

**Testimony of
Edward W. Gallagher
Vice President, Economics and Risk Management
Dairyalea Cooperative Inc.**

**Before the
U.S. House of Representatives Committee on Agriculture
Subcommittee on Livestock, Dairy and Poultry
Hearing on Federal Order Rulemaking Procedures
April 24, 2007**

Thank you for inviting Dairyalea Cooperative Inc. to testify before you today. Dairyalea is a dairy cooperative that markets milk on behalf of 2,400 dairy farmer members located in the Northeastern United States. Dairyalea is the fifth largest U.S. dairy cooperative.

Dairyalea supports the continuation of the Federal Order program, but recognizes that reform of the hearing process is necessary. Dairyalea is tremendously appreciative that this Committee has taken the time to hold this inquiry on the Federal Order hearing process.

My name is Edward Gallagher. I live in Cazenovia, New York. I serve as Dairyalea's Vice President of Economics and Risk Management. I have spent my entire lifetime working in the dairy industry. I was raised on my family's dairy farm in the small town of Sangerfield in Central New York State. The farm is now operated by my brother and his family. I have a Bachelor's degree from Cornell University and a Master's degree from The Ohio State University – both in Agricultural Economics. Upon graduation from Cornell, I became a full-time USDA employee at the former New York-New Jersey Market Administrator's office – as an economist. I worked for the Market Administrator's office for 12 years – the last 5 as its Chief of Market Analysis, Research and Information. In 1996, I was hired by Dairyalea Cooperative. I have significant experience in both Federal and State Order hearing processes. I am a member of a number of work groups looking into Federal Order reform – including a National Milk Producers Federation task force. I believe I have much to contribute about the Federal Order hearing process.

The Federal Milk Marketing Order program has served the United States dairy farmer and dairy industry well over the last 70-plus years. It has helped to stabilize a factious market for Class I milk and to create equity among handlers and producers. It is our belief that it has been one of the most important economic development programs for the United States dairy industry. It remains important. Federal Orders assist in deriving Class I revenue in addition to what would otherwise occur; and the monthly minimum price announcements provide an important safety net and reference point from which most milk prices emanate. Dairyalea strongly supports the continuation of the Federal Milk Marketing Order program.

Over time, Federal Orders will need to change to survive. The Orders must adapt to changing markets, marketing conditions, business practices and technological advancements,

among other things. Going forward, Federal Orders must be more market oriented and develop industry accepted pricing customs that can stand the test of time, if indeed, events should transpire resulting in the termination of the Federal Order program.

Federal Orders must be able to quickly adjust their regulations as circumstances arise, if the program is going to remain relevant. Presently, the process of changing Federal Orders to adapt to these changes takes far too long. Reform of this process is necessary. As part of this reform, the Secretary of Agriculture must have a mechanism that allows him or her to quickly address issues that are causing disruption in the marketplace. For instance, incentives to increase ethanol production are leading to strong increases in livestock feed prices without a commensurate response in the milk price. This has compounded a dairy farm profitability issue emanating from higher input prices because of energy related items such as diesel fuel, utility costs, fertilizer and chemicals, as well as general cost increases for labor, insurance, equipment and almost every other input. The Secretary of Agriculture must have the tools at hand to react quickly. It would help, for instance, if a decision to raise Class I prices could be immediately implemented. As it is, a hearing about increasing Class I prices ended four months ago and the industry has no idea when the decision might be issued.

The present operation of the Federal Order hearing process has resulted in hearings with no resolution or hearings where the ultimate resolution takes years. The failure to provide quick decisions has implications on the underlying support for the Federal Order program and generates business risk for dairy farmers, plant operators and businesses that market dairy products. For example, a hearing convened on June 20, 2005 to consider changes to what products will be included in Class I or not in Class I. The lack of resolution to this issue has resulted in some plant operators and marketers “shelving” new product innovation due to the uncertainty of the product’s Federal Order cost basis. No one wins when this happens. Reform is needed to more quickly develop solutions.

Dairyalea believes that the formal rule making process, utilized by USDA to change Federal Orders, should continue. However, it should be improved upon to result in faster hearing decisions. To accommodate this, the industry and USDA has to work together differently than in the past. Dairyalea requests that the following 8 steps be taken to reform the process.

