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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1146 and 1147

[Doc. No. AMS-DA-21-0013]

RIN 0581-AE00

Dairy Donation Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule finalizes establishment of the Dairy Donation Program as required by the Consolidated Appropriations Act of 2021. Under the program, eligible dairy organizations that account to a Federal milk marketing order and incur a qualified expense related to certain dairy product donations may apply for and receive reimbursements for those donations. The program facilitates dairy product donations and minimizes food waste. The program works in tandem with the Milk Donation Reimbursement Program, and thus this rule also makes corresponding changes to those regulations.

DATES: This final rule is effective August 25, 2023.

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SUPPLEMENTARY INFORMATION: Section 762 of the Consolidated Appropriations Act of 2021 (CAA) (Pub. L. 116-260) authorizes the Secretary of Agriculture (Secretary) to establish a program to reimburse dairy organizations for donated dairy products to non-profit organizations for distribution to recipient individuals and families. The Secretary delegated authority to establish and administer this program to

the Agricultural Marketing Service (AMS). The program was implemented on September 1, 2021, through an interim final rule (86 FR 48887). This rule finalizes and makes minor changes to the provisions of the Dairy Donation Program (DDP) codified at 7 CFR part 1147. Program provisions are intended to encourage the donation of dairy products and to prevent and minimize food waste.

The DDP is an additional donation program that overlays existing United States Department of Agriculture (“USDA” or “Department”) dairy milk donation activities, such as the Milk Donation Reimbursement Program (MDRP). The MDRP was established as part of the 2018 Farm Bill to facilitate the donation of fluid milk products and avoid food waste. The program was funded with \$9 million in fiscal year 2019, and \$5 million per fiscal year thereafter. DDP and MDRP are separate from USDA purchase programs. These donation programs provide for reimbursement of certain costs for donations made between two private entities. Food purchases under USDA’s The Emergency Food Assistance Program (TEFAP) and Section 32 programs are made through a bid process where USDA purchases the product and arranges for delivery to the distribution point.

DDP and MDRP are separate and distinct from USDA’s Dairy Margin Coverage (which acts as a safety net program), indemnity and disaster assistance programs, risk management tools through the public-private partnership of the Federal Crop Insurance Program, or USDA purchases of commodities, which may include dairy products depending on the market conditions and demand from school lunch or nutrition programs.

This rule also makes corresponding minor changes to the MDRP provisions (codified at 7 CFR part 1146) previously amended by the interim final rule. In this rule, AMS is making minor changes to the DDP information collection forms, which also apply to MDRP, to gain administrative efficiencies and lessen the burden for entities participating in the two programs. The form changes include adding *distribution center* as an additional entity type and allowing for the Dairy Donation and Distribution Plan to include multiple partnerships per eligible dairy organization. These

changes will be discussed in more detail later in the rule.

Background

In 2020, the COVID-19 pandemic disrupted dairy supply chains and displaced significant volumes of milk normally used in food service channels. This led to milk being dumped or fed to animals across the United States. AMS estimates that the volume of milk dumped due to pandemic-related supply chain issues was almost triple what is typically observed during normal market conditions.¹ At the same time, amidst surging unemployment and economic hardship nationwide, an increasing number of individuals needed nutrient-dense foods such as dairy products. Throughout 2020 and 2021, milk and dairy products were included in food donations authorized under the Coronavirus Aid, Relief, and Economic Security Act (CARES) and through the Commodity Credit Corporation (CCC). In December 2020, Congress authorized an additional \$400 million until expended to establish the DDP, designed to encourage the timely and efficient distribution of dairy products to families and individuals while reducing food waste.

While the DDP was intended to assist in balancing the supply chain during the pandemic recovery, it also provides the benefit of creating an incentive to donate dairy products during the normal spring flush of milk production. During normal marketing years (pre-pandemic), daily milk production in the spring averaged 6 to 7 percent more than in the lower production months of the fall.² USDA’s Economic Research Service (ERS), using 2020 and 2021 food security data, estimates that 10.5 and 10.2 percent, respectively, of U.S. households were food insecure.³ The United States remains in the midst of the recovery, and even while employment is returning to normal levels, there continues to be food insecurity. The persistent need for

¹ USDA Federal Milk Marketing Order Statistics, Other Use Volumes, March and April, 2015 through 2021.

² USDA, National Agricultural Statistics Service, Monthly Milk Production data, 2012 through 2020. <https://usda.library.cornell.edu/concern/publications/h989r321c?locale=en>.

³ Trends in U.S. Food Security, 2020 and 2021; Update for October 18, 2022. <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/interactive-charts-and-highlights/#childtrends>, accessed August 23, 2021.

nutrient-dense foods such as dairy products can be met, in part, through donations encouraged by the DDP.

An interim final rule was published in the **Federal Register** on September 1, 2021 (86 FR 48887). Copies of the rule were made available through the internet by the Department and the Office of the Federal Register. The rule provided a 60-day comment period which ended November 1, 2021. Four comments were received, which are discussed in the applicable sections of this final rule. While all comments supported the program, some requested consideration of changes to specific program provisions.

The program was initially established through an interim final rule, with regulations set to expire on September 1, 2023, unless program provisions are finalized. Congress rescinded current program funding through the Financial Responsibility Act of 2023,⁴ enacted on June 3, 2023. However, this final rule completes the DDP rulemaking by addressing relevant public comments, making minor administrative changes to reduce burden on the industry, and removing the program's sunset provision.

The following paragraphs give a general overview of how the DDP operates. Detailed explanations of program provisions can be found later in the *Program Provisions* section.

Who is eligible to participate?

