

Testimony

Regarding Proposals Seeking To Amend the Class I Fluid Milk Product Definition

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On behalf of National Family Farm Coalition

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Held by: USDA/Agricultural Marketing Service/Dairy Division

My name is John Bunting. I am a dairy farmer in Delaware County, NY and I also write for a dairy publication. Today I am testifying on behalf of National Family Farm Coalition (NFFC) in opposition to amending the definition of fluid milk. The NFFC was founded in 1986 and represents family farm and rural groups in 30 states whose members' face the challenge of the deepening economic recession in rural communities caused primarily by low farm prices and the increasing corporate control of agriculture. The dairy subcommittee has members from coast to coast.

NFFC has taken an active role in the dairy protein debate. NFFC submitted testimony to the U.S. International Trade Commission hearing on dairy proteins. NFFC submitted a citizens petition to the Food and Drug Administration (FDA) in April of 2004 requesting the Food and Drug Administration to Notify State and Federal regulators of GRAS requirements of Milk Protein Concentrate (2004P-0202/CP1).ⁱ

The context of this hearing is particularly troubling in that it represents a significant step backwards in the nearly one hundred year struggle in the effort to gain public confidence in the quality of dairy products. Indeed, the language of 7 USC 608 (c) 18 states the need to “insure a sufficient quantity of pure and wholesome milk”. In 1934, under *Nebbia v. New York*, the U.S. Supreme Court (291 U.S. 502) clearly stated that milk was clothed in public interest. The Court wrote, “Thus, understood, "affected with a public interest" is the equivalent of "subject to the exercise of the police power"

Milk Protein Concentrate neither a legal food ingredient, nor considered milk under FDA rules

From the very beginning the use of Milk Protein Concentrates (MPC) has been a flagrant violation of the public’s interest and the rule of law. In spite of wide spread usage, there is no GRAS (**G**enerally **R**ecognized **A**s **S**afe) for MPC’s. According to the FDA “Under sections 201(s) and 409 of the Act, and FDA’s implementing regulations in 21 CFR 170.3 and 21 CFR 170.30, the use of a food substance may be GRAS either through scientific procedures or, for a substance used in food before 1958, through experience based on common use in food.”ⁱⁱ

MPCs were not used in food prior to 1958 and therefore subject to “scientific procedures” in determining GRAS. Under a “Freedom of Information Request” response to me on August 13 2003, the FDA stated, “We have searched our files and find no responsive information for the scientific studies on human safety and consumption of ultrafiltered milk/milk protein concentrate.”

There is at least one very good reason for this; there is no definition for milk protein concentrate. Nothing can be studied scientifically which cannot be defined.

U.S Customs made an attempt to define MPC’s and failed. In September 2002 National Milk Producers Federation (NMPF) petitioned Customs for a definition. In Customs decision we read:

Many of the comments contend that your position, which limits coverage of the Note to products produced by ultrafiltration, is not supported by the language of the Note. These comments point out that when Congress was drafting the Note, it could have used restrictive language to achieve the result you urge. However, this was not done.

These commenters state that in the food industry, the term “milk protein concentrates” is commonly used to refer to a wide variety of products of varying composition. These products are manufactured to specification to render them suitable for specific end uses in the food industry. In addition, they point out that certain milk protein concentrates are obtained by a combination of ultrafiltration and blending, while other products contain milk proteins that are isolated from milk by other processes such as precipitation. They contend that products containing 40 percent or more protein by weight have more protein than milk and are thus milk protein concentrates. They also note that if Congress intended the provision to be limited to the total milk protein that was the subject of the previous Customs ruling, it would not have enacted the broad language of Additional Note 13 and would not have set the milk protein threshold as low as 40 percent.

Upon consideration of the petition and the comments submitted, Customs agrees with the comments received that the Note does not restrict MPCs to any particular method of manufacture. Rather, the Note speaks to “any” complete milk protein concentrate which contains a specified protein percentage by weight. The use of the term “any” suggests that a broad rather than restrictive reading of the note was intended. The Note does require that the protein be “complete” which, according to the Note, requires that it contain casein and lactalbumin. However, the Note neither requires that the proteins be in the same proportion as they are found in milk, nor does it specify relative percentages of the protein components. It requires only that the source of the proteins be milk, that casein and lactalbumin be present, and that they constitute 40 percent or more, by weight, of the product.ⁱⁱⁱ

Clearly, the dairy food industry wants to be totally free and unrestricted in calling anything it so chooses MPC’s. Clearly then, we are not talking about “amending” any definition of milk. This hearing is, in reality, about **eliminating** any definition of milk in the interest of processor profit.

Under GRAS regulations, FDA allows individual determination for each product produced. This is not done because the sole purpose of MPC use is because processors profit from use of lower-cost ingredients. To test for each product would severely reduce or eliminate profit. Therefore, all MPC use is a reprehensible violation of the rule of law.

Making this matter even worse is the tacit complicity of FDA in MPC use. While FDA correctly states use of MPC’s in standardize products is illegal, they say use of MPC’s in

non-standardized products is allowed. FDA fails to mention that GRAS certification is required in non-standardized products.

Certainly, industry could correct this problem by clearly defining MPC's and running scientific safety studies. The fact that this could be done and has not been done suggests there may indeed be a dark unsafe side to MPC's.