1) Authority to Increase Milk Prices

The Secretary of Agriculture should be provided with specific authority to temporarily increase milk prices within 30 days of a hearing considering an increase, provided such adjustment is appropriate. This would give the Secretary the ability to address the dairy farmer profitability crisis occurring as a result of higher livestock feed prices.

2) Completion of Open Amendatory Actions

Two “National” Federal Order hearings have concluded without a final decision being implemented or the proceedings terminated. This Committee should urge USDA to move to a final order and implementation within the next 45 days.

3) Support of USDA Actions to Facilitate Faster Hearings

USDA has taken a number of initiatives to hasten the hearing process. This includes outreach to industry to develop solutions to issues and pre-hearing conferences to discuss hearing proposals. These actions should be acknowledged, encouraged and, in some cases, codified.

4) Independent Report of Steps to Omit in Post-Hearing Decision Process

An independent review by a non-governmental accounting or consulting business should occur to identify whether steps may be omitted in the post-hearing approval process. Presently, a number of Federal departments must review and “sign-off” on Federal Order decisions. This adds to the delay in the process. A steering committee, to work with the business conducting the independent review, should be established, in order to facilitate a fast and timely report. The steering committee should be composed of no more than five people and include a person from this Congressional Committee, Dana Coale, Deputy Administrator of USDA Dairy Programs, a Market Administrator, a producer representative and a processor representative. A report should be forwarded to this Committee within 60 days of securing the independent review team.

5) Require Statutory Changes to Hearing/Amendatory Process

The Code of Federal Regulations should be amended to facilitate a different and faster hearing process. Deadlines for the steps of the process must be included. As part of this process reform, there must be greater interaction between those seeking changes and USDA – prior to requesting a hearing. Industry-wide pre-hearing conferences and the advance submission of hearing testimony must be required. These aspects will create better hearing records and reduce the length of time that USDA needs in the process of determining changes, after the hearing occurs, and in writing the decisions. Exhibits 1 and 1-a (attached), outline Dairylea’s proposal to change the Federal Order rulemaking process. Dairylea presents this proposal as a part of the debate to reform the rule making process to generate faster decisions. With greater cooperation by the industry and the inclusion of tight deadlines, Dairylea believes that Federal Order changes can be implemented within seven to eleven months of a formal meeting with USDA describing the sought after proposal and within three to seven months of the beginning of a hearing. Certainly, the complexity of the issues at the hearing will impact the time frame.

The States of California, New York and Maine and the Commonwealth of Pennsylvania operate state milk marketing orders. These state orders have fast turnaround time from the date that a hearing is requested to the date that a change is implemented. The Committee should seek input into the various procedures used by these states in their efforts to produce timely decisions.

6) Hire/Retain Additional Administrative Law Judges

Administrative Law Judges (ALJ) are an important element of the hearing process. From time-to-time, USDA has had difficulty securing an ALJ for a hearing or there are scheduling conflicts that delay the hearing process. The identification or availability of an ALJ should not be a factor in the timeliness of the Federal Order hearing process. Additional ALJs should be hired or retained by USDA. To support the quick and efficient development of a hearing record, professional court reporting services should always be used.

7) Increase the Use of Market Administrator Staff Members

USDA has been making strides to increase its Washington, DC professional staff. It is important to have a strong and seasoned professional staff that can understand the complex

issues involved in milk marketing and Federal Order regulation. With the ever-increasing work load and the ever-increasing cost-of-living in the greater Washington, DC area, recruiting will continue to be a difficult challenge. Recently, USDA has reached out to professional staff members at the various Market Administrator's offices, to assist them in their hearing process. This should continue, be encouraged, codified if necessary and relied upon more often. The Market Administrator offices should be used to a greater extent to accomplish the economic analysis, policy decision making and decision write-up, that goes into the Federal Order hearing process. Additionally, the Market Administrator's offices tend to be in locations offering a more flexible cost-of-living. These offices should be looked to in an effort to attract and retain the professional staffing necessary to quickly accomplish the workload involved in the Federal Order hearing process.