Program eligibility continues to be open to eligible dairy organizations (EDOs), defined as dairy farmers (either individually or as part of a cooperative) or dairy processors that meet the following conditions: (1) account to a Federal Milk Marketing Order (FMMO) marketwide pool; and (2) incur a qualified expense. Although the definition of EDO includes individual dairy farmers, most farmers might not meet the other specified provisions to qualify as EDOs. For example, most farmers would not incur qualified expenses since they do not have the infrastructure to process raw milk into donated eligible dairy products. Those individual dairy farmers who do meet the required provisions would qualify as EDOs under statutes and this rule for both the DDP and MDRP.

The DDP and MDRP refer to the same statutory EDO definition; interpretation of that definition contained in the interim final rule was adopted by both programs. This final rule amends that interpretation, as explained below, to lessen the burden on participants and gain administrative efficiencies.

(1) Account to an FMMO Marketwide Pool

The DDP authorizing statute⁵ adopts the EDO definition contained in the statute establishing the MDRP.⁶ When AMS implemented the MDRP, it interpreted the statutory language, "account to an FMMO marketwide pool," to apply to entities regulated by, and therefore filing reports with, an FMMO. Participation in the MDRP was limited, partly due to the requirement to be regulated.

The COVID-19 pandemic and its impacts affected the entire United States. Supply chain disruptions described earlier were not limited to only those regulated by an FMMO. Consequently, Congress authorized the DDP through a broad relief package. In reviewing Congressional intent to encourage dairy product donation across the country, AMS determined the interpretation of "account to" as requiring regulation by an FMMO to be too narrow. Instead, a broader definition allowing for an EDO to "account to" an FMMO marketwide pool by filing a report with an FMMO office was deemed more appropriate. Consequently, the interim final rule revised the definition of "eligible dairy organization" for MDRP by removing the requirement that the EDO be regulated under an FMMO. It also adopted the same definition for the DDP.

In the interim final rule, USDA determined that the specific report that an EDO must submit to "account to" an FMMO marketwide pool was a monthly report that lists its fresh fluid products and/or bulk dairy commodity products purchased and how they were utilized to produce donated eligible dairy products. A comment from a Puerto Rican dairy processor explained that the industry, as well as consumers, suffered severe economic losses due to the pandemic, which were exacerbated in Puerto Rico due to its isolation from major US markets. The commenter suggested that the program provide more reporting flexibility in non-FMMO regions to make program impacts more equitable.

AMS agrees with this commenter. To receive a reimbursement for donations under the DDP, an EDO is required to submit a Reimbursement Claim Form. Requiring entities not regulated by an FMMO to submit a monthly report in addition to the Reimbursement Claim

Form is overly burdensome for participants because both forms contain duplicative information.

The filing of the initial report serves to establish a relationship between the EDO and the FMMO office that will be auditing its DDP reimbursements. All other information needed to administer the program is submitted through the application and reimbursement process. There is no additional need to collect duplicative information through a monthly report filing with the FMMO office. Therefore, this final rule finds that accounting to an FMMO marketwide pool can be satisfied by an entity submitting a report once to any FMMO office. EDOs can contact their local FMMO office or access the DDP website to determine the applicable FMMO office where the report should be filed. The filing of this report for the purpose of participating in the DDP does not cause the EDO to become regulated by the FMMO. For the reasons so stated, USDA is amending the definition in this final rule as requested by the commenter.

(2) Incur a Qualified Expense

The statute further specifies that an EDO must incur a qualified expense. Since only Class I fluid products are donated through the MDRP and most Class I processors are regulated by an FMMO, incurring a qualified expense in the MDRP was originally interpreted as paying minimum classified values into an FMMO pool because that is the requirement for processors regulated by an FMMO. The interim final rule found that an EDO no longer needed to be regulated under an FMMO and added a definition of "qualified expense" to MDRP regulations to specify that a qualified expense is not tied to the FMMO regulatory requirement of paying minimum classified values. The DDP adopted the same definition in the interim final rule. This final rule continues to find those provisions appropriate.

EDOs incur a qualified expense by either purchasing a fluid milk product (raw milk, skim milk, cream, or concentrated fluid milk products) for processing into an eligible dairy product or purchasing bulk dairy commodity product for further processing into an eligible dairy product.

Dairy processors often buy fluid milk products for processing into dairy products. Dairy processors also purchase bulk dairy commodity products for further processing into retail packages. For example, a processor buys 40-pound cheese blocks to further process and package into 8-ounce blocks or bags of shredded cheese

⁵ Sec. 762(a)(1) of the Consolidated Appropriations Act of 2021.

⁶ Sec. 1431 of the Agricultural Act of 2014 (7 U.S.C. 9071(a)). Implementing regulations are codified at 7 CFR part 1147.

⁴ Public Law 118-5.

typically preferred by consumers and eligible distributors alike. The DDP is intended to facilitate these types of product donations. Therefore, in addition to processors who buy fluid milk products for processing, the DDP allows secondary processors who purchase and further process bulk commodities for donation to qualify as an EDO. To be considered an EDO, a secondary processor also needs to account to an FMMO marketwide pool as described earlier.

Once these two above conditions—accounting to an FMMO and incurring a qualified expense—are met, EDOs participate in the program by forming partnerships with eligible distributors and then submitting a Dairy Donation and Distribution Plan (Plan) to AMS for approval. If an EDO or eligible distributor is looking for a partner, they may contact the DDP Office (*ddp@usda.gov*) for assistance.

What is reimbursed?

