+ 5
81-90.....	+ 30.0	+ 5
91-100.....	+ 27.5	+ 5
101-110.....	+ 25.0	+ 4
111-120.....	+ 22.5	+ 4
121-125.....	+ 20.0	+ 4
126-130.....	+ 20.0	+ 3
131-140.....	+ 17.5	+ 3
141-150.....	+ 15.0	+ 3
151-160.....	+ 12.5	+ 2
161-170.....	+ 10.0	+ 2
171-175.....	+ 7.5	+ 2
176-180.....	+ 7.5	+ 1
181-190.....	+ 5.0	+ 1
191-200.....	+ 2.5	+ 1
201-210.....	0.0	0
211-220.....	- 2.5	0
221-225.....	- 5.0	0
226-230.....	- 5.0	0
231-240.....	- 7.5	0
241-250.....	- 10.0	0
251-260.....	- 12.5	0
261-270.....	- 15.0	0
271-275.....	- 17.5	0
276-280.....	- 17.5	0
281-290.....	- 20.0	0
291-300.....	- 22.5	0
301-310.....	- 25.0	0
311-320.....	- 27.5	0
321-325.....	- 30.0	0
326-330.....	- 30.0	0
331-340.....	- 32.5	0
341-350.....	- 35.0	0
351-360.....	- 37.5	0
361-370.....	- 40.0	0
371-375.....	- 42.5	0
376-380.....	- 42.5	0
381-390.....	- 45.0	0
391-400.....	- 47.5	0
401 and over.....	- 50.0	0

55. Section 1002.53 is revised to read as follows:

§ 1002.53 Producer-handler price differential.

For skim milk and butterfat received from a handler who is a producer-handler under this or any other order and is assigned to Class I-A pursuant to § 1002.45(a)(8)(iii), the transferee handler shall pay a differential equal to the difference between the Class I-A price and the Class III price both

appropriately adjusted for differentials pursuant to § 1002.52.

56. Section 1002.55 is revised to read as follows:

§ 1002.55 Transportation credit on bulk unit pool milk.

For pool milk received by a handler in a pool or partial pool unit, a transportation credit at the rate of 15 cents per hundredweight shall be computed.

57. A new § 1002.56 is added to read as follows:

§ 1002.56 Announcement of class prices and butterfat differential.

The market administrator shall announce publicly:

(a) On or before the fifth day of each month, the following:

(1) The Class I price for the following month applicable at the 201-210 mile zone and at the 1-10 mile zone.

(2) The Class III price for the preceding month applicable at the 201-210 mile zone and at the 1-10 mile zone;

(3) The butterfat differential for the preceding month;

(4) The average price per hundredweight for manufacturing grade milk, f.o.b. plants in Wisconsin and Minnesota, as reported by the United States Department of Agriculture for the preceding month;

(5) The simple average of the daily wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk creamery butter per pound at Chicago, as reported by the United States Department of Agriculture for the preceding month; and

(6) The weighted average of carlot prices per pound for nonfat dry milk solids, spray process, for human consumption, f.o.b. manufacturing plants in the Chicago area, as published by the United States Department of Agriculture for the period from the 26th day of the second preceding month through the 25th day of the preceding month.

(b) On or before the fifteenth day of each month, the Class II price for the following month applicable at the 201-210 mile zone and at the 1-10 mile zone.

§ 1002.70 [Redesignated as § 1002.60]

58. Section 1002.70 is redesignated as § 1002.60, and amended by changing all references to § 1002.51 to § 1002.52", changing the reference "§ 1002.45(a)(17)" in paragraph (a) to § 1002.45(a)(20)", and revising paragraph (d) to read as follows:

§ 1002.60 Net pool obligation of handlers.

(d) Add the amounts computed in paragraph (d) (1) through (4) of this section:

(1) Multiply the pounds of overage deducted from each class pursuant to § 1002.45(a)(20) and the corresponding step of § 1002.45(b) by the applicable class price adjusted by the differentials pursuant to § 1002.52 and 1002.81;

(2) Multiply the difference between the applicable Class I-A and Class III prices, both adjusted by the applicable differential pursuant to § 1002.52, by the pounds of skim milk and butterfat in other source milk subtracted from Class I-A pursuant to § 1002.45(a)(8)(i) and the corresponding step of § 1002.45(b) and by the pounds of skim milk and butterfat specified in § 1002.44(d)(3)(vii);

(3) Multiply the producer-handler price differential by the pounds of skim milk and butterfat subtracted from Class I-A pursuant to § 1002.45(a)(8)(iii) and the corresponding step of § 1002.45(b);

(4) Multiply the difference between the Class III price for the preceding month and the Class I-A price or the Class II price, as the case may be, for the current month, both applicable at the location of the nearest plant or unit from which an equivalent quantity of Class III milk was received in the preceding month, by the pounds of skim milk and butterfat subtracted from Class I-A and Class II pursuant to § 1002.45(a)(11) and the corresponding step of § 1002.45(b).

§ 1002.71 [Redesignated as § 1002.61]

59. Section 1002.71 is redesignated as § 1002.61 and amended by changing the reference "§ 1002.84" in the introductory text to "§ 1002.71", changing the reference "§ 1002.70" in paragraph (a) to "§ 1002.60", changing the reference "§ 1002.89" in paragraph (b) to "§ 1002.77", and redesignating paragraphs (b-1) through (g) as paragraphs (c) through (h). In paragraph (e), the references to "paragraph (c)" are changed to "paragraph (d)", and in paragraph (h) the reference to "paragraph (f)" is changed to "paragraph (g)".

60. A new § 1002.62 is added to read as follows:

§ 1002.62 Announcement of uniform price.

The market administrator shall publicly announce on or before the 14th day of each month, the uniform price for the preceding month pursuant to § 1002.61 applicable at the 201-210 mile zone and at the 1-10 mile zone pursuant to § 1002.82.

§§ 1002.83 through 1002.89 [Redesignated as §§ 1002.70 through 1002.77]

61. Sections 1002.83 through 1002.89 are redesignated as §§ 1002.70 through 1002.77. The centered heading preceding § 1002.83 will now precede § 1002.70.

62. Section 1002.70 is revised to read as follows:

§ 1002.70 Producer settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer settlement fund" into which he shall deposit all payments and out of which he shall make all payments pursuant to §§ 1002.72 through 1002.77. All amounts subtracted under § 1002.61(d), inclusive of interest earned thereon, shall remain therein as an obligated balance until it is withdrawn for the purpose of effectuating § 1002.61(e).

§ 1002.71 [Amended]

63. Section 1002.71 is amended by changing the reference "§ 1002.90" to "§ 1002.85".

§ 1002.72 [Amended]

64. Section 1002.72 is amended by changing the reference "§ 1002.84" to "§ 1002.71".

§ 1002.73 [Amended]

65. In Section 1002.73, paragraph (a) is amended by changing the reference "§ 1002.84" to "§ 1002.71", and the reference "§ 1002.85" to "§ 1002.72".

§ 1002.76 [Amended]

66. Section 1002.76 is amended by changing the reference "§§ 1002.85 and 1002.90" to "§§ 1002.72 and 1002.85".

§ 1002.77 [Amended]

67. Section 1002.77 is amended by removing paragraph (l).

68. Section 1002.82 is revised to read as follows:

§ 1002.82 Transportation differentials.

The transportation differential shall be plus or minus the appropriate differential shown in column B of the schedule in § 1002.52(c) for the zone of the plant to which the milk is delivered or in the case of farms included in units the zone of the township in which the milk is received.

§ 1002.90 [Redesignated as § 1002.85]

69. Section 1002.90 is redesignated as § 1002.85 and amended by changing the reference "§ 1002.85" to "§ 1002.72", and changing the reference "§ 1002.70(d)(2)" to "§ 1002.60(d)(2)". The centered heading preceding § 1002.90 will now precede § 1002.85.

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

70. Section 1004.10 is amended by revising paragraph (d) to read as follows:

§ 1004.10 Producer-handler.

(d) Sections 1004.40 through 1004.45, 1004.50 through 1004.54, 1004.60 through 1004.62, 1004.70 through 1004.79, 1004.85 and 1004.86, and 1004.90 through 1004.95 shall not apply to a producer-handler.

71. Section 1004.11 is revised to read as follows:

§ 1004.11 Dairy farmer.

Dairy farmer means any person who produces milk which is delivered in bulk to a plant. A dairy farmer shall be a "dairy farmer for other markets" with respect to milk reported pursuant to § 1004.7(d)(4).

72. Section 1004.12 is amended by revising paragraphs (a), (e) and (f)(5) to read as follows:

§ 1004.12 Producer.

(a) A dairy farmer with respect to milk which is received at a pool plant pursuant to § 1004.7(a), (b), or (e) directly from the farm.

(e) Milk which is diverted in accordance with the provisions of this section shall be deemed to have been received by the handler for whose account it is diverted at a pool plant at the location of the plant from which it is diverted, except that, for the purpose of applying location adjustments pursuant to §§ 1004.52 and 1004.75 and the direct-delivery differential pursuant to § 1004.79, milk which is diverted shall be considered to be received at the location of the plant to which the milk is diverted.

(f) ***

(5) Dairy farmer with respect to milk physically received at a pool plant as diverted milk from an other order plant if all of the milk so received from such dairy farmer is assigned to Class II or Class III and the milk is treated as producer milk under the provisions of such other order.

73. Section 1004.13 is amended by revising paragraph (a) to read as follows:

§ 1004.13 Producer milk.

(a) Received at a pool plant pursuant to § 1004.7(a), (b), or (e) directly from the farm.

74. Section 1004.14 is revised to read as follows:

§ 1004.14 Other source milk.

Other source milk means all skim milk and butterfat contained in or represented by:

(a) Receipts in the form of fluid milk products and bulk products specified in § 1004.40(b)(1) from any source other than producers, handlers described in § 1004.9(c), or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1004.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1004.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1004.40(b)(1)) for which the handler fails to establish a disposition.

75. Section 1004.15 is revised to read as follows:

§ 1004.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section "fluid milk product" means any of the following products in fluid or frozen form: Milk, skim milk, lowfat milk, milk drinks, buttermilk, filled milk, and milkshake and ice milk mixes containing less than 20 percent total solids, including any such products that are flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted.

(b) The term "fluid milk product" shall not include:

(1) Evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers or aseptically packaged and hermetically sealed in foil-lined paper containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

76. A new § 1004.16 is added to read as follows:

§ 1004.16 Fluid cream product.

Fluid cream product means cream (other than plastic cream or frozen cream) or a mixture of cream and milk or skim milk containing 10 percent or more butterfat, with or without the addition of other ingredients.

77. A new § 1004.21 is added to read as follows:

§ 1004.21 Product prices.

The prices specified in this section as computed and published by the Director of the Dairy Division, Agricultural Marketing Service, shall be used in calculating the basic Class II formula price pursuant to § 1004.51(b), and the term "work-day" as used herein shall mean each Monday through Friday that is not a national holiday.

(a) *Butter price* means the simple average of the prices per pound of approved (92-score) butter on the Chicago Mercantile Exchange for the work-days during the first 15 days of the month, using the price reported each week as the price for the day of the report, and for each succeeding work-day until the next price is reported.

(b) *Cheddar cheese price* means the simple average for the work-days during the first 15 days of the month, of the prices per pound of cheddar cheese in 40-pound blocks on the National Cheese Exchange (Green Bay, WI). The price reported for each week shall be used as the price for the day on which reported, and for each succeeding work-day until the next price is reported.

(c) *Nonfat dry milk price* means the simple average of the prices per pound of nonfat dry milk for the work-days during the first 15 days of the month computed as follows:

(1) Use the prices (using the midpoint of any price range as one price) reported each week for high heat, low heat and approved nonfat dry milk, respectively, for the Central States production area;

(2) Compute a simple average of the weekly prices for the three types of nonfat dry milk in paragraph (c)(1) of this section. Such average shall be the daily price for the day on which the prices were reported and for each preceding work-day until the day such prices were previously reported; and

(3) Add the prices determined in paragraph (c)(2) of this section for the work-days during the first 15 days of the month and compute the simple average thereof.

(d) *Edible whey price* means the simple average of the prices per pound of edible whey powder for the Central States production area for the work-days during the first 15 days of the month. The prices used shall be the price (using the midpoint of any price

range as one price) reported each week as the daily price for the day on which reported, and for each preceding work-day until the day such price was previously reported.

78. In § 1004.30, paragraphs (a)(1), (2) and (3) are revised to read as follows:

§ 1004.30 Reports of receipts and utilization.

(a) * * * *

(1) The quantities of skim milk and butterfat contained in:

(i) Receipts of producer milk (including such handler's own production) and milk received from a cooperative association for which it is a handler pursuant to § 1004.9(c);

(ii) Receipts of fluid milk products and bulk fluid cream products from other pool plants; and

(iii) Receipts of other source milk;

(2) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1004.40(b)(1);

(3) The utilization or disposition of all skim milk and butterfat required to be reported pursuant to this paragraph, showing separately in-area route disposition, except filled milk, and filled milk route disposition in the area;

* * * * *

79. Section 1004.40 is revised to read as follows:

§ 1004.40 Classes of utilization.

Subject to the conditions set forth in §§ 1004.41 through 1004.44, all skim milk and butterfat required to be reported by a handler pursuant to §§ 1004.30 and 1004.32 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged inventory of fluid milk products at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product, egg nog, and any product containing artificial fat, fat substitutes, or 6 percent or more nonmilk fat (or oil), that resembles a fluid cream product or egg nog, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In bulk fluid milk products and bulk fluid cream products disposed of to any commercial food processing establishment (other than a milk or filled milk plant) at which food products (other than milk products and filled

milk) are processed and from which there is no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages; and

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, dry curd cottage cheese, and their by-products (whey);

(ii) Milkshake and ice milk mixes (or bases) containing 20 percent or more total solids, frozen desserts, and frozen dessert mixes;

(iii) Any concentrated milk product in bulk fluid form other than that specified in paragraph (c)(1)(iv) of this section;

(iv) Plastic cream, frozen cream, anhydrous milkfat, aerated cream, sour cream and sour half and half, and sour cream mixtures containing nonmilk items;

(v) Custards, puddings, pancake mixes and buttermilk biscuit mixes, yogurt and any other semi-solid product resembling a Class II product and containing less than 10 percent butterfat;

(vi) Formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed containers; and

(vii) Candy, soup, bakery products and other prepared foods which are processed for general distribution to the public.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cheese (other than cottage cheese, lowfat cottage cheese, and dry curd cottage cheese) and its by-products (whey);

(ii) Butter;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(vi) Any product not otherwise specified in this section.

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and products specified in paragraph (b)(1) of this section that are dumped by a handler if the market administrator is notified of such dumping in advance and is given

the opportunity to verify such disposition;

(5) In skim milk in any modified fluid milk product that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1004.15; and

(6) In shrinkage assigned pursuant to § 1004.41(a) to the receipts specified in § 1004.41(a)(2) and in shrinkage specified in § 1004.41 (b) and (c).

80. Section 1004.41 is revised to read as follows:

§ 1004.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1004.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraphs (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraphs; and

(2) In other source milk not specified in paragraphs (b) (1) through (6) of this section, which was received in the form of a bulk fluid milk product or a bulk fluid cream product;

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant and milk received from a handler described in § 1004.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1004.9(c) and in milk diverted to such plant from another pool plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted from such plant by the plant operator to another plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm

bulk tank samples, the applicable percentage shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk tank lots of fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operators of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in receipts from dairy farmers for other markets pursuant to § 1004.11 and receipts of bulk fluid milk products from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk tank lots of fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraphs (b) (1), (2), (4), (5), and (6) of this section; and

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1004.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

81. Section 1004.42 is revised to read as follows:

§ 1004.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. In either case, the classification of such transfers or diversions shall be subject to the following conditions:

(1) The skim milk or butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the transferee-plant or divertee-plant after the computations

pursuant to § 1004.44(a)(13) and the corresponding step of § 1004.44(b);

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1004.44(a)(8) or the corresponding step of § 1004.44(b), the skim milk or butterfat so transferred or diverted shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1004.44(a) (12) or (13) or the corresponding steps of § 1004.44(b), the skim milk or butterfat so transferred or diverted, up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant or the divertee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another order plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraphs (b) (1), (2), or (3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as

Class I, subject to adjustment when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to another order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1004.40.

(c) *Transfers to producer-handlers and transfers and diversions to exempt distributing plants operated by governmental agencies.* Skim milk or butterfat in the following forms that is transferred from a pool plant to a producer-handler under this or any other Federal order or transferred or diverted from a pool plant to an exempt distributing plant operated by a governmental agency shall be classified:

(1) As Class I milk, if so moved in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to its receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not another order plant, a producer-handler plant, or an exempt distributing plant operated by a governmental agency shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraphs (d)(2)(i) (A) and (B) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraphs (d)(2) (ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed

pursuant to § 1004.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of milk for such nonpool plant; and

(B) To such nonpool plant's receipts of milk from plants not fully regulated under any Federal milk order which the

market administrator determines constitute regular sources of milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class III utilization, and then to Class II utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class III utilization, then to any remaining Class II utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in paragraph (d)(2) of this section.

82. Section 1004.43 is revised to read as follows:

§ 1004.43 General classification rules.

(a) Each month, the market administrator shall correct for mathematical and other obvious errors, the reports of receipts and utilization submitted pursuant to § 1004.30 (a), (b) and (d) by each handler and compute the total pounds of skim milk and butterfat, respectively, in each class at each of the plants of such handler, and the total pounds of skim milk and butterfat in each class which was received from producers by a cooperative association handler pursuant to § 1004.9 (b) and (c) and was not received at a pool plant.

(b) If any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such products plus all the water originally associated with such solids.

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1004.9 (b) or (c) shall be determined separately from the operations of any pool plant

operated by such cooperative association.

83. Section 1004.44 is revised to read as follows:

§ 1004.44 Classification of producer milk.

After making the computations pursuant to § 1004.43, the market administrator each month shall determine the classification of milk received from producers by each cooperative association handler pursuant to § 1004.9 (b) and (c) which was not received at a pool plant, and the classification of milk received from producers and from cooperative association handlers pursuant to § 1004.9(c) at each pool plant for each handler as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1004.41(b);

(2) Subtract from the total pounds of skim milk in Class I, the pounds of skim milk in:

(i) Receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any Federal milk order is classified and priced as Class I milk and is not used as an offset for any other payment obligation under any order; and

(ii) Receipts of exempt milk;

(3) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(8)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining, or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the remaining pounds of skim milk in Class I the pounds of skim milk in packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(5) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1004.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the

pounds of skim milk in products specified in § 1004.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph (a)(6) or comparable provisions of another Federal milk order in the immediately preceding month;

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to, any product specified in § 1004.40(b), but not in excess of the pounds of skim milk remaining in Class II;

(8) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1004.40(b)(1) that was not subtracted pursuant to paragraph (a) (5), (6), and (7) of this section;

(ii) Receipts of fluid milk products from dairy farmers for other markets pursuant to § 1004.11 and from unidentified sources;

(iii) Receipts of fluid milk products from a producer-handler, as defined under this or any other Federal order;

(iv) Receipts (other than exempt milk) of fluid milk products from a handler pursuant to § 1004.9(e);

(v) Receipts of reconstituted skim milk in filled milk from unregulated supply plants that were not subtracted pursuant to paragraph (a)(2) of this section;

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling to the extent that reconstituted skim milk is allocated to Class I at the transferor plant and is not assigned under this step at a plant regulated under another market pool order;

(9) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2)(i) and (8)(v) of this section for which the handler requests a classification other than Class I, but not in excess of

the pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a) (2)(i), (8)(v) and (9)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraphs (a)(9)(ii) (A) through (C) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount;

(A) Multiply by 1.25 the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, from a cooperative association in its capacity as a handler pursuant to § 1004.9(c), and in receipts of bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(8)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentage that the receipts of skim milk in fluid milk products from unregulated supply plants remaining at this pool plant is of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(8)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler, but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(10) Subtract from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1004.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraphs (a) (4), (6) and (8)(i) of this section;

(11) Add to the remaining pounds of skim milk in Class III, the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(12) Subject to the provisions of paragraphs (a)(12) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from unregulated supply plants and from other order plants if not classified or priced pursuant to the order regulating such plants, that were not subtracted pursuant to paragraphs (a) (2)(i), (8)(v) and (9) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received;

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to paragraph (a)(12) of this section exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to paragraph (a)(12) of this section exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk

in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(13) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in remaining receipts of bulk fluid milk products from other order plants (except receipts from other order plants not classified and priced pursuant to the order regulating such plants) that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a) (8)(vi) and (9)(iii) of this section;

(i) Subject to the provisions of paragraphs (a)(13) (ii), (iii) and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II with respect to whichever of the following quantities represents the lower proportion of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class, as announced for the month pursuant to § 1004.45(b); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(13)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(13)(ii) of this section, should the computations pursuant to paragraph (a)(13) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceeds the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II

to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(13)(ii) of this section, should the computations pursuant to paragraph (a)(13) (i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(14) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant and from a cooperative association in its capacity as a handler pursuant to § 1004.9(c) according to the classification assigned pursuant to § 1004.42(a); and

(15) If the pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(15) of this section and the corresponding step of paragraph (b) of this section.

84. In Section 1004.45, paragraph (b) is amended by changing the reference to "§ 1004.44(a)(10)" to "§ 1004.44(a)(13)", and paragraphs (c) and (d) are revised to read as follows:

§ 1004.45 Market administrator's reports and announcements concerning classification.

(c) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from an other order plant, the class to which such receipts are allocated pursuant to § 1004.44 on the basis of such report, and thereafter any change in such allocation required to correct errors disclosed in verification of such report; and

(d) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to an other order plant, the class to which such shipments were allocated by the market administrator of the other order on the basis of the report by the receiving handler; and, as necessary, any changes in such classification arising from the verification of such report.

85. Section 1004.50 is revised to read as follows:

§ 1004.50 Class prices.

Subject to the provisions of § 1004.52 the class prices per hundredweight of milk for the month shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus \$3.03.

(b) *Class II price.* The Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The Class II price shall be the basic Class II formula price computed pursuant to § 1004.51(b) for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, plus any amount by which the basic Class II formula price for the second preceding month, adjusted pursuant to paragraphs (b)(1) and (b)(2) of this section, was less than the basic formula price for the second preceding month.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1004.51(a) and add 10 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1004.51(b).

(c) *Class III price.* Subject to the adjustment set forth below for the applicable month, the Class III price shall be the basic formula price for the month.

Month	Amount
January.....	+\$0.05
February.....	+.04
March.....	-.03
April.....	-.07
May.....	-.10
June.....	-.09
July.....	+.05
August.....	+.12
September.....	+.08
October.....	+.08
November.....	+.08
December.....	+.08

86. Section 1004.51 is revised to read as follows:

§ 1004.51 Basic formula prices.

(a) The "basic formula price" shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to a 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential pursuant to § 1004.74 shall be used.

(b) The "basic Class II formula price" for the month shall be the basic formula price for the second preceding month plus or minus the amount computed pursuant to paragraphs (b)(1) through (4) of this section.

(1) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1004.21 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(i) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(A) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(B) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(C) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(ii) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(A) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(B) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(2) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(3) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b)(2) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (b)(3)(i) and (ii) of this section:

(i) Combine the total production of American cheese for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(ii) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the National Agricultural Statistics Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(4) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b)(2) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (b)(3) of this section.

§ 1004.52 [Amended]

87. Section 1004.52 is amended by removing the word "pool" from paragraph (a).

88. Section 1004.53 is revised to read as follows:

§ 1004.53 Announcement of class prices and producer butterfat differential.

The market administrator shall announce publicly on or before:

(a) The fifth day of each month, the following:

(1) The Class I price for the following month;

(2) The Class III price for the preceding month; and

(3) The producer butterfat differential for the preceding month.

(b) The fifteenth day of each month, the Class II price for the following month.

89. Section 1004.60 is revised to read as follows:

§ 1004.60 Handler's value of milk for computing uniform prices.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk of each handler with respect to each of the handler's pool plants and of each handler described in § 1004.9(b) and (c) as follows:

(a) Multiply the quantity of milk received from a cooperative association as a handler pursuant to § 1004.9(c) and allocated pursuant to § 1004.44(a)(14) and the corresponding step of § 1004.44(b) and the quantity of producer milk in each class, as computed pursuant to § 1004.44(c), by the applicable class prices (adjusted pursuant to § 1004.52);

(b) Add the amount obtained from multiplying the pounds of overage deducted from each class pursuant to § 1004.44(a)(15) and the corresponding step of § 1004.44(b) by the applicable class prices adjusted by the applicable differentials pursuant to §§ 1004.52, 1004.74 and 1004.79;

(c) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price applicable at the location of the pool plant or the Class II price, as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1004.44(a)(10) and the corresponding step of § 1004.44(b);

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the pool plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(8)(i) through (iv) and the corresponding step of § 1004.44(b), excluding receipts of bulk fluid cream products from an other order plant;

(e) Add the amount obtained from multiplying the difference between the

Class I price applicable at the location of the transferor-plant (but not less than the Class III price) and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1004.44(a)(8)(v) and (vi) and the corresponding step of § 1004.44(b); and

(f) Add an amount equal to the value at the Class I price of skim milk and butterfat assigned to Class I pursuant to § 1004.44(a)(12) and the corresponding step of § 1004.44(b) (excluding receipts from partially-regulated distributing plants for which disposition a specific allocation is made to Federal order receipts from this or any other order) adjusted for the location of the nearest plant from which such types of receipts were received.

90. Section 1004.61 is amended by changing the reference to "§ 1004.60(e)" in paragraph (a) (4)(ii) to "§ 1004.60(f)" revising paragraphs (a)(5) and (b) to read as follows, and by changing the reference "(b)(7)" in paragraph (c) to "(b)(5)".

§ 1004.61 Computation of weighted average price and uniform prices for base milk and excess milk.

(a) * * *

(5) Subtract not less than 4 cents nor more than 5 cents per hundredweight. The resulting figure shall be the weighted average price for the month.

(b) Subject to paragraph (c) of this section, for each month the market administrator shall compute the uniform prices per hundredweight for base milk and excess milk, each of 3.5 percent butterfat content, f.o.b. market, as follows:

(1) Compute the aggregate value of excess milk for all handlers included in the computations pursuant to paragraph (a) of this section as follows:

(i) Multiply the quantity of such milk which does not exceed the total quantity of producer milk received by such handlers assigned to Class III milk by the Class III milk price;

(ii) Multiply the remaining hundredweight quantity of excess milk that does not exceed the total quantity of such handlers' producer milk assigned to Class II milk by the Class II price;

(iii) Multiply the remaining hundredweight quantity of excess milk by the Class I price; and

(iv) Add together the resulting amounts;

(2) Divide the total value of excess milk obtained in paragraph (b)(1) of this section by the total hundredweight of such milk and round to the nearest cent. The result shall be the uniform price for excess milk.

(3) From the amount resulting from the computations of paragraphs (a)(1) through (3) of this section subtract an amount computed by multiplying the hundredweight of milk specified in paragraph (a)(4)(ii) of this section by the weighted average price;

(4) Subtract the aggregate value of excess milk determined in paragraph (b)(1) of this section;

(5) Divide the result obtained in paragraph (b)(4) of this section by the total hundredweight of base milk for handlers included in the computations pursuant to paragraph (a) of this section and subtract not less than 4 cents nor more than 5 cents per hundredweight. The result shall be the uniform price for base milk.

* * *

91. In § 1004.71, paragraph (b)(2) is amended by changing the reference "§ 1004.60(e)" to "§ 1004.60(f)", and paragraph (c)(2) is revised to read as follows:

§ 1004.71 Payments to the producer-settlement fund.

* * *

(c) * * *

(2) Compute the value of the quantity assigned in paragraph (c)(1) of this section to Class I disposition in this area, at the Class I price under this part applicable at the location of the other order plant and subtract its value at the Class III price.

92. In § 1004.73, paragraph (a)(1) is amended by changing the words "Class II" to "Class III".

93. Section 1004.75 is revised to read as follows:

§ 1004.75 Location differentials to producers and on nonpool milk.

(a) For milk received from producers and from cooperative association handlers pursuant to § 1004.9(c) at a plant located 55 miles or more from the city hall in Philadelphia, PA, and also at least 75 miles from the nearer of the zero milestone in Washington, DC, or the city hall in Baltimore, MD (all distances to be the shortest highway distance as determined by the market administrator), the uniform price for base milk computed pursuant to § 1004.61(b) shall be reduced 1.5 cents for each 10 miles distance or fraction thereof that such plant is from the nearest of such basing points.

(b) For purposes of computations pursuant to §§ 1004.71 and 1004.73 the weighted average price shall be reduced at the rate set forth in paragraph (a) of this section applicable at the location of the nonpool plant from which the milk was received, except that the adjusted

weighted average price shall not be less than the Class III price.

94. Section 1004.76 is amended by revising paragraphs (a)(1)(i) and (b)(5) to read as follows:

§ 1004.76 Payments by a handler operating a partially regulated distributing plant.

(a) * * *

(1)(i) The obligation that would have been computed pursuant to § 1004.60 at such plant shall be determined as though such plant were a pool plant. For purposes of such computation, receipts at such nonpool plant from a pool plant, a cooperative association as a handler pursuant to § 1004.9(b), or an other order plant shall be assigned to the utilization at which classified at the pool plant or other order plant and transfers from such nonpool plant to a pool plant or an other order plant shall be classified as Class III milk if allocated to such class at the pool plant or other order plant and be valued at the weighted average price of the respective order if so allocated to Class I milk except that reconstituted skim milk in filled milk shall be valued at the Class III price. There shall be included in the obligation so computed a charge in the amount specified in § 1004.60(f) and a credit in the amount specified in § 1004.71(b)(2) with respect to receipts from an unregulated supply plant, except that the credit for receipts of reconstituted skim milk in filled milk shall be at the Class III price, unless an obligation with respect to such plant is computed as specified below in paragraph (a)(1)(ii) of this section; and

(b) * * *

(5) From the value of such milk at the Class I price, subtract its value at the weighted average price, and add for the quantity of reconstituted skim milk specified in paragraph (b)(3) of this section its value computed at the Class I price less the value of such milk at the Class III price (except that the Class I price and the weighted average price

shall be adjusted for the location of the nonpool plant and shall not be less than the Class III price).

95. Section 1004.85 is amended by revising paragraph (a) to read as follows:

§ 1004.85 Assessment for order administration.

(a) Each handler (excluding a cooperative association in its capacity as a handler pursuant to § 1004.9(c), and a cooperative association as the operator of a pool plant with respect to milk transferred in bulk to a pool plant) with respect to the handler's receipts of producer milk (including such handler's own-farm production, milk received from a cooperative association pursuant to § 1004.9(c), and milk transferred in bulk from a pool plant owned and operated by a cooperative association) and other source milk allocated to Class I pursuant to § 1004.44(a) (8) and (12) and the corresponding step of § 1004.44(b), except such other source milk that is excluded from the computations pursuant to § 1004.60 (d) and (f);

§ 1004.92 [Amended]

96. Section 1004.92 is amended by removing the last sentence of paragraph (a) and removing and reserving paragraph (e).

The parties hereto, in order to effectuate the declared policy of the Act, and in accordance with the rules of practice and procedure effective thereunder (7 CFR part 900), desire to enter into this marketing agreement and do hereby agree that the provisions referred to in paragraph I hereof as augmented by the provisions specified in paragraph II hereof, shall be and are the provisions of this marketing agreement as if set out in full herein.