8) Require the Secretary of Agriculture to Make Annual Reports on the Hearing/Amendatory Process

Within six months from today, the Secretary of Agriculture should appear before this Committee to report on changes USDA has made to the hearing process, to review all "open" hearings, to report on the length of time the hearings have been open, the types of hearing requests that have been turned down and other issues pertinent to the Federal Order program. Thereafter, the Secretary should report to this Committee on an annual basis. From this review, the Committee should publish a type of "report card" identifying how the Secretary is doing in handling issues relative to changing Federal Orders via the hearing process. To assist the Committee in reviewing the Secretary's accomplishments, a private industry group may be appointed by the Committee. Such appointed group should consist of no more than five people.

Thank you for providing the opportunity for me to testify today on behalf of Dairylea Cooperative. We look forward to working with you to strengthen the Federal Order program.

Exhibit 1

**Dairylea Cooperative's Proposal to Reform
Federal Order Rule Making Procedures**

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- The process of Federal Order rulemaking must change so that USDA has the ability to understand the proposed changes, develop appropriate analysis, if possible, and have a road map of how it thinks it will change a Federal Order(s) – all prior to the hearing convening.
 - All referenced dates moved to next business day if such date falls on a weekend or holiday.
 - USDA is encouraged to manage the process so a rule making proceeding is not extended to each of the deadline dates
 - USDA proactively works with dairy industry relative to possible changes to Federal Orders
 - USDA may announce its interest in holding a hearing on a particular change
 - ❖ The subject matter may be a result of a concept or idea raised by an interested party
 - USDA may hold a public meeting to discuss the issue in an attempt to prepare the industry to develop proposals
 - ❖ USDA may continue to hold private meetings with interested parties relative to changes to Federal Orders
 - A proposed hearing petitioner must meet with USDA to discuss its proposal at least 10 days prior to requesting a hearing.
 - Hearing request results in an agreement to 1) a hearing and announcement of a pre-hearing conference or 2) a rejection of the hearing request
 - Such notice as to 1) or 2) above must be made within 15 days of receipt of request to hold a hearing
 - At the time of the hearing announcement, USDA will also ask for additional proposals to be filed within 15 days
 - ❖ USDA may broadly or narrowly define the scope of the potential hearing
 - ❖ USDA may accept additional proposals at its discretion even if petitioner did not meet with USDA to discuss such proposal
- However, USDA must still be able to meet its deadlines
- Such pre-hearing conference must occur within 20 days of announcement of acceptance of a proposal for a hearing and the announcement of the pre-hearing conference

- ❖ The purpose of the pre-hearing conference will be to allow the proponents to describe their proposals and answer questions about the proposals.
 - USDA will have unlimited time to ask questions.
 - Interested parties will be able to submit questions for proponents to USDA.
- Within 4 business days of the pre-hearing conference, any entity requesting a proposal to be heard, which will not be heard by USDA, shall receive written notification as to why such proposal will not be heard at this hearing.
- Within 5 business days of the pre-hearing conference, USDA will announce the hearing date and the proposals to be considered. Such hearing will occur no later than the first Monday that is 75 days after the pre-hearing conference.
- Within 1 day of the pre-hearing conference, proponents, opponents and interested parties will submit pertinent data requests to USDA.
 - Within 30 days of the pre-hearing conference, USDA shall supply such data or indicate why it can not be supplied.
 - ❖ All such data shall be put on the USDA website by the same date.
- Within 45 days of the pre-hearing conference, all proponents wishing to be heard at the hearing shall pre-submit their testimony. Within 15 days of proponent submission, opponents must pre-submit their testimony.
 - Pre-submission of hearing testimony provides USDA with an additional 15-30 days, prior to convening the hearing, to consider and analyze any potential changes to Federal Orders
 - Farmers do not need to pre-submit their testimony.
- At the hearing, pre-submitted testimony is entered into the record without being read. Individuals testifying are then cross-examined.
 - In such case, the proponent shall be allowed to make edits/corrections to the testimony and provide a five minute overview of the testimony.
 - USDA may make “hardship” allowances for entities unable to pre-submit their testimony, at the discretion of the ALJ.
- Industry briefs are due as prescribed by the ALJ.
- USDA must publish a recommended or interim final decision within 75 days of the end of the hearing, but in no case more than 100 days from the day the hearing initially convened.
 - The Hearing decision should not include a write-up of proposals submitted or an overview of all of the testimony. This information is available on the USDA website. Instead, USDA should write-up why a proposal will be implemented and any appropriate economic analysis and why other proposals were rejected.
- Briefs are due within 15 days of recommended decision being published or within 30 days of an interim final decision being published
- USDA’s final decision must be published within 30 days of the briefing due date.
 - A referendum, if necessary is to be conducted within 20 days.
- Any changes to the final decision must be implemented on the first day of a month following no more than 30 days after the announcement of the final decision.