Upon Plan approval, EDOs can submit a Reimbursement Claim Form (Claim Form) to receive reimbursement for donations. The DDP reimburses EDOs for some of the following: a. input costs: milk equivalent of either a fluid milk product or a bulk dairy commodity product used in the eligible dairy product; b. manufacturing costs; and c. transportation costs.

a. Input Costs—Fresh Fluid Milk or Bulk Dairy Commodity Product Milk Equivalent

In the FMMO system, milk is priced based on its end use. FMMO classifications are generally: Class I—traditionally the highest-class price—for beverage fluid milk products such as whole, skim, nonfat, and flavored milks; Class II for soft products such as yogurt, ice cream, and packaged fluid cream; Class III for spreadable and hard cheeses; and Class IV for butter and dried milk products. Announced monthly, FMMO-minimum classified prices reflect surveyed end-product wholesale market prices. Under an FMMO, regulated processors are required to pay at least minimum classified values based on how they use their milk.

This final rule continues to find that for processors purchasing and processing fresh fluid milk products (raw milk, skim milk, cream, or concentrated fluid products), the DDP will reimburse for the FMMO-minimum classified value applicable on the date of production for fresh fluid milk products used to make donated eligible dairy products. FMMO prices are a good approximation of what the processor

paid for the fresh fluid milk products because they represent observed market values paid for product at the time of purchase.

The DDP does not reimburse for powders and other dry dairy products used as an ingredient in eligible dairy products (for example, powder used to fortify cheeses or ice cream.) Reimbursement is not extended to these ingredients because the DDP is designed to encourage the use of excess fresh fluid milk for donation, rather than being dumped. Dry milk powders in retail packaging—such as 10-ounce containers of nonfat dry milk, which are made directly from fresh fluid milk—continue to be considered eligible dairy products under this program, as surplus milk is likely manufactured into dry milk powder as opposed to being dumped.

Since FMMO minimum classified prices are stated on a hundredweight basis, EDOs should continue to report donations in the quantity and size of the donated product, which is converted to hundredweights with a yield factor (how much product can be made from 100 pounds of milk). Applicable announced minimum class skim and butterfat prices are used in determining the input cost of the donated dairy product. EDOs have the ability to provide an actual product yield factor, or the EDO can use a standard yield factor. Standard yield factors are posted on the DDP website.

Secondary processors buying bulk dairy commodity products for further processing and donation, as described earlier, will continue to be reimbursed at the classified use value applicable for the month the eligible dairy product was processed into the consumer-type package. The reimbursed value represents the milk-equivalent market price of the bulk dairy product at the time of conversion into an eligible dairy product.

b. Manufacturing Costs

Processors incur expenses beyond input costs to make dairy products. To encourage dairy product donations, this final rule continues to reimburse for some of the manufacturing costs incurred to convert fluid milk products into eligible dairy products. These manufacturing costs are reimbursed at the manufacturing (make) allowance levels contained in the FMMO uniform pricing formulas, which are generally accepted by the industry as representative costs of manufacturing dairy products from raw milk.

The interim final rule found it appropriate for the Class IV make allowance contained in the Class IV

price formula to apply to Class I and II products. USDA lacked data on Class I and II manufacturing costs and asked for public comment on this issue in the interim final rule. A comment submitted from a dairy trade association included average ranges for Class I and II manufacturing costs for its members that produced such products. Submitted information concluded Class I costs ranged from \$4.50–\$10 per hundredweight (cwt) and Class II costs ranged from \$5–\$6 per cwt. While the cost ranges provided a general approximation of those experienced by its members, the comment lacked details on the underlying data needed to determine what the average cost ranges represented. For example, the submission did not include the specific products represented, the data collection timeframe, types of costs incurred, geographic disbursement of plants, size of plants, or how much of the Class I or II markets were represented. No other comments on Class I and II manufacturing costs were received.

While the data provided lacked detail, it is reasonable to conclude the Class IV manufacturing allowance, which equates to \$2.16 per cwt, is significantly lower than the actual cost experienced by Class I plants. This final rule continues to find that while the DDP should not reimburse for all manufacturing costs, it should strive to reimburse at a level adequate for processors to choose to process and donate dairy products instead of dumping milk.

During the first year of administering the DDP, USDA experienced fluid milk processors choosing not to participate because the reimbursement rate was too low. As the statutory objective of the program is to encourage the donation of milk and dairy products to individuals and families, this final rule finds that the manufacturing cost reimbursement for Class I products should be increased.

As the input cost reimbursed through the DDP aligns with the product's classification, this final rule finds manufacturing costs should be similarly aligned. Under FMMOs, the base raw skim milk value of Class I products is the average of the Class III and Class IV skim milk price formulas, plus \$0.74. Implicitly, this means Class I handlers regulated by the FMMO system receive a Class I manufacturing allowance that is the average of the Class III and Class IV manufacturing allowances. Therefore, this final rule finds the manufacturing cost reimbursement for Class I products donated through the DDP should likewise be the average of the Class III and Class IV manufacturing

allowances. Currently those manufacturing allowances equate to \$3.17 per cwt and \$2.16 per cwt, respectively, resulting in an average of \$2.67 per cwt.

Recognizing Class II products are priced off the Class IV advanced skim milk pricing factor, Class II manufacturing costs reimbursed through the DPP will remain at the Class IV level, currently \$2.16 per cwt.

This final rule makes no changes to the manufacturing cost reimbursement for Class III and IV products, which equates to \$3.17 and \$2.16 per hundredweight, respectively, for milk containing 3.5 percent butterfat. If the FMMO make allowances are updated in the future, DDP regulations referencing the FMMO regulations will be automatically adjusted.