I. The findings and determinations, order relative to handling, and the provisions of §§ ¹ to ², all

inclusive, of the order regulating the handling of milk in the (name of order) marketing area (7 CFR part ²) which is annexed hereto; and

II. The following provisions

§ ³ Record of milk handled and authorization to correct typographical errors.

(a) Record of milk handled. The undersigned certifies that he handled during the month of _____, _____ hundredweight of milk covered by this marketing agreement.

(b) Authorization to correct typographical errors. The undersigned hereby authorizes the Director, or Acting Director, Dairy Division, Agricultural Marketing Service, to correct any typographical errors which may have been made in this marketing agreement.

§ ³ Effective date. This marketing agreement shall become effective upon the execution of a counterpart hereof by the Secretary in accordance with § 900.14(a) of the aforesaid rules of practice and procedure.

In Witness Whereof, the contracting handlers, acting under the provisions of the Act, for the purposes and subject to the limitations herein contained and not otherwise, have hereunto set their respective hands and seals.

(Signature)

(Seal)

(Name)

By (Title)

(Address)

Attest:

Date:

[FR Doc. 90-28698 Filed 12-10-90; 8:45 am]

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² Appropriate part number.

³ Next consecutive section number

¹ First and last sections of order.

Test Report Federal Register

**Tuesday,
December 11, 1990**

Part III

Environmental Protection Agency

40 CFR Part 60

**Standards of Performance for New
Stationary Sources; Polypropylene,
Polyethylene, Polystyrene, and
Poly(ethylene terephthalate)
Manufacturing Industry; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[FRL-3752-2]

RIN 2060-AA37

Standards of Performance For New Stationary Sources; Polypropylene, Polyethylene, Polystyrene, and Poly(ethylene terephthalate) Manufacturing Industry

AGENCY: Environmental Protection Agency (EPA or the Agency).

ACTION: Final rule.

SUMMARY: Standards of performance to limit volatile organic compound (VOC) emissions from new, modified, and reconstructed process sections at certain polymer manufacturing plants were proposed in the *Federal Register* on September 30, 1987 (52 FR 36678). A new approach for determining which process emissions from polypropylene and polyethylene production would be subject to the proposed standards was presented for public comment in the *Federal Register* on January 10, 1989 (54 FR 890). This action promulgates these standards of performance for polypropylene, polyethylene, polystyrene, and poly(ethylene terephthalate) (PET) plants. These standards implement section 111 of the Clean Air Act and are based on the Administrator's determination that emissions from these polymer manufacturing facilities cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. The intended effect of these standards is to require all new, modified, and reconstructed process sections at these polymer manufacturing plants to achieve emission levels that reflect the best demonstrated system of continuous emission reduction considering costs, non-air quality health, and environmental and energy impacts.

EFFECTIVE DATES: December 11, 1990.

These standards of performance become effective upon promulgation but apply to affected facilities for which construction, modification, or reconstruction commenced after either September 30, 1987, or January 10, 1989, as identified in the final rule.

Under section 307(b)(1) of the Clean Air Act, judicial review of the actions taken by this notice is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the Clean Air Act,

the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements. *Incorporation by Reference:* The incorporation by reference of certain publications in these standards is approved by the Director of the Office of the Federal Register as of December 7, 1990.

ADDRESSES: *Background information document.* The background information document (BID) for the promulgated standards may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777. Please refer to "Polymer Manufacturing Industry—Background Information for Promulgated Standards of Performance" (EPA-450/3-89-019b). The BID contains (1) A summary of all the public comments made on the proposed standards and the Administrator's responses to the comments, (2) a summary of the changes made to the standards since proposal, and (3) the final Environmental Impact Statement, which summarizes the impacts of the standards.

Docket. A docket number A-82-19, containing information considered by EPA in the development of the promulgated standards is available for public inspection between 8:30 a.m. and 3:30 p.m. Monday through Friday at EPA's Air Docket (LE-131) room M-1500, 1st Floor, Waterside Mall, 401 M Street SW, Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information and official interpretations of applicability compliance requirements, and reporting aspects of the promulgated standards, contact the appropriate Regional, State, or local office contact as listed in 40 CFR 60.4. For further information on the background of the regulatory decisions in the promulgated standards, contact Mr. Sims Roy, Standards Development Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5263. For further information on the technical aspects of the promulgated standards, contact Mr. Les Evans, Chemicals and Petroleum Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5410. For further information on the testing and monitoring requirements of the promulgated standards, contact Mr. Bill Grimley, Emission Measurement Branch,

Technical Support Division (MD-14), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-1065.

SUPPLEMENTARY INFORMATION:

I. The Standards

Standards of performance for new sources established under section 111 of the Clean Air Act reflect:

* * * application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated (Section 111(a)(1)).

For convenience, this will be referred to as "best demonstrated technology," or "BDT."

As prescribed by Section 111, promulgation of these standards was preceded by the Administrator's determination (40 CFR 60.16, 44 FR 49220, dated August 21, 1979) that segments of the polymer manufacturing industry contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare and for which standards are to be promulgated. Segments of the polymer manufacturing industry identified include polypropylene, polyethylene, polystyrene, and polyester resins.

The promulgated standards limit VOC emissions from certain process sources in new, modified, and reconstructed affected facilities within polymer manufacturing plants that produce the following basic polymers: polypropylene, polyethylene, polystyrene, and PET. In addition, the promulgated standards apply to certain sources in polymer manufacturing plants that produce copolymers consisting of at least 50 percent weight of ethylene, propylene, or bis-(2-hydroxyethyl)-terephthalate, or at least 80 percent by weight of styrene. The promulgated standards also cover VOC emissions from equipment leaks in all of these plants except those producing PET or PET copolymers. The promulgated standards do not cover manufacturers of elastomers or synthetic rubber.

As in the proposed standards, the limits in the final rule are expressed in terms of total organic compounds (TOC) minus methane and ethane rather than in terms of VOC. As explained in the September 30, 1987, *Federal Register* notice (52 FR 36698), the best systems of continuous emission reduction applicable to polymer manufacturing operations do not selectively control VOC, but rather these control

technologies control all organic compounds. Moreover, the numerical values of the emission limits were based on total organic data (excluding methane and ethane). Therefore, to reflect accurately the performance of technologies selected as the best systems of continuous emission reduction and to make the emission limits consistent with the data and test methods from which the limits were derived, the standards are expressed in terms of TOC (minus methane and ethane). For the same reason, the test procedures prescribe measurement of TOC (minus methane and ethane). In short, the standards rely on controlling TOC (minus methane and ethane) as the best demonstrated surrogate for controlling VOCs, which react to form ozone in the atmosphere.

The affected facility for process sources of VOC emissions is the "process section" and for equipment leaks of VOC emissions, the "process unit." These are the same affected facility designations as were proposed, although the definitions of the various process sections have been revised for purposes of clarification.

Process Emissions

Background. On September 30, 1987, standards to control VOC emissions from certain polymer manufacturing facilities were proposed (52 FR 36678). The standards proposed were based on an analysis of the environmental, energy, and economic impacts of various levels of emission reduction achieved through the application of various control technologies to reduce emissions. The technologies analyzed for controlling process emissions were selected based on the particular characteristics of the emission streams being controlled. For example, waste gas streams from polypropylene and polyethylene production processes are characterized by the presence of low boiling components, polymerizable materials, and a mixture of VOC's. These characteristics tend to make recovery techniques, such as condensers, impractical. Controlling these streams is more likely to involve combustion techniques. Therefore, combustion technologies, such as flares and incinerators, were analyzed for reducing VOC emissions from these polymer production processes.

To analyze the impacts of applying the various levels of emission reductions, process sections and model plants were developed as representative of production steps and processes found in the polymer industry. A total of five generic process sections and twelve model plants were developed for the

four major polymers. In general, increasing levels of control of process emissions were obtained by controlling additional emission streams from process sections or, in the case of condensers, increasing the efficiency of the control device. For each level of control, the Agency calculated VOC emission reduction impacts, annual and capital costs, secondary air quality, energy, and economic impacts, and cost-effectiveness values. Based on these factors, the Agency identified which process emissions from process section in each model plant would be required to be controlled and the level of control reflecting BDT. Such process emissions and process section were then proposed for control in the September 30, 1987, Federal Register notice.

The public comment period on the September 30, 1987, Federal Register notice closed February 8, 1988. Fourteen comment letters were received, all from industry sources. A wide range of comments were received. Numerous comments focused on the use of model plants as the basis for determining which process emissions from the polypropylene and polyethylene segments of the industry would be subject to the proposed standards. Most of these comments expressed concern over the inflexibility of standards, determined through the analysis of model plants, for dealing with process changes in these two segments of the industry. According to the commenters, such process changes significantly affect the emission stream characteristics. As a result, controls that were identified as BDT for model plants would, in some cases, be unreasonable for processes that did not correspond to the models. Similarly, other processes or streams for which control is reasonable may not be affected by the standards. As a result of information received in these comments, the Agency examined alternative approaches that would ensure that emission streams, for which reasonable controls are available, are required to be controlled. This need existed primarily for polypropylene and polyethylene production processes. The Agency did not propose to extend this new approach to polystyrene or PET production processes. Polystyrene and PET processes are more mature and significant changes are not expected. As such, the model plant approach is a less complex, more direct regulatory approach. A generic approach would be more complicated and potentially less effective for these processes due to the use of recovery-type controls and the difficulty in applying these to combined streams.

On January 10, 1989, the Agency reopened the public comment period for the limited purpose of allowing public comment on a new approach for determining which process emissions from polypropylene and polyethylene production processes would be subject to the proposed standards (54 FR 890). The new approach was developed considering the same types of control techniques as for the model plant approach. Under the new approach, generic emission stream characteristics would be used to make the control determination rather than rely on a fixed set of emission stream characteristics based on model plants. For continuous process emissions, the control determination would be based on either the VOC concentration or annual emissions or both. For intermittent emissions, it would be based on the type of release alone.

Comments received on the January 10, 1989, Federal Register notice were generally favorable, although several significant concerns were raised. These concerns were on identifying which intermittent releases would be exempt from control; the VOC weight percent exemption suggested for individual emission streams from modified and reconstructed affected facilities, but not for emission streams from new affected facilities; and the definition of "concurrent" by which emission streams from affected facilities constructed, modified, or reconstructed would be combined in making the control determination. These and other comments resulted in changes to the proposed standards and are discussed below.

Polypropylene and polyethylene. The promulgated process emission standards for polypropylene and polyethylene plants apply to all new, modified, and reconstructed process sections involved in the manufacture of polypropylene, polyethylene, or a polypropylene or polyethylene copolymer. Because of the new approach for determining which process emissions are to be controlled, some polypropylene and polyethylene affected facilities have a September 30, 1987, applicability date and others have a January 10, 1989, applicability date.

The promulgated standards implement the new approach presented in the January 10, 1989, Federal Register notice, with several important changes. The basic procedure for determining which continuous process emissions are to be controlled requires combining emission streams within one of three VOC weight percent ranges, calculating the combined stream's weight percent VOC and total annual emissions, calculating a

threshold emission level based on the combined stream's VOC concentration, and comparing the combined stream's total annual emissions with the calculated threshold emission (CTE) level. If the combined stream's total annual emissions are equal to or greater than the CTE level, then all of the individual emission streams that made up the combined stream are to be controlled by 98 percent reduction or to 20 ppm by volume (ppmv), whichever is less stringent. If the combined stream's total annual emissions are less than the CTE level, then only those individual streams with individual flows of 8 scfm or less and with annual emissions of at least 1.6 Mg/yr are required to be controlled at that time. Control of these streams, however, does not need to be by 98 percent reduction or to 20 ppmv. These streams may be controlled in any existing control device. Individual streams with annual emissions less than 1.6 Mg/yr or with VOC concentrations of less than 0.1 weight percent VOC are exempt from control and are not used in any of the above procedures.

The above procedures are essentially the same as that presented in the January 10, 1989, **Federal Register** notice with the following exceptions:

1. The individual weight percent VOC cutoff has been extended to new affected facilities. It was proposed that only emission streams from existing sources that are modified or reconstructed could use this exemption.

2. The specific term "concurrent" has been eliminated in the final rule. However, the final rule requires all emission streams to be subject to potential control if sufficient emissions become available to require control under the new approach regardless of when one affected facility is constructed, modified, or reconstructed relative to another.

3. Emission streams that become subject to BDT under this standard and that are already controlled by a control device that is required as a result of a Federally enforceable rule do not need to be controlled by 98 percent or to 20 ppmv until the existing control device is modified or reconstructed or replaced.

For intermittent emissions from polypropylene and polyethylene sources, the promulgated rule requires control of all intermittent emissions except emergency releases. For purposes of this rule, emergency releases involve, in part, those intermittent releases that are necessary

to prevent catastrophic equipment damage or personnel safety hazards, including those necessary to minimize the adverse effects of a runaway reaction such as may occur in a low pressure process, and those releases that occur as a result of decompositions and of attempts to prevent decompositions, such as occur in high pressure processes. Intermittent releases that occur as part of specific system features designed to maintain normal operating conditions in the process vessel are to be controlled. The promulgated rule for intermittent emissions follows more closely the proposed rule in the September 30, 1987, **Federal Register** notice than that rule presented in the January 10, 1989, **Federal Register** notice.

The promulgated standards for polypropylene and polyethylene sources allow affected facilities that are constructed, modified, or reconstructed between September 30, 1987, and January 10, 1989, to be exempt from control if their uncontrolled emission rates are below those uncontrolled threshold emission rates presented in the September 30, 1987, **Federal Register** notice. Emissions from such affected facilities, however, become subject to the standards if the process section's uncontrolled emission rate becomes greater than the uncontrolled threshold emission rate at a later date or if the process section is modified or reconstructed after January 10, 1989.

If the uncontrolled emission rate of an existing facility with a control device is greater than the uncontrolled threshold emission rate and control by 98 percent or to 20 ppmv has been determined to be required under the new approach, the promulgated rule allows such stream to continue to be controlled in its present control device. At such time that the existing control device is modified, reconstructed, or replaced, the vent stream is then required to be controlled by 98 percent or to 20 ppmv.

The promulgated standards for polypropylene and polyethylene contain fairly complex procedures for determining which process emissions are subject to the standards. This is the result of adopting a generic approach. Commenters requested that the Agency clarify this procedure and the standards that are to be met. To meet this request,

the Agency developed a series of five flow diagrams, which are presented as Figures 1 through 3. The purpose of these figures is to provide only an overview of the determination procedure for polypropylene and polyethylene process emissions, and do not contain specific details found in the final rule. The following paragraphs summarize the purpose of each figure.

Figure 1 initiates the determination procedure for each process section. Through this figure, affected facilities are identified and separated according to their applicability date (between September 30, 1987, and on or before January 10, 1989, and after January 10, 1989). This figure also includes the exemption step provided to affected facilities with an applicability date between September 30, 1987, and January 10, 1989, and identifies how these emissions can become subject to the rule at a later date (see Block 1.6). For process sections that are identified as affected facilities subject to the standard, Figure 1 directs the user to Figure 2A for continuous emissions and to Figure 3 for intermittent emissions.

Figure 2A is the first of three flow diagrams applicable to continuous emissions. The first step in Figure 2A separates those continuous emissions that are uncontrolled from those that are controlled in an existing control device. This is necessary as the determination procedure is different depending on whether the emissions are already being controlled. If they are, the flow diagram directs the user to Figure 2C. For uncontrolled continuous emissions, Figure 2A continues by showing the exemptions provided for individual emission streams (see Block 2A.5). (Note that an individual stream that is exempted based on its annual emissions or its VOC weight percent becomes subject to the standards at a later date if its annual emissions become 1.6 Mg/yr or greater (if it had been exempted on the basis of the annual emissions exemption) or its VOC concentration becomes 0.10 weight percent or greater (if it had been exempted on the basis of the VOC concentration exemption) (see Block 2A.6).) Once qualifying individual emission streams are exempted, the user is directed to Figure 2B.

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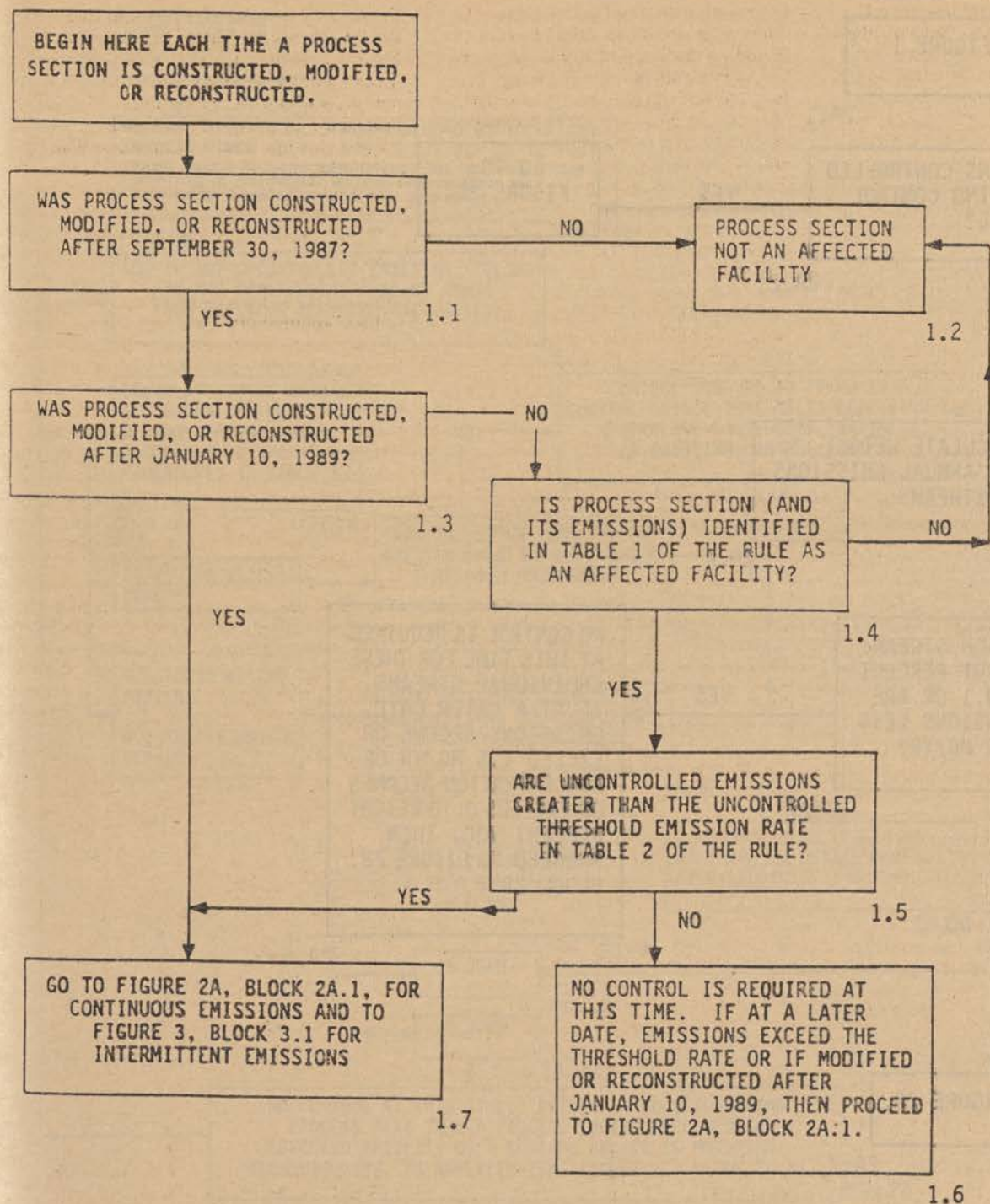


Figure 1. Initial Decisionmaking for Determining Which Polypropylene and Polyethylene Process Sections Are Affected Facilities Subject to the Standards

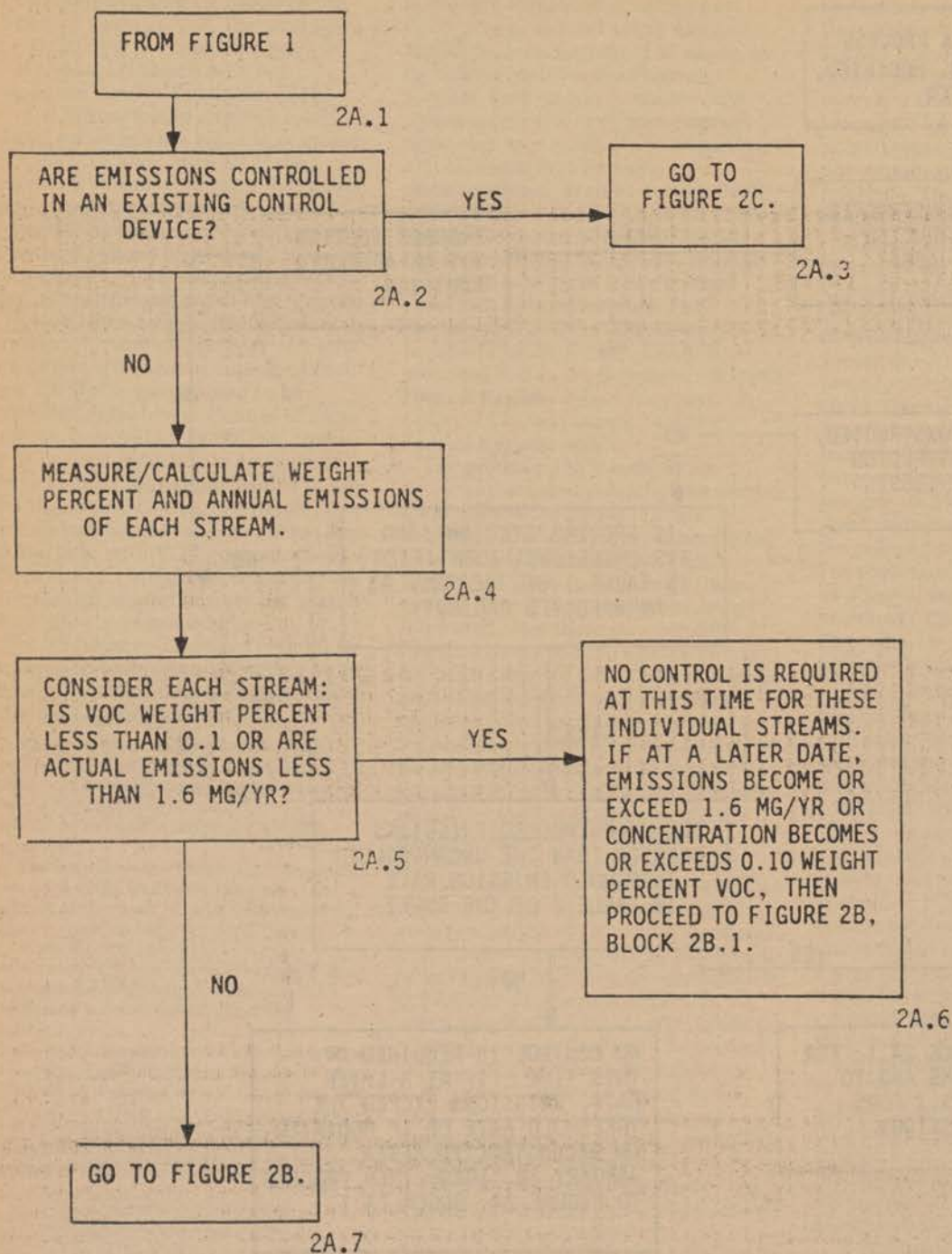


Figure 2A. Continuous Emissions - Separation of Controlled from Uncontrolled Emissions and Individual Stream Exemptions

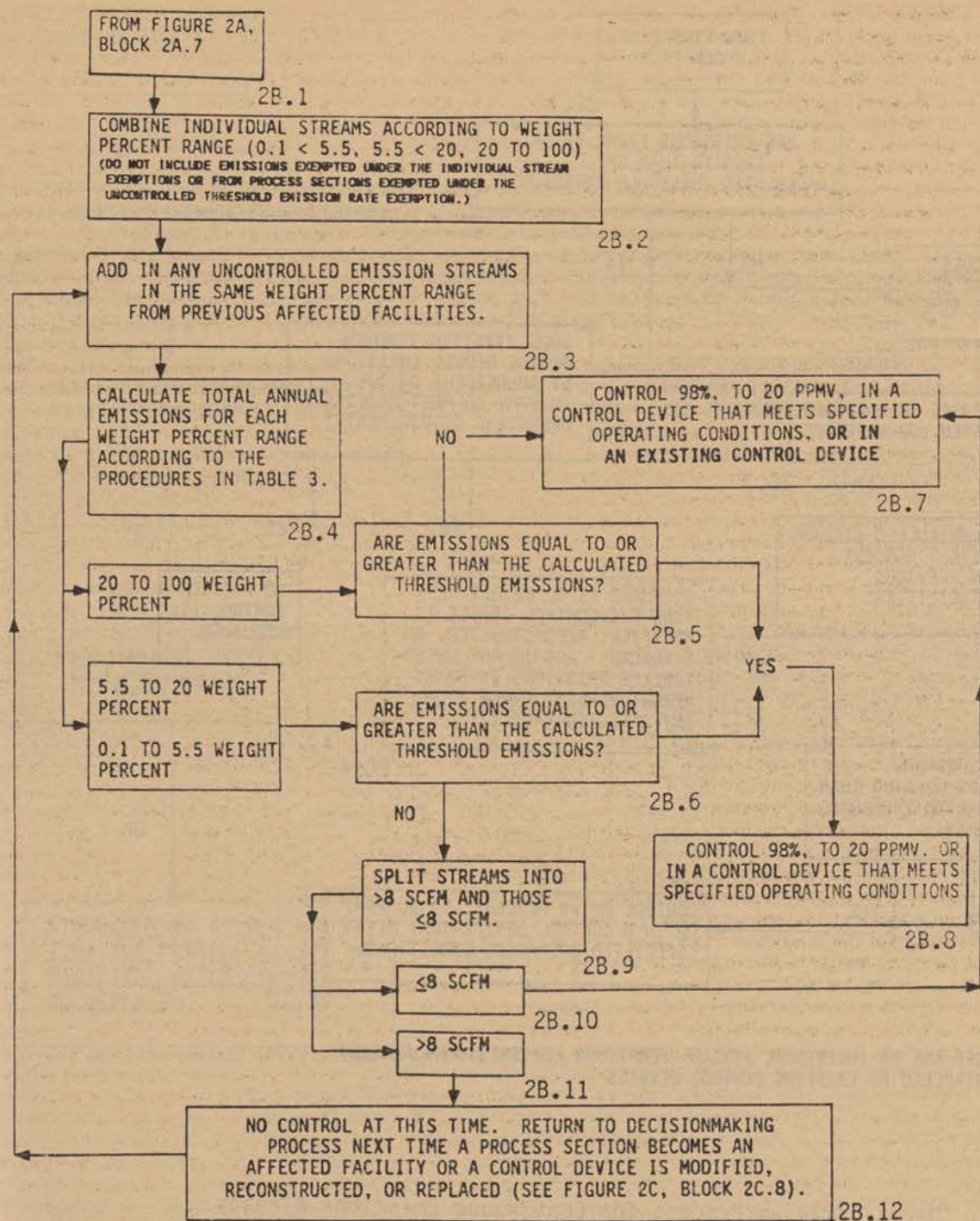
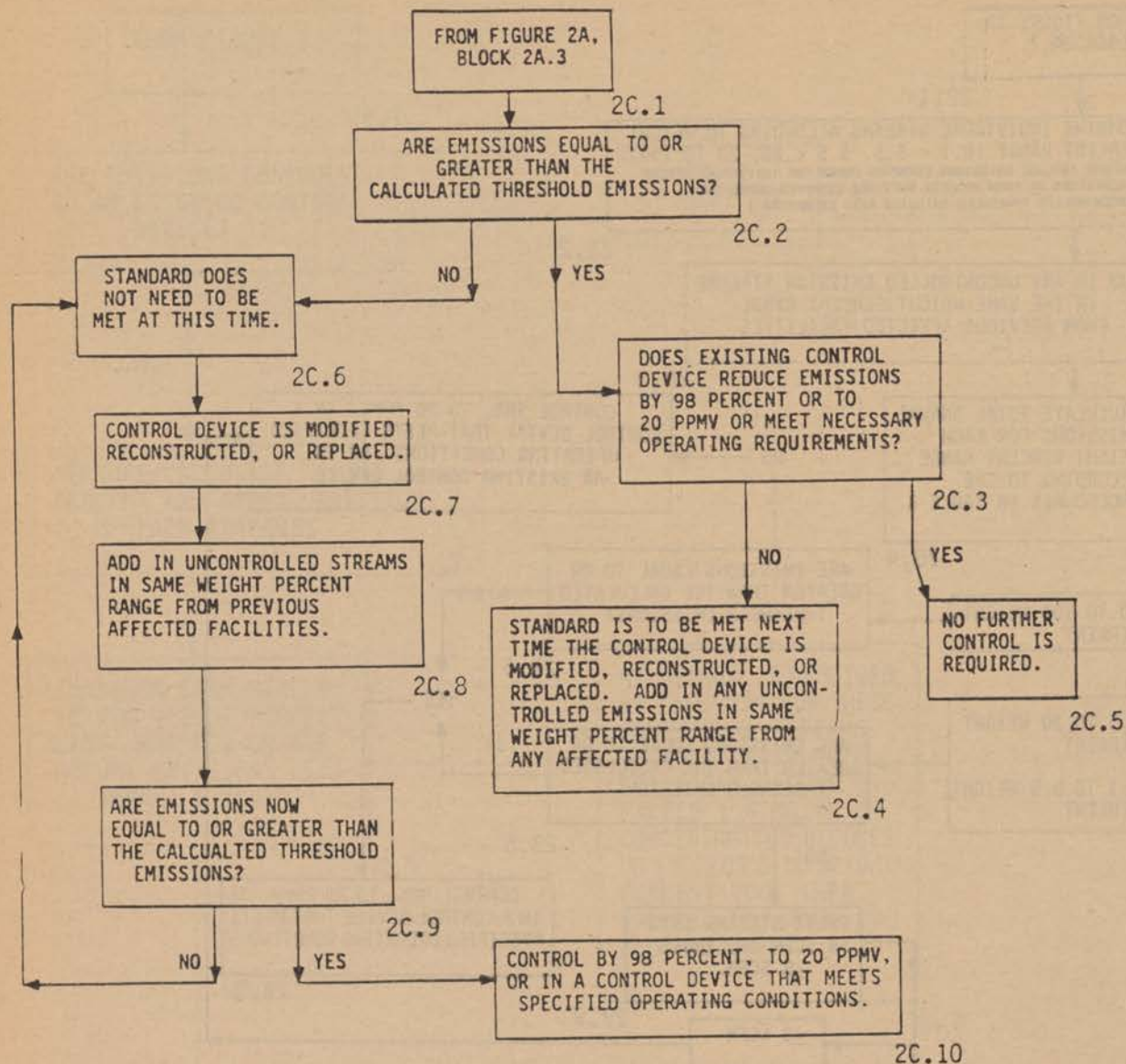


Figure 2B. Decisionmaking Process for Uncontrolled Continuous Emissions from Polypropylene and Polyethylene Affected Facilities



NOTE: THERE ARE NO INDIVIDUAL STREAM EXEMPTIONS FOR EMISSIONS ALREADY CONTROLLED BY EXISTING CONTROL DEVICES

Figure 2C. Decisionmaking Process for Continuous Emissions Already Controlled at Polypropylene and Polyethylene Affected Facilities

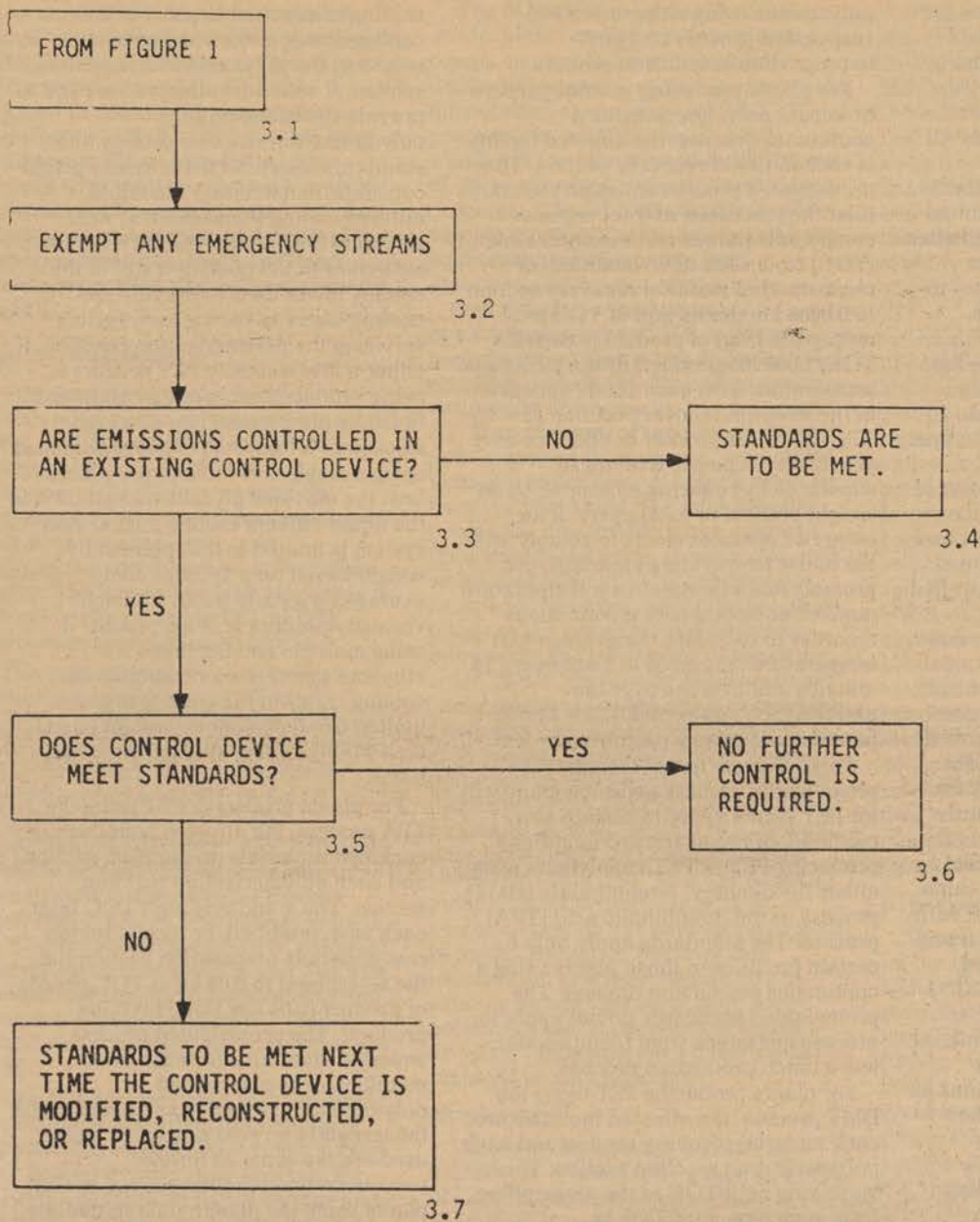


Figure 3. Decisionmaking Process for Intermittent Emissions of Polypropylene and Polyethylene Affected Facilities

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Figure 2B outlines the procedures for combining nonexempt uncontrolled continuous emissions and determining which emissions are to be controlled. This figure corresponds to the steps detailed in Table 3 in the final rule. An important feature of the rule is the "loop" provided between Blocks 2B.12 and 2B.3. In the final rule, uncontrolled emissions that remain uncontrolled after passing through this determination procedure are still subject to control in the future as new process sections become affected facilities.