No imported MPCs are produced in compliance with Grade A Pure Milk Ordinance

In addition to the troubling disregard for GRAS regulations, these proposals require the abandonment and tossing out of the Grade "A" Pasteurized Milk Ordinance (PMO).^{iv}

The PMO requires:

“Each dairy farm, milk plant, receiving station, milk tank truck cleaning facility and transfer station whose milk or milk products are intended for consumption within ...of...¹ or it's jurisdiction, and each bulk milk hauler/sampler who collects samples of raw milk for pasteurization, for bacterial, chemical or temperature standards and hauls milk from a dairy farm to a milk plant, receiving station or transfer station and each milk tank truck and its appurtenances shall be inspected by the Regulatory Agency prior to the issuance of a permit.”

USDA Foreign Agricultural Service trade database list over 40 countries which have imported Chapter 35 dairy proteins, which include casein, caseinates and casein MPC's.

Do those proposing the use of these dairy based products, such as MPCs and caseinates, really expect farms in Belarus, the Ukraine and Peoples Republic of China will be inspected by a qualified U.S. agency? That, of course, would be preposterous. “M-A-83 - Grade "A" Powdered Dairy Blends as Ingredients, etc.”^v requires, “If a powdered blend is to be used as an ingredient in the production of a Grade "A" product from an IMS listed plant, the blend must be labeled Grade "A" and the plants where the Grade "A" dairy powders are manufactured and the facility where the powder is blended and packaged must each have an acceptable IMS listing.” How do the proponents of these proposals, or USDA, propose to guarantee that Powdered Dairy Blends and Ingredients will be sourced from PMO-approved sources?

From “nutrient content claim” to labeling to the PMO definition of “concentrated milk”, all of these and more would have to be thrown out if the proposals advocating the use high protein products are incorporated into USDA Federal Milk Order rules and regulations.

Anyone who might suggest, limiting these ingredients to only domestically produced products is sadly ignorant of the power of the WTO (World Trade Organization). Rules promulgated by the WTO are not as likely to be ignored as U.S. rules.

Will these proposals allow for foreign dairy farmers to siphon off Federal Milk Order pool revenues?

Finally, there is the bottom line. The Federal Orders are about payment. In the May 2005 issue of *The Progressive Dairyman*, Elwin Hollon, a DFA Vice President spoke of this hearing. The article said, referring to statements by Hollon, “The main emphasis is on new forms of milk proteins, like milk protein concentrate (MPC), that are used to create new fluid products. Hollon says if a farmer’s milk is used to make a product that competes with Class I, then the farmer should be paid for Class I.”

What farmer and where? All indications are that MPC’s cannot be made profitably in the U.S. MPC would dictate use of imported MPC’s. Is anyone thinking farmers in India or New Zealand will be getting blend price for their milk? Furthermore, as Mr. Hollon must surely know, the domestic MPC producing Dariconcepts plant in Portales, N.M. pays Class IV price for MPC production.^{vi} The USITC report *Conditions of Competition for Milk Protein Products in the U.S. Market*, Investigation No. 332—453 mentions several advantageous of the Portales plant and says, “Even with these advantages, purchasers of MPC from the Dairiconcepts facility still pay a premium over the price of imported MPC to provide the facility with a return that is equivalent to the return on SMP.”^{vii}

In reality, the bottom line is to have MPC’s accepted as just “Good ole’ milk” which they are not. These proposals are merely a continuation of the deception associated with the use of MPC’s. A recent example of the deception is found in U.S. patent application number [20050123647](#), which proposes use of MPC’s to make cheese, we find not once but, twice, “Other GRAS (Generally Regarded As Safe) ingredients common to cheese making process may be added at any suitable stage...” Despite widespread claims of safety MPC’s to this day are not GRAS. And, MPC’s are not milk and have no place in the definition of fluid milk.

To summarize, I speak in opposition to all proposals which would classify as Class I (fluid) ingredients in the use of dairy-based beverages which do not currently meet Federal Milk Order requirements for 6.5% nonfat dairy solids.

- Milk Protein Concentrates do not meet FDA food safety rules, under GRAS specifications, as legal food ingredients.
- Milk Protein Concentrates and caseins, which are not manufactured to any degree in the U.S. are imported in vast quantities. The sources of the foreign dairy ingredients do not meet U.S. Pure Milk Ordinance standards for Grade A farm, plant, and milk truck haulers. Nor do various dairy personnel from such nations comply with U.S. PMO rules.
- If USDA were to implement these proposals, there could be a revenue outflow from the Federal Milk order revenue pools to foreign dairy producers.
- If USDA were to implement these proposals, the Department would be in violation of its legislative mandate to provide “pure and wholesome milk.” “Milk” in the form of illegal MPCs and foreign-sourced dairy ingredients that do

not comply with the U.S. Pure Milk Ordinance and FDA's GRAS specifications can neither be pure or wholesome.

By all reason and logic, it is a farce that USDA should even elevate these issues to the level of a national Federal Milk Order hearing.

ⁱ <http://www.fda.gov/ohrms/dockets/dailys/04/apr04/042904/04P-0202-ACK00001-vol1.pdf>

ⁱⁱ <http://www.cfsan.fda.gov/~dms/grasguid.html>

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http://www.cbp.gov/linkhandler/cgov/toolbox/legal/bulletins_decisions/bulletins_2003/vol37_07302003_n031/37genno31.ctt/37genno31.pdf Page 6

^{iv} <http://www.cfsan.fda.gov/~ear/pmo01-2.html>

^v <http://vm.cfsan.fda.gov/~ear/M-A-83.html>

^{vi} <http://hotdocs.usitc.gov/docs/pubs/332/pub3692.pdf>

^{vii} *ibid* Page 5-20