The public comment submitted by the dairy trade association also suggested DDP manufacturing cost reimbursement be adjusted to more accurately reflect actual component tests of raw milk. The current FMMO make allowances, and therefore the DDP manufacturing reimbursement levels, reflect standard component levels—3.5% butterfat, 2.99% protein, and 5.69% other solids. According to the commenter, actual component tests of raw milk are higher (4% butterfat, for example). The comment states that incorporating these higher component levels would increase the manufacturing reimbursement under the DDP. This final rule finds the factors contained in the manufacturing allowances used in both the FMMO program and the DDP should be consistent. If FMMO make allowances are amended, this final rule allows for DDP manufacturing cost reimbursements to change automatically.

c. Transportation Costs

Transportation costs from the processor to a distribution outlet are often cost prohibitive. Absent reimbursement, processors may not be willing to incur additional transportation costs, and feeding organizations may lack the funding to cover these costs to facilitate the donation. The DDP aims to facilitate timely donations and reduce food waste. Therefore, this final rule continues to find the DDP should cover part of the transportation costs from the EDO to the eligible distributor. This may be especially beneficial to rural communities whose donation sites are often far from plants serving them and who may not receive assistance from other government feeding programs with distribution points closer to urban centers.

As the reimbursement value is paid to the EDO, the DDP only reimburses for transportation if the EDO incurred the expense. If donated eligible dairy products are picked up from the plant by the eligible distributor, no transportation reimbursement will be paid. Details of the transportation cost reimbursement rate are explained later in this rule.

Total Reimbursement Value

Section 762(d)(2)(A) of the CAA specifies that total reimbursement—the sum of input, manufacturing, and transportation costs—must be set neither too high to “interfere with the commercial marketing of milk or dairy products” nor too low to “be sufficient to avoid food waste.” The statute further requires total reimbursement to be between the highest and lowest of the classified milk values. To ensure costs can be sufficiently covered for most donations, the interim final rule capped the total reimbursement payment, on a per cwt basis, at the Class I value for the highest FMMO differential zone (Dade County, Florida). Capping at the highest FMMO zone allowed for Class I handlers to obtain some reimbursement for manufacturing and transportation costs.

Section 762(d)(2)(B)(iv) of the CAA further allows the Secretary to maintain traditional price relationships—Class I being the highest, followed in sequence by II, III and IV—in setting the reimbursement rate. In 2020, dairy markets experienced pronounced class price inversions, where the Class III price was significantly higher than the Class I price in many areas of the country. However, the Class III price has been above the Class I price in Dade County, Florida, only three times since the current pricing system was adopted on January 1, 2000.⁷ No extreme price inversions have occurred since the interim final rule was published, and such extreme inversions are not anticipated in the foreseeable future. While the DDP does not directly determine classified prices and price relationships, the interim final rule found that program rules should not exacerbate price inversions if they occur. In times of price inversion, where the Class I price is not the highest-class price, the interim final rule continued to cap total reimbursements at the Class I price for Dade County, Florida. This final rule continues to find the reimbursement cap appropriate.

⁷ USDA, Federal Milk Marketing Order Statistics, Final Class and Component Prices by Order. <https://www.ams.usda.gov/resources/marketing-order-statistics/final-class-and-component-prices-order>.

When do plans and reimbursement claims need to be submitted?

Entities must submit Plan and Eligible Distributor Certification Forms (Certification Forms) to AMS for approval before they can submit Claim Forms for reimbursement. Reimbursement Claim Forms, along with supporting documentation, can be filed any time after the Plan is approved and the donation is made. AMS uses the supporting documentation to verify program requirements were met. Plans only need to be submitted once for approval. The DDP does not require annual Plan renewal.

How does AMS handle both the DDP and MDRP?

Although program funds for the DDP and MDRP are statutorily prohibited from being consolidated, the two programs operate as one from a stakeholder standpoint. EDOs making Class I fluid milk product donations which are covered by both programs are reimbursed through MDRP funds at the difference between the Class I and lowest classified price and receive a supplemental reimbursement of the lowest classified price plus the manufacturing and transportation cost reimbursement through DDP funds. Total combined reimbursement is capped at the Class I price in Dade County, Florida.

EDOs already enrolled in MDRP were automatically enrolled in the DDP when the interim final rule became effective. Subsequently, they received supplementary payments for fluid milk products donated under their currently approved MDRP Plans.

Is there a retroactive period for reimbursement?

Section 762(h) of the CAA requires supplementary payments be made to EDOs participating in the MDRP for donations made on or after January 1, 2020. Since the statute allows for retroactive reimbursement to those participating in the DDP, a retroactive date of January 1, 2020, was adopted in the interim final rule to apply to the DDP to streamline administration of the two programs. To ensure adequate availability of funds for donations made before enactment of the CAA, total program expenditures for eligible dairy product donations made from January 1, 2020, to December 27, 2020, were limited to no more than \$50 million under the interim final rule.⁸ A deadline

⁸ As indicated in the Economic Analysis contained in the interim final rule, USDA expected the DDP to expend \$68 million annually. In determining funds available for this retroactive

for requesting retroactive reimbursement was posted on the AMS web page for the DDP, and roughly \$712,000 in retroactive claims were submitted.

Program Provisions

The following details the DDP provisions and amendments to the MDRP, where applicable.

Definitions

The statute includes definitions for terms used. Section 1147.1 provides definitions for terms as they are used in the new program. Key terms are “eligible dairy organization,” “eligible dairy product,” “eligible distributor,” “eligible partnership,” and “qualified expense.” This final rule makes no changes to these definitions.

Eligible dairy organization (EDO). As explained in the *Background* section, section 762(a)(1) of the CAA adopts the same EDO definition contained in the statute establishing the MDRP. See Sec. 1431(a) and (b) of the Agricultural Act of 2014 (7 U.S.C. 9071(a)). The regulatory definition matches the statutory definition, which specifies that a dairy organization eligible to participate in the program is a dairy farmer, either individually or as part of a cooperative, or a dairy processor that: (1) accounts to an FMMO marketwide pool; and (2) incurs qualified expenses. See *id.*

Eligible dairy product. Section 762(a)(2) of the CAA specifies that only dairy products primarily made from milk, including fluid milk, produced and processed in the United States are eligible for donation and reimbursement under the DDP. Additional standards defining further requirements for eligible dairy products are described in the commodity specification provisions. Accordingly, § 1147.1 defines “eligible dairy product” as a dairy product meeting the commodity specifications referenced in § 1147.3.