Figure 2C outlines the procedure for handling emissions that are already being controlled. Note that for these emissions there are no individual stream exemptions as for uncontrolled emissions. The stream characteristics of the inlet stream to the control device are used first to calculate the CTE level and second to compare with the CTE level (Block 2C.2). Also note that uncontrolled emissions are combined with the controlled emissions in one of two ways. First, if the controlled stream is to meet the standards the next time the control device is modified, reconstructed, or replaced (Block 2C.4), any uncontrolled emissions in the same weight percent range as the controlled stream are also to be controlled to meet the standards. Second, if the controlled stream's emissions are less than the CTE level, any uncontrolled emissions in the same weight percent range are combined with the controlled stream (Block 2C.8) if and when the control device is modified, reconstructed, or replaced (Block 2C.7).

Lastly, Figure 3 outlines the determination procedure for intermittent emissions. This procedure is much simpler than for continuous emissions as it is based on stream type rather than stream characteristics. This figure shows the exemption for emergency vent streams and the timing for when the standards are to be met, which depends on whether the intermittent streams are uncontrolled or controlled in an existing control device.

Polystyrene. The promulgated process emission standards for polystyrene plants apply to certain new, modified, and reconstructed facilities producing general purpose (crystal) or impact polystyrene or polystyrene copolymers. The standards apply only to certain facilities in those plants producing general purpose or impact polystyrene using a continuous process. These standards do not affect process emissions from facilities that produce general purpose (crystal) or impact polystyrene or polystyrene copolymers using a batch production process or for facilities that produce expandable

polystyrene using either an in-situ suspension process or a post-impregnation suspension process.

For plants producing general purpose or impact polystyrene using a continuous process, the affected facility is each material recovery section. The promulgated process emission standards limit the emissions of total organic compounds (minus methane and ethane) (TOC) from each new, modified, or reconstructed material recovery section to 0.0036 kilograms (kg) of TOC per megagram (Mg) of product (0.0036 lbs TOC/1,000 lbs product) or the outlet gas temperature from each final condenser in the material recovery section to -25°C (-13°F). An owner or operator may also elect to comply with these standards by reducing emissions by 98 weight percent or to 20 ppmv. If an owner or operator elects to comply with the outlet temperature standard, the promulgated rule requires a temperature monitor equipped with a continuous recorder to calculate the average exit temperature measured at least every 15 minutes and average over the performance test period. Each 3-hour period constitutes a performance test.

Poly(ethylene terephthalate) The promulgated process emission standards for PET plants apply to certain new, modified, or reconstructed facilities producing PET or PET copolymers using either the dimethyl terephthalate (DMT) process or the terephthalic acid (TPA) process. The standards apply only to certain facilities in those plants using a continuous production process. The promulgated standards do not apply to process emissions from facilities that use a batch production process.

For plants producing PET using the DMT process, the affected facilities are each material recovery section and each polymerization reaction section. These standards limit TOC to the atmosphere from each new, modified, or reconstructed material recovery section (i.e., methanol recovery) to 0.018 kg of TOC per Mg of product (0.018 lbs TOC/1,000 lbs product) or the outlet gas temperature from each final condenser in the material recovery section (i.e., methanol recovery) to $+3^{\circ}\text{C}$ ($+37^{\circ}\text{F}$). The promulgated process emission standards limit TOC to the atmosphere from each new, modified, or reconstructed polymerization reaction section to 0.02 kg TOC per Mg of product (0.02 lbs TOC/1,000 lbs product). This limit includes emissions from any equipment used to recover further the ethylene glycol for reuse in the process or sale offsite, but does not include organic compound emissions released to the atmosphere from the

cooling tower used to provide the cooling water to the vacuum system servicing the polymerization reaction section. If steam-jet ejectors are used to provide the vacuum in the polymerization reaction section, the standards also limit the ethylene glycol concentration in either the liquid effluent exiting the vacuum system servicing the polymerization reaction section or in the cooling water in the cooling tower used to provide the cooling water to the vacuum system servicing the polymerization reaction. If either a low viscosity PET product is being produced using one or more end finishers per process line or a high viscosity PET product is being produced using a single end finisher per process line, the ethylene glycol concentration in the liquid effluent exiting the vacuum system is limited to 0.35 percent by weight based on a 14-day rolling average on a daily basis. If a high viscosity product is being produced using multiple end finishers, the ethylene glycol concentration in the cooling water in the cooling tower is limited to 6.0 percent by weight based on a 14-day rolling average on a daily basis.

For plants producing PET using the TPA process, the affected facilities are each raw materials preparation section and each polymerization reaction section. The standards limit TOC from each new, modified, or reconstructed raw materials preparation section (i.e., the esterifiers) to 0.04 kg of TOC per Mg of product (0.04 lbs TOC/1,000 lbs product). The promulgated process emission standards for each new, modified, or reconstructed polymerization reaction section in which the terephthalic acid process is being used are the same as for the polymerization reaction section in PET plants using the dimethyl terephthalate process.

For determining compliance with the ethylene glycol concentration standards, ASTM-D2908-74, "Standard Practice for Measuring Volatile Organic Matter in Water by Aqueous-Injection Chromatography," is used. At least one sample per operating day is to be collected with an average ethylene glycol concentration by weight calculated on a daily basis over a rolling 14-day period of operating days. Each daily average ethylene glycol concentration so calculated constitutes a performance test. The promulgated standards allow an owner or operator to institute a reduced testing program if the concentration of the ethylene glycol meets certain criteria.

As an alternative to demonstrating compliance with the 98 percent emission reduction requirements contained in any of the standards outlined above, affected facilities may demonstrate compliance with a TOC emission limit of 20 ppmv. Flares may be used to comply with the promulgated standards, provided the flares are operated under conditions, as specified in § 60.18 of the General Provisions, that have been shown to result in a 98 percent reduction in TOC.

Fugitive Emissions

The promulgated standards of performance cover certain equipment leaks of VOC emissions within polypropylene, polyethylene, polystyrene (including expandable polystyrene), polypropylene copolymer, polyethylene copolymer, and polystyrene copolymer manufacturing plants. The equipment leak standards do not cover equipment in PET or PET copolymer manufacturing plants.

The promulgated standards require owners and operators of affected facilities in the plants identified above to comply with 40 CFR part 60—subpart VV—"Standards of Performance for Equipment leaks of VOC in the Synthetic Organic Chemicals Manufacturing Industry" (SOCMI) and apply to pumps, valves, sampling connections, pressure relief devices, open-ended valves, and compressors in VOC service within each new, modified, and reconstructed process unit. "In VOC service" means that a fugitive emission source contains or contacts a fluid containing 10 or more percent by weight VOC.

The SOCMI standards that are made applicable to the affected facilities in the plants specified above require: (1) A leak detection and repair program for valves in gas or light liquid service and for pumps in light liquid service; (2) certain equipment for compressors, sampling connection systems, and open-ended valves; and (3) no detectable emissions from pressure relief devices in gas service during normal operation. "In gas service" means that a fugitive emission source contains VOC fluids in the gaseous or vapor state. "In light liquid service" means that a fugitive emission source contains a liquid in which the vapor pressure of one or more of the components is greater than 0.3 kPa at 20 degrees Centigrade, as obtained from standard reference texts or as determined by ASTM Method D-2879, and the total concentration of the pure components having a vapor pressure greater than 0.3 kPa at 20 degrees Centigrade is equal to or greater than 20 percent by weight.

The SOCMI standards allow the use of "leakless" equipment for valves, pumps, compressors and sampling connection systems as an alternative to the required equipment and work practices. In addition, the SOCMI standards for valves provide for the use of alternative leak detection and repair programs. The SOCMI standards also contain a procedure for determining the equivalency of alternative leak detection and repair programs.

One change to the proposed application of subpart VV to polymer manufacturing plants has occurred since proposal. In § 60.482-2(b), there are two definitions of when a leak is detected: (1) "If an instrument reading of 10,000 ppm or greater is measured" and (2) "If there are indications of liquids dripping from the pump seal." Certain polymer pumps are designed to purge polymer fluid from bleed ports, thereby allowing small quantities of VOC emissions to escape to the atmosphere. These pumps must use the polymer fluid to provide lubrication and/or cooling of the pump shaft. While the Agency believes that "indications of liquids dripping from the pump seal" should not be applied to such pumps, the 10,000 ppm or greater definition should be retained to ensure these pumps are not emitting significant quantities of VOC. Further, the Agency does not believe that this exemption should be applied to "new" or replaced pumps, because there are pumps available that do not have this designed-in purge. Therefore, the final rule exempts purging from bleed ports in existing pumps that must have such ports from the "indications of liquid dripping" definition until the pump is replaced or reconstructed.

Monitoring

Where an incinerator, a boiler or heater with a heat input design capacity of less than 150 million Btu/hr, or a condenser is used to comply with these standards, a temperature monitor is required. Where a flare is used to comply with these standards, a thermocouple, an ultraviolet sensor, an infrared beam sensor, or similar monitoring device is required to indicate the continuous presence of either the flare flame or each pilot light flame, depending on the types of emission streams being controlled. Where an adsorber is used, a scrubbing liquid temperature monitor and a specific gravity monitor are required. For absorbers, condensers, and adsorbers, an organic monitoring device that indicates the concentration level of organic compounds may be used instead.

The promulgated standards also require owners or operators using a vent

system that contains valves that could divert a vent stream from a control device either to: (1) Install a flow indicator, equipped with a recorder, immediately downstream of each valve that if opened would divert the vent stream to the atmosphere or (2) implement monitoring, recordkeeping, and reporting requirements concerning the position of such valves and their car seals.

Exemption and Threshold Levels

These standards contain various types of cutoffs. Some of these cutoffs exempt individual process emission streams and groups of process emission streams from control. Other cutoffs identify threshold emission levels, which are used for determining when process emissions from certain affected facilities are to be controlled. The factors considered in selecting these various cutoff levels are specific to the Polymer Manufacturing NSPS, and would not necessarily be appropriate for other source categories. Likewise, the various cutoff levels selected should not be viewed as benchmarks for other standards. Cutoffs found to be necessary for other source categories will be based on factors relevant to those categories, and may or may not resemble those for the polymer manufacturing processes covered under these standards.

II. Environmental Impacts

The promulgated standards are based on the application of BDT to control VOC emissions from certain polymer manufacturing facilities. To estimate the impacts of the promulgated standards, EPA projected that 85 newly constructed, modified, and reconstructed polymer manufacturing process lines, which is approximately equal to 27 plants, would be affected by the standards during the first 5 years after the effective date of the standards. The EPA estimates that VOC emissions would be reduced in the fifth year following implementation of the promulgated standards by 2.9 to 3.2 gigagrams (G_g) (3,200 to 3,500 tons), an emission reduction of approximately 42 percent from projected emission levels under the regulatory baseline. This range results from assumptions as to how new growth in the industry will occur. These estimates are essentially the same as estimated at proposal.

Solid waste impacts are projected to be minimal. The promulgated standards are projected to result in the first five years in less than 0.1 cubic meter (m^3) (1.2 cubic feet) per year of solid waste, which would be generated through the use of catalytic incinerators at high density polyethylene (HDPE), slurry

process plants. As process sections are modified and reconstructed over time, more catalytic incinerators are likely to be installed accompanied by an increase in solid waste. Solid waste generated by VOC equipment leak detection and repair programs include mechanical seals, seal packing, rupture disks, and valves. The solid waste impact of these programs are not anticipated to be significant because of the ability to recycle metal solid wastes and the small quantity of wastes generated.

Noise impacts attributable to the promulgated standards is also expected to be minimal. Flares can be a source of noise pollution. Noise generated during flaring results from unsteadiness in the combustion process and steam injection. Almost all polymer production processes already have flares located on site. Many of these flares may be used to meet the promulgated standards. For new flares, by employing proper flare design and site selection, potential noise impacts on community areas surrounding each affected plant should be minimal.

No adverse water impact and radiation impacts are expected to occur as a result of the promulgated standards.

III. Energy Impacts

The promulgated standards would increase energy consumption slightly in most polymer plants through the application of BDT for process emissions. Nationwide, total energy consumption due to process VOC controls is estimated to increase between 11 and 30 terajoules (TJ) per year. The 11 TJ estimate is based upon assumptions concerning how new growth in the industry will occur and the sharing of control devices by individual affected facilities. The 30 TJ estimate is a worst-case estimate in which all growth is assumed to occur as individual process sections and each process section has its own control device. These estimates of increased energy consumption represent small amounts of energy compared to that required to produce a polymer. For example, a HDPE solution process model plant comprised of three process lines would use approximately 24,000 TJ per year. Thus, total nationwide energy consumption is estimated to be between 0.05 and 0.13 percent of the energy consumed in this one model plant.

Application of BOT for equipment leaks of VOC emissions is estimated to reduce VOC emissions that have a total energy value of approximately 66 TJ per year. By taking into account this energy value, the promulgated standards are estimated to result in a net decrease in

energy consumption of between 36 and 55 TJ per year in the fifth year after these standards are in place.

IV. Cost Impacts

The costs for these standards have changed slightly since proposal. Capital costs have increased for polystyrene plants and PET plants reflecting revised condenser costs, which, in part, took into account potential freezing problems that required a different condenser system. The annual costs were also revised to reflect revised unit price costs for natural gas and electricity. The net effect of these changes was marginal. Total nationwide capital costs in the fifth year following the promulgation of these standards is estimated to be approximately \$4.3 to \$4.5 million (compared to \$4.5 million at proposal) and annual costs to be approximately \$1.3 million (down from \$1.4 million at proposal) (reported in June 1980 dollars).

Under the promulgated standards, increased capital expenditures over the baseline range from approximately \$4,600 per process line-equivalent in a PET plant using a DMT process to approximately \$273,000 per process line-equivalent in a polypropylene plant using a liquid phase process. Annualized cost increases range from about \$1,400 per process line-equivalent in a PET plant using a DMT process to approximately \$92,000 per process line-equivalent in a polypropylene plant using a liquid phase process.

V. Economic Impacts

Adverse impacts would be minor. If all costs are passed through to the customer, maximum price increases range from less than 0.2 percent, for plants producing PET using a DMT process, to approximately 0.44 percent, for polypropylene plants using a liquid phase process. The Agency has determined that the costs of these promulgated standards will not have any significant impacts on the industry.

The environmental, energy, and economic impacts are discussed in greater detail in the background information document for the proposed standards, "Polymer Manufacturing Industry—Background Information for Proposed Standards," EPA-450/3-83-019a, and in Docket Items IV-B-13 and IV-B-22.

In addition, the incremental cost effectiveness of alternative levels of control were also evaluated in order to determine the reasonableness of control in light of the costs to reduce emissions and to ensure that the controls required by this rule are reasonable relative to other regulations. Additional details on

costs can be found in the BID for the proposed standards.

VI. Public Participation

Prior to proposal of the standards, interested parties were advised by public notice in the *Federal Register* (48 FR 12825), March 28, 1983, of a meeting of the National Air Pollution Control Techniques Advisory Committee to discuss the standards for polymer manufacturing plants recommended for proposal. This meeting was held on April 26, 27, and 28, 1983. The meeting was open to the public and each attendee was given an opportunity to comment on the standards recommended for proposal.

The standards were proposed and published in the *Federal Register* on September 30, 1987 (52 FR 36678) and January 10, 1989 (54 FR 890). The preamble to the proposed standards discussed the availability of the BID, "Polymer Manufacturing Industry—Background Information for Proposed Standards," EPA-450/3-019a, which described in detail the regulatory alternatives considered and the impacts of those alternatives. Public comments were solicited at the time of proposal, and copies of the BID were distributed to interested parties.

To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed standards, a public hearing was held on November 16, 1987, at Research Triangle Park, North Carolina. The hearing was open to the public; however, no one presented any comments.

The public comment period was from September 30, 1987, to February 8, 1988 for the September 30, 1987, *Federal Register* notice and from January 10, 1989, to February 21, 1989, for the January 10, 1989, *Federal Register* notice. Some 14 comment letters were received on the first *Federal Register* notice and 11 comment letters on the second notice. The comments have been carefully considered and, where determined to be appropriate by the Administrator, changes have been made in the proposed standards.

VII. Significant Comments and Changes to the Proposed Standards

Comments on the proposed standards were received from industry and trade associations. A detailed discussion of these comments and responses can be found in the promulgation BID, which is referred to in the ADDRESSES section of this preamble. The summary of comments and responses in the BID serve as the basis for the revisions that

have been made to the standards between proposal and promulgation. The major comments and responses are summarized in this preamble. Most of the comment letters contained multiple comments. The comments have been divided into the following areas: Basis for the Standards, Control Technology-Process Emissions, Control Technology-Equipment Leaks of VOC, Modification/Reconstruction, Monitoring Requirements, Test Methods and Procedures, Reporting and Recordkeeping Requirements, and Miscellaneous.

Basis for the Standards

Coverage of Processes

Comment: Two commenters (IV-D-2, IV-D-14) were concerned that processes that produce certain elastomers and rubber products would be covered by the proposed standards, and that this would be inappropriate. Commenter IV-D-2 felt that the assumption made by EPA that as long as the proportion of propylene used in the production of polypropylene copolymers is at least 50 percent by weight in the copolymer product, the production processes used to manufacture both the polymer and the copolymer are essentially the same, and the resulting definition of polypropylene would include inappropriately their copolymer production facilities that produced ethylene-propylene terpolymers rubber products, which are considered "elastomers" under industry definitions. This commenter stated that the intent of these regulations is to cover thermoplastics and their manufacturers, and that there appears to be a lack of documentation evidencing studies of the processes of rubber manufacturers in the Agency's published documentation. Thus, this commenter concluded, any regulation of their facilities without a more comprehensive study that includes the specific nature of design and manufacture of synthetic rubber producers in premature and could harm any further expansion projects now under consideration.

Commenter IV-D-14 stated that several of their member companies produce synthetic rubbers using processes entirely unlike those used for production of plastics composed of polyethylene, polypropylene, polystyrene or polybis(2-hydroxyethyl)terephthalate. The commenter noted that the composition and physical arrangement of compounds in the polymer molecule result in physical characteristics that are clearly those of a rubber rather than a "thermoplastic." The commenter pointed

out that none of their member companies' ethylene/propylene/diene monomers (EDPM) production facilities were included in the surveys conducted by EPA prior to proposal of these rules. In view of the major differences between the polymerization and finishing operations of the EPDM rubber plants and those of the thermoplastic resin plants, this commenter requested that the proposed standards for polyethylene and polypropylene apply to certain sources in polymer manufacturing plants that produce copolymers consisting of at least 80 percent (rather than 50 percent) by weight of ethylene or propylene, respectively.

Response: The intent of these standards is to cover certain producers of thermoplastic or thermoset resins and copolymers of these resins that are in turn themselves thermoplastic or thermoset resins. The Agency does not intend for these standards to cover synthetic rubber producers, including manufacturers of thermoplastic or thermoset elastomers, such as ethylene-propylene copolymers and terpolymers that are elastomers or rubbers. Resins are thermoplastic or thermoset polymers that are essentially synonymous with the term plastic. Elastomers are also thermoplastic or thermoset polymers, but are capable of returning to their initial form following deformation. Synthetic rubber and elastomer producers, however, may still be regulated in the future under this standard or a new standard should the Agency decide such regulation is warranted.

The Agency agrees that the definition of polypropylene in the September 30, 1987, Federal Register notice would have subjected certain elastomer and synthetic rubber producers to these standards, because the definition did not contain the clarifying term "thermoplastic". Therefore, the Agency has revised the definition of polypropylene to include the term "thermoplastic." The Agency believes that the revision to the definition of polypropylene limits the scope of these standards appropriately.

Comment: One commenter (IV-D-1) stated that there are more alternative polypropylene technologies than the two listed in BID Vol. I and in the proposed regulations. This commenter assumed that the new source performance standards (NSPS) should be applicable to all polypropylene processes. The commenter then concluded that the NSPS should be amended to include, at least, the "bulk (liquid-phase) polymerization technology." The

commenter stated that bulk plant technology, although in principle a liquid-phase polymerization process, is unlike the "traditional" slurry process and hence, conclusions drawn on the basis of the "slurry process" do not apply directly to the bulk process.

Commenter IV-D-45 also noted that in order to determine applicability dates for affected facilities (using Tables 1 and 2 of the proposed regulation), one must still have a clear understanding of which "production process" applies (the applicable model plant) and the definition of "process section" (which equipment falls into which process section), especially where plants have commenced construction, modifications, or reconstruction between the two proposed regulation dates.

Response: The commenter is correct in assuming that the standards proposed in the September 30, 1987, Federal Register notice were to be applicable to all polypropylene processes. At that time, the Agency understood that all such processes could be described as either liquid phase or gas phase processes and that the model plants described in BID Vol. I were reasonable representations of those processes upon which to base standards. Comments received on the September 30, 1987, Federal Register notice, however, indicated that the polypropylene model plants may not be adequate representations of all processes. As a result of this and other comments, the Agency undertook an analysis to examine alternative ways to determine which process emissions from polypropylene (and polyethylene) plants should be controlled. The results of this analysis were presented in a January 10, 1989, Federal Register notice for public comment. The approach selected by the Agency and incorporated into the final rule is independent of the particular process technology used to produce polypropylene or polyethylene. Thus, the non-representatives of the polypropylene, liquid phase model plant presented in BID Vol. I as it applies to the bulk process is no longer a concern.

For polypropylene facilities that are constructed, modified, or reconstructed after September 30, 1987, and on or before January 10, 1989, the owner or operator of such facilities must still determine which process—liquid phase or gas phase—his or her facility falls under for purposes of determining the affected facilities. The final rule requires an owner or operator to select one of the production processes listed in Table 1 of the final rule to apply to his or her facility. The determination of which emissions from these affected facilities

would be controlled are made using the new approach, which is independent of process type, rather than the control/no-control decisions that were based on the model plant. However, an owner or operator can still use the uncontrolled threshold emission rates proposed in the September 30, 1987, **Federal Register** notice to exempt these affected facilities from control, if he or she so elects.

Definition of Affected Facility

Comment: One commenter (IV-D-13) stated that the selection of process sections as affected facilities results in unreasonable cost and gives unfair trade advantage to patent holders of these processes which the Agency selected as model plants. The commenter stated that the proposed standards will require companies with existing polymer plants to divide up their plants into process sections and process lines, creating a need to develop expensive new accounting and recordkeeping methods and procedures to determine if modifications occur. The commenter stated that plants are not designed, estimated, justified and built, and cost centers are not usually set up by process sections. A large polypropylene or polyethylene polymer plant may have as many as 10 to 15 affected facilities, according to the commenter, and over the course of a year many small changes may be made to these plants. To evaluate whether a modification that has been made falls under the proposed rules, the commenter stated that completely new accounting systems must be developed and implemented. For existing polypropylene and polyethylene plants, the commenter believes a more reasonable choice would be to designate each process line as the affected facility. The commenter stated that a problem recognized by EPA concerning the choice of process units, i.e., "a process line cannot be determined clearly" (52 FR 36683), is even more of a problem with the selection of process section as the affected facility. Specifically, the commenter pointed out, material recovery is being utilized more and more by the industry as a means of reducing overall emissions. According to the commenter, in the model plants studied by the Agency, material recovery occurred primarily after the reaction section, while modern plants continue the recovery of raw materials throughout the process line, wherever it can be done economically. The commenter concluded that the standards need to be revised to a process line concept.

Response: The main considerations in selecting the definition of affected

facility are the application of best demonstrated technology and the degree to which replacement equipment is brought under the standards. As a result, narrower definitions are preferred. This preference can be overcome if analysis concludes that a broader designation would result in greater emission reductions or avoid unreasonable impacts (i.e., costs, energy, or other environmental impacts). The commenter's main point for changing the definition of affected facility is the need by industry to develop and implement completely new accounting systems to track costs for as many as 10 to 15 affected facilities in a large polypropylene or polyethylene plant. The commenter also believes that defining process sections is even more difficult than defining a process line and refers to changing practices of material recovery in the industry.

The Agency disagrees with the commenter on both points. The imposition of new regulations on the industry would likely require some plants to develop new accounting systems to track modifications and reconstructions whether the definition of affected facility is "process section" or "process line." Furthermore, under either definition, the owner or operator would still need to track all changes. The only difference is the number of affected facilities that would be tracked. On this issue, the commenter claims that 10 to 15 affected facilities is too many. The Agency simply disagrees with this statement. The Agency rejected designating each individual emission point as an affected facility because a typical plant may have as many as 40 individual process emission points; a large plant may have substantially more. In terms of process sections, the commenter notes that a large plant may have 10 to 15 process sections; a typical plant would likely have fewer. The number of process lines at any plant will always be less than the number of process sections; but, the Agency is not convinced that at large plants 10 to 15 affected facilities is unreasonable.

With regard to the second point, the commenter claims that the definition of "process section" is even more of a problem than that of a "process line." The Agency again disagrees. The example provided by the commenter may not match the material recovery section of the model plant, but that is irrelevant to the definition. The concept of material recovery is the key aspect of identifying the material recovery process section or material recovery process sections at a plant. (The Agency has revised the definitions of the

process sections to help clarify the placement of equipment in the appropriate process section (see § 60.561, Definitions, of the final rule and § 2.2, Definition of Affected Facility in the BID for the promulgated standards).) Further, the Agency identified a major conceptual problem with trying to define a "process line," where equipment was shared between two otherwise distinct process lines. The commenter offered no suggestions as to how to deal with that problem.

In summary, the Agency finds no reason to change the definition of affected facility for process emissions.

Model Plant vs. Generic Approach

The majority of comments received dealt with the appropriateness of using model plants as the basis for determining which process emissions from polypropylene and polyethylene plants would be subject to the standards. Based on these comments, the Agency has adopted a "generic" approach in the final rule, which is basically the same as that approach presented in the January 10, 1989, **Federal Register** notice reopening the public comment period.

Comment: Several commenters (IV-D-6, IV-D-7, and IV-D-8) stated that, in many cases, the model plants used to develop this standard do not adequately reflect current operation of manufacturing plants. For example, Commenter IV-D-7 referred to the model plant for low density polyethylene (LDPE) based on the UNIPOL process. This commenter noted that the model plant did not consider the modified UNIPOL process that has a pelletizer section added and the linear low density polyethylene (LLDPE) solution process. The commenter stated that emission characteristics differ significantly from the model plant, but are controlled the same. The commenter then stated that the gas phase process for polypropylene failed to consider emergency atmospheric vents that are used on newer plants. Therefore, Commenter IV-D-8 suggested that these model plants be reviewed to ensure that they are representative of operating plants throughout the industry. Similarly, Commenters IV-D-6 and IV-D-8 stated that there are several aspects of the fluid bed gas phase polyethylene process model plant (used to describe the LDPE low pressure and HDPE gas phase processes) that do not reflect actual current operations. A number of specific discrepancies (and the changes suggested by Commenter IV-D-8) were identified by the commenters.