Exhibit 1-a

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**Example Time Table for Federal Order Hearing Process Deadlines
Using Calendar Year 2007**

<u>Date</u>	<u>Event</u>
Jan 2	Meet with Dairy Division to discuss proposal
Jan 12	Proponent formally requests hearing
Jan 29	Announcement that hearing to be held; additional proposals requested
Feb 13	Additional proposals submitted
Feb 20	Pre-hearing conference convenes
Feb 21	Interested parties request data from USDA
Feb 26	Formal letters sent to entities that proposal request has been rejected
Feb 27	USDA announces hearing date and proposals to be heard
Mar 22	USDA supplies data per requests
Apr 9	Proponent testimony pre-submitted
Apr 24	Opponent testimony pre-submitted
May 7	Hearing convenes
May 18	Hearing Adjourns
Aug 1	Recommended decision published
Aug 16	Interested parties briefs are due
Sep 17	Final decision announced
Oct 9	Referendum concludes
Nov 1	New Order implemented

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Work History: Dairylea Cooperative Inc, 1996 – Present
Assist in the management of Dairylea’s business operations
Operate Dairylea’s milk price risk management program
Offer milk price and dairy industry outlook intelligence
Provide Federal and state marketing order expertise
Assist in governmental relations endeavors
Support the management of Dairy Marketing Services’ milk marketing operations
Aid in the management of Dairy Farmers of America’s Northeast Area Council and its milk price risk management program
USDA/NY-NJ Federal Order Market Administrator’s Office, 1983-1996
Chief, Market Analysis, Research and Information, 1991-1996
Economist, 1989-1991
Cooperative Relations Specialist, 1984-1991
Research Associate, 1983-1984
Family’s dairy farm, through 1984

Education: M.S., Agricultural Economics, The Ohio State University, 1989
B.S., Agricultural Economics, Cornell University, 1984

Relevant Work: * Member of the National Milk Producers Federal Order Task Force
* Member of the Association of Dairy Cooperatives of the Northeast – a multi-cooperative agency that addresses Federal Order issues affecting the Northeastern United States
* Discuss Federal Order issues with USDA and private industry personnel
* Participated in the development of Federal Order amendment proposals
* Testified as a government employee and a private industry expert witness at Federal Order hearings
* Expert witness at Pennsylvania Milk Marketing Board hearings, Northeast Dairy Compact Hearings and New York and New Jersey State order hearings
* Participated in the Federal Order Reform process
* Assisted in the development of the Northeast Federal Order
* Assisted in the operation of the NY-NJ Federal Order

Committee on Agriculture
U.S. House of Representatives
Required Witness Disclosure Form

House Rules* require nongovernmental witnesses to disclose the amount and source of Federal grants received since October 1, 2004.

Name: Edward Gallagher
Address: 5001 Brittonfield, Prkwy, Syracuse, NY 13221
Telephone: 315-433-0000 ext 5658
Organization you represent (if any): Dairy Lea Cooperative Inc.

1. Please list any federal grants or contracts (including subgrants and subcontracts) you have received since October 1, 2004, as well as the source and the amount of each grant or contract. House Rules do **NOT** require disclosure of federal payments to individuals, such as Social Security or Medicare benefits, farm program payments, or assistance to agricultural producers:

Source: _____ Amount: _____

Source: _____ Amount: _____

2. If you are appearing on behalf of an organization, please list any federal grants or contracts (including subgrants and subcontracts) the organization has received since October 1, 2004, as well as the source and the amount of each grant or contract:

Source: _____ Amount: _____

Source: _____ Amount: _____

Please check here if this form is NOT applicable to you: _____

Signature: Edward W. Gallagher

* Rule XI, clause 2(g)(4) of the U.S. House of Representatives provides: *Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof. In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by any entity represented by the witness.*

PLEASE ATTACH DISCLOSURE FORM TO EACH COPY OF TESTIMONY.