Eligible distributor. Section 762(a)(3) of the CAA defines “eligible distributor” as “a public or private nonprofit organization that distributes donated eligible dairy products to recipient individuals and families.” Section 1147.1 likewise defines “eligible distributor” as a public or private nonprofit feeding organization distributing, or coordinating the distribution of, donated eligible dairy products to recipient individuals and families. Eligible distributors such as food banks, shelters, kitchens, and other food

distribution organizations are eligible so long as they are nonprofit entities. Under this program, participating eligible distributors fill out an Eligible Distributor Certification Form to verify their non-profit status and affirm they have appropriate facilities and processes for distributing donated dairy products to recipient individuals and families.

Eligible partnership. Section 762(c) of the CAA requires an EDO and eligible distributor form a partnership to participate in the DDP. Requiring parties to apply as a partnership ensures all program provisions are met and an agreed-upon structure is in place when eligible dairy products are available for donation and distribution. Section 762(a)(4) of the CAA defines “eligible partnership” as “a partnership between an eligible dairy organization and an eligible distributor,” and this rule continues to find the same definition appropriate.

AMS recognizes some EDOs may have processing plants in multiple locations reporting to different FMMOs. Similarly, eligible distributors may have multiple distribution sites; for example, several food pantries are operated by one umbrella organization. Thus, under § 1147.102(a), the eligible partnership can submit one Plan to cover multiple plants and/or distribution locations as long as only one EDO is represented.

Qualified expense. The statute does not define “qualified expense,” but does specify one needs to be incurred to be eligible for program participation. Section 1147.1 defines “qualified expense” as the cost incurred to purchase fresh fluid milk for processing into eligible dairy products or the cost incurred to purchase bulk dairy commodity products for further processing into eligible dairy products. A qualified expense is different than the reimbursement rate, which is described later in this final rule. Because defining “qualified expense” is fundamental to determining program eligibility and the MDRP and DDP reference the same “eligible dairy organization” statutory definition, the “qualified expense” definition was added to the MDRP regulation in the interim final rule and remains unchanged by this final rule.

Additional terms necessary for administration of the program are defined in § 1147.1. “Program” is defined as the Dairy Donation Program, and “Secretary” is defined as the Secretary of the United States Department of Agriculture or a representative authorized to act in the Secretary’s stead.

Commodity Specifications

The final rule amends the DDP’s commodity specification provisions to expand applicability to eligible distributors, as explained below.

The DDP is intended to reimburse eligible dairy organizations for timely donations of eligible dairy products and minimize food waste. It is therefore reasonable to ensure eligible dairy products donated under the DDP meet minimum food safety and quality standards and are in package sizes desired by eligible distributors, consistent with the intent of the program to minimize food waste that might otherwise result. The final rule makes no changes to § 1147.3, which defines the program’s commodity specifications.

The final rule continues to require that EDOs comply with all applicable Federal, State, and local laws, executive orders, and rules and regulations related to its performance under this program.

To qualify under the program, eligible dairy products must:

1. Be made primarily from cow’s (bovine) milk produced in the United States;
2. Be packaged in consumer-sized packaging; and
3. Meet the applicable provisions for dairy products in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et. seq.*), as amended. Grade ‘A’ dairy products must meet the applicable provisions of the current edition of the Pasteurized Milk Ordinance⁹; and
4. Have a sell-by, best-by, or use-by date no sooner than 12 days from the date the eligible dairy product is delivered to the eligible distributor.

Currently, bovine cow’s milk is the only type of milk in surplus being dumped at the farm. Since the program is designed to prevent surplus milk from being dumped at the farm, it is the Secretary’s discretion to limit the DDP to cow’s (bovine) milk.

Program provisions also specify donated dairy products must be in consumer-sized packaging. This provision should be interpreted by the eligible partnership as to whatever consumer-sized package is agreeable to both entities. Examples of consumer-sized packaging include, but are not limited to, gallons of milk, 8-ounce blocks of cheese, single serve containers of yogurt, 1-pound packages of butter, or large bags of milk if the eligible distributor has the ability to dispense (*i.e.*, a soup kitchen). When submitting

period, USDA limited expenditures to approximately 80 percent (\$50 million), consistent with other USDA COVID-19 recovery programs (7 CFR part 9—Coronavirus Food Assistance Program).

⁹ <https://www.fda.gov/food/guidance-documents-regulatory-information-topic-food-and-dietary-supplements/milk-guidance-documents-regulatory-information>.

Plans for approval, the EDO is required to list what types of products it will be donating. The submitted information is checked against the distribution process explained by the eligible distributor to ensure it has the ability to distribute the types of products to be donated.

Program Eligibility and Participation

As explained below, this final rule makes no changes to the program eligibility and participation provisions, except for a modification of the Plan submission requirements designed to lessen the burden on participants.

Section 1147.100 requires an eligible dairy organization must be a member of a partnership whose Plan has been approved by AMS to be eligible for reimbursements under the DDP.

Section 1147.102 outlines requirements for Plan submission in order to be considered for the program. The interim final rule required the EDO to submit a Plan for each partnership. Upon administering the program, AMS found requiring an EDO to submit a separate Plan for each partnership overly burdensome to participants, as the EDO was submitting the same information about its operations on multiple Plans. Allowing Plans to cover multiple partnerships with the same EDO eliminates reporting redundancies, increases efficiencies, and reduces participant burden. Plans must continue to include a signed affirmation regarding the type of product to be donated and the EDO's ability to process and transport eligible dairy products consistent with the requirements in the commodity specifications under § 1147.3.