Commenter IV-D-8 also stated that by using reaction mechanisms as the models for developing the NSPS control requirements EPA has tailored the rule to these particular patented processes and that this provides an unfair advantage for both the licensors and licensees of those technologies because the sale of licenses is due, in part, to the ability of a process to comply with applicable environmental standards. The commenter pointed to the low pressure, LDPE process as the best example. The commenter stated that when the model plant for this process was developed, the only process in use was a fluid bed gas phase facility licensed by a major U.S. chemical company. Since that time, the commenter continues, both a slurry and a solution process have been revised to produce the linear low density product, and a new gas phase facility licensed by a major British petrochemical company is currently under construction. According to the commenter, these newer processes differ greatly from the low pressure process that the Agency considers state-of-the-art. The commenter notes that if the NSPS is promulgated as written, it will require that similar new installations, as well as existing units that are modified or reconstructed, be equipped with emission controls designed specifically for the fluid bed gas phase facility. The commenter suggests that the economic penalty resulting from this action be considered before the regulation is finalized.

This commenter then suggested that it might be more appropriate for EPA to establish control requirements based on the system pressure and process type rather than the specific technology used because system pressure (not reaction mechanism) is the primary factor influencing emissions from polyolefin manufacturing facilities and will determine the relative ease at which unreacted raw materials are removed from reacted mixtures. The commenter also stated that system pressure will also be a factor in defining the process step from which the unreacted raw material will be emitted, noting that the higher pressure processes tend to hold on to the unreacted materials longer, thereby yielding greater emissions in later process steps (i.e., product storage).

The commenter illustrated this suggestion by breaking the polyethylene processes into two broad classes—high and low pressure. Under the low pressure classification, the commenter indicated that there are presently three commercial processes—(1) Gas phase,

(2) liquid slurry and (3) liquid solution. According to the commenter, each of these processes in the newer and more recently modified plants has the capability of manufacturing both HDPE and LDPE. Under the high pressure classification, the commenter indicated that there are presently two commercial processes—(1) tubular and (2) autoclave—both of which manufacture conventional LDPE.

The commenter pointed out that under the proposed regulation, if these low pressure solution or slurry process plants manufacture LLDPE, then they are grouped with the gas phase model plant, while if they manufacture HDPE, they are grouped with either the HDPE solution model or the HDPE slurry model. The problem or inconsistency with this result, according to the commenter, is that from a product, process, and emissions point of view, when a solution plant manufactures LLDPE it actually more closely resembles the HDPE solution model and when a slurry plant manufactures LLDPE, it more closely resembles the HDPE slurry model than the gas phase model plant. Finally, the commenter pointed out that the product finishing areas of modern solution and slurry LDPE plants resemble the HDPE solution and HDPE slurry model plants much more than they do the gas phase model plant.

Commenter IV-D-6 stated that there are no intermittent (non-emergency) vents from the product finishing and product storage process sections in high pressure, LDPE plants. This commenter pointed out that continuous emissions from these two process sections were not proposed for control and felt, therefore, that these sections should not be considered as affected facilities.

Response: These comments were made in response to the September 30, 1987, *Federal Register* notice. The Agency took these comments under consideration and as a result of extensive analysis presented in the January 10, 1989, *Federal Register* notice, a new approach for determining which process emissions from all polypropylene and polyethylene plants would be subject to control. The new approach encompasses all emission streams and process sections in these types of polymer plants as an integral part of the new approach. The new approach does away with the need to define model plants and the Agency determined it was unnecessary to revise the model plants. Under the new approach, it may be possible that certain processes do not have one type of emissions from certain process sections

or lack one of the basic process sections. It is not the intent of the new approach to identify such specific situations, thereby potentially limiting its applicability, if not now, then in the future as processes change. Therefore, the Agency has retained as designated affected facilities under the new approach all process sections and emissions from polypropylene and polyethylene plants, as was presented in the January 10, 1989, *Federal Register* notice.

Low VOC Concentration Streams

Comment: Three commenters (IV-D-6, IV-D-8, IV-D-13) expressed concern over requiring control of dilute streams. Commenters IV-D-6 and IV-D-8 stated that the Agency has not demonstrated that using a device that is 98 percent efficient or reducing the TOC concentration to 20 ppmv on a dry basis (corrected to three percent oxygen content) is either possible or economically reasonable for dilute gas streams. The commenters noted that control of dilute streams has become much more significant since the industry now relies more heavily on material recovery for control and, as a result, the extent to which low concentration (TOC) streams now exist in these processes was not anticipated and the difficulty and expense involved in controlling these streams was not considered by EPA. Commenters IV-D-8 and IV-D-13 concluded, that, unless EPA can establish the availability and cost effectiveness of controls for dilute gas streams, controls should not be required.

Commenter IV-D-8 also stated that if BID Vol. I did in fact establish that 20 ppmv is the lowest VOC concentration achievable by combustion of gas streams containing less than 2,000 ppmv VOC, then the lowest achievable VOC concentration is controlled far greater than the best technology system called for by Section 111 of the Clean Air Act.

Finally, the commenters suggested that EPA should also establish a procedure in the regulation that would exempt any dilute concentration stream in any affected facility from control if it can be shown that control of that stream is not cost effective. Commenter IV-D-8 suggested as one possible way to do this is to consider the application of a Total Resource Effective (TRE) Index to the subject vent streams. This was also suggested by the other two commenters. If a suitable alternative test cannot be provided, the commenter (IV-D-8) continued, EPA should exempt all low concentration streams from control in this standard using the same rationale it

used to exempt the continuous vent streams from the product storage bins.

Response: The BID for the proposed standards summarized information contained in Docket Items II-B-4 and II-B-5. These docket items contain the conclusions reached by EPA concerning thermal incinerator performance over a number of tests. The Agency believes that the conclusions reached in those docket items are still valid and support the proposed standard. Furthermore, the new approach presented in the January 10, 1989, Federal Register notice and adopted in the final rule considers a wide range of low VOC concentration streams and the cost of their control for determining the level of emissions necessary for control to be cost effective. The final rule incorporates a low VOC concentration exemption for new and existing affected facilities.

With regard to specific points raised by the commenters, one commenter (IV-D-8) suggested that 20 ppmv is more stringent than the best technology system called for by Section 111 of the Clean Air Act [presumably calculating 99 percent reduction ($2000-20/2000=0.99$)], which is more stringent than the 98 percent destruction. The commenter is incorrect, but the Agency understands the confusion. In evaluating the performance capabilities of incinerators, the Agency examined a large number of streams that had combustion air added to them prior to being combusted. For these streams, the tests showed a leveling off at 20 ppmv at the outlet when the concentration of streams with combustion air fell below 1,000 ppmv. In other words, 98 percent destruction was still being achieved by emission streams with combustion air that had VOC concentrations down to 1,000 ppmv. Many of the streams examined, however, required combustion air to be added to them. The amount of combustion air required typically reduced the VOC concentration by one-half. Thus, 2,000 ppmv of VOC before combustion air is required could be incinerated by 98 percent (on a weight basis). In summary, the 20 ppmv standard does not require a greater degree of control than the best technology system, which is 98 percent destruction by weight.

Comment: Four commenters (IV-D-39, IV-D-43/IV-D-50, IV-D-44, IV-D-45) expressed concern over the lack of an exemption for streams with less than 0.1 weight percent VOC from new affected facilities. The commenters noted that the Agency's reason for excluding new affected facilities from the low VOC concentration exclusion was to preclude operators from purposefully diluting

streams to benefit from the exemption. Commenter IV-D-39 pointed out that "intentional dilution is circumvention of control, which is already forbidden." The commenters all believed that the lack of this exemption would result in the imposition of controls that were not cost effective. Commenter IV-D-43/50 identified several reasons as to why very low VOC concentrations (0 to 5 percent of the lower explosive level (LEL)) are found in the industry and stated that EPA should not require companies to compromise safety by requiring higher VOC concentrations when history has led industry to use more dilute levels to ensure employee safety.

As a group, the commenters recommended that EPA use the same procedures for determining control of dilute VOC streams (<5.5 weight percent VOC) for new affected facilities as it did for modified and reconstructed facilities, and the EPA promulgate the same provisions for determining control required for new facilities as it has proposed for modified and reconstructed facilities. Commenter IV-D-45 stated that not to do so would subject the proposal to allegations that it is not representative of all affected facilities in the categories being regulated, hence defective.

Response: The Agency has carefully considered this issue. The Agency is still concerned that new facilities could be designed so as to "take advantage" of a low VOC concentration cutoff, and at less expense than the cost of controlling the streams. One commenter (IV-D-43/50) indicated that the Agency could compare the purge air rates of a new facility with existing rates. The Agency agrees that this could be a useful mechanism to evaluate whether a company is trying to intentionally dilute the stream to circumvent the rule. The Agency is concerned that this is not necessarily applicable in all cases, either because it is a first time facility for an owner or operator or because its technology is sufficiently different from the technology at existing facilities that a comparison is inappropriate. Another commenter (IV-D-45) pointed out that the nature of storage bin purges are such that the VOC concentration is initially high and drops over time, and that such equipment and air purges are designed so that the maximum concentration would be between 20 and 25 of the LEL. The Agency believes that recognition of this design feature is a useful tool for evaluating whether "to much" dilution is taking place. This again is somewhat limited in that not all dilute streams will have VOC concentrations that vary as

dramatically as might occur in storage bins. On the other hand, designing storage bin air purge rates so as to have maximum VOC concentrations at 20 and 25 percent of the LEL makes it more difficult to justify streams that are diluted so that the maximum VOC concentration is significant below this level. By examining these and other items (e.g., design criteria for pneumatic conveyors), the Agency now believes that there are a sufficient number of indicators that can be used to judge whether intentional circumvention is being practiced at new facilities. Therefore, the Agency has extended both the VOC concentration exemption and the calculated threshold emission equations used for existing affected facilities to new affected facilities.

Applicability of Generic Approach

Comment: One commenter (IV-D-44) stated that the model plant approach, contained in the September 30, 1987, proposal, excluded certain process sections from being affected facilities for both continuous and intermittent emissions, and that the January 10, 1989, proposal appears to provide an exemption for only facilities exempted by Table 1. According to the commenter, it would be unfair to penalize projects which commenced construction, modification, or reconstruction under this September 30, 1987, guidance and on or before the January 10, 1989, proposal, which were not designated as affected facilities in the September 30, 1987, proposal. The commenter then stated that the Agency recognized (54 FR 905) that certain emissions and process sections not required to be controlled under the standards proposed on September 30, 1987, may be required to be controlled under the new approach and therefore, the Agency proposed to resolve this potential compliance problem by proposing a new applicability date (i.e., January 10, 1989) for those facilities that would have been excluded under the original proposal, but subject under the new approach. The commenter recommended that the model plant approach (September 30, 1987, proposal) should be the governing standard for polypropylene and polyethylene construction, modification, and reconstruction projects which can be shown to have commenced after September 30, 1987, but on or before January 10, 1989.

Response: The January 10, 1989, Federal Register notice does what the commenter recommends in Table 2 of the regulation portion of that notice. Table 2 lists all the emission and process sections that were excluded as

affected facilities in the September 30, 1987, notice and applies a January 10, 1989, applicability date to these emissions and process sections. Thus, as indicated in the January 10, 1989, **Federal Register** notice and as provided for in the final rule, only those process sections identified in the September 30, 1987, **Federal Register** notice are affected facilities when constructed, modified, or reconstructed after September 30, 1987, and on or before January 10, 1989, for the appropriate continuous or intermittent emissions. It should be noted that the procedure for determining control or no control of the emissions from these process sections is the "generic" or new approach. The uncontrolled threshold emission rates proposed in the September 30, 1987, **Federal Register** notice, however, can still be used for these affected facilities, if an owner or operator so elects, to exempt individual process sections from control. (Note: Process sections that are exempted on the basis of an uncontrolled threshold emission rate become subject to the standards if the uncontrolled emissions exceed the uncontrolled threshold emission rate at a later date or if the process section is modified or reconstructed after January 10, 1989.)

Comment: One commenter (IV-D-5) stated that it is possible for equipment to be designed to produce more than one of the polymers covered by the proposed standards. The commenter pointed out that the preamble indicates that merely switching production from one type of polymer to another would not be classified as a "modification" as long as the original equipment was designed to accommodate both products. The commenter requested clarification as to which category of polymer process (and thus standards) would be applicable to new facilities that are designed to produce more than one polymer using the same process equipment.

Response: The situation described by the commenter had not been envisioned by the Agency when the standards were proposed on September 30, 1987. Where a new facility is constructed, modified, or reconstructed after January 10, 1989, the situation described by the commenter does not exist because the same procedure is applied for determining control regardless of whether a LDPE, HDPE, or polypropylene product is being produced. However if a facility is built after September 30, 1987, and on or before January 10, 1989, the standards to be met could be different where that facility is designed to produce more than one polymer (e.g., HDPE and LDPE) as

different process sections (and their emissions) were designated as affected facilities depending upon whether HDPE or LDPE was being produced. As presented in the January 10, 1989, **Federal Register** notice, the new approach did not guide an operator or owner in determining which process sections are to be considered affected facilities for those process sections constructed, modified, or reconstructed on or before January 10, 1989, where two types of polymers (e.g., LDPE and HDPE) are produced in the same equipment.

In addition, the uncontrolled threshold emission rate to be applied in exempting emissions from control differ depending on whether HDPE or LDPE is being produced. The January 10, 1989, **Federal Register** notice allowed owners or operators the option to exempt from control emissions that under the new approach would require control, but could be shown under the model plant approach to be exempt from control through the use of the uncontrolled threshold emission rate exemption. (Note: Process sections that are exempted on the basis of an uncontrolled threshold emission rate become subject to the standards if the uncontrolled emissions exceed the uncontrolled threshold emission rate at a later date or if the process section is modified or reconstructed after January 10, 1989.)

The Agency considered several options to clarify which process sections and uncontrolled threshold emission rates are to be used where a facility is designed to produce more than one polymer using the same process equipment. Of the options considered, the Agency selected the option that would allow the owner/operator to select one model plant (presumably the one that most closely matches the hybrid facility) for the purpose of determining the affected facilities with a September 30, 1987, applicability date and use the uncontrolled threshold emission rates for those process sections as identified in the September 30, 1987, **Federal Register** notice.

Comment: Three commenters (IV-D-7, IV-D-8, IV-D-13) recommended that any existing facility which becomes modified should not have to meet the requirements of section 60.562-1 if the facility's existing emissions (controlled or uncontrolled) are already equal to or less than the rates in Table 1 of the proposed standards. The commenters stated that proposed exemption rates failed to consider that there are some existing facilities, which will become modified, that are already achieving significant emission reductions through

existing State and prevention of significant deterioration permits, and that additional controls are likely to be installed on existing facilities as a result of State Implementation Plan revisions for ozone nonattainment areas.

Another commenter (IV-D-47) stated that the criteria for determining applicability should not be termed "uncontrolled emissions," but "Federally enforceable emissions limits" in order to allow credit for the emissions controls that have already been required by State Air Pollution Control Agencies.

Response: The Agency agrees that the regulation needs to take into account emission streams that are already controlled as a result of State regulations, especially those that are Federally enforceable. The promulgated regulation requires an owner or operator to examine the uncontrolled emissions (i.e., those that would be emitted to the atmosphere in the absence of an add-on control device). Where an emission stream in an affected facility is controlled by an existing control device (i.e., one that was operating before September 30, 1987, or one that was operating between September 30, 1987, and January 10, 1989, on emissions from a process section that was not identified as an affected facility in the September 30, 1987, **Federal Register** notice), the inlet conditions to the control device would be examined to determine whether that emission stream is required to be controlled by BDT. Individual streams that are vented to the same control device constitute a single stream. The following describes how control determinations are to be made for controlled streams.

For polypropylene and polyethylene affected facilities with an applicability date of September 30, 1987, but before January 10, 1989, the inlet emission rate is compared to the uncontrolled threshold emission rate for the appropriate process section and type of emission (i.e., continuous or intermittent). If the inlet emission rate is equal to or less than the corresponding uncontrolled threshold emission rate, no further control is required. However, if the inlet emission rate were to exceed the uncontrolled threshold emission rate at some time in the future, then the new approach for determining which process emissions are required to meet the standards, as discussed in the following paragraphs, would be used to redetermine whether these emissions need to be controlled to meet the standards in the final rule. The new approach would also be used in those instances where the inlet emission rate

is greater than the corresponding uncontrolled threshold emission rate.

For polypropylene and polyethylene affected facilities with a January 10, 1989, applicability date and for those facilities identified above, the new approach would be used. Under the new approach, the annual emissions of the inlet emission stream would be compared to the CTE level, which would be calculated based on the TOC weight percent of the inlet stream.

If the emissions (Mg/yr) of the stream entering the control device are greater than or equal to the CTE level, then that stream is subject to BDT (98 percent reduction, 20 ppmv, control in flare meeting the specified operating conditions). If the existing control device is meeting BDT, then no further control of the stream (or combined streams) is required. If the existing control device is not meeting BDT (e.g., only achieves 90 percent reduction), then the emission stream is required to be controlled to BDT at the next available opportunity. The Agency considers this to be a reasonable approach because the cost of immediately retrofitting the control device would be high compared to the incremental emission reduction obtained during the interim period. The next available opportunity constitutes the next time the existing control device is reconstructed or replaced or its operation is changed as the result of changes in State or local requirements. At such time, any uncontrolled emissions in the same weight percent range from any affected facility are also required to be controlled.

If the emissions (Mg/yr) of the stream entering the control device are less than the CTE level, BDT is not required at that time. Whenever the existing control device is reconstructed, replaced, or changed (as discussed above), the controlled stream is reevaluated to see if BDT is required by combining its annual inlet emissions with the annual emissions of any uncontrolled vent stream within the same weight percent range and comparing the combined emissions to the CTE level, which is calculated based on the TOC weight percent of the combined emissions. If these combined emissions are now equal to or greater than the CTE level, BDT is required for the controlled and uncontrolled vent streams.

It is important to note that the "delay" in applying BDT to a controlled stream does not affect the timing for applying BDT to uncontrolled emission streams. Application of BDT is required for all uncontrolled emissions as soon as the total annual emissions for a combined stream (or single stream) are equal to or

greater than the CTE level for the weight percent.

For all polystyrene and PET affected facilities, if the inlet emission rate is less than or equal to the uncontrolled threshold emission rate, then the existing control does not need to be BDT. If the inlet emission rate is greater than the uncontrolled threshold emission rate, then the stream is required to meet BDT at the next available opportunity (as discussed above).

Control Technology—Process Emissions Intermittent Emissions

Comment: Commenters identified several concerns related to the January 10, 1989, **Federal Register** notice regarding the proposed generic approach for determining which intermittent emissions from polyethylene and polypropylene plants would be required to be controlled. Commenter IV-D-43 pointed out that the regulation presented in the January 10, 1989, **Federal Register** notice, which now requires that intermittent vents in an affected facility be combusted by a flare, allows an exemption for decompositions, but no longer exempts emergency intermittent streams (§ 60.562-1(a)(2)) as was provided for in the September 30, 1987, **Federal Register** notice. The commenter stated that the exemption for emergency vents should be retained for reasons of personal safety, lack of available technology, and cost. Primarily for these reasons, the commenters also expressed concern over the definition of decomposition.

The following paragraphs summarize these comments into one of three categories: (1) The availability and adequacy of technology for controlling all intermittent releases other than decompositions; (2) the cost of controlling emergency releases other than decompositions; and (3) the definition of "decomposition". For additional detail, please refer to section 2.6.6, Emergency Stream Exemption, in Chapter 2, and section 3.3, Intermittent Emissions, in Chapter 3 of BID Vol. II.

Control technology. Several commenters questioned the availability of controls for non-decomposition emergency releases and the safety of requiring controls for such releases. Commenters made this comment primarily in reference to high pressure releases from the LDPE, high pressure process.

Commenter IV-D-46 stated that facilities required to capture non-decomposition emergency releases in a high pressure plant would likely have to design to criteria for facilities designed

to capture decomposition emissions, because decomposition emissions are going to exit through the same emergency release system (i.e., open dump valves or blown rupture discs). According to the commenter, a containment system to capture a high pressure emergency release would create an undesirable safety risk because of the enormous size of the system and the possibility of overpressurization or internal ignition that could cause a catastrophic explosion. To minimize these problems, the commenter stated that an enormous vent collection system would be required to collect the emergency release and feed it to a flare, and each emergency vent collection system would require a sophisticated polymer filtering system that would not create backpressure in the system. The commenter stated that they were not aware of any such system in this service. Commenter IV-D-47 stated that, until technology to control such releases is developed, safety concerns should mandate venting such releases to the air.

More generally, Commenter IV-D-44 stated that the requirement that each intermittent vent stream other than decompositions be controlled does not take into account that some intermittent streams for safety reasons cannot be controlled in a flare system. This commenter pointed out that relief valves are extensively used in the chemical industry for protecting pressure vessels from the over-pressurization which may occur for a number of reasons (i.e., fire, exothermic reaction, inadequate cooling). The commenter noted that, based on the definition of "Intermittent Emissions" (52 FR 36707), the emissions from relief valves would be included as an intermittent emission source, thus requiring control. This commenter stated that relief valves in the polyethylene industry are primarily vented to flare systems and secondary relief devices that vent emissions to the atmosphere are only used when normal venting to flare is too slow to protect plant personnel from injury or prevent mechanical damage to the plant. As an example, the commenter noted that should for any reason the flare header become plugged (which has happened) and a plant experiences an emergency situation, the secondary relief valve would be the only avenue of process relief to protect personnel and equipment. In the commenter's opinion, requiring these to be controlled would compromise the safety and integrity of the process unit.

Costs. Most commenters (IV-D-39, IV-D-42, IV-D-43, IV-D-44, 45, 46, 47, 48) expressed concern over the costs of controlling certain intermittent streams that would be incurred because of the way the types of intermittent streams were defined in the January 10, 1989, **Federal Register** notice. Commenter IV-D-39 pointed out that their HDPE and polypropylene plants do not contain decomposition streams, but they do have runaway reactions. The commenter pointed out that they have in the past installed rupture discs under pressure safety valves to vent to the atmosphere emissions from these runaway reactions. According to the commenter, these emissions would not be allowed to be vented to the atmosphere under the proposed rule presented in the January 10, 1989, **Federal Register** notice, and significantly higher equipment costs (e.g., flare header size) would be incurred.

Commenter IV-D-44 stated that routing of other emergency vent streams, which currently utilizes an automatic control mechanism for atmospheric venting, to a control device may be significantly different in cost for retrofit of an existing unit versus cost for a new unit, that the cost for retrofitting the control and associated hardware would be excessive, and therefore the regulation should allow for a cost effective-justification review for retrofit requirements.

Commenter IV-D-46 stated the cost of controlling high pressure emergency releases, as would be required by the proposed procedure outlined in the January 10, 1989, **Federal Register** notice, would be prohibitive, if achievable. This commenter stated that the control facilities required to capture a high pressure, non-decomposition emergency release or a high pressure decomposition emergency release would be similar in design and cost, the control of either would be not cost effective; and, therefore, all emergency releases should be excluded from the need to be controlled.

Two commenters (IV-D-42 and IV-D-48) expressed concern that the proposed standards as presented in the January 10, 1989, **Federal Register** notice would require control of the UNIPOL emergency reactor blowdown. These commenters indicated that these emergency blowdowns are very infrequent and occur as a result of a runaway reaction. The commenters stated that the consequences of not having an emergency blowdown are quite costly (because of a resin meltdown in the reaction). Commenter IV-D-42 stated that the alternative of

using a very large flare to handle these very short duration emergency blowdowns is extremely expensive and has been documented in their comments to the September 30, 1987, proposed rule.

Definition. Several commenters expressed concern that the definition of decomposition, which was proposed in the January 10, 1989, **Federal Register** notice, would exclude certain intermittent streams that should also be exempted from control requirements under these standards. Commenter IV-D-47 stated that the distinction between decomposition releases and planned releases to prevent decomposition is a matter of semantics more than a technical difference as the technological difficulties for controlling each release are similar. The commenter pointed out that the time interval between detection of a need to release and the time that decomposition actually occurs is on the order of one second. According to Commenter IV-D-44, there is no system that can distinguish between an out-of-control condition and a false indication, therefore the same preventative measures must be taken quickly in either case to protect equipment and personnel.

Another type of comment concerning the definition of decomposition was that certain facilities did not experience decompositions, but had other types of runaway reactions or upset conditions that should also be excluded from control because of the high costs of controlling such releases. As noted earlier, two commenters (IV-D-42 and IV-D-48) were concerned that the definition of decomposition did not appear to include the UNIPOL emergency reactor blowdowns. Due to the cost of control, these commenters recommended that UNIPOL emergency reactor blowdowns be excluded from control in the same manner as "decompositions."

Commenter IV-D-47 stated that the Agency's proposed rules should provide an exemption for upset operations emissions in the polypropylene process. Commenters IV-D-47 noted that current polypropylene technology is such that runaway reactions do not occur. In the event of a power failure affecting the recirculation compressors, the commenter stated that the reactor beds would no longer be fluidized and unless the reactor is vented the reaction will continue to the point of making one large polymer "chunk" in the reactor. According to the commenter, the clean up procedure following such an occurrence would require personnel to enter the reactor vessel where potential pockets of decomposition gas remain.

The polymer "chunk" would have to be cut into small blocks using air-driven saws. The downtime required for this situation may take two weeks and be very labor intensive and costly. The commenter pointed out that while such an occurrence is very infrequent, upset operations emissions do occur and requested that they be addressed in the proposed regulations.

Response: The Agency partially agrees with the commenters. The Agency agrees that the definition of "decomposition" was (unintentionally) too narrow and would have resulted in costly applications of the technology. On the other hand, the Agency has found control systems available and demonstrated for all types of intermittent emissions, although such systems are not used uniformly throughout the industry. The Agency has found that process design is an important factor in the particular control system used at a plant. Thus, some intermittent emissions are released to the atmosphere because they are a part of the process design for maintaining normal operations, for preventing more serious process upsets, or for relieving process equipment when process conditions exceed the design capacity of the system. Regardless of the particular set of intermittent emissions a particular system was found to control, in every case, each system can be designed and operated in a safe manner. However, the Agency agrees with the commenters that some types of intermittent releases may not be reasonable to control on the basis of the costs and emission reduction involved. The following paragraphs focus the Agency's response to this set of comments in the same three general areas as used above: Control technology, costs, and definition.

Control technology. The commenters were primarily concerned with the availability of technology for controlling non-decomposition emissions from LDPE, high pressure plants. These emissions can be very similar to decompositions emissions in terms of the length of release (very short) and the magnitude of the volume of the release (very large). The commenters also mentioned the control of relief valves that protect process vessels during times of fire, exothermic reactions, and inadequate cooling. The commenters felt that the definition of decomposition in the January 10, 1989, **Federal Register** notice would require control of these streams, and that such control technology was unavailable for the safe control of such streams. The Agency understands and concurs with the need to provide safe operations and does not

expect that operators would do anything unsafe in response to these standards. There is always the possibility of safety concerns with any manufacturing process, including its air pollution control equipment. The Agency expects operators to act prudently when complying with the standards by designing and operating air pollution control equipment properly. In selecting BDT and drafting standards, EPA considers only demonstrated technologies, as required by the Clean Air Act, and, therefore, only requires technologies that can be properly designed and operated.

Intermittent releases from polymer manufacturing plants can be among the largest sources of VOC emissions at a plant. Some of these releases have high volumes released in very short periods of times. During the development of these standards, the Agency has collected much information on a variety of polypropylene and polyethylene processes and their emission control systems. The control of decomposition emissions was found to have occurred at a single LDPE, high pressure facility (see Docket Item II-D-7). None of the other LDPE, high pressure facilities controlled decomposition emissions. The control of non-decomposition emergency releases varies from among facilities and types of processes. At least two LDPE, high pressure plants control some of the non-decomposition releases, which include safety valve discharges, and releases from various process upsets and certain types of equipment malfunctions (e.g., seal and gasket "blow outs"). Other types of plants (polypropylene; LDPE, low pressure or gas phase; and HDPE) control similar types of emissions, although one type of emissions controlled at one plant may not be controlled at another. Those emissions that generally are uncontrolled throughout the industry include releases that occur as a result of fire, power failure, and other unexpected events that could lead to severe equipment or personnel injury if not vented to the atmosphere. However, even some of these emissions are controlled at certain plants. For example, most of the polypropylene, liquid phase plants for which information has been gathered control all emergency-type releases. The following two paragraphs describe, in detail, the intermittent control systems employed at two different facilities.

One company (see Docket Item II-B-75) sends pressure relief emissions from the compressors at a LDPE, high pressure plant to the plant's flare. These safety relief valves regulate the pressure

in the system around the compressors. When pressures go "too high," these valves open and relieve the pressure. This pressure relief system protects the equipment from internal problems. At this plant, seals, gaskets, or some other equipment will occasionally "blow out," creating a hazardous situation unless brought under immediate control. A "block and dump" valve system is employed to handle this situation. Combustible gas alarms signal an operator that an explosive situation has arisen. The operator will activate the block and dump system. Valves are opened to evacuate the ethylene in the system at the point where the leak has occurred and dump it to the flare. At the same time, the main ethylene feed to the area is blocked off, the reaction is stopped, and the catalyst feed is shut off. This block and dump system is designed to protect the equipment from external problems. Decompositions are accidents, unplanned runaway reactions that occur due to bearing failure, too much catalyst, or some unknown cause. This company does not attempt to recognize and prevent decompositions. When one does occur, they review the incident to try to determine the cause. Once the cause is found, the company tries to implement whatever may be necessary to reduce the likelihood of the triggering cause from recurring. The only emissions at this plant that are not vented to the flare are the decompositions. This company stressed that to require the venting of decompositions to a flare would be outside their safety practices.

Another company (see Docket Item IV-D-55) uses a multi-stage relief system to protect plant equipment against overpressure in two stages. This company uses a system of automatically controlled vents, operator activated vents, and relief devices to discharge vents that result from normal plant upsets and equipment malfunctions to a closed system, such as a flare or incinerator. Relief vents that result from emergency conditions, such as fires, total loss of power, and runaway reactions, are discharged to the atmosphere through relieving devices, which are set slightly above the set pressure of the first stage relieving device. More specifically, for this company's polypropylene and polyethylene flash chambers, the relief valves discharging to the flare provides overpressure protection for the flash chamber for typical process upsets, whereas the additional relief valves discharge to the atmosphere in the event of an emergency condition resulting from a plant power failure or fire, and in

the case of the polypropylene flash chambers, from a runaway reaction in the polypropylene reactor. In the case of the polyethylene reactor, the relief valve discharging to the atmosphere provides overpressure protection for the reactor in the event of fire in the polyethylene reactor. Both reactor systems are designed to withstand all other possible causes of overpressure.

In summary, the Agency believes that the control technology exists for the safe control of any intermittent release that may occur at a facility subject to these standards. However, the cost of achieving such control may be sufficiently high as not to warrant control under these standards. The following section of this response addresses the costs of control.

