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June 12, 2006

Mr. David Ikari, Chief
Dairy Marketing Branch
California Department of Food and Agriculture
560 J. Street, Suite 150
Sacramento, CA 95814

Re: *June 1-2, 2006 Class 2, 3, 4a, and 4b Hearing - Post Hearing Brief*

Mr. Hearing Officer and Members of the Panel:

On behalf of the Dairy Institute of California (“Dairy Institute”), this letter is submitted in response to the groundless contentions by the Center for Race Poverty and the Environment (“CRPE”) that the California Department of Food and Agriculture’s (“CDFA”) proposed Amendments to the Stabilization and Marketing Plans for Market Milk are subject to the requirements of the California Environmental Quality Act (“CEQA”). Put simply, the pricing of milk is not a “project” within the meaning of CEQA and is therefore not subject to CEQA review. CRPE’s arguments regarding the speculative, remote effects of milk pricing are neither factually supported nor legally sufficient to change the nature of CDFA’s decision. As the Amendments are not a “necessary” nor an “essential” step in a process that would ultimately result in the construction of specific new facilities, the CDFA’s decision cannot be subject to CEQA. See Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School District, 11 Cal. Rptr. 2d. 792 (Ct. App. 1992). At best, CRPE can merely speculate that the Amendments may provide some additional revenues to processors so that one or more processors, somewhere in California, might one day have sufficient funds to create additional processing capacity necessary to supply the dairy needs of California. And providing such capacity is precisely the objective that the Legislature mandated in order to protect the health and public welfare of all Californians. See, e.g., Cal. Food & Agric. Code § 61802 (2006). The Amendments cannot be subject to CEQA.

CEQA only applies to “projects” as defined under California Public Resources Code § 21065: “Project means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) an activity indirectly undertaken by a public agency; (b) an activity

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undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans or other forms of assistance from one or more public agencies or, (c) an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.”

The California Supreme Court has held that in order for the activity to be a “project” within the meaning of CEQA, it must be “a necessary step in a chain of events which would culminate in physical impact on the environment.” Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168, 179 (Cal. 1982). The CDFA’s approval of the Amendments is not a *necessary* step in a chain of events that would culminate in physical impact on the environment, either through the construction of process or production facilities, or otherwise.

Even more on point, in Kaufman & Broad-South Bay, 11 Cal. Rptr. at 798, the Court held that the creation of a community facilities district which could possibly finance future schools was not subject to CEQA because there was not a casual link between the formation of the district and the construction of new schools. The Court found that the formation of the district would not create a need for new schools, nor would the development of additional schools be “entirely dependent” upon formation of the district. Id. The Court found that the creation of the district may ultimately provide “some of the funds necessary” to create additional school capacity, it is “an essential step culminating in action which may affect the environment.” Id. Likewise, while the revenues created by the Amendments may provide “some of the funds necessary” to build additional processing or production capacity, it is not “an essential step culminating in action which may affect the environment.” Id.; See also Citizens to Enforce CEQA v. City of Rohnert Park, 33 Cal. Rptr. 3d. 208 (Ct. App. 2005) (establishing a source of funds did not qualify as having a reasonably foreseeable environmental impact because a specific project or development was not approved.)

The Amendments will not create a need for new processing facilities, or new dairies, nor will the development of future processing or production facilities be “entirely dependent” on the amended pricing structure. Hence, under established California law, the pricing decisions are not a CEQA “project.” No development can or will result from CDFA’s decision. If additional processing and production facilities are developed, they will be the subject of independent review and approval within the relevant local jurisdictions.

Moreover, not only do the milk pricing decisions fall outside the scope of the meaning of “project,” they are excluded from the definition of “project.” The CEQA guidelines provides that a project does *not* include: “The creation of government funding or *other government fiscal activities*, which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment.” Cal. Code Regs. Tit. 14, § 15378(b)(4) (2006). The CDFA’s decisions regarding the pricing of milk are a “government fiscal activity.” The decision represents the implementation of economic policy as required by the Legislature under the California Food and Agriculture Code. Indeed, the economic policy is

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one designed to encourage adequate milk production and is in furtherance of a *legislative* policy implemented by the CDFA. See, e.g., Cal. Food & Agric. Code § 61802 (2006), The policies have been in place and implemented for many decades. The Amendments do not relate to or contemplate any specific project or projects.

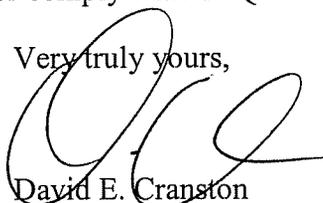
Similarly, CEQA guidelines also exclude from the definition of project “continuing... administrative activities... such as general policy and procedure making” (except for specific instances that are not applicable here.) Cal. Code Regs., tit. 14, § 15378(b)(2) (2006). Here, CDFA is making an administrative decision implementing a general policy encouraging and facilitating the production of milk through pricing changes, which it has done several times a year for many years.

The Amendments to the Plan are merely that. The Plan has been in effect for several decades. As described above, the Plan has always been designed and intended to encourage the adequate production of milk. CRPE has failed to adequately address how the Amendments *alone* create the potential for any significant environmental impact.

Finally, CRPE has failed to offer any evidence that a physical change to the environment will occur or is a reasonably foreseeable consequence of the approval of the Amendments. In Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d. 420 (Cal. App. 2006), the Court rejected the notion that possible, speculative outcomes of the adoption of an ordinance prohibiting big box stores within City limits triggers CEQA review. And where the possibility of a significant environmental effect is not peculiar to the ordinance in question, CEQA is not triggered. Here, CRPE has offered no evidence that the construction of additional processing or production facilities will *not* occur in the absence of the adoption of these Amendments. The amended pricing structure may merely provide additional revenues for such construction to possibly occur. And, CRPE has failed to offer any significant evidence (as opposed to speculation) as to when or where the construction might occur -- pointedly demonstrating that it would be impossible to meaningfully review any environmental effects.

Accordingly, CDFA is not required to comply with CEQA in adopting the Amendments.

Very truly yours,



David E. Cranston

DEC/

cc: Rachel Kaldor
William Schiek