Along with the Plan submission, eligible distributors are required to submit a signed Certification Form, which includes a description of the eligible distributor's distribution process, contact information, and a tax identification number to ensure compliance with program provisions. AMS has found that details of a particular partnership—the EDO and the eligible distributor—are sufficiently covered in the information provided in the Eligible Distributor Certification Form. Accordingly, this final rule amends the regulations to allow the EDO to submit one Plan to cover all its partnerships and a separate Certification Form for each eligible distributor to AMS.

As specified in § 1147.208, AMS only collects information deemed necessary to determine whether an eligible partnership's Plan should be approved. All proprietary business information submitted is used only for the purposes

of the program and kept confidential by AMS.

Section 1147.104 specifies the process AMS will continue to use to review and approve program applications. Within 15 business days of application submission, AMS reviews the Plan and Certification Form, determines whether to approve or disapprove, and notifies the eligible partnership of the determination. Under § 1147.104(a)(1), AMS reviews the information submitted by the partnership, including the signed affirmation that the partnership can meet the requirements related to proper processing, transport, storage, and distribution of eligible dairy products. Under § 1147.104(a)(2), AMS considers the extent to which the Plan would advance the statutory purposes of the DDP, namely, whether the Plan would facilitate the timely donation of eligible dairy products and prevent and minimize food waste. *See* Sec. 762(b) of the CAA.

Finally, section 762(c)(2)(B)(i) of the CAA specifies that priority review is given to submitted Plans where an emergency or disaster was a substantial factor, including a declared or renewed public health emergency under section 319 of the Public Health Service Act (42 U.S.C. 247(d)) or a disaster designated by the Secretary. In reviewing a Plan, AMS determines if an emergency or disaster was a substantial factor in the Plan's submission. In this case, "substantial factor" means that a supply and/or demand disruption caused by the emergency or disaster event is a main reason for the partnership submitting the Plan. For example, the COVID-19 public health emergency—which caused a significant decrease in school and restaurant dairy demand, leading to large volumes of displaced milk and many people in need of food assistance—could be considered a justification for priority review. If an emergency or disaster is deemed a substantial factor, AMS prioritizes review of that Plan to facilitate donations and meet an immediate need. Section 1147.104(a)(3) incorporates those factors for Plan prioritization.

Once approved, Plans do not need to be resubmitted in subsequent fiscal years, unless changes are made. Eligible partnerships that received reimbursement from the MDRP were automatically enrolled in the DDP when the program was implemented and became eligible to receive the supplemental reimbursement as defined in § 1147.109.

Reimbursement and Reimbursement Price

This final rule makes minor administrative changes to the Reimbursement Claim Form and subsequently the MDRP and DDP regulations, to ensure proper reimbursement rates. This rule continues to find the reimbursement price—the sum of input, transportation, and manufacturing costs—an appropriate reimbursement rate to meet program objectives.

Section 762(d) of the statute requires the Secretary to reimburse EDOs with approved Plans. Section 1147.106(a) provides the process and describes the necessary information and documentation AMS requires to verify the EDO's donation and calculate its reimbursement. To receive reimbursement, the EDO must complete and submit a Reimbursement Claim Form (Claim Form) that includes: the type, volume, and manufactured date of the eligible dairy products donated; the entity type (processor, co-pack facility, distribution center, or eligible distributor); the physical address(es) of the eligible dairy organization's processing plant(s), co-pack facility(ies), and distribution center(s), and the eligible distributor's distribution site(s); the universal product code(s) (UPCs) for donated product(s); the sell-by, best-by, or use-by date(s) for donated product(s); and the dates the donated dairy products were processed and shipped to the eligible distributor.

In administering the DDP since September 1, 2021, AMS learned some EDOs transport donated product to EDO-owned distribution centers before delivering to an eligible distributor as part of their normal business operations. As the DDP was designed to only reimburse for transportation from the last point of ownership by the EDO, obtaining information on a distribution center location, where applicable, is necessary to determine the accurate transportation reimbursement. Accordingly, this final rule adds "distribution center" as an additional entity type to the Claim Form in order to improve data accuracy and ensure proper reimbursement calculations.

There is no requirement dictating the frequency of Claim Form submissions; therefore, any time after its Plan is approved, the EDO can submit Claim Forms for donations made. The EDO also must provide adequate documentation, which should be available through its normal business records, to verify the eligible distributor received the donated eligible dairy products. Such documentation could

include, but is not limited to, processing and shipping records, bills of lading, storage records, or receiving records from the eligible distributor. As specified in § 1147.208, AMS only collects the information and documentation needed to verify the EDO's reimbursement claim.

Section 762(d)(4) of the CAA allows the Secretary to make retroactive reimbursements to EDOs that donate eligible dairy products before their Plans are approved. As provided for in statute, eligible dairy products donated through the MDRP are eligible for supplemental reimbursement through DDP for donations made on or after January 1, 2020. To gain administrative efficiencies and streamline the two programs, donations of eligible dairy products through DDP beginning on the same date were also eligible for reimbursement by the interim final rule. Accordingly, § 1147.106(a)(3) provides for donations of eligible dairy products beginning on January 1, 2020, to be eligible for reimbursement. As described earlier, total reimbursement for donations made from January 1, 2020, through December 27, 2020, was capped at \$50 million by the interim final rule. This cap was implemented to ensure equitable distribution of funds for that time period in case a large number of claims were submitted. Participating entities had 6 months to submit claims for this time period; only 20 claims were received and approximately \$712,000 was reimbursed.

As authorized by section 762(d)(3)(B) of the CAA, AMS may verify the accuracy of supporting documentation with spot checks and audits under § 1147.206.