Costs. The Agency has costed flame systems for controlling the various types of emergency releases identified by the commenters (see Docket Items II-D-105, IV-B-11, and IV-B-12). Generally, the cost of controlling decomposition emissions exceeded \$7,000/Mg of VOC reduction and was as high as \$200,000/Mg of VOC reduction. The cost of controlling runaway reaction releases from UNIPOL polypropylene and polyethylene process were generally around \$9,000/Mg of VOC reduction. Based on these findings, the Agency believes that the cost of controlling high volumes of flow that are released over short periods of time under the circumstances described by the commenters are unreasonable given the resulting emission reduction. Based on the information provided by the commenters and previously by the industry as a whole, these releases are related to operating conditions that are abnormal and abnormal to the point that the design of the process cannot return conditions to normal operations. In at least one instance, in the case of emissions during attempts to prevent decompositions, these releases are triggered to prevent a decomposition from occurring although there is no guarantee that a decomposition would actually have occurred if the release was not made. However, the explosive nature of a decomposition and the rapidity with which it occurs makes it virtually impossible to distinguish between situations. Thus, the Agency decided to "broaden" the definition of decomposition emissions to include those emissions that occur as a result of attempts to prevent decompositions.

In contrast, some polymer producers use pressure relief valves or other mechanisms to vent emissions from process vessels as part of the process design for operating the vessels under

normal operating conditions and certain upset conditions, and for maintaining normal process conditions. Examination of the information available indicates that these emissions have been controlled and can be controlled cost effectively. The costs of controlling intermittent emissions from polypropylene and polyethylene plants were estimated based on the model plants presented in BID Vol. I (see Docket Item IV-B-12). The cost of control for routine and non-decomposition, emergency-type releases in a flare ranged from \$70 to \$1,890 per Mg of VOC reduction for single process lines and between \$45 and \$885 per Mg for whole plants. These intermittent releases are designed to keep the process vessel in normal operating conditions; they are not releases that occur because of abnormal operating conditions (e.g., fire or loss of power) or because releases are necessary to prevent equipment damage or personnel safety hazardous because the operating conditions can no longer be returned to normal operating conditions.

Definition. While the Agency would like to relate the decision on whether to require control for all intermittent releases in the same manner as has been done for continuous emissions, that approach is not feasible (54 FR 903). Therefore, the promulgated standard continues to require control of appropriate intermittent releases by defining the types of intermittent releases that are exempt from the standards. As noted earlier in this response, the January 10, 1989, *Federal Register* notice defined too narrowly those intermittent releases that could be exempted from control by using the term "decomposition." In the promulgated standard, the definition of "emergency vent stream" has been revised and is used for exempting individual intermittent releases from control requirements. The definition exempts intermittent streams in a very similar way as the September 30, 1987, *Federal Register* notice. The final definition of emergency vent stream covers those intermittent vents that occur from process equipment where normal operating parameters are exceeded such that the process equipment cannot be returned to normal operating conditions using the design features of the system and venting must occur to avoid equipment failure or adverse safety personnel consequence. Releases of this nature include emissions that occur during a decomposition event, during attempts to prevent decompositions, and during reactor dumps to minimize the adverse consequences of a runaway

reaction (other than a decomposition). In addition, the definition of "decomposition emissions" has been revised to include those emissions that occur as a result of attempts to prevent decompositions.

Condensers

Comment: One commenter (IV-D-8) stated that the use of refrigeration condensers are not technically feasible for polystyrene processes and do not meet the criteria for standards of performance as stated in the BID: "standards of performance must (1) Realistically reflect best demonstrated control practices; (2) adequately consider the cost, the nonair quality, health and environmental impacts, and the energy requirement of such control; (3) be applicable to existing sources that are modified or reconstructed as well as new installations; and (4) meet the conditions of all variations of operating conditions being considered anywhere in the country."

The commenter wrote that the Agency is correct in stating in the BID that condensers are cost effective for recovery of compounds with relatively high boiling points like styrene and that a refrigerated condenser is not feasible when moisture is present in the stream which might cause freezing in the condenser. The commenter then pointed out that the latter holds true for continuous polystyrene processes.

The commenter then gave a number of reasons why freezing will occur. First and most important, according to the commenter, is the water in the vent. The commenter noted that the Agency assumed that when plants switched from steam ejectors to vacuum pumps, the freezing problem associated with water disappeared with the steam. However, the commenter stated, there is water entering with the raw materials and with the air leakage into the system (especially true in hot, humid climates). The commenter pointed out that most of the water comes from the water content of the styrene and the rubber used in the manufacture of high impact polystyrene (HIPS). Another potential problem with using a refrigerated condenser, according to the commenter, is the presence of additives in the process, some of which have high freezing points. One company reports freezing of the primary condensers coming off the devolatilizer when they ran the condenser's glycol system at -2 to -4°C . Thus, if certain additives are present, the freezing is more likely to take place.

Response: After further investigation, the Agency agrees that freezing may be a problem at sub-zero temperatures.

Therefore, the Agency has reanalyzed the regulatory alternatives for polystyrene plants using spared heat exchangers with defrost capabilities and a refrigeration system for sub-zero applications. This reanalysis is presented in Docket Item IV-B-18.

Comment: Two commenters (IV-D-6, IV-D-8) expressed concern over the costs basis used to select refrigerated condensers as the basis of the proposed standards for polystyrene plants.

Commenter IV-D-8 stated that the Agency did not adequately determine the costs and cost-effectiveness associated with using refrigerated condensers in the polystyrene continuous process. Commenter IV-D-6 stated the cost of the refrigeration condenser system for the model plant in the BID appears to be totally unrealistic and grossly underestimated and the cost of the specified technology to achieve the indicated reductions does not appear to justify the additional control above 0.12 kg/Mg of product. The commenter pointed out the following cost factors they felt might have been overlooked:

1. Moisture content of the stream would require drying systems;
2. Poor heat transfer coefficients due to the high nitrogen and noncondensable content of the stream;
3. Explosion-proof requirements must be Class I division 2;
4. Refrigeration system would be non-standard (probably propylene) due to the temperature requirements;
5. Higher metallurgy (stainless steel) required due to the low temperature requirement; and
6. Cost for new process condenser and associated piping appears not to have been considered in development of the proposal. Existing chilled water condensers are not rated for this low temperature application and refrigeration service. Therefore, new process condensers would be required.

On the basis of these comments regarding the cost and cost-effectiveness of refrigerated condensers, as well as the questionable viability of the technology due to the presence of water, Commenter IV-D-8 stated that EPA must redetermine the best technology system for polystyrene continuous processes.

Response: The commenters have brought up a number of points concerning the use of and cost estimates for refrigerated condensers on emission streams from polystyrene plants using continuous processes. For the response to these comments, the reader is referred to Docket Item IV-B-18. The following summarizes the Agency's response to the commenters concerns.

The Agency agrees that consideration of subzero condenser applications requires dealing with moisture level. Based on conversations with a number of vendors, the Agency has reevaluated control below 32 °F using a system composed of two heat exchangers each equipped with a defrost unit and a refrigeration unit to service both heat exchangers. This system now incorporates stainless steel construction. The system previously considered noncondensibles and, thus, the Agency feels proper heat transfer coefficients have been used. Vendor contacts indicated that ethylene glycol-water solutions and Freon 502 coolants would suffice; non-standard refrigerants would not be needed. In addition, the explosion proof requirements, which refer to electrical wiring requirements, have been directly considered. Based on these assumptions, the Agency has recalculated the costs of the control alternatives.

Commenter IV-D-8 suggested that the Agency establish a new baseline to determine cost effectiveness before determining the final rule. The Agency provides for an uncontrolled emission rate threshold level that protects against non-cost effective control of facilities referred to by the commenter. Therefore, the Agency has retained the baseline as presented in BID Vol. I.

Comment: One commenter (IV-D-6) stated that the uncontrolled emission rate of 0.016 kg VOC/Mg of product for continuous polystyrene plants needs to be reconsidered to take into account the presence of water in the material recovery condenser vent stream. The commenter stated further that it appears inappropriate that the newest facilities built with the latest devolatilizing vacuum and refrigeration technologies cannot meet this uncontrolled emission level. The commenter suggested that this value, if appropriate at all, needs to be in the 0.050 kg VOC/Mg product range.

Response: The uncontrolled emission rate for the material recovery section from polystyrene plants has been recalculated based on the new data concerning water in the material recovery condenser vent stream. The new uncontrolled threshold emission rate has increased to 0.05 kg TOC/Mg product. This increase reflects the use of a spared condenser system to bypass the potential freezing problem of using subfreezing temperatures in the condenser.

The commenter refers to the inappropriateness of the proposed uncontrolled emission rate by referring to the newest facilities with the latest devolatilizing vacuum and refrigeration technologies not being able to meet that

level. The commenter appears to presume a relationship between the level of uncontrolled emissions from a facility that installs the latest process equipment and the level of emissions that can be achieved when air pollution control is sought. The Agency disagrees with this apparent assumption. The uncontrolled emissions from an industrial facility in the absence of environmental regulation is typically determined by a different set of economic and cost criteria than the criteria used in setting environmental standards. The lower level of emissions required by the standards does not say anything about the technical capabilities of the latest equipment installed by industry, but reflects the use of emission control equipment that allows further reduction in emissions. As noted above, the Agency reevaluated the appropriateness of the control technique used and as a result of this reevaluation has increased the uncontrolled emission rate.

Poly(ethylene terephthalate) Standards

Comment: One commenter (IV-D-12) stated that the vapor streams from the material recovery (methanol recovery) section of PET processes both high and low viscosity DMT are laden with water vapor. The commenter pointed out that the concentration of TOC emissions and condenser temperature are regulated in sections 60.562-1(c)(1) (i) and (ii) and 60.562-1(c)(4)(iv) of the September 30, 1987, Federal Register notice. According to the commenter, if a refrigerated condenser were used as the final condenser in the material recovery section, the vapor stream would have to be dried before entering the condenser or the condenser would freeze and plug. The commenter stated that such a drier for that large a flow and concentration would be prohibitively expensive in terms of capital and operating cost and should be excluded.

Response: The Agency has reevaluated the regulator alternatives for the material recovery section from PET/DMT processes to taken into account potential freezing problems. However, rather than using a drier on the stream, the Agency used a lower cost approach of analyzing the potential emission reduction and cost using a spared condenser system. This has resulted in a revision to the standard for this process section. Based on the revised analysis, the final rule sets an emission limit of 0.018 kg TOC/Mg product for material recovery sections. Alternatively, an owner or operator of an affected facility may limit the outlet temperature of the final condenser to +3 °C (+37 °F). At proposal, these

limits were 0.0027 kg TOC/Mg product and -24 °C (-11 °F), respectively. In addition, the uncontrolled threshold emission rate increased to 0.12 kg TOC/Mg product.

Comment: One commenter (IV-D-11) stated that the limit of 0.04 kg TOC/Mg product from esterification vessels for high viscosity PET using multiple end finishers (Section 60.562-1(c)(4)(iii) of the September 30, 1987, Federal Register notice) appears to be in error and is not supported by BID Vol. I. The commenter stated that the appropriate limit should be 0.15 kg TOC/Mg product.

Response: The Agency reviewed the information in BID Vol. I and the docket concerning this comment. The sources show inconsistent treatment of esterifiers from high viscosity PET plants using multiple end finishers. For example, Chapter 8 states that baseline control costs for these facilities were estimated assuming reflux condensers on the esterifiers, which are associated with an emission rate of 0.04 kg TOC/Mg of product. The commenter, who uses a different type of condenser on their esterifiers, has stated that they would expect their condenser to be as efficient as reflux condensers. While a previous estimate based on sampling conducted in 1978 at the commenter's facility showed an estimated emission rate of 0.15 kg TOC/Mg product, a more recent test conducted by the commenter shows that the controlled emissions from the esterifiers are below 0.04 kg TOC/Mg product. In developing the baseline control costs, the Agency incorporated reflux condensers as baseline control. Unfortunately, this was not shown in Chapter 6, where the contradictory, and erroneous, statement that distillation columns with an emission rate of 0.15 kg TOC/Mg product are shown. For new plants, it was the Agency's judgment that reflux condensers represented best available technology and should serve as baseline for new, grass roots plants. As noted above, the more recent test by the commenter shows that their condensers are achieving equivalent levels of control. The Agency also conducted a new analysis specifically estimating the cost of controlling the commenter's 0.15 kg TOC/Mg product stream to 0.04 kg TOC/Mg product (see Docket Item IV-B-20). This analysis showed the cost of control to be reasonable. Thus, while the commenter is correct in pointing out discrepancies in the BID for the proposed standards, the final rule retains the proposed standard of 0.04 kg TOC/Mg product.

Comment: Two commenters (IV-D-8, IV-D-13) stated that while the control

technology exists to achieve final condenser outlet temperatures of -24°C during steady state operation of a poly(ethylene terephthalate) plant, there are routine stages of the operation of a plant which make this temperature unachievable. The commenters pointed out that the composition of the vent stream during startup, shutdown, and process upsets varies to the point that maintaining an outlet temperature of -24°C would lead to freeze ups and further process upsets. The water content, polymer carryover and other contaminants in the stream during startup or shutdown, the commenter continued, will affect the temperature at which the condenser outlet can be operated without freezing during this portion of the processing. Therefore, the commenters stated, if a gas temperature is specified in the standard and is included as a permit parameter, there will be times when the process must perform violate the permit and adequate recognition that the standards do not apply during startup, shutdown, or malfunction conditions must be given.

The commenters then suggested that the regulatory language be changed to reflect that if refrigerated condensers are used for control, then when the process runs at steady state the outlet gas temperature should be -24°C .

Response: Periods of startup, shutdown, and malfunction are not considered to be in violation if they exceed the expressed emission limits, as provided for in the General Provisions, section 60.8(c):

"* * * nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard."

Since the proposed standards do not specify otherwise, the General Provision section was assumed to be prevailing. However, the alternative temperature standard does not necessarily fall within the definition of "emission limit" as used in § 60.8(c). The Agency intends the same treatment to be accorded the alternative temperature standard as for a true emission limit. Owners and operators are still required to maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions, to the extent practicable, at all times including periods of startup, shutdown, and malfunction (General Provisions, § 60.11(d)). Therefore, the promulgated standard includes the commenter's suggestion.

Modification/Reconstruction

Comment: One commenter (IV-D-47) referred to 54 FR 893 in which is stated: "Under the new approach, any existing process section that is modified or reconstructed becomes an affected facility subject to the proposed standards. Similarly, any newly constructed process section at an existing plant or a new plant would be an affected facility * * *." The commenter then stated that the impact of these statements is unclear where an existing process section that is modified or reconstructed becomes an affected facility subject to the proposed standards, yet that modification or reconstruction results in increased emissions only in another section. The commenter asked how the standards are to be applied in this situation.

Response: Modification or reconstruction to a process section only affects that process section regardless of the effect on emissions in other process sections. A process section is "modified" if a physical change occurs to the facility or there is an operational change to the facility either of which results in an increase in the emission rate. In the example provided by the commenter, the modified process section would not become an affected facility because there is no increase in emissions from that process section. Assuming the other process section is not modified, as defined, then it is not considered to be an affected facility because there is no increase in emissions from that process section. Assuming the other process section is not modified, as defined, then it is not considered to be an affected facility even though there is an increase in emissions.

A process section is "reconstructed" if the replacement of components in the existing facility occurs so that the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new process section and it is technologically and economically feasible to meet the applicable standards. The definition of reconstruction does not depend on an increase in emissions. Thus, in the example provided by the commenter, if the first process section is reconstructed, then it becomes an affected facility subject to the standards regardless of the fact there has been no increase in emissions. (Note: This is also true even if a decrease in emissions occurs.) As before, if the process section in which emissions do increase does not undergo replacement of components so as to constitute a reconstruction, then that

process section is not an affected facility and is not subject to the standards.

Miscellaneous

Comment: Several commenters (IV-D-39, IV-D-44, IV-D-50) expressed concern over the definition of "concurrent" in the January 10, 1989, Federal Register notice and the concept of concurrently constructed, modified, and reconstructed affected facilities. Commenter IV-D-39 suggested that the word "concurrent" be deleted. This commenter stated that its purpose is unclear and that it appears to require that modifications to existing facilities occurring within two years of each other would be treated as new facilities with the stricter low VOC concentration requirements being applied.

Commenter IV-D-44 suggested that the two-year time frame in the definition of "concurrent" be replaced with a six-month period. This commenter stated that the definition of concurrent as proposed could impose retroactive additional control measures and costs to projects already completed or near completion. Commenter IV-D-44 believes that no additional requirements should ever be imposed on projects already completed or which have initiated construction. This commenter illustrated their concern by stating that major projects could be vulnerable for additional control requirements and incurred costs up to five years (three years from commencement to completion plus two-year concurrent period) from date of commencement. Commenter IV-D-44 stated that this was "totally unreasonable and not cost effective." The commenter believes that all control decisions for concurrent projects should be made during their common planning/design phase and that projects should not be considered concurrent unless they have a common planning time frame. According to this commenter, two years is too long a time frame for the definition of concurrent and is longer than most planning cycles.

Commenter IV-D-44 also stated that the proposed use of concurrent does not appear to exempt projects under construction, modification, or reconstruction prior to January 10, 1989, from additional control requirements. The commenter recommended that projects started prior to January 10, 1989, be excluded from being considered concurrent with other projects begun after January 10, 1989.

Commenter IV-D-50 stated that the wording of the definition of concurrent is confusing (54 FR 895). According to this commenter, the definition as stated

now would lead to the following scenario: when a plant commences a project "B" within two years of the commencement of a previous project "A" at the same plant, and it commences a project "C" within two years of the commencement of project "B," then "B" can be concurrent with "A" and "C" can be concurrent with "B" while "C" may not be concurrent with "A". Commenter IV-D-50 then stated that this situation could foreseeably go on for years and makes the completion date of each successive project irrelevant. Commenter IV-D-50 recommended that the EPA eliminate the concept of concurrent control, but that if the EPA feels this definition is absolutely necessary, suggested as an alternative to the statement in the revised proposal (54 FR 895) the following language:

" * * * construction, modification, or reconstruction within a process unit (replacing, "of affected facilities") which has commenced in the two year period prior to the commencement date of the construction, modification, or reconstruction of an affected facility."

Response: Under the generic approach for determining which process emission streams are to be controlled from polypropylene and polyethylene facilities, the Agency proposed in the January 10, 1989, Federal Register notice that emissions from all concurrently constructed, modified, and reconstructed affected facilities be combined (according to the procedures outlined in that notice) for purposes of determining which emission streams would be controlled. When a new plant is built, all of the process sections are (obviously) concurrent, and the generic approach requires combining emission streams in the same weight percent range across all process sections. This procedure formed the basis for the development of the calculated threshold emission levels proposed in the January 10, 1989, Federal Register notice.

The Agency extended this concept of concurrent construction to modified and reconstructed affected facilities. If two process sections are modified at the same time, the Agency knows of no reason not to combine streams across the two process sections for control determinations. In fact, the generic approach is specifically designed to reach more reasonable control/no control determinations when this is done than when each process section is considered individually. Further, the Agency believes that reasonable control decisions can be made even for affected facilities that are not "concurrent," as

defined in the January 10, 1989, Federal Register notice.

The Agency has decided that the term "concurrent" is unnecessary to implement the generic approach and has eliminated it from the final rule. However, the Agency has replaced it with a different and more expansive procedure. This new procedure requires uncontrolled emission streams from an affected facility to be examined for pollutant control whenever a process section at the plant site is constructed, modified, or reconstructed regardless of the time interval between the commencement or completion dates of the affected facilities. Once an emission stream is controlled as a result of these standards, it is never again considered for determining the control of other emission streams.

In implementing this new procedure, the Agency disagrees with the commenters that it is unreasonable to require control of emissions from an affected facility that has begun operation (i.e., after it has been completed). The generic approach was designed to identify that level of annual emissions for a given weight percent of VOC in a single or combined emission stream above which control is deemed to be reasonable, regardless of the number of emission streams, the period of time when they became subject to the standards, or the planning phases or periods at a plant site. In addition, the Agency disagrees that there is a need to distinguish between those process sections that became affected facilities on or before January 10, 1989, and those that became affected facilities after January 10, 1989. Reasonable control determinations can be made regardless of an affected facility's applicability date.

To illustrate how this new procedure works, the following example is provided.

Example: At a polypropylene plant, Process Section A is reconstructed. There are three continuous emission streams (1, 2, and 3), one in each of the three weight percent ranges. Stream 3, which is in the 20 to 100 weight percent VOC range, has emissions greater than the CTE level and, thus, control is required. Emissions from Streams 1 and 2 are below their respective CTE's and, thus, no control is required. Process Section B is modified, and has two emission streams, 4 and 5. Emission Stream 4 is in the same weight percent range as Emission Stream 1, and Emission Stream 5 is in the same weight percent range as Emission Stream 2. These emission streams would now be combined (4 with 1 and 5 with 2) to determine whether emissions in each weight percent range are greater than their respective CTE's. Suppose the total emissions from Emission Streams 5 and 2 are greater than the CTE level for their

weight percent. These two streams would now be controlled. Suppose the other two streams (4 and 1) remain uncontrolled (i.e., their total annual emissions are less than the CTE level for their weight percent).

Finally, Process Section C is constructed at the plant site. Process Section C has two emission streams, 6 and 7. Emission Stream 6 is in the same weight percent range as Emission Streams 4 and 1. Since the latter two streams are still uncontrolled, they would be combined with Emission Stream 6 from Process Section C to determine whether control is required of all three streams. Suppose the total emissions now exceed the CTE level for the combined weight percent, then all three streams would be controlled. Emission Stream 7, which is in the 20 to 100 weight percent range, would be evaluated on its own, since there are no uncontrolled streams from an affected facility in this weight percent range. If the annual emissions of Emission Stream 7 are less than the CTE level, no control is required. (Note: In all cases where control is not required, streams with flow less than or equal to 8 scfm are still required to be controlled.)

Monitoring Requirements

Comment: Four commenters (IV-D-5, IV-D-6, IV-D-7, IV-D-8) questioned the need and desirability of requiring flow measuring devices on vents to control equipment. According to the commenters, this will add significant cost, provide no useful data, and add to the burden of recordkeeping. One commenter (IV-D-6) specifically wondered how the flow monitoring data would affect the control of emissions. This commenter also stated that the flare requirement portion of the fugitive emission standard (40 CFR part 60—subpart VV) does not require flow monitoring devices.

Two commenters (IV-D-7, IV-D-8) maintained that flow measurement on intermittent vents will be especially valueless since it will be difficult to differentiate between true no-flow situations and instrument problems. Two of the commenters (IV-D-7, IV-D-8) stated that installation of flow devices in a process flare system that also serves as a safety flare is not a good practice from a maintenance or safety standpoint. One commenter (IV-D-8) stated further than the temperature, density, pressure, and fouling or corrosive characteristics of flared gases tend to cause maintenance and reliability problems on flow measuring elements that are placed into the flare gas line. Commenter IV-D-8 noted that while external measurement devices are available, they are expensive and certainly should not be required on each individual vent stream into the flare gas header. This commenter also claimed that measuring every flare gas vent stream flow is not possible, with even

single stream flare gas flow measurements being notoriously difficult to measure.

One commenter (IV-D-6) stated that technical problems exist for retrofit of modified facilities where emergency vent systems are integrated with normal process vent streams, because the range of flow rates makes accurate measurement of lower flows impossible without causing excessive restrictions to emergency ventings.

Commenter (IV-D-8) suggested that paragraphs 60.563(a)(2), (b)(2), and (c)(2) of the September 30, 1987, **Federal Register** notice, which require the installation of a flow indicator to provide a record of the vent stream flow to the incinerator or flare, be deleted. All four commenters felt that engineering estimates and design calculations of the vent flows should be adequate to ascertain compliance with flare flow allowable ranges.

One commenter (IV-D-5) recommended that a requirement for an engineering piping report be substituted for the flow instrument requirements for flares. This commenter believes that an engineering report describing the piping arrangement for the vent streams would provide assurance that these streams will be continuously flared. Such a report, the commenter said, would achieve the same objective as the flow instrument requirement by showing that the vent streams are "hard wired" (no physical possibility of an atmospheric release prior to the flare) without the burden of installing, operating, and maintaining a large number of flow recorders.

Response: The EPA considers it very important to ensure that vent streams are continuously vented to the flare (or other control device). The primary intent of the flow monitoring requirement was to provide a means for indicating when vent streams were bypassing the flare or other control device. In the September 30, 1987, **Federal Register** notice, flow indicators were proposed. Flow indicators envisioned by the Agency would simply provide an indication of flow/no flow, and need not provide quantitative estimates of flow rates. The Agency has reevaluated the use of flow indicators as proposed and in light of the comments received. This reevaluation has led the Agency to the following conclusions.

1. Flow meters, which provide quantitative estimates for flow rates, could be one way to ensure emissions are vented to a control device. However, as pointed out by the commenters, there may be technical problems and less expensive ways to achieve the same goal.

2. Flow indicators located on the vent pipe between the emission source and the control device by themselves may be insufficient to meet the intent (even though this was what was proposed).

3. Engineering reports that show an emission stream is "hard piped" to a control device is a less expensive method than flow meters to ensure the entire flow will be vented to the control device. Other piping arrangements can be used, but car seals on valves or flow indicators located immediately downstream of each valve that could divert a portion of the flow to the atmosphere, either directly or indirectly, become necessary.

Considering the above conclusions, the Agency is now requiring an engineering report that describes the piping arrangement for venting the affected emission streams to the control device. If any valves are present in the line between the source and the control device, the rule requires them to be car-sealed opened. In addition, all valves that allow emissions to bypass the control device are required to be car-sealed closed. The monitoring requirements have been revised now that this engineering report is required. An owner or operator may elect to follow one of two methods for monitoring the vent system. One method would require monthly inspection of the valves to inspect the car seals, the reporting and recording of any time the car seals are broken, and the recording and reporting of any time the valve position has changed. The other method would require the installation of a flow indicator, which gives an indication of flow/no flow, at the closest downstream point of each valve that is required to be car-sealed closed. The owner or operator is to record all periods of flow (which indicates a portion of the emission stream is bypassing the control device) and report such periods of flow.

Comment: The commenters (IV-D-6, IV-D-8) pointed out that the preamble clearly states that thermocouples is the only acceptable monitor, while the standard allows for a thermocouple or similar device. The commenters requested that this confusion be eliminated from the rule.

Four commenters (IV-D-6, IV-D-7, IV-D-8, IV-D-49) requested that a provision for any other equivalent devices capable of detecting a flame be allowed with the regulations (§§ 60.563 (b)(1) and (c)(1) of the September 30, 1987, **Federal Register** notice). One commenter (IV-D-8) suggested that visual inspection combined with an assessment of the reliability of the fuel supply to the pilot be allowed as an equivalent pilot flame detection system. The commenters stated that the final rule should allow individual plants to select alternate flame sensors as the

point of the regulation should be to require a pilot detection system (i.e., thermocouples, flame ionization detectors and remote infrared scanners) capable of detecting a flame.

Response: The preamble for the proposed rule should not have stated so distinctly that thermocouples were the only acceptable monitor. Other similar devices are acceptable provided they provide the necessary recordkeeping requirements.

The presence of a flame is obviously critical to the operation of a flare as a control device. The intent of the flare monitoring regulation is to require a reliable monitoring device on the flare that will indicate there is no flame present and, thus, when the flare is not operating; or in the case of intermittent emissions, not in a ready state to control emissions. For flares controlling continuous emissions, monitoring of the flare flame or pilot light flames is appropriate to ensure the vent stream is being destroyed. For flares controlling intermittent emissions, a flare flame will not always be present. Thus, for these flares, it is important to monitor the pilot light flames.

Thermocouples are generally accepted as the most reliable means to monitor the presence of a pilot flame. For flares controlling intermittent emissions alone, it is important to ensure that the pilot lights are lit (i.e., have a flame present). Thus, the standards require such flares to monitor the pilot light flames using a thermocouple or equivalent monitoring device. For flares controlling both intermittent and continuous emissions or continuous emissions alone, EPA has decided that the use of certain optical devices is also acceptable to indicate the presence of a flame (either the flare flame or pilot light flames). Ultra-violet or infrared beam sensors may be used in lieu of thermocouples for these flares. These devices offer an advantage over thermocouples because they may be installed remote from the flare tip thereby allowing maintenance to be done without shutting down the flare. It is important that these optical devices be installed properly to minimize the effects of solar radiance. Although these devices may have difficulty in distinguishing the pilot flame from the main flame, the detection of a flame fulfills the intent of the regulation for flares used to control both continuous and intermittent emissions or continuous emissions alone.

The detection of flame presence by visual means or by remote video camera is not a suitable method of monitoring. A flame is operating smokelessly, it can

be difficult to determine if a flame is present.

Flame ionization detectors are not considered as reliable as other monitoring technologies. The experience of one flare manufacturer (see Docket Item IV-D-54) showed major problems with the accumulation of moisture on the flame rod, which tended to ground the flame rod and then lock up the system. Further, this manufacturer found that the formation of small amounts of carbon in the pilot flame and its accumulation around the base of the flame rod also tended to "ground out" the flame rod and lock up the system.

The EPA is willing to take into consideration any operating records or test data for alternative monitoring devices.

Comment: Four commenters (IV-D-6, IV-D-7, IV-D-8, IV-D-49) stated that thermocouples are known to be unreliable when placed in the severe operating environment at the top of a flare and that the flare tip maintenance period can typically be much longer than the service period for a thermocouple. The commenters then asked what needs to be done when a pilot flame thermocouple burns out. Is the flare to be shut down prior to the regular maintenance to replace the pilot thermocouple? The commenters pointed out that since flares are emergency relief devices, taking a flare out of service can not usually be done without taking the entire process which the flare services out of services and that more emissions would undoubtedly result from premature flare maintenance related to thermocouple burnout. Commenter IV-D-49 also stated that thermocouples can be difficult to replace.

Response: Recent improvements in thermocouple installation technology have extended the operating life of thermocouples in flare monitoring service. If a thermocouple is sheathed within a thermowell, the thermocouple is protected from the severe flame environment, and the thermocouple operating life can be extended to approximately the same length of time as the flare tip maintenance period. Installing a thermocouple with thermowell will reduce significantly the number of times an operator must decide whether to shut down upon thermocouple failure.

Any breakdown or malfunction of the thermocouple should be repaired as soon as practicable as stated in § 61.14(b) of the General Provisions. The operator is expected to determine the best time to shut the flare down after considering how to minimize emissions both for safety and environmental reasons.

Comment: Two commenters (IV-D-44, IV-D-50) stated that language in the January 10, 1989, Federal Register notice appears to require monitoring of existing continuous emission streams prior to any modifications or reconstructions. The commenters believe that a monitoring requirement would raise the following concerns or questions:

- Determination of emissions prior to modification by sampling is not appropriate because emissions may vary with product runs, and the worse case product may not be available for monitoring within a reasonable time. These emissions can be calculated with reasonable accuracy. (IV-D-44)
- What is the economic justification/basis for requiring testing of existing streams as opposed to calculating? (IV-D-44, IV-D-50)
- What test method, duration, frequency and monitoring are contemplated? (IV-D-50)
- For processes that make a wide variety of products, what product line emissions (different hydrocarbon constituents, product densities, etc.) should be measured? (IV-D-50)
- What is the environmental benefit of requiring testing of existing streams? (IV-D-50)

The commenters pointed out that Table 4 "Procedure for Determining Control and Applicable Standard for Continuous Emission Streams from Modified or Reconstructed Polypropylene and Polyethylene Affected Facilities" (Ref: 54 FR 906) specifies in Step 3 that calculations of VOC concentration in the applicable weight percent range should be made before and after any modification or reconstruction. The commenters requested clarification of this issue (monitoring vs. calculation) and recommended engineering calculations as specified in Table 4 be used in the procedural step in determining control requirements of emissions before and after any modification or reconstruction. The word "measure" on page 54 FR 895 should be changed to "calculate," according to Commenter IV-D-44.

Response: The language in the preamble to the January 10, 1989, Federal Register notice did not intend to imply that monitoring of existing continuous emissions was being required, although the language was not as precise as it should have been. In that notice, the Agency intended that measurements rather than calculations be used to obtain the VOC concentrations of each applicable VOC stream. Measurement of the applicable stream would occur after a modification or reconstruction determination has been made by the appropriate enforcement agency, but before any actual changes have been undertaken. This clarification narrows the language in the preamble from "any changes to an

existing process section that could conceivably be a modification or reconstruction" to only those that are determined to be modification or reconstruction.

In the final rule, the requirement to measure the VOC concentration or the annual emission rate rather than calculate these values is applied to only those individual streams that an owner or operator seek to exempt from control through either the VOC weight percent exemption or the low annual emissions exemption. As provided in the General Provisions, if an owner or operator believes that an alternative procedure is an accurate as a measurement, then the owner or operator may still petition the Administrator for approval.

While the Agency would prefer actual test data, the final rule allows an owner or operator to submit calculations calculating the weight percent and annual emissions of each nonexempt vent stream in lieu of actual test data, provided such calculations can be demonstrated to be sufficiently accurate as to preclude the necessity of a test.

In testing or calculating the weight percent and annual emissions of a vent stream, an owner or operator is required to evaluate the stream under conditions representative of normal operation. This may require an owner or operator to make assumptions or estimates of how the affected facility will be operated or how emission streams will vary during production of various products. The period during which testing of a stream occurs, thus, need not be a "worst case" product, but preferably a representative product. Where affected facilities are used to produce a wide variety of products, then an owner or operator would calculate (or measure) the emission streams that would occur during the course of a year for each of the products. The resulting data would be combined to identify composite streams and their weighted average VOC concentrations and total annual emissions. Each composite stream's VOC concentration would then be used to calculate the threshold emission rate and a control/no control determination would be made by comparing the calculated (or measured) annual emissions with the threshold emission rate.

Where an owner or operator tests an emission stream, the final rule requires the use of Test Method 18 to determine the VOC concentration and Test Method 2, 2A, 2C or 2D, as appropriate, to determine the volumetric flow rate. Each test shall consist of three 1-hour runs in which either an integrated sample or four grab samples shall be taken.

In determining whether a test or calculation is to be required, the Agency considers a number of factors such as the use of the information, the relative cost of conducting the tests, and the availability of alternative procedures. Because the individual stream exemptions allow an individual stream to be exempt from control under this NSPS, the Agency believes this decision needs to be made based on test data. (Note: If the annual emissions become 1.6 Mg/yr or greater (if using the annual emissions exemption) or the VOC concentration becomes 0.10 weight percent or higher (if using the VOC concentration exemption) at a later date, then the individual stream is no longer exempt from the standards.) For nonexempt streams, a no control decision may change to a control decision as more facilities at a plant are constructed, modified, or reconstructed. Thus, while test data are preferable for determining the VOC weight percent concentrations, the Agency has decided that calculations showing the VOC concentrations can be an acceptable alternative to testing, and at greatly reduced costs.

VIII. Administrative

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review (section 307(d)(7)(A)).

The effective date of this regulation is December 11, 1991. Section 111 of the Clean Air Act provides that standards of performance or revisions thereof become effective upon promulgation and apply to certain affected facilities of which the construction or modification was commenced after the date of proposal, September 30, 1987, and for other affected facilities, after January 10, 1989.

As prescribed in section 111, the promulgation of these standards was preceded by the Administrator's determination (40 CFR 60.16, 44 FR 49222, dated August 21, 1979) that polypropylene, polyethylene, polystyrene, and polyester resin plants

contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. In accordance with Section 117 of the Act, publication of these promulgated standards was preceded by consultation with appropriate advisory committees, independent experts, and Federal departments and agencies.

This regulation will be reviewed 4 years from the date of promulgation as required by the Clean Air Act. This review will include an assessment of such factors as the need for integration with other programs, the existence of alternative methods, enforceability, improvements in emission control technology, and reporting requirements.

Section 317 of the Clean Air Act requires the Administrator to prepare an economic impact assessment for any new source standard of performance promulgated under section 111(b) of the Act. An economic impact assessment was prepared for this regulation and for other regulatory alternatives. All aspects of the assessment were considered in the formulation of the standards to ensure that cost was carefully considered in determining the best demonstrated technology. The economic impact assessment is included in the BID for the proposed standards.

Information collection requirements associated with this regulation (those included in 40 CFR part 60, subpart A and subpart DDD) have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number (2060-0145).

Under Executive Order 12291, EPA is required to judge whether a regulation is a "major rule" and therefore subject to the requirements of a regulatory impact analysis (RIA). The Agency has determined that this regulation would result in none of the adverse economic effects set forth in Section 1 of the Order as grounds for finding a regulation to be a "major rule." The Agency has, therefore, concluded that this regulation is not a "major rule" under Executive Order 12291.

The Regulatory Flexibility Act of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of a Regulatory Flexibility Analysis in those instances where small business impacts are possible. Because these standards impose no adverse economic impacts, a Regulatory Flexibility has not been conducted.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 60

Air pollution control, Incorporation by reference, Intergovernmental relations, Plastic materials, synthetic resins, and nonvulcanizable elastomers (SIC 2821), and Reporting and recordkeeping requirements.

Dated: November 7, 1990.

William K. Reilly,
Administrator.

PART 60—[AMENDED]

40 CFR part 60 is amended as follows:

1. The authority citation for part 60 continues to read as follows:

Authority: Secs. 101, 111, 114, 116, 301, Clean Air Act as amended (42 U.S.C. 7401, 7411, 7414, 7416, 7601.)

2. By adding a new subpart DDD to read as follows:

Subpart DDD—Standards of Performance for Volatile Organic Compound (VOC) Emissions from the Polymer Manufacturing Industry

- Sec.
- 60.560 Applicability and designation of affected facilities.
 - 60.561 Definitions.
 - 60.562-1 Standards: Process emissions.
 - 60.562-2 Standards: Equipment leaks of VOC.
 - 60.563 Monitoring requirements.
 - 60.564 Test methods and procedures.
 - 60.565 Reporting and recordkeeping requirements.
 - 60.566 Delegation of authority.

Subpart DDD—Standards of Performance for Volatile Organic Compound (VOC) Emissions from the Polymer Manufacturing Industry

§ 60.560 Applicability and designation of affected facilities.

(a) *Affected facilities.* The provisions of this subpart apply to affected facilities involved in the manufacture of polypropylene, polyethylene, polystyrene, or poly (ethylene terephthalate) as defined in § 60.561 of this subpart. The affected facilities designated below for polypropylene and polyethylene are inclusive of all equipment used in the manufacture of these polymers, beginning with raw materials preparation and ending with product storage, and cover all emissions emanating from such equipment.

(1) For process emissions from any polypropylene and polyethylene manufacturing process that uses a continuous process, the affected

facilities are each of the following process sections: each raw materials preparation section, each polymerization reaction section, each material recovery section, each product finishing section, and each product storage section. These process sections are affected facilities for process emissions that are emitted continuously and for process emissions that are emitted intermittently.

(2) For process emissions from polystyrene manufacturing processes that use a continuous process, the affected facilities are each material recovery section. These process sections are affected facilities for only those process emissions that are emitted continuously.

(3) For process emissions from poly(ethylene terephthalate) manufacturing processes that use a continuous process, the affected facilities are each polymerization reaction section. If the process uses dimethyl terephthalate, then each material recovery section is also an affected facility. If the process uses terephthalic acid, then each raw materials preparation section is also an affected facility. These process sections are affected facilities for only those process emissions that are emitted continuously.

(4) For VOC emissions from equipment leaks from polypropylene, polyethylene, and polystyrene (including expandable polystyrene) manufacturing processes, the affected facilities are each group of fugitive emissions equipment (as defined in § 60.561) within any process unit (as defined in § 60.561). This subpart does not apply to VOC emissions from equipment leaks from poly(ethylene terephthalate) manufacturing processes.

(i) Affected facilities with a design capacity to produce less than 1,000 Mg/yr shall be exempt from § 60.562-2.

(ii) Addition or replacement of equipment for the purposes of improvement which is accomplished without a capital expenditure shall not by itself be considered a modification under § 60.562-2.

(b) *Applicability dates.* The applicability date identifies when an affected facility becomes subject to a standard. Usually, a standard has a single applicability date. However, some polypropylene and polyethylene affected facilities have a September 30, 1987, applicability date and others have a January 10, 1989, applicability date. The following paragraphs identify the applicability dates for all affected facilities subject to this subpart.

(1) *Polypropylene and polyethylene.* Each process section in a polypropylene

or polyethylene production process is a potential affected facility for both continuous and intermittent emissions. The applicability date depends on when the process section was constructed, modified, or reconstructed and, in some instances, on the type of production process.

(i) The applicability date for any polypropylene or polyethylene affected facility that is constructed, modified, or reconstructed after January 10, 1989, regardless of the type of production process being used, is January 10, 1989.

(ii) Only some polypropylene or polyethylene process sections that are constructed, modified, or reconstructed on or before January 10, 1989, but after September 30, 1987, are affected facilities. These process sections (and the type of emissions to be controlled) are identified by an "x" in Table 1. The applicability date for the process sections (and the emissions to be controlled) that are identified by an "x" in Table 1 is September 30, 1987. Since the affected facilities that have a September 30, 1987, applicability date are determined by the type of production process (e.g., liquid phase, gas phase), each owner or operator shall identify the particular production process that applies to his or her particular process.

TABLE 1.—POLYPROPYLENE AND POLYETHYLENE AFFECTED FACILITIES WITH SEPTEMBER 30, 1987, APPLICABILITY DATE

Polymer	Production process	Process section	Emissions	
			Continuous	Intermittent
Polypropylene	Liquid phase	Raw Materials Preparation	X	—
		Material Recovery	X	—
		Polymerization Reaction	X	X
		Product Finishing	X	—
		Product Storage	—	—
Polypropylene	Gas Phase	Raw Materials Preparation	—	—
		Polymerization Reaction	—	X
		Material Recovery	X	—
		Product Finishing	—	—
		Product Storage	—	—
Low Density Polyethylene	High Pressure	Raw Materials Preparation	—	X
		Polymerization Reaction	—	X
		Material Recovery	—	X
		Product Finishing	—	X
		Product Storage	—	X
Low Density Polyethylene	Low Pressure	Raw Materials Preparation	X	X
		Polymerization Reaction	—	X
		Material Recovery	—	—
High Density Polyethylene	Gas Phase	Product Finishing	X	—
		Product Storage	—	—
High Density Polyethylene	Liquid Phase Slurry	Raw Materials Preparation	—	X
		Polymerization Reaction	—	—
		Material Recovery	X	—
		Product Finishing	X	—
High Density Polyethylene	Liquid Phase Solution	Product Storage	—	—
		Raw Materials Preparation	X	X
		Polymerization Reaction	—	X
		Material Recovery	X	X
		Product Finishing	—	—

NOTE: "X" denotes that that process section is an affected facility for continuous or intermittent emissions or both, as shown, which has a September 30, 1987, applicability date.

"—" denotes that that process section is not considered an affected facility for continuous or intermittent emissions or both, as shown, if the process section is constructed, modified, or reconstructed after September 30, 1987, and on or before January 10, 1989. These process sections are affected facilities if they are constructed, modified, or reconstructed after January 10, 1989.

(2) *Polystyrene*. The applicability date for each polystyrene affected facility is September 30, 1987.

(3) *Poly(ethylene terephthalate)*. The applicability date for each poly(ethylene terephthalate) affected facility is September 30, 1987.

(c) Any facility under paragraph (a) of this section that commences construction, modification, or reconstruction after its applicability date as identified under paragraph (b) of this section is subject to the requirements of this subpart, except as provided in paragraphs (d) through (f) of this section.

(d) Any polypropylene or polyethylene affected facility with a September 30, 1987, applicability date that commenced construction, modification, or reconstruction after September 30, 1987, and on or before January 10, 1989, with an uncontrolled emission rate (as defined in footnote a to Table 2) at or below those identified in Table 2 is not subject to the requirements of § 60.562-1 unless and until its uncontrolled emission rate exceeds that rate listed for it in Table 2 or it is modified or reconstructed after January 10, 1989. At such time, such facility becomes subject to § 60.562-1 and the procedures identified in § 60.562-1(a) shall be used to determine the control of emissions from the facility.

TABLE 2.—MAXIMUM UNCONTROLLED THRESHOLD EMISSION RATES ^a

Production process	Process section	Uncontrolled emission rate, kg TOC/mg product
Polypropylene, liquid phase process.	Raw Materials Preparation.	0.15 ^b
	Polymerization Reaction.	0.14 ^b , 0.24 ^c
	Material Recovery.	0.19 ^b
Polypropylene, gas phase process.	Product Finishing...	1.57 ^b
	Polymerization Reaction.	0.12 ^c
Low Density Polyethylene, high pressure process.	Material Recovery.	0.02 ^b
	Raw Materials Preparation.	0.41 ^d
	Polymerization Reaction.	(*)
	Material Recovery.	(*)
	Product Finishing...	(*)
	Product Storage....	(*)

TABLE 2.—MAXIMUM UNCONTROLLED THRESHOLD EMISSION RATES ^a—Continued

Production process	Process section	Uncontrolled emission rate, kg TOC/mg product
Low Density Polyethylene, high pressure process.	Raw Materials Preparation.	0.05 ^e
	Polymerization Reaction.	0.03 ^e
High Density Polyethylene, liquid phase slurry process.	Production Finishing.	0.01 ^b
	Raw Materials Preparation.	0.25 ^c
	Material Recovery.	0.11 ^b
High Density Polyethylene, liquid phase solution process.	Product Finishing...	0.41 ^b
	Raw Materials Preparation.	0.24 ^f
	Polymerization Reaction.	0.16 ^c
High Density Polyethylene, gas phase process.	Material Recovery.	1.68 ^f
	Raw Materials Preparation.	0.05 ^f
	Polymerization Reaction.	0.03 ^e
Polystyrene, continuous process.	Product Finishing...	0.01 ^b
	Material Recovery.	0.05 ^{b, h}
Poly(ethylene terephthalate), dimethyl terephthalate process.	Material Recovery.	0.12 ^{b, h}
	Polymerization Reaction.	1.80 ^{b, i, j}
Poly(ethylene terephthalate), terephthalic acid process.	Raw Materials Preparation.	(*)
	Polymerization Reaction.	1.80 ^{b, j, m} 3.92 ^{b, k, m}

^a "Uncontrolled emission rate" refers to the emission rate of a vent stream that vents directly to the atmosphere and to the emission rate of a vent stream to the atmosphere that would occur in the absence of any add-on control devices but after any material recovery devices that constitute part of the normal material recovery operations in a process line where potential emissions are recovered for recycle or resale.

^b Emission rate applies to continuous emissions only.

^c Emission rate applies to intermittent emissions only.

^d Total emission rate for non-emergency intermittent emissions from raw materials preparation, polymerization reaction material recovery, product finishing, and product storage process sections.

^e See footnote d.

^f Emission rate applies to both continuous and intermittent emissions.

^g Emission rate applies to non-emergency intermittent emissions only.

^h Applies to modified or reconstructed affected facilities only.

ⁱ Includes emissions from the cooling water tower.

^j Applies to a process line producing low viscosity poly(ethylene terephthalate).

^k Applies to a process line producing high viscosity poly(ethylene terephthalate).

^l See footnote m.

^m Applies to the sum of emissions to the atmosphere from the polymerization reaction section (including emissions from the cooling water tower) and the raw materials preparation section (i.e., the esterifiers).

(e)(1) Modified or reconstructed affected facilities at polystyrene and poly(ethylene terephthalate) plants with uncontrolled emission rates at or below those identified in Table 2 are exempt from the requirements of § 60.562-1 unless and until its uncontrolled emission rate exceeds that rate listed for it in Table 2. This exemption does not apply to new polystyrene or poly(ethylene terephthalate) affected facilities.

(2) Emissions from modified or reconstructed affected facilities that are controlled by an existing control device and that have uncontrolled emission rates greater than the uncontrolled threshold emission rates identified in Table 2 are exempt from the requirements of § 60.561 unless and until the existing control device is modified, reconstructed, or replaced.

(f) No process section of an experimental process line is considered an affected facility for continuous or intermittent process emissions.

(g) Individual vent streams that emit continuous emissions with uncontrolled annual emissions of less than 1.6 Mg/yr or with a weight percent TOC of less than 0.10 percent from a new, modified, or reconstructed polypropylene or polyethylene affected facility are exempt from the requirements of § 60.562-1(a)(1). If at a later date, an individual stream's uncontrolled annual emissions become 1.6 Mg/yr or greater (if the stream was exempted on the basis of the uncontrolled annual emissions exemption) or VOC concentration becomes 0.10 weight percent or higher (if the stream was exempted on the basis of the VOC concentration exemption), then the stream is subject to the requirements of § 60.562-1.

(h) Emergency vent streams, as defined in § 60.561, from a new, modified, or reconstructed polypropylene or polyethylene affected facility are exempt from the requirements of § 60.562-1(a)(2).

(i) An owner or operator of a polypropylene or polyethylene affected

facility that commenced construction, modification, or reconstruction after September 30, 1987, and on or before January 10, 1989, and that is in a process line in which more than one type of polyolefin (i.e., polypropylene, low density polyethylene, high density polyethylene, or their polymers) is produced shall select one of the polymer/production process combinations in Table 1 for purposes of determining applicable affected facilities and uncontrolled threshold emissions rates.

(Note: The numerical emissions limits in these standards are expressed in terms of total organic compounds, measured as total organic compounds less methane and ethane.)

§ 60.561 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act, in subpart A of part 60, or in subpart VV of part 60, and the following terms shall have the specific meanings given them.

Boiler means any enclosed combustion device that extracts useful energy in the form of steam.

Capital expenditure means, in addition to the definition in 40 CFR 60.2, an expenditure for a physical or operational change to an existing facility that exceeds P, the product of the facility's replacement cost, R, and an adjusted annual asset guideline repair allowance, A, as reflected by the following equation: $P = R \times A$, where

(a) The adjusted annual asset guideline repair allowance, A, is the product of the percent of the replacement cost, Y, and the applicable basic annual asset guideline repair allowance, B, as reflected by the following equation: $A = Y \times (B \div 100)$;

(b) The percent Y is determined from the following equation: $Y = 1.0 - 0.57 \log X$, where X is 1986 minus the year of construction; and

(c) The applicable basic annual asset guideline repair allowance, B, is equal to 12.5.

Car-sealed means, for purposes of these standards, a seal that is placed on the device used to change the position of a valve (e.g., from opened to closed) such that the position of the valve cannot be changed without breaking the seal and requiring the replacement of the old seal once broken with a new seal.

Closed vent system means a system that is not open to the atmosphere and that is composed of piping, connections, and, if necessary, flow inducing devices that transport gas or vapor from a piece or pieces of equipment to a control device.

Continuous emissions means any gas stream containing VOC that is generated essentially continuously when the process line or any piece of equipment in the process line is operating.

Continuous process means polymerization process in which reactants are introduced in a continuous manner and products are removed either continuously or intermittently at regular intervals so that the process can be operated and polymers produced essentially continuously.

Control device means an enclosed combustion device, vapor recovery system, or flare.

Copolymer means a polymer that has two different repeat units in its chain.

Decomposition means, for the purposes of these standards, an event in a polymerization reactor that advances to the point where the polymerization reaction becomes uncontrollable, the polymer begins to break down (decompose), and it becomes necessary to relieve the reactor instantaneously in order to avoid catastrophic equipment damage or serious adverse personnel safety consequences.

Decomposition emissions refers to those emissions released from a polymer production process as the result of a decomposition or during attempts to prevent a decomposition.

Emergency vent stream means, for the purposes of these standards, an intermittent emission that results from a decomposition, attempts to prevent decompositions, power failure, equipment failure, or other unexpected cause that requires immediate venting of gases from process equipment in order to avoid safety hazards or equipment damage. This includes intermittent vents that occur from process equipment where normal operating parameters (e.g., pressure to temperature) are exceeded such that the process equipment can not be returned to normal operating conditions using the design features of the system and venting must occur to avoid equipment failure or adverse safety personnel consequences and to minimize adverse effects of the runaway reaction. This does not include intermittent vents that are designed into the process to maintain normal operating conditions of process vessels including those vents that regulate normal process vessel pressure.

End finisher means a polymerization reaction vessel operated under very low pressures, typically at pressures of 2 torr or less, in order to produce high viscosity poly(ethylene terephthalate). An end finisher is preceded in a high viscosity poly(ethylene terephthalate)

process line by one or more polymerization vessels operated under less severe vacuums, typically between 5 and 10 torr. A high viscosity poly(ethylene terephthalate) process line may have one or more end finishers.

Existing control device means, for the purposes of these standards, an air pollution control device that has been in operation on or before September 30, 1987, or that has been in operation between September 30, 1987, and January 10, 1989, on those continuous or intermittent emissions from a process section that is marked by an "—" in Table 1 of this subpart.

Existing control device is reconstructed means, for the purposes of these standards, the capital expenditure of at least 50 percent of the replacement cost of the existing control device.

Existing control device is replaced means, for the purposes of these standards, the replacement of an existing control device with another control device.

Expandable polystyrene means a polystyrene bead to which a blowing agent has been added using either an in-situ suspension process or a post-impregnation suspension process.

Experimental process line means a polymer or copolymer manufacturing process line with the sole purpose of operating to evaluate polymer manufacturing processes, technologies, or products. An experimental process line does not produce a polymer or resin that is sold or that is used as a raw material for nonexperimental process lines.

Flame zone means that portion of the combustion chamber in a boiler occupied by the flame envelope.

Fugitive emissions equipment means each pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, valve, and flange or other connector in VOC service and any devices or systems required by subpart VV of this part.

Gas phase process means a polymerization process in which the polymerization process is carried out in the gas phase; i.e., the monomer(s) are gases in a fluidized bed of catalyst particles and granular polymer.

High density polyethylene (HDPE) means a thermoplastic polymer or copolymer comprised of at least 50 percent ethylene by weight and having a density of greater than 0.940 g/cm³.

High pressure process means the conventional production process for the manufacture of low density polyethylene in which a reaction pressure of about 15,000 psig or greater is used.

High viscosity poly(ethylene terephthalate) means poly(ethylene terephthalate) that has an intrinsic viscosity of 0.9 or higher and is used in such applications as tire cord and seat belts.

Incinerator means an enclosed combustion device that is used for destroying VOC.

In-situ suspension process means a manufacturing process in which styrene, blowing agent, and other raw materials are added together within a reactor for the production of expandable polystyrene.

Intermittent emissions means those gas streams containing VOC that are generated at intervals during process line operation and includes both planned and emergency releases.

Liquid phase process means a polymerization process in which the polymerization reaction is carried out in the liquid phase; i.e., the monomer(s) and any catalyst are dissolved, or suspended in a liquid solvent.

Liquid phase slurry process means a liquid phase polymerization process in which the monomer(s) are in solution (completely dissolved) in a liquid solvent, but the polymer is in the form of solid particles suspended in the liquid reaction mixture during the polymerization reaction; sometimes called a particle form process.

Liquid phase solution process means a liquid phase polymerization process in which both the monomer(s) and polymer are in solution (completely dissolved) in the liquid reaction mixture.

Low density polyethylene (LDPE) means a thermoplastic polymer or copolymer comprised of at least 50 percent ethylene by weight and having a density of 0.940 g/cm³ or less.

Low pressure process means a production process for the manufacture of low density polyethylene in which a reaction pressure markedly below that used in a high pressure process is used. Reaction pressure of current low pressure processes typically go up to about 300 psig.

Low viscosity poly(ethylene terephthalate) means a poly(ethylene terephthalate) that has an intrinsic viscosity of less than 0.75 and is used in such applications as clothing, bottle, and film production.

Material recovery section means the equipment that recovers unreacted or by-product materials from any process section for return to the process line, off-site purification or treatment, or sale. Equipment designed to separate unreacted or by-product material from the polymer product are to be included in this process section, provided at least some of the material is recovered for

reuse in the process, off-site purification or treatment, or sale, at the time the process section becomes an affected facility. Otherwise such equipment are to be assigned to one of the other process sections, as appropriate.

Equipment that treats recovered materials are to be included in this process section, but equipment that also treats raw materials are not to be included in this process section. The latter equipment are to be included in the raw materials preparation section. If equipment is used to return unreacted or by-product material directly to the same piece of process equipment from which it was emitted, then that equipment is considered part of the process section that contains the process equipment. If equipment is used to recover unreacted or by-product material from a process section and return it to another process section or a different piece of process equipment in the same process section or sends it off-site for purification, treatment, or sale, then such equipment are considered part of a material recovery section. Equipment used for the on-site recovery of ethylene glycol from poly(ethylene terephthalate) plants, however, are not included in the material recovery section, but are covered under the standards applicable to the polymerization reaction section (§ 60.562-1(c)(1)(ii)(A) or (2)(ii)(A)).

Operating day means, for the purposes of these standards, any calendar day during which equipment used in the manufacture of polymer was operating for at least 8 hours or one labor shift, whichever is shorter. Only operating days shall be used in determining compliance with the standards specified in § 60.562-1(c)(1)(ii)(B), (1)(ii)(C), (2)(ii)(B), and (2)(ii)(C). Any calendar day in which equipment is used for less than 8 hours or one labor shift, whichever is less, is not an "operating day" and shall not be used as part of the rolling 14-day period for determining compliance with the standards specified in § 60.562-1(c)(1)(ii)(B), (1)(ii)(C), (2)(ii)(B), and (2)(ii)(C).

Polyethylene means a thermoplastic polymer or copolymer comprised of at least 50 percent ethylene by weight; see low density polyethylene and high density polyethylene.

Poly(ethylene terephthalate) (PET) means a polymer or copolymer comprised of at least 50 percent bis-(2-hydroxyethyl)-terephthalate (BHET) by weight.

Poly(ethylene terephthalate) (PET) manufacture using dimethyl terephthalic means the manufacturing of poly(ethylene terephthalate) based on the esterification of dimethyl

terephthalate (DMT) with ethylene glycol to form the intermediate monomer bis-(2-hydroxyethyl)-terephthalate (BHET) that is subsequently polymerized to PET.

Poly(ethylene terephthalate) (PET) manufacture using terephthalic acid means the manufacturing of poly(ethylene terephthalate) based on the esterification reaction of terephthalic acid (TPA) with ethylene glycol to form the intermediate monomer bis-(2-hydroxyethyl)-terephthalate (BHET) that is subsequently polymerized to form PET.

Polymerization reaction section means the equipment designed to cause monomer(s) to react to form polymers, including equipment designed primarily to cause the formation of short polymer chains (oligomers or low polymers), but not including equipment designed to prepare raw materials for polymerization, e.g., esterification vessels. For the purposes of these standards, the polymerization reaction section begins with the equipment used to transfer the materials from the raw materials preparation section and ends with the last vessel in which polymerization occurs. Equipment used for the on-site recovery of ethylene glycol from poly(ethylene terephthalate) plants, however, are included in this process section, rather than in the material recovery process section.

Polypropylene (PP) means a thermoplastic polymer or copolymer comprised of at least 50 percent propylene by weight.

Polystyrene (PS) means a thermoplastic polymer or copolymer comprised of at least 80 percent styrene or para-methylstyrene by weight.

Post-impregnation suspension process means a manufacturing process in which polystyrene beads are first formed in a suspension process, washed, dried, or otherwise finished and then added with a blowing agent to another reactor in which the beads and blowing agent are reacted to produce expandable polystyrene.

Process heater means a device that transfers heat liberated by burning fuel to fluids contained in tubular coils, including all fluids except water that is heated to produce steam.

Process line means a group of equipment assembled that can operate independently if supplied with sufficient raw materials to produce polypropylene, polyethylene, polystyrene, (general purpose, crystal, or expandable) or poly(ethylene terephthalate) or one of their copolymers. A process line consists of the equipment in the following process sections (to the extent

that these process sections are present at a plant: raw materials preparation, polymerization reaction, product finishing, product storage, and material recovery.

Process section means the equipment designed to accomplish a general but well-defined task in polymer production. Process sections include raw materials preparation, polymerization reaction, material recovery, product finishing, and product storage and may be dedicated to a single process line or common to more than one process line.

Process unit means equipment assembled to perform any of the physical and chemical operations in the production of polypropylene, polyethylene, polystyrene, (general purpose, crystal, or expandable), or poly(ethylene terephthalate) or one of their copolymers. A process unit can operate independently if supplied with sufficient feed or raw materials and sufficient storage facilities for the product. Examples of process units are raw materials handling and monomer recovery.

Product finishing section means the equipment that treats, shapes, or modifies the polymer or resin to produce the finished end product of the particular facility, including equipment that prepares the product for product finishing. For the purposes of these standards, the product finishing section begins with the equipment used to transfer the polymerized product from the polymerization reaction section and ends with the last piece of equipment that modifies the characteristics of the polymer. Product finishing equipment may accomplish product separation, extruding and pelletizing, cooling and drying, blending, additives introduction, curing, or annealing. Equipment used to separate unreacted or by-product material from the product are to be included in this process section, provided the material separated from the polymer product is not recovered at the time the process section becomes an affected facility. If the material is being recovered, then the separation equipment are to be included in the material recovery section. Product finishing does not include polymerization, the physical mixing of the pellets to obtain a homogenous mixture of the polymer (except as noted below), or the shaping (such as fiber spinning, molding, or fabricating) or modification (such as fiber stretching and crimping) of the finished end product. If physical mixing occurs in equipment located between product finishing equipment (i.e., before all the chemical and physical characteristics

have been "set" by virtue of having passed through the last piece of equipment in the product finishing section), then such equipment are to be included in this process section. Equipment used to physically mix the finished product that are located after last piece of equipment in the product finishing section are part of the product storage section.

Product storage section means the equipment that is designed to store the finished polymer or resin end product of the particular facility. For the purposes of these standards, the product storage section begins with the equipment used to transfer the finished product out of the product finishing section and ends with the containers used to store the final product. Any equipment used after the product finishing section to recover unreacted or by-product material are to be considered part of a material recovery section. Product storage does not include any intentional modification of the characteristics of any polymer or resin product, but does include equipment that provide a uniform mixture of product, provided such equipment are used after the last product finishing piece of equipment. This process section also does not include the shipment of a finished polymer or resin product to another facility for further finishing or fabrication.

Raw materials preparation section means the equipment located at a polymer manufacturing plant designed to prepare raw materials, such as monomers and solvents, for polymerization. For the purposes of these standards, this process section begins with the equipment used to transfer raw materials from storage and recovered material from material recovery process sections, and ends with the last piece of equipment that prepares the material for polymerization. The raw materials preparation section may include equipment that accomplishes purification, drying, or other treatment of raw materials or of raw and recovered materials together, activation of catalysts, and esterification including the formation of some short polymer chains (oligomers), but does not include equipment that is designed primarily to accomplish the formation of oligomers, the treatment of recovered materials alone, or the storage of raw materials.