Under section 762(d)(2)(A) of the CAA, the Secretary shall set a reimbursement price that reflects the cost of the milk required to make the donated eligible dairy product, is between the FMMO Class I and Class IV minimum prices for the month of production, is sufficient to avoid food waste, and does not interfere with the commercial marketing of milk or dairy products. Section 1147.108 provides for reimbursement of three separate cost factors: (1) input cost—fluid milk product or bulk dairy commodity product milk-equivalent cost; (2) manufacturing cost of converting fluid milk into a product; and (3) transportation cost from the EDO to the eligible distributor. Section 1147.108(a) provides that reimbursements are the sum of the three cost factors.

For the first of these factors, input cost, processors purchasing and processing fresh fluid milk products (raw milk, skim milk, cream, or

concentrated fluid products), are reimbursed at the applicable FMMO minimum classified skim and butterfat values. Processors purchasing bulk dairy commodity products for further processing into eligible dairy products are reimbursed at the applicable FMMO minimum classified skim and butterfat values for the fluid milk equivalent contained in the bulk product. This value is determined by the milk's end use (Class I for fluid milk products, Class II for soft products such as yogurt, Class III for cheese products, and Class IV for butter and powder products) pursuant to 7 CFR 1000.40 and the applicable classified price in effect for the month of production pursuant to 7 CFR 1000.50.

The manufacturing cost for processing fluid milk is represented by the applicable FMMO make allowances contained in 7 CFR 1000.50. The DDP uses the FMMO make allowances in the Class III and IV price formulas to reflect manufacturing costs for Class III and IV products, as they are based on surveyed cost data of wholesale Class III and IV products. The Department lacked data on manufacturing costs for Class I and II products. As such, the interim final rule adopted the lowest make allowance, Class IV, as the representative manufacturing costs and requested public comment on manufacturing costs for these classes of products. One comment was received. As explained in the *Background* section, the comment did not include full context on what the cost ranges represented. However, AMS finds it reasonable to conclude from the data submitted that Class I manufacturing costs are higher than the Class IV make allowance currently used. Upon further review, this final rule amends the Class I make allowance to be the average of the Class III and IV make allowances, as the Class I pricing formula is a function of the average of Class III and IV prices. Also discussed earlier, the Class IV make allowance will still apply for Class II products, as the Class II price is a function of the Class IV price. This final rule does not retroactively apply the amended make allowance for Class I products to reimbursements made prior to the implementation of this final rule. The new Class I make allowance will only apply to reimbursement of Class I products submitted after the implementation of this final rule.

As explained in the *Background* section, the program does not reimburse additional processing costs for bulk products purchased and further processed. Processors purchasing bulk dairy commodity products for further processing receive the same

manufacturing cost reimbursement as described above. Processors buy bulk product on a per-pound basis, and it is reasonable to conclude the price paid represented both the fluid milk value (which they are being reimbursed for as described earlier) and the cost to convert the fluid milk into the bulk commodity. Therefore, eligible dairy products made from bulk dairy commodity products are only eligible to receive the manufacturing cost reimbursement applicable to fluid milk.

The transportation cost reimbursement is based on the U.S. monthly average diesel fuel price¹⁰ for the month the donation was made, a fuel economy factor of 6.1 miles per gallon,¹¹ and the shortest hard-surface distance from the last point of EDO-ownership of the product to the eligible distributor's physical distribution location. The final rule clarifies that transportation cost reimbursement is from the last point of EDO-ownership, which does not necessarily mean from the plant where the product was produced. As a normal course of business, some processors transport product to an EDO-owned distribution center before delivering to the eligible distributor. To ensure efficient movements of product and proper application of transportation reimbursement, it is appropriate the EDO only receive reimbursement from the last point of ownership. Transportation reimbursement is only be paid if the EDO incurred the transportation cost, which is verified on audit.

Section 762(h) of the CAA requires the Secretary to make supplemental reimbursements to EDOs receiving reimbursements under the MDRP from January 1, 2020, to the date when DDP program funds are no longer available. AMS recognizes an EDO under MDRP is also eligible under DDP. Further, eligible dairy products under MDRP also qualify as eligible dairy products under DDP (notably, fluid milk products). Since DDP reimburses at a higher rate than MDRP, a supplemental reimbursement is needed to properly use funds for and fulfill the purposes of both programs. Section 1147.109 provides the process AMS follows to make a supplemental reimbursement to EDOs receiving reimbursement under

¹⁰ U.S. Energy Information Administration (EIA), 2022; Gasoline and Diesel Fuel Update for December 5, 2022. <https://www.eia.gov/petroleum/gasdiesel/>, accessed December 9, 2022.

¹¹ United States Department of Transportation, 2021; Combination Truck Fuel Consumption Data. <https://www.bts.gov/browse-statistical-products-and-data/freight-facts-and-figures/combination-truck-fuel-consumption>, accessed August 23, 2021.

MDRP. EDOs with already approved Plans under MDRP were automatically enrolled in DDP when the program was implemented and received supplemental reimbursements equal to the difference they received under MDRP and the reimbursement they would be eligible to receive for the same products under DDP, calculated in § 1147.108. New applicants to the DDP that donate fluid milk products will be automatically enrolled in MDRP. Upon approval, AMS makes reimbursements under the MDRP provisions and then supplemental reimbursements under the DDP provisions.

Administrative Provisions

This final rule continues the administrative provisions without change.

Section 762(g) of the CAA requires AMS to publish donation activity for the program. Accordingly, § 1147.200 provides that AMS periodically reports on its publicly accessible website the aggregated donation activity under this program. Such information includes types and volume of product donated, as well as remaining available funds. Since April 2022, AMS has posted reports quarterly on its website, along with the Plan and Claim Form templates to be submitted for program participation.