Recovery system means an individual unit or series of material recovery units, such as absorbers, condensers, and carbon adsorbers, used for recovering volatile organic compounds.

Total organic compounds (TOC) means those compounds measured according to the procedures specified in § 60.564.

Vent stream means any gas stream released to the atmosphere directly from an emission source or indirectly either through another piece of process equipment or a material recovery device that constitutes part of the normal recovery operations in a polymer process line where potential emissions are recovered for recycle or resale, and any gas stream directed to an air pollution control device. The emissions released from an air pollution control device are not considered a vent stream unless, as noted above, the control device is part of the normal material recovery operations in a polymer process line where potential emissions are recovered for recycle or resale.

Volatile organic compounds (VOC) means, for the purposes of these standards, any reactive organic compounds as defined in § 60.2 Definitions.

§ 60.562-1 Standards: Process emissions.

(a) Polypropylene, low density polyethylene, and high density polyethylene. Each owner or operator of a polypropylene, low density polyethylene, or high density polyethylene process line containing a process section subject to the provisions of this subpart shall comply with the provisions in this section on and after the date on which the initial performance test required by § 60.8 is completed, but not later than 60 days after achieving the maximum production rate at which the affected facility will be operated, or 180 days after initial startup whichever comes first.

(1) **Continuous emissions.** For each vent stream that emits continuous emissions from an affected facility as defined in § 60.560(a)(1), the owner or operator shall use the procedures identified in paragraphs (a)(1)(ii) and (iii) of this section for determining which continuous emissions are to be controlled and which level of control listed in paragraph (a)(1)(i) of this section is to be met. The owner or operator shall use the procedures identified in paragraphs (a)(1)(ii) and (iii) of this section each time a process section is constructed, modified, or reconstructed at the plant site.

(i) **Level of control.** Continuous emission streams determined to be subject to control pursuant to the procedures identified in paragraphs (a)(1)(ii) and (iii) of this section, as applicable, shall meet one of the control levels identified in paragraphs (a)(1)(i)

(A) through (D) of this section. The procedures in paragraphs (a)(1) (ii) and (iii) of this section identify which level of control may be met. The level of control identified in paragraph (a)(1)(i)(D) of this section is limited to certain continuous emission streams, which are identified through the procedures in paragraphs (a)(1) (ii) and (iii) of this section.

(A) Reduce emissions of total organic compounds (minus methane and ethane) (TOC) by 98 weight percent, or to a concentration of 20 parts per millions by volume (ppmv) on a dry basis, whichever is less stringent. The TOC is expressed as the sum of the actual compounds, not carbon equivalents. If an owner or operator elects to comply with the 20 ppmv standard, the concentration shall include a correction to 3 percent oxygen only when supplemental combustion air is used to combust the vent stream.

(B) Combust the emissions in a boiler or process heater with a design heat input capacity of 150 million Btu/hour or

greater by introducing the vent stream into the flame zone of the boiler or process heater. (Note: A boiler or process heater of lesser design heat capacity may be used, but must demonstrate compliance with paragraph (a)(1)(i)(A) of this section.)

(C) Combust the emissions in a flare that meets the conditions specified in § 60.18. If the flare is used to control both continuous and intermittent emissions, the flare shall meet the conditions specified in § 60.18 at all times (i.e., which controlling continuous emissions alone or when controlling both continuous and intermittent emissions).

(D) Vent the emissions to a control device located on the plant site.

(ii) *Uncontrolled Continuous Emissions.* For each vent stream that emits continuous emissions from an affected facility as defined in § 60.560(a)(1) and that is not controlled in an existing control device, the owner or operator shall use the procedures identified in Table 3 to identify those

continuous emissions from each constructed, modified, or reconstructed affected facility that are to be controlled. The owner shall include in the procedure all uncontrolled continuous vent streams from previously constructed, modified, or reconstructed affected facilities at the plant site each time a process section is constructed, modified, or reconstructed at the plant site. In applying the procedures shown in Table 3, the stream characteristics may be either measured or calculated as specified in § 60.564(d). For modified or reconstructed affected facilities, these stream characteristics are to be determined after a modification or reconstruction determination has been made by the Administrator, but before any actual changes have been undertaken, and then again after the actual changes have been made. Figure 1 provides a summary overview of the control determination procedure described in Table 3.

TABLE 3.—PROCEDURE FOR DETERMINING CONTROL AND APPLICABLE STANDARD FOR CONTINUOUS EMISSION STREAMS FROM NEW, MODIFIED, OR RECONSTRUCTED POLYPROPYLENE AND POLYETHYLENE AFFECTED FACILITIES

Procedure /a/	Applicable TOC weight percent range	Control/no control criteria	Applicable standard
1. Sum all uncontrolled streams with TOC weight percent within the applicable weight percent range from all affected facilities at a plant site.	0.10 < 5.5	1. If total combined uncontrolled emissions are equal to or greater than the calculated threshold emissions (CTE) /b/, control.	1. § 60.562-1(a)(1)(i) (A), (B), or (C).
2. Calculate total uncontrolled annual emissions for each weight percent range. For modified or affected facilities, use the total uncontrolled emissions after modification or reconstruction.		2. If total combined uncontrolled emissions are less than the CTE /b/, control only individual streams with volume flow rates of 8 scfm or less.	2. § 60.562-1(a)(1)(i) (A) through (D).
3. Calculate composite TOC concentration (weight percent) for streams in the 0.10 to less than 5.5 weight percent range and for streams in the 5.5 to less than 20 weight percent range. For modified or reconstructed affected facilities, calculate the composite VOC concentration before and after modification and reconstruction.	5.5 < 20	1. If total combined uncontrolled emissions are equal to or greater than CTE, control.	1. § 60.562-1(a)(1)(i) (A), (B), or (C).
4. Select the higher of the two TOC concentrations for each weight percent range for vent streams from a modified or reconstructed affected facility.		2. If total combined uncontrolled emissions are less than the CTE /b/, control only individual streams with volume flow rates of 8 scfm or less.	2. § 60.562-1(a)(1)(i) (A) through (D).
5. Calculate the threshold emissions for the 0.10 to less than 5.5 weight percent range and for the 5.5 to less than 20 weight percent range using the respective composite TOC concentration selected above.	20 to 100	1. If total combined uncontrolled emissions are equal to or greater than 18.2 Mg/yr, control.	1. § 60.562-1(a)(1)(i) (A), (B), or (C).
		2. If total combined uncontrolled emissions are less than 18.2 Mg/yr, control.	2. § 60.562-1(a)(1)(i) (A) through (D).

a. Individual streams excluded under paragraph § 60.560(g) from the requirements of § 60.562-1 are to be excluded from all calculations in this table. This paragraph exempts all individual emission streams with individual uncontrolled annual emission rates of less than 1.6 Mg/yr and all individual emission streams with individual TOC concentrations of less than 0.10 percent TOC by weight.

b. For the 0.10 to less than 5.5 weight percent range, the following equations are used:

If the percent composite TOC concentration is	Use this equation to calculate threshold emissions	If the percent composite TOC concentration is	Use this equation to calculate threshold emissions
0.10 < 0.12	$(a \times 7.5 \times 10^6) + 225$	0.4 < 0.6	$48.3 + 31 (0.6 - \text{weight percent TOC})$
0.12 < 0.2	$(b \times 58.3) + 116.8$	0.6 < 5.5	48.3
0.2 < 0.3	$(c \times 3020) + 71.8$		
0.3 < 0.4	$(d \times 547) + 54.5$		

where: $a = (0.12 - \text{weight percent TOC})^{2.5}$

$$\left[\frac{0.18}{\text{weight percent TOC}} \right]^{0.5} - 1$$

$$b = \frac{\text{weight percent TOC}}{\text{weight percent TOC}}$$

$$c = (0.3 - \text{weight percent TOC})^2$$

$$d = (0.4 - \text{weight percent TOC})^{1.5}$$

For the 5.5 to less than 20 weight percent range, the following equations are used.

If the percent composite TOC concentration is	Use this equation to calculate threshold emissions
5.5 < 7.0	$(e \times 740) + 31$
7.0 < 9.0	$(f \times 324) + 25.0$
9.0 < 20	$(g \times 125) + 18.2$

where:

$$e = \frac{\left[\frac{7.0}{\text{weight percent TOC}} \right]^{0.5} - 1}{\text{weight percent TOC}}$$

$$f = \frac{\left[\frac{9.0}{\text{weight percent TOC}} \right]^{0.5} - 1}{\text{weight percent TOC}}$$

$$g = \frac{\left[\frac{20.0}{\text{weight percent TOC}} \right]^{0.5} - 1}{\text{weight percent TOC}}$$

$$h = \frac{\left[\frac{20.0}{\text{weight percent TOC}} \right]^{0.5} - 1}{\text{weight percent TOC}}$$

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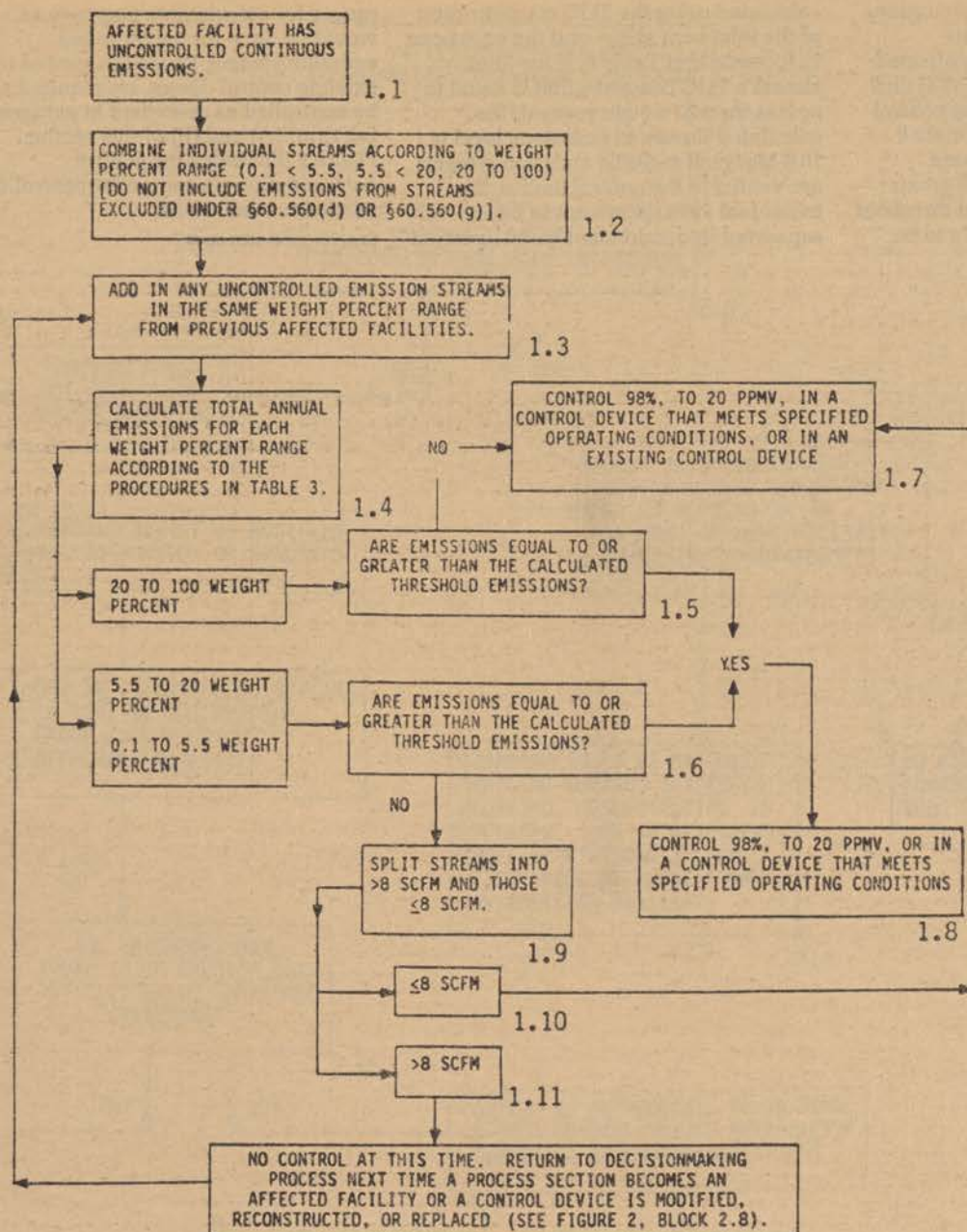


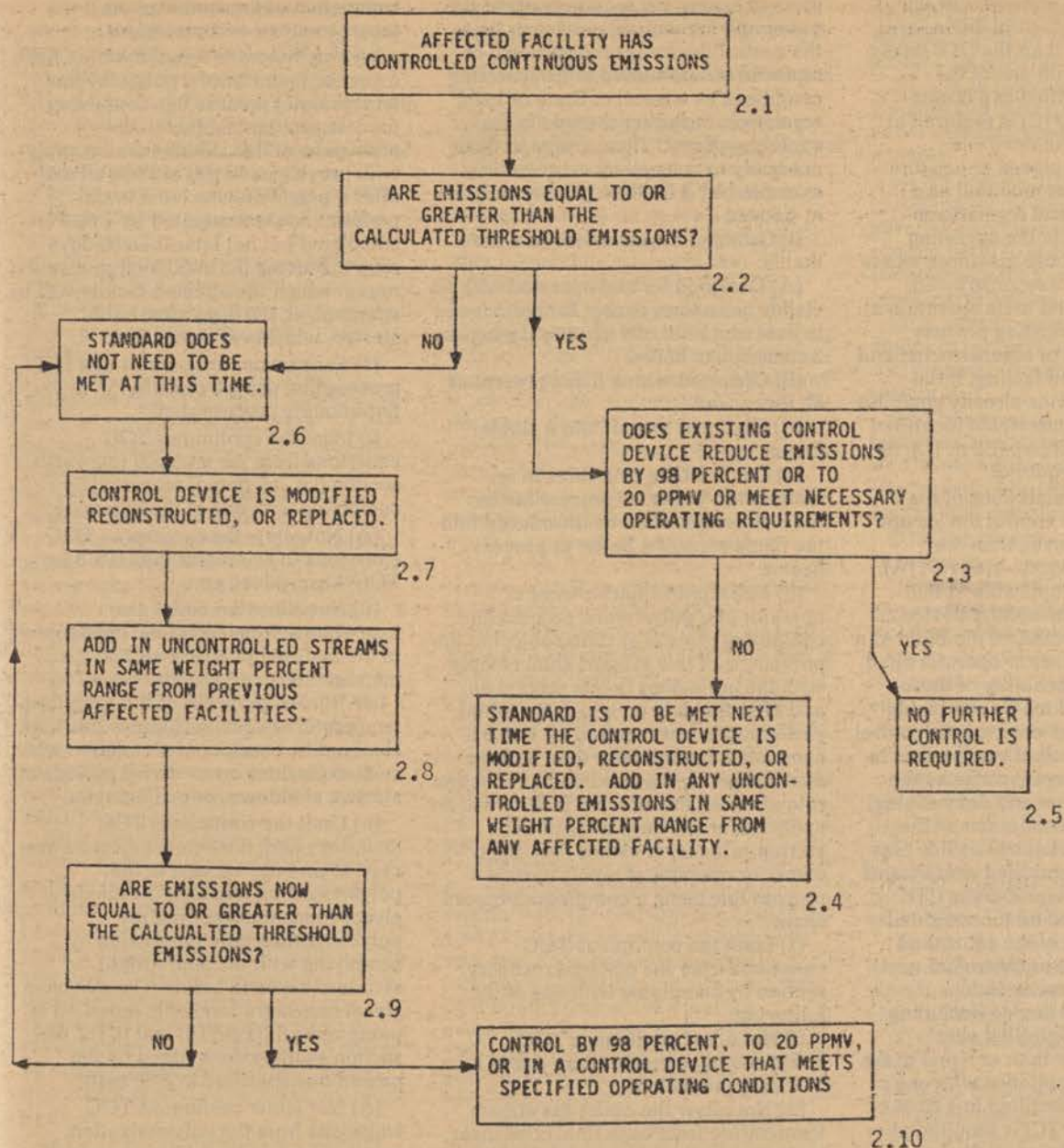
Figure 1. Decisionmaking Process for Uncontrolled Continuous Emissions from Polypropylene and Polyethylene Affected Facilities

(iii) Controlled Continuous Emissions. For each vent stream that emits continuous emissions from an affected facility as defined in § 60.560(a)(1) and that is controlled in an existing control device, each owner or operator shall determine whether the emissions entering the control device are greater than or equal to the calculated threshold emissions (CTE) level, which is to be

calculated using the TOC concentration of the inlet vent steam and the equations in footnote b of Table 3. If the inlet stream's TOC concentration is equal to or less than 20 weight percent, the calculated threshold emissions level is 18.2 Mg/yr. If multiple emission streams are vented to the control device, the individual streams are not to be separated into individual weight percent

ranges for calculations purposes as would be done for uncontrolled emission streams. Emissions vented to an existing control device are required to be controlled as described in paragraphs (a)(1)(iii) (A) and (B) of this section. Figure 2 illustrates the control determination procedure for controlled continuous emissions.

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NOTE: There are no individual stream exemptions for emissions already controlled by existing control devices.

Figure 2. Decisionmaking Process for Continuous Emissions Already Controlled at Polypropylene and Polyethylene Affected Facilities

(A) If the annual emissions of the steam entering the control device are equal to or greater than the CTE levels, then compliance with one of the requirements identified in § 60.562-1(a)(1)(i) (A), (B), or (C) is required at such time the control device is reconstructed or replaced or has its operating conditions modified as a result of State or local regulations (including changes in the operating permit) including those instances where the control device is reconstructed, replaced, or modified in its operation at the same time the existing process section is modified or reconstructed and becomes an affected facility. If the existing control device already complies with one of the requirements identified in § 60.562-1(a)(1)(i) (A), (B), or (C), no further control is required.

(B) If the annual emissions of the stream entering the control device are less than the CTE level, then the requirements of § 60.562-1(a)(1)(i) (A), (B), or (C) are not applicable at that time. However, if the control device is replaced, reconstructed, or modified at a later date, each owner or operator shall reevaluate the applicability of these standards. This is done by combining with the vent stream entering the control device any uncontrolled vent streams in the same weight percent range as the controlled vent stream and determining whether the annual emissions of the stream entering the control device plus the applicable uncontrolled vent streams are greater than or equal to the CTE level, which is based on the weighted TOC concentration of the controlled vent stream and the uncontrolled vent streams. If the annual emissions entering the control device (including the applicable uncontrolled vent streams) are greater than or equal to the CTE level, then compliance with one of the requirements identified in § 60.562-1(a)(1)(i) (A), (B), or (C) is required at that time for both the controlled and uncontrolled vent streams. If the annual emissions are less than the CTE level, compliance with these standards is again not required at such time. However, if the control device is again replaced, reconstructed, or modified, each owner or operator shall repeat this determination procedure.

(2) *Intermittent emissions.* The owner or operator shall control each vent stream that emits intermittent emissions from an affected facility as defined in § 60.560-1(a)(1) by meeting one of the control requirements specified in paragraphs (a)(2) (i) and (ii) of this section. If a vent stream that emits intermittent emissions is controlled in an existing flare, incinerator, boiler, or

process heater, the requirements of this paragraph are waived until such time the control device is reconstructed or replaced or is modified in its operating conditions as a result of State or local regulation, including changes in the operating permit. This paragraph does not apply to emergency vent streams exempted by § 60.560(h) and as defined in § 60.561.

(i) Combust the emissions in a flare that is:

(A) Designed for and operated with no visible emissions, except for periods not to exceed a total of 5 minutes during any 2 consecutive hours;

(B) Operated with a flame present at all times; and

(C) Designed to maintain a stable flame.

(ii) Combust the emissions in an incinerator, boiler, or process heater. Such emissions shall be introduced into the flame zone of a boiler or process heater.

(b) *Polystyrene.* Each owner or operator of a polystyrene process line containing process section subject to the provisions of this subpart shall comply with the provisions in this section on and after the date on which the initial performance test required by § 60.8 is completed, but not later than 60 days after achieving the maximum production rate at which the affected facility will be operated, or 180 days after initial startup, whichever comes first. Each owner or operator of a polystyrene process line using a continuous process shall:

(i) Limit the continuous TOC emissions from the material recovery section by complying with one of the following:

(i) Not allow continuous TOC emissions to be greater than 0.0036 kg TOC/Mg product; or

(ii) Not allow the outlet gas stream temperature from each final condenser in the material recovery section to exceed -25°C (-13°F). For purposes of this standard, temperature excursions above this limit shall not be considered a violation when such excursions occur during periods of startup, shutdown, or malfunction; or

(iii) Comply with § 60.562-1(a)(1)(i) (A), (B), or (C).

(2) If continuous TOC emissions from the material recovery section are routed through an existing emergency vapor recovery system, then compliance with these standards is required when the emergency vapor recovery system undergoes modification, reconstruction, or replacement. In such instances, compliance with these standards shall be achieved no later than 180 days after

completion of the modification, reconstruction, or replacement.

(c) *Poly(ethylene terephthalate).* Each owner or operator of a poly(ethylene terephthalate) process line containing process sections subject to the provisions of this subpart shall comply with provisions in this section on and after the date on which the initial performance test required by § 60.8 is completed but not later than 60 days after achieving the maximum production rate at which the affected facility will be operated, or 180 days after initial startup, whichever comes first.

(1) Each owner or operator of a PET process line using a dimethyl terephthalate process shall:

(i) Limit the continuous TOC emissions from the material recovery section (i.e., methanol recovery) by complying with one of the following:

(A) Not allow the continuous TOC emissions to be greater than 0.018 kg TOC/Mg product; or

(B) Not allow the outlet gas temperature from each final condenser in the material recovery section (i.e., methanol recovery) to exceed $+3^{\circ}\text{C}$ ($+37^{\circ}\text{F}$). For purposes of this standard, temperature excursions above this limit shall not be considered a violation when such excursions occur during periods of startup, shutdown, or malfunction.

(ii) Limit the continuous TOC emissions and, if steam-jet ejectors are used to provide vacuum to the polymerization reactors, the ethylene glycol concentration from the polymerization reaction section by complying with the appropriate standard set forth below. The ethylene glycol concentration limits specified in paragraphs (c)(1)(ii) (B) and (C) of this section shall be determined by the procedures specified in § 60.564(j).

(A) Not allow continuous TOC emissions from the polymerization reaction section (including emissions from any equipment used to further recover the ethylene glycol, but excluding those emissions from the cooling tower) to be greater than 0.02 kg TOC/Mg product; and

(B) If steam-jet ejectors are used as vacuum producers and a low viscosity product is being produced using single or multiple end finishers or a high viscosity product is being produced using a single end finisher, maintain the concentration of ethylene glycol in the liquid effluent exiting the vacuum system servicing the polymerization reaction section at or below 0.35 percent by weight, averaged on a daily basis over a rolling 14-day period of operating days; or

(C) If steam-jet ejectors are used as vacuum producers and a high viscosity product is being produced using multiple end finishers, maintain an ethylene glycol concentration in the cooling tower at or below 6.0 percent by weight averaged on a daily basis over a rolling 14-day period of operating days.

(2) Each owner or operator of a PET process line using a terephthalic acid process shall:

(i) Not allow the continuous TOC emissions from the esterification vessels in the raw materials preparation section to be greater than 0.04 kg TOC/Mg product.

(ii) Limit the continuous TOC emissions and, if steam-jet ejectors are used to provide vacuum to the polymerization reactors, the ethylene glycol concentration from the polymerization reaction section by complying with the appropriate standard set forth below. The ethylene glycol concentration limits specified in paragraphs (c)(2)(ii) (B) and (C) of this section shall be determined by the procedures specified in § 60.564(j).

(A) Not allow continuous TOC emissions from the polymerization reaction section (including emissions from any equipment used to further recover the ethylene glycol, but excluding those emissions from the cooling tower) to be greater than 0.02 kg TOC/Mg product; and

(B) If steam-jet ejectors are used as vacuum producers and a low viscosity product is being produced using single or multiple end finishers or a high viscosity product is being produced using a single end finisher, maintain the concentration of ethylene glycol in the liquid effluent exiting the vacuum system servicing the polymerization reaction section at or below 0.35 percent by weight, averaged on a daily basis over a rolling 14-day period of operating days; or

(C) If steam-jet ejectors are used as vacuum producers and a high viscosity product is being produced using multiple end finishers, maintain an ethylene glycol concentration in the cooling tower at or below 6.0 percent by weight averaged on a daily basis over a rolling 14-day period of operating days.

(d) Closed vent systems and control devices used to comply with this subpart shall be operated at all times when emissions may be vented to them.

(e) Vent systems that contain valves that could divert a vent stream from a control device shall have car-sealed opened all valves in the vent system from the emission source to the control device and car-sealed closed all valves in vent system that would lead the vent stream to the atmosphere, either directly

or indirectly, bypassing the control device.

§ 60.562-2 Standards: Equipment leaks of VOC.

(a) Each owner or operator of an affected facility subject to the provisions of this subpart shall comply with the requirements specified in § 60.482-1 through § 60.482-10 as soon as practicable, but no later than 180 days after initial startup, except that indications of liquids dripping from bleed ports in existing pumps in light liquid service are not considered to be a leak as defined in § 60.482-2(b)(2). For purposes of this standard, a "bleed port" is a technologically-required feature of the pump whereby polymer fluid used to provide lubrication and/or cooling of the pump shaft exits the pump, thereby resulting in a visible leak of fluid. This exemption expires when the existing pump is replaced or reconstructed.

(b) An owner or operator may elect to comply with the requirements specified in § 60.483-1 and § 60.483-2.

(c) An owner or operator may apply to the Administrator for a determination of equivalency for any means of emission limitation that achieves a reduction in emissions of VOC at least equivalent to the reduction in emissions of VOC achieved by the controls required in this subpart. In doing so, the owner or operator shall comply with requirements specified in § 60.484.

(d) Each owner or operator subject to the provisions of this subpart shall comply with the provisions specified in § 60.485 except an owner or operator may use the following provision in addition to § 60.485(e): Equipment is in light liquid service if the percent evaporated is greater than 10 percent at 150 °C as determined by ASTM Method D86-78 (incorporated by reference as specified in § 60.17).

(e) Each owner or operator subject to the provisions of this subpart shall comply with § 60.486 and § 60.487.

§ 60.563 Monitoring requirements.

(a) Whenever a particular item of monitoring equipment is specified in this section to be installed, the owner or operator shall install, calibrate, maintain, and operate according to manufacturer's specifications that item as follows:

(1) A temperature monitoring device to measure and record continuously the operating temperature to within 1 percent (relative to degrees Celsius) or ± 0.5 °C (± 0.9 °F), whichever is greater.

(2) A flame monitoring device, such as a thermocouple, an ultraviolet sensor, an infrared beam sensor, or similar device

to indicate and record continuously whether a flare or pilot light flame is present, as specified.

(3) A flow monitoring indicator to indicate and record whether or not flow exists at least once every fifteen minutes.

(4) An organic monitoring device (based on a detection principle such as infrared, photoionization, or thermal conductivity) to indicate and record continuously the concentration level of organic compounds.

(5) A specific gravity monitoring device to measure and record continuously to within 0.02 specific gravity unit.

(b) The owner or operator shall install, as applicable, the monitoring equipment for the control means used to comply with § 60.562-1, except § 60.562-1(a)(1)(i)(D), as follows:

(1) If the control equipment is an incinerator:

(i) For a noncatalytic incinerator, a temperature monitoring device shall be installed in the firebox.

(ii) For a catalytic incinerator, temperature monitoring devices shall be installed in the gas stream immediately before and after the catalytic bed.

(2) If a flare is used:

(i) A flame monitoring device shall be installed to indicate the presence of a flare flame or a flame for each pilot light, if the flare is used to comply with § 60.562-1(a)(1), including those flares controlling both continuous and intermittent emissions.

(ii) A thermocouple or equivalent monitoring device to indicate the presence of a flame at each pilot light, if used to comply with § 60.562-1(a)(2).

(3) If a boiler or process heater is used:

(i) If the boiler or process heater has a heat input design capacity of less than 150 million Btu/hr, a temperature monitoring device shall be installed between the radiant section and the convection zone for watertube boilers and between the furnace (combustion zone) and the firetubes for firetube boilers.

(ii) If the boiler or process heater has a heat input design capacity of 150 million Btu/hr or greater, such records to indicate the periods of operation of the boiler or process heater shall be maintained. The records must be readily available for inspection.

(4) If an absorber is the final unit in a system:

(i) A temperature monitoring device and a specific gravity monitoring device for the scrubber liquid shall be installed, or

(ii) An organic monitoring device shall be installed at the outlet of the absorber.

(5) If a condenser is the final unit in a system:

(i) A temperature monitoring device shall be installed at the condenser exit (product side), or

(ii) An organic monitoring device shall be installed at the outlet of the condenser.

(6) If a carbon adsorber is the final unit in a system, an organic monitoring device shall be installed at the outlet of the carbon bed.

(c) Owners or operators of control devices used to comply with the provisions of this subpart, except § 60.562-1(a)(1)(i)(D), shall monitor these control devices to ensure that they are operated and maintained in conformance with their designs.

(d) Owners or operators using a vent system that contains valves that could divert a vent stream from a control device used to comply with the provisions of this subpart shall do one or a combination of the following:

(1) Install a flow indicator immediately downstream of each valve that if opened would allow a vent stream to bypass the control device and be emitted, either directly or indirectly, to the atmosphere. The flow indicator shall be capable of recording flow at least once every fifteen minutes.

(2) Monitor the valves once a month, checking the position of the valves and the condition of the car seal, and identify all times when the car seals have been broken and the valve position has been changed (i.e., from opened to closed for valves in the vent piping to the control device and from closed to open for valves that allow the stream to be vented directly or indirectly to the atmosphere).

(e) An owner or operator complying with the standards specified under § 60.562-1, except § 60.562-1(a)(1)(i)(D), with control devices other than an incinerator, boiler, process heater, flare, absorber, condenser, or carbon adsorber or by any other means shall provide to the Administrator information describing the operation of the control device and the process parameter(s) which would indicate proper operation and maintenance of the device. The Administrator may request further information and will specify appropriate monitoring procedures or requirements.

§ 60.564 Test methods and procedures.

(a) In conducting the performance tests required in § 60.8, the owner or operator shall use as reference methods and procedures the test methods in appendix A of this part or other methods and procedures specified in this section,

except as provided under § 60.8(b). Owners or operators complying with § 60.562-1(a)(1)(i)(D) need not perform a performance test on the control device, provided the control device is not used to comply with any other requirement of § 60.562-1(a).

(1) Whenever changes are made in production capacity, feedstock type or catalyst type, or whenever there is replacement, removal, or addition of a control device, each owner or operator shall conduct a performance test according to the procedures in this section as appropriate, in order to determine compliance with § 60.562-1.

(2) Where a boiler or process heater with a design heat input capacity of 150 million Btu/hour or greater is used, the requirement for an initial performance test is waived, in accordance with § 60.8(b). However, the Administrator reserves the option to require testing at such other times as may be required, as provided for in § 114 of the Act.