Section 762(e) of the CAA prohibits the sale of eligible dairy products donated under the DDP back into commercial markets and specifies that eligible distributors who violate that prohibition will not be eligible for future participation in the DDP. Section 1147.204 implements the statutory prohibition and penalty for violation. In addition, the program prohibits reimbursement for donated eligible dairy products made in conjunction with marketing or promotional events.

Section 762(f) of the CAA directs the Secretary to conduct appropriate reviews or audits to ensure the integrity of the DDP. Under section 762(d)(3)(B) of the CAA, the Secretary is further authorized to verify the accuracy of submitted documentation through spot checks and audits. Section 1147.206 provides that AMS verifies the proper delivery of and payment for donated eligible dairy products. Specifically, AMS ensures the donated eligible dairy products were delivered to the eligible distributor and the accuracy of the reimbursed value paid to the EDO. The section further provides for the review, audit, and spot checks of information submitted.

As mentioned in the above discussions, § 1147.208 requires AMS to maintain confidentiality regarding

information collected to administer the program and to use the information only for program purposes.

A books and records provision is included in § 1147.209 to ensure the EDO maintains necessary records to be made available to AMS upon request in conjunction with an audit.

Section 1147.210 specifies that dairy products sold or donated under any other USDA commodity purchase or donation program, other than the MDRP, are not eligible for reimbursement under the DDP. From time to time, USDA may purchase dairy products for use in nutrition assistance programs or other uses, but vendors are compensated for those purchases through funding under those program provisions. One of the main purposes of the DDP is to reduce food waste by encouraging the donation of additional dairy products through eligible distributors. Thus, EDOs who received compensation for dairy product purchases under other USDA programs may not receive reimbursements for the same dairy products under the DDP.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35), AMS has requested approval of updated information collection and recordkeeping requirements for the DDP. AMS received no public comments on the Office of Management and Budget (OMB)-approved information collection portion of the interim final rule. AMS is now making three minor changes (described below) to lessen the burden on participants and increase administrative efficiencies.

Title: Dairy Donation Program Final Rule.

OMB Number: 0581-0327.

Expiration Date of Approval: Pending.

Type of Request: Approval of Updated Information Collection.

Abstract: The Consolidated Appropriations Act of 2021 (CAA) mandated establishment of a Dairy Donation Program (DDP) to reimburse eligible dairy organizations (EDO) for milk used to make eligible dairy products donated to non-profit groups for distribution to recipient individuals and families. Under the program, EDOs account to a Federal milk marketing order (FMMO) by filing a report with an FMMO. Entities not already filing an FMMO report will be required to submit a Report of Receipts and Utilization. The information collection burden is being changed to allow the report to be submitted once rather than every month donated products are manufactured as was originally implemented.

All EDOs must submit a Dairy Donation and Distribution Plan (Plan) outlining their partnership(s) and products to be donated and, for each eligible distributor partner, an Eligible Distributor Certification Form (Certification Form) describing the process of transporting, storing, and distributing eligible product to an eligible distributor. Once approved, the EDO can file a Reimbursement Claim Form (Claim Form) to receive reimbursement for the donated eligible dairy products. Since the final rule allows for EDOs to include multiple partnerships on one Plan, whereas the interim final rule required EDOs to submit one Plan per partnership, the number of responses and reporting burden for the Plan will decrease. Further, due to this same change, the number of responses and reporting burden for the Claim Form will decrease because the EDO will no longer need to submit separate Claim Forms for each partnership.

Dairy Donation and Distribution Plan

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Eligible dairy organizations.

Estimated Number of Respondents: 150.

Estimated Number of Responses: 150.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 150 hours.

Eligible Distributor Certification Form

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 15 minutes per response.

Respondents: Eligible distributors.

Estimated Number of Respondents: 300.

Estimated Number of Responses: 300.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 75 hours.

Reimbursement Claim Form

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 2 hours per response.

Respondents: Eligible dairy organizations.

Estimated Number of Respondents: 150.

Estimated Number of Responses: 600.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 1,200 hours.

Report of Receipts and Utilization

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Eligible dairy organizations.

Estimated Number of Respondents: 15.

Estimated Number of Responses: 15.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 15 hours.

Comments: No comments were received on the information collection in the interim final rule.

In the interim final rule, AMS estimated 150 respondents would form 2 partnerships on average for a total of 300 partnerships. In the first fiscal year of program operation, there were approximately 120 respondents that formed 280 partnerships.

Each EDO is required to submit a Plan, which can cover multiple partnerships with that EDO, and a Certification Form for each eligible distributor partner. These forms only need to be submitted once; there will not be an annual renewal requirement. AMS estimates 1 hour to complete a Plan. Accompanying the Plan, the EDO will be required to complete a Certification Form, which AMS anticipates will take 15 minutes.

AMS estimates 10 percent of the 150 EDO participants do not already account to an FMMO by filing a report.

Therefore, approximately 15 respondents will need to account to an FMMO by filing a Report of Receipts and Utilization Form. All other EDOs have accounted to an FMMO through their normal report filing based on their existing association with an FMMO. AMS estimates 1 hour to complete the form. Filing of this form will not cause an EDO to become regulated by an FMMO.

Claim Forms can be submitted any time after Plan approval and will be processed on at least a quarterly basis. AMS estimated that to capture efficiencies respondents will submit Claim Forms no more than once per quarter and it will take 2 hours to complete the form per quarter.

Assuming the reporting burden will be completed by an administrative assistant employee, at an hourly salary rate of \$21.70¹², AMS estimates the

following annual reporting costs per participant, assuming two eligible distributor partners per EDO: for the first year of participation, the annualized cost is \$206.15 (one Plan, two