(3) The owner or operator shall determine the average organic concentration for each performance test run using the equipment described in § 60.563(a)(4). The average organic concentration shall be determined from measurements taken at least every 15 minutes during each performance test run. The average of the three runs shall be the base value for the monitoring program.

(4) When an absorber is the final unit in the system, the owner or operator shall determine the average specific gravity for each performance test run using specific gravity monitoring equipment described in § 60.563(a)(5). An average specific gravity shall be determined from measurements taken at least every 15 minutes during each performance test run. The average of the three runs shall be the base value for the monitoring program.

(5) When a condenser is the final unit in the system, the owner or operator shall determine the average outlet temperature for each performance test run using the temperature monitoring equipment described in § 60.563(a)(1). An average temperature shall be determined from measurements taken at least every 15 minutes during each performance test run while the vent stream is normally routed and constituted. The average of the three runs shall be the base value for the monitoring program.

(b) The owner or operator shall determine compliance with the emission concentration standard in § 60.562-1(a)(1)(i)(A) or (b)(1)(iii) if applicable [if not, see paragraph (c) of this section] as follows:

(1) The TOC concentration is the sum of the individual components and shall be computed for each run using the following equation:

$$C_{\text{TOC}} = \sum_{j=1}^n C_j$$

where:

C_{TOC} = Concentration of TOC (minus methane and ethane), dry basis, ppmv.

C_j = the concentration of sample component j , ppm.

n = Number of components in the sample.

(i) Method 18 shall be used to determine the concentration of each individual organic component (C_j) in the gas stream. Method 1 or 1A, as appropriate, shall be used to determine the sampling site at the outlet of the control device. Method 4 shall be used to determine the moisture content, if necessary.

(ii) The sampling time for each run shall be 1 hour in which either an integrated sample or four grab samples shall be taken. If grab sampling is used, then the samples shall be taken at 15 minute intervals.

(2) If supplemental combustion air is used, the TOC concentration shall be corrected to 3 percent oxygen and shall be computed using the following equation:

$$C_{\text{CORR}} = C_{\text{MEAS}} \times \left(\frac{17.9}{20.9 - \%O_{2d}} \right)$$

where:

C_{CORR} = Concentration of TOC corrected to 3 percent oxygen, dry basis, ppm by volume.

C_{MEAS} = Concentration of TOC (minus methane and ethane), dry basis, ppm by volume, as calculated in paragraph (b)(1) of this section.

$\%O_{2d}$ = Concentration of O_2 , dry basis, percent by volume.

The emission rate correction factor, integrated sampling and analysis procedure of Method 3 shall be used to determine the oxygen concentration ($\%O_{2d}$). The sampling site shall be the same as that of the TOC sample and the samples shall be taken during the same time that the TOC samples are taken.

(c) If paragraph (b) of this section is not applicable, then the owner or operator shall determine compliance with the percent emission reduction standard in § 60.562-1(a)(1)(i)(A) or (b)(1)(iii) as follows:

(1) The emission reduction of TOC (minus methane and ethane) shall be determined using the following equation:

$$P = \frac{E_{\text{inlet}} - E_{\text{outlet}}}{E_{\text{inlet}}} \times 100$$

where:

P = Percent emission reduction, by weight.

E_{inlet} = Mass rate of TOC entering the control device, kg TOC/hr.

E_{outlet} = Mass rate of TOC, discharged to the atmosphere, kg TOC/hr.

(2) The mass rates of TOC (E_i , E_o) shall be computed using the following equations:

$$E_i = K_1 \left(\sum_{j=1}^n C_{ij} M_{ij} \right) Q_i$$

$$E_o = K_1 \left(\sum_{j=1}^n C_{oj} M_{oj} \right) Q_o$$

where:

C_{ij} , C_{oj} = Concentration of sample component "j" of the gas stream at the inlet and outlet of the control device, respectively, dry basis, ppmv.

M_{ij} , M_{oj} = Molecular weight of sample component "j" of the gas stream at the inlet and outlet of the control device respectively, g/g-mole (lb/lb-mole).

Q_i , Q_o = Flow rate of the gas stream at the inlet and outlet of the control device, respectively, dscm/hr (dscf/hr).

$K_1 = 4.157 \times 10^{-8} \text{ [(kg)/(g-mole)]} / \{[(g)(ppm)(dscm)] \{5.711 \times 10^{-15} \text{ [(lb)/(lb-mole)]} / [(lb)(ppm)(dscf)]\}\}$

(i) Method 18 shall be used to determine the concentration of each individual organic component (C_i , C_o) in the gas stream. Method 1 or 1A, as appropriate, shall be used to determine the inlet and outlet sampling sites. The inlet site shall be before the inlet of the control device and after all product recovery units.

(ii) Method 2, 2A, 2C, or 2D, as appropriate, shall be used to determine

the volumetric flow rates (Q_i , Q_o). If necessary, Method 4 shall be used to determine the moisture content. Both determinations shall be compatible with the Method 18 determinations.

(iii) Inlet and outlet samples shall be taken simultaneously. The sampling time for each run shall be 1 hour in which either an integrated sample or four grab samples shall be taken. If grab sampling is used, then the samples shall be taken at 15 minute intervals.

(d) An owner or operator shall determine compliance with the individual stream exemptions in § 60.560(g) and the procedures specified in Table 3 for compliance with § 60.562-1(a)(1) as identified in paragraphs (d)(1) and (2) of this section. An owner or operator using the procedures specified in § 60.562-1(a)(1) for determining which continuous process emissions are to be controlled may use calculations demonstrated to be sufficiently accurate as to preclude the necessity of actual testing for purposes of calculating the uncontrolled annual emissions and weight percent of TOC. Owners or operators seeking to exempt streams under § 60.560(g) must use the appropriate test procedures specified in this section.

(1) The uncontrolled annual emissions of the individual vent stream shall be determined using the following equation:

$$E_{\text{unc}} = K_1 \left(\sum_{j=1}^n C_j M_j \right) Q \times 8,600 \times \frac{1 \text{ Mg}}{1,000 \text{ kg}}$$

where:

E_{unc} = uncontrolled annual emissions, Mg/yr

C_j = concentration of sample component "j" of the gas stream, dry basis, ppmv.

M_j = Molecular weight of sample component "j" of the gas stream, g/g-mole (lb/lb-mole).

Q = Flow rate of the gas stream, dscm/hr (dscf/hr).

$K_1 = 4.157 \times 10^{-8} \text{ [(kg)/(g-mole)]} / \{[(g)(ppm)(dscm)] \{5.711 \times 10^{-15} \text{ [(lb)/(lb-mole)]} / [(lb)(ppm)(dscf)]\}\}$

8,600 = operating hours per year

(i) Method 18 shall be used to determine the concentration of each individual organic component (C_j) in the gas stream. Method 1 or 1A, as appropriate, shall be used to determine the sampling site. If the gas stream is controlled in an existing control device, the sampling site shall be before the inlet of the control device and after all product recovery units.

(ii) Method 2, 2A, 2C, or 2D, as appropriate, shall be used to determine the volumetric flow rate (Q). If necessary, Method 4 shall be used to determine the moisture content. Both determinations shall be compatible with the Method 18 determinations.

(iii) The sampling time for each run shall be 1 hour in which either an integrated sample or four grab samples shall be taken. If grab sampling is used, then the samples shall be taken at 15 minute intervals.

(2) The weight percent VOC of the uncontrolled individual vent stream shall be determined using the following equation:

$$\text{weight \% TOC} = \frac{\sum_{j=1}^n C_j M_j}{MW_{\text{gas}} \times 10^6} \times 100$$

where:

C_j = concentration of sample TOC component "j" of the gas stream, dry basis, ppmv.

M_j = Molecular weight of sample TOC component "j" of the gas stream, g/g-mole (lb/lb-mole).

MW_{gas} = Average molecular weight of the entire gas stream, g/g-mole (lb/lb-mole).

(i) Method 18 shall be used to determine the concentration of each individual organic component (C_j) in the gas stream. Method 1 or 1A, as appropriate, shall be used to determine the sampling site. If the gas stream is controlled in an existing control device, the sampling site shall be before the inlet of the control device and after all product recovery units. If necessary, Method 4 shall be used to determine the moisture content. This determination

shall be compatible with the Method 18 determinations.

(ii) The average molecular weight of the gas stream shall be determined using methods approved by the Administrator. If the carrier component of the gas stream is nitrogen, then an average molecular weight of 28 g/g-mole (lb/lb-mole) may be used in lieu of testing. If the carrier component of the gas stream is air, then an average molecular weight of 29 g/g-mole (lb/lb-mole) may be used in lieu of testing.

(iii) The sampling time for each run shall be 1 hour in which either an integrated sample or four grab samples shall be taken. If grab sampling is used, then the samples shall be taken at 15 minute intervals.

(e) The owner or operator shall determine compliance of flares with the visible emission and flare provisions in § 60.562-1 as follows:

(1) Method 22 shall be used to determine visible emission. The observation period for each run shall be 2 hours.

(2) The monitoring device of § 60.563(b)(2) shall be used to determine whether a flame is present.

(f) The owner or operator shall determine compliance with the net heating value provisions in § 60.18 as referenced by § 60.562-1(a)(1)(i)(C). The net heating value of the process vent stream being combusted in a flare shall be computed as follows:

$$H_T = K_2 \left(\sum_{j=1}^n C_j H_j \right)$$

where:

H_T = Net heating value of the sample based on the net enthalpy per mole of offgas combusted at 25 °C and 760 mmHg, but the standard temperature for determining the volume corresponding to one mole is 20 °C, MJ/scm.

K_2 = Conversion constant, 1.740×10^{-7}

$$\frac{(1) \text{ (g mole)}}{\text{ppm}} \frac{(\text{MJ})}{\text{scm}} \frac{(\text{kcal})}{\text{scm}}$$

where standard temperature for

$$\frac{(\text{g mole})}{\text{scm}} \text{ is } 20^\circ\text{C};$$

C_j = Concentration of sample component j in ppm on a wet basis.

H_j = Net heat of combustion of sample component j, at 25 °C and 760 mm Hg, kcal/g-mole.

(1) Method 18 shall be used to determine the concentration of each individual organic component (C_j) in the gas stream. Method 1 or 1A, as appropriate, shall be used to determine the sampling site to the inlet of the flare. Using this same sample, ASTM D1946-77 (incorporated by reference—see § 60.17) shall be used to determine the hydrogen and carbon monoxide content.

(2) The sampling time for each run shall be 1 hour in which either an integrated sample or four grab samples shall be taken. If grab sampling is used, then the samples shall be taken at 15 minute intervals.

(3) Published or calculated values shall be used for the net heats of combustion of the sample components. If values are not published or cannot be calculated, ASTM D2382-76 (incorporated by reference—see § 60.17) may be used to determine the net heat of combustion of component "j."

(g) The owner or operator shall determine compliance with the exit velocity provisions in § 60.18 as referenced by § 60.562-1(a)(1)(i)(C) as follows:

(1) If applicable, the net heating value (H_T) of the process vent shall be determined according to the procedures in paragraph (f) of this section to determine the applicable velocity requirements.

(2) If applicable, the maximum permitted velocity (V_{max}) for steam-assisted and nonassisted flares shall be computed using the following equation:

where:

$$\text{Log}_{10}(V_{max}) = (H_T + 23.8)/31.7$$

V_{max} = Maximum permitted velocity, m/sec.

23.8 = Constant.

31.7 = Constant.

H_T = The net heating value as determined in paragraph (f) of this section.

(3) The maximum permitted velocity, V_{max} , for air-assisted flares shall be determined by the following equation:

where:

$$V_{max} = 8.706 + 0.7084(H_T)$$

V_{max} = Maximum permitted velocity, m/sec.

8.706 = Constant.

0.7084 = Constant.

H_T = The net heating value as determined in paragraph (f) of this section.

(4) The actual exit velocity of a flare shall be determined by dividing the volumetric flow rate (in units of standard temperature and pressure), as determined by Method 2, 2A, 2C, or 2D as appropriate, by the unobstructed (free) cross sectional area of the flare tip.

(h) The owner or operator shall determine compliance with the mass emission per mass product standards in §§ 60.560 (d) and (e) and in §§ 60.562-1

(b)(1)(i), (c)(1)(i)(A), (c)(1)(ii)(A), (c)(2)(i), and (c)(2)(ii)(A). The emission rate of TOC shall be computed using the following equation:

$$ER_{TOC} = \frac{E_{TOC}}{P_p \times 1,000 \text{ kg}}$$

where:

ER_{TOC} = Emission rate of total organic compounds (minus methane and ethane), kg TOC/Mg product.

E_{TOC} = Emission rate of total organic compounds (minus methane and ethane) in the sample, kg/hr.

P_p = The rate of polymer produced, kg/hr.

(1) The mass rate of TOC, E_{TOC} , shall be determined according to the procedures, as appropriate, in paragraph (c)(2) of this section. The sampling site for determining compliance with §§ 60.560 (d) and (e) shall be before any add-on control devices and after all product recovery devices. Otherwise, the sampling site shall be at the outlet of the control device.

(2) The rate of polymer produced, P_p (kg/hr), shall be determined by dividing the weight of polymer pulled in kilograms (kg) from the process line during the performance test by the number of hours (hr) taken to perform the performance test. The polymer pulled, in kilograms, shall be determined by direct measurement or, subject to prior approval by the Administrator, computed from materials balance by good engineering practice.

(i) The owner or operator shall determine continuous compliance with the temperature requirements in §§ 60.562-1(b)(1)(ii) and 60.562-1(c)(1)(i)(B) by using the temperature monitoring equipment described in § 60.563(a)(1). An average temperature shall be determined from measurements taken at least every 15 minutes every three hours while the vent stream is normally routed and constituted. Each three-hour period constitutes a performance test.

(j) For purposes of determining compliance with § 60.562-1(c) (1)(ii)(B), (1)(ii)(C), (2)(ii)(B), or (2)(ii)(C), the ethylene glycol concentration in either the cooling tower or the liquid effluent from steam-jet ejectors used to produce a vacuum in the polymerization reactors, whichever is applicable, shall be determined:

(1) Using procedures that conform to the methods described in ASTM D2908-74, "Standard Practice for Measuring Volatile Organic Matter in Water by Aqueous-Injection Gas

Chromatography" (incorporated by reference—see § 60.17), except as provided in paragraph (j)(2) of this section:

(i) At least one sample per operating day shall be collected using the grab sampling procedures of ASTM D3370-78, "Standard Practices for Sampling Water" (incorporated by reference—see § 60.17). An average ethylene glycol concentration by weight shall be calculated on a daily basis over a rolling 14-day period of operating days, except as provided in paragraphs (j)(1) (ii) and (iii) of this section. Each daily average ethylene glycol concentration so calculated constitutes a performance test. Exceedance of the standard during the reduced testing program specified in paragraphs (j)(1) (ii) and (iii) of this section is a violation of these standards.

(ii) For those determining compliance with § 60.562-1(c) (1)(ii)(B) or (2)(ii)(B), the owner or operator may elect to reduce the sampling program to any 14 consecutive day period once every two calendar months, if at least seventeen consecutive 14-day rolling average concentrations immediately preceding the reduced sampling program are each less than 0.10 weight percent ethylene glycol. If the average concentration obtained over the 14 day sampling during the reduced testing period exceeds the upper 95 percent confidence interval calculated from the most recent test results in which no one 14-day average exceeded 0.10 weight percent ethylene glycol, then the owner or operator shall reinstitute a daily sampling program. A reduced sampling program can be reinstituted if the requirements specified in this paragraph are met.

(iii) For those determining compliance with § 60.562-1 (c)(1)(ii)(C) or (c)(2)(ii)(C), the owner or operator may elect to reduce the sampling program to any 14 consecutive day period once every two calendar months, if at least seventeen consecutive 14-day rolling average concentrations immediately preceding the reduced sampling program are each less than 1.8 weight percent ethylene glycol. If the average concentration obtained over the 14 day sampling during the reduced test period exceeds the upper 95 percent confidence interval calculated from the most recent test results 14-day in which no one 14-day average exceeded 1.8 weight percent ethylene glycol, then the owner

or operator shall reinstitute a daily sampling program. A reduced program can be reinstituted if the requirements specified in this paragraph are met.

(iv) The upper 95 percent confidence interval shall be calculated using the equation:

$$Cl_{95} = \frac{\sum_{i=1}^n X_i}{n} + 2 \sqrt{\frac{n \sum X_i^2 - (\sum X_i)^2}{n(n-1)}}$$

where:

X_i = daily ethylene glycol concentration for each day used to calculate each 14-day rolling average used in test results to justify implementing the reduced testing program.

n = number of ethylene glycol concentrations.

(2) Measuring an alternative parameter, such as carbon oxygen demand or biological oxygen demand, that is demonstrated to be directly proportional to the ethylene glycol concentration. Such parameter shall be measured during the initial 14-day performance test during which the facility is shown to be in compliance with the ethylene glycol concentration standard whereby the ethylene glycol concentration is determined using the procedures described in paragraph (j)(1) of this section. The alternative parameter shall be measured on a daily basis and the average value of the alternative parameter shall be calculated on a daily basis over a rolling 14-day period of operating days. Each daily average value of the alternative parameter constitutes a performance test.

§ 60.565 Reporting and recordkeeping requirements.

(a) Each owner or operator subject to the provisions of this subpart shall keep an up-to-date, readily-accessible record of the following information measured during each performance test, and shall include the following information in the report of the initial performance test in addition to the written results of such performance tests as required under § 60.8. Where a control device is used to comply with § 60.562-1(a)(1)(i)(D) only, a report containing performance test data need not be submitted, but a report containing the information in § 60.565(a)(11) is required. Where a boiler or process heater with a design heat input capacity of 150 million Btu/hour or greater is used to comply with § 60.562-1(a), a report containing performance test data need not be

submitted, but a report containing the information in § 60.565(a)(2)(i) is required. The same information specified in this section shall be submitted in the reports of all subsequently required performance tests where either the emission control efficiency of a combustion device or the outlet concentration of TOC (minus methane and ethane) is determined.

(1) When an incinerator is used to demonstrate compliance with § 60.562-1, except § 60.562-1(a)(2):

(i) The average firebox temperature of the incinerator (or the average temperature upstream and downstream of the catalyst bed), measured at least every 15 minutes and averaged over the performance test period, and

(ii) The percent reduction of TOC (minus methane and ethane) achieved by the incinerator, the concentration of TOC (minus methane and ethane) (ppmv, by compound) at the outlet of the control device on a dry basis, or the emission rate in terms of kilograms TOC (minus methane and ethane) per megagram of product at the outlet of the control device, whichever is appropriate. If supplemental combustion air is used, the TOC concentration corrected to 3 percent oxygen shall be recorded and reported.

(2) When a boiler or process heater is used to demonstrate compliance with § 60.562-1, except § 60.562-1(a)(2):

(i) A description of the location at which the vent stream is introduced into the boiler or process heater, and

(ii) For boiler or process heaters with a design heat input capacity of less than 150 million Btu/hr, all 3-hour periods of operation during which the average combustion temperature was more than 28°C (50°F) below the average combustion temperature during the most recent performance test at which compliance was determined.

(3) When a flare is used to demonstrate compliance with § 60.562-1, except § 60.562-1(a)(2):

(i) All visible emission readings, heat content determination, flow rate measurements, and exit velocity determinations made during the performance test.

(ii) Continuous records of the pilot flame heat-sensing monitoring, and

(iii) Records of all periods of operations during which the pilot flame is absent.

(4) When an incinerator, boiler, or process heater is used to demonstrate compliance with § 60.562-1(a)(2), a description of the location at which the vent stream is introduced into the incinerator, boiler, or process heater.

(5) When a flare is used to demonstrate compliance with § 60.564-1(a)(2):

(i) All visible emission readings made during the performance test;

(ii) Continuous records of the pilot flame heat-sensing monitoring, and

(iii) Records of all periods of operation during which the pilot flame is absent.

(6) When an absorber is the final unit in a system to demonstrate compliance with § 60.562-1, except § 60.562-1(a)(2), the specific gravity (or alternative parameter that is a measure of the degree of absorbing liquid saturation, if approved by the Administrator), and average temperature, measured at least every 15 minutes and averaged over the performance test period, of the absorbing liquid (both measured while the vent stream is normally routed and constituted).

(7) When a condenser is the final unit in a system to demonstrate compliance with § 60.562-1, except § 60.562-1(a)(2), the average exit (product side) temperature, measured at least every 15 minutes and averaged over the performance test period while the vent stream is normally routed and constituted.

(8) Daily measurement and daily average 14-day rolling average of the ethylene glycol concentration in the liquid effluent exiting the vacuum system servicing the polymerization reaction section, if an owner or operator is subject to § 60.562-1(c) (1)(ii)(B) or (2)(ii)(B), or of the ethylene glycol concentration in the cooling water in the cooling tower, if subject to § 60.562-1(c) (2)(ii)(C) or (2)(iii)(C).

(9) When a carbon adsorber is the final unit in a system to demonstrate compliance with § 60.562-1, except § 60.562-1(a)(2): the concentration level or reading indicated by the organics monitoring device at the outlet of the adsorber, measured at least every 15 minutes and averaged over the performance test period while the vent stream is normally routed and constituted.

(10) When an owner or operator seeks to comply with the requirements of this subpart by complying with the uncontrolled threshold emission rate cutoff provision in §§ 60.560 (d) and (e) or with the individual stream exemptions in § 60.560(g), each process operation variable (e.g., pressure, temperature, type of catalyst) that may

result in an increase in the uncontrolled emission rate, if § 60.560(d) or (e) is applicable, or in an increase in the uncontrolled annual emissions or the VOC weight percent, as appropriate, if § 60.560(g) is applicable, should such operating variable be changed.

(11) When an owner or operator uses a control device to comply with § 60.564-1(a)(1)(i)(D) alone: all periods when the control device is not operating.

(b)(1) Each owner or operator subject to the provisions of this subpart shall submit with the initial performance test or, if complying with § 60.564-1(a)(1)(i)(D), as a separate report, an engineering report describing in detail the vent system used to vent each affected vent stream to a control device. This report shall include all valves and vent pipes that could vent the stream to the atmosphere, thereby bypassing the control device, and identify which valves are car-sealed opened and which valves are car-sealed closed.

(2) If a vent system containing valves that could divert the emission stream away from the control device is used, each owner or operator subject to the provisions of this subpart shall keep for at least two years up-to-date, readily accessible continuous records of:

(i) All periods when flow is indicated if flow indicators are installed under § 60.563(d)(1).

(ii) All times when maintenance is performed on car-sealed valves, when the car seal is broken, and when the valve position is changed (i.e., from open to closed for valves in the vent piping to the control device and from closed to open for valves that vent the stream directly or indirectly to the atmosphere bypassing the control device).

(c) Where an incinerator is used to comply with § 60.562-1, except §§ 60.562(a)(1)(i)(D) and (a)(2), each owner or operator subject to the provisions of this subpart shall keep for at least 2 years up-to-date, readily accessible continuous records of:

(1) The temperature measurements specified under § 60.563(b)(1).

(2) Records of periods of operation during which the parameter boundaries established during the most recent performance test are exceeded. Periods of operation during which the parameter boundaries established during the most recent performance test are exceeded are defined as follows:

(i) For noncatalytic incinerators, all 3-hour periods of operation during which the average combustion temperature was more than 28 °C (50 °F) below the average combustion temperature during the most recent performance test to which compliance was demonstrated.

(ii) For catalytic incinerators, all 3-hour periods of operation during which the average temperature of the vent stream immediately before the catalyst bed is more than 28 °C (50 °F) below the average temperature of the vent stream during the most recent performance test at which compliance was demonstrated. The owner or operator also shall record all 3-hour periods of operation during which the average temperature difference across the catalyst bed is less than 80 percent of the average temperature difference of the device during the most recent performance test at which compliance was demonstrated.

(d) Where a boiler or process heater is used to comply with § 60.562-1, except §§ 60.562-1 (a)(1)(i)(D) and (a)(2), each owner or operator subject to the provisions of this subpart shall keep for at least 2 years up-to-date, readily accessible continuous records of:

(1) Where a boiler or process heater with a heat input design capacity of 150 million Btu/hr or greater is used, all periods of operation of the boiler or process heater. (Examples of such records could include records of steam use, fuel use, or monitoring data collected pursuant to other State or Federal regulatory requirements), and

(2) Where a boiler or process heater with a heat input design capacity of less than 150 million Btu/hr is used, all periods of operation during which the parameter boundaries established during the most recent performance test are exceeded. Periods of operation during which the parameter boundaries established during the most recent performance test are exceeded are defined as all 3-hour periods of operation during which the average combustion temperature was more than 28 °C (50 °F) below the average combustion temperature during the most recent performance test at which compliance was demonstrated.

(e) Where a flare is used to comply with § 60.562-1, except § 60.562-1(a)(1)(i)(D), each owner or operator subject to the provisions of this subpart shall keep for at least 2 years up-to-date, readily accessible continuous records of:

(1) The flare or pilot light flame heat sensing monitoring specified under § 60.563(b)(2), and

(2) All periods of operations in which the flare or pilot flame, as appropriate, is absent.

(f) Where an adsorber, condenser, absorber, or a control device other than a flare, incinerator, boiler, or process heater is used to comply with § 60.562-1, except § 60.562-1(a)(1)(i)(D), each owner or operator subject to the provisions of this subpart shall keep for at least 2

years up-to-date, readily-accessible continuous records of the periods of operation during which the parameter boundaries established during the most recent performance test are exceeded. Where an owner or operator seeks to comply with § 60.562-1, periods of operation during which the parameter boundaries established during the most recent performance tests are exceeded are defined as follows:

(1) Where an absorber is the final unit in a system:

(i) All 3-hour periods of operation during which the average absorbing liquid temperature was more than 11 °C (20 °F) above the average absorbing liquid temperature during the most recent performance test, and

(ii) All 3-hour periods of operation during which the average absorbing liquid specific gravity was more than 0.1 unit above, or more than 0.1 unit below, the average absorbing liquid specific gravity during the most recent performance test (unless monitoring of an alternative parameter than is a measure of the degree of absorbing liquid saturation is approved by the Administrator, in which case he or she will define appropriate parameter boundaries and periods of operation during which they are exceeded).

(2) Where a condenser is the final unit in a system, all 3-hour periods of operation during which the average condenser operating temperature was more than 6 °C (10 °F) above the average operating temperature during the most recent performance test.

(3) Where a carbon adsorber is the final unit in a system, all 3-hour periods of operation during which the average organic concentration level in the carbon adsorber gases is more than 20 percent greater than the exhaust gas concentration level or reading measured by the organics monitoring system during the most recent performance test.

(g) Each owner or operator of an affected facility subject to the provisions of this subpart and seeking to demonstrate compliance with § 60.562-1 shall keep up-to-date, readily accessible records of:

(1) Any changes in production capacity, feedstock type, or catalyst type, or of any replacement, removal or addition of product recovery equipment; and

(2) The results of any performance test performed pursuant to the procedures specified by § 60.564.

(h) Each owner or operator of an affected facility that seeks to comply with the requirements of this subpart by complying with the uncontrolled

threshold emission rate cutoff provision in §§ 60.560 (d) and (e) or with the individual stream exemptions in § 60.560(g) shall keep for at least 2 years up-to-date, readily accessible records of any change in process operation that increases the uncontrolled emission rate of the process line in which the affected facility is located, if § 60.560 (d) or (e) is applicable, or that increase the uncontrolled annual emissions or the VOC weight percent of the individual stream, if § 60.560(g) is applicable.

(i) Each owner and operator subject to the provisions of this subpart is exempt from § 60.7(c) of the General Provisions.

(j) The Administrator will specify appropriate reporting and recordkeeping requirements where the owner or operator of an affected facility complies with the standards specified under § 60.562-1 other than as provided under § 60.565 (a) through (e).

(k) Each owner or operator that seeks to comply with the requirements of this subpart by complying with the uncontrolled threshold emission rate cutoff provision of §§ 60.560 (d) and (e), the individual stream exemptions of § 60.560(g), or the requirements of § 60.562-1 shall submit to the Administrator semiannual reports of the following recorded information, as applicable. The initial report shall be submitted within 6 months after the initial start-up date.

(1) Exceedances of monitored parameters recorded under §§ 60.565 (c), (d)(2), and (f).

(2) All periods recorded under § 60.565(b) when the vent stream has been diverted from the control device.

(3) All periods recorded under § 60.565(d) when the boiler or process heater was not operating.

(4) All periods recorded under § 60.565(e) in which the flare or pilot flame was absent.

(5) All periods recorded under § 60.565(a)(8) when the 14-day rolling average exceeded the standard specified in § 60.562-1(c) (1)(ii)(B), (1)(ii)(C), (2)(ii)(B), or (2)(ii)(C), as applicable.

(6) Any change in process operations that increases the uncontrolled emission rate of the process line in which the affected facility is located, as recorded in § 60.565(h).

(7) Any change in process operations that increases the uncontrolled annual emissions or the VOC weight percent of the individual stream, as recorded in § 60.565(h).

(l) Each owner or operator subject to the provisions of this subpart shall notify the Administrator of the specific provisions of § 60.562, § 60.560(d), or § 60.560(e), as applicable, with which

the owner or operator has elected to comply. Notification shall be submitted with the notification of initial startup required by § 60.7(a)(3). If an owner or operator elects at a later date to use an alternative provision of § 60.562 with which he or she will comply or becomes subject to § 60.562 for the first time (i.e., the owner or operator can no longer meet the requirements of this subpart by complying with the uncontrolled threshold emission rate cutoff provision in § 60.560 (d) or (e)), then the owner or operator shall notify the Administrator 90 days before implementing a change and, upon implementing a change, a performance test shall be performed as specified in § 60.564.

(m) The requirements of this subsection remain in force until and unless EPA, in delegating enforcement authority to a State under section 111(c) of the Act, approves alternative reporting requirements or means of compliance surveillance adopted by such State. In that event, affected sources within the State will be relieved of the obligation to comply with this subsection, provided that they comply with the requirements established by the State.

§ 60.566 Delegation of authority.

(a) In delegating implementation and enforcement authority to a State under section 111(c) of the Act, the authority contained in paragraph (b) of this section shall be retained by the Administrator and not transferred to a State.

(b) Authority which will not be delegated to States: § 60.562-2(c).

3. Section 60.17(a) is amended by revising paragraphs (a)(6), (a)(38), and (a)(40) and by adding paragraphs (a)(60) and (a)(61) to read as follows:

§ 60.17 Incorporations by reference.

* * *

(a) * * *

(6) ASTM D1946-77, Standard Method for Analysis of Reformed Gas by Gas Chromatography, IBR approved for §§ 60.45(f)(5)(i), 60.18(f), 60.614(d)(2)(ii), 60.614(d)(4), 60.664(d)(2)(ii), 60.664(d)(4) and 60.564(f).

(38) ASTM D2382-76, Heat of Combustion of Hydrocarbon Fuels by Bomb Calorimeter [High-Precision Method], IBR approved for §§ 60.18(f), 60.485(g), 60.614(d)(4), 60.664(d)(4), and 60.564(f).

(40) ASTM D86-78, Distillation of Petroleum Products, IBR approved for § 60.593(d), § 60.633(h), and § 60.562-2(d).

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(60) ASTM D2908-74, Standard Practice for Measuring Volatile Organic Matter in Water by Aqueous-Injection Gas Chromatography, IBR approved for § 60.564(j).

(61) ASTM D3370-76, Standard Practices for Sampling Water, IBR approved for § 60.564(j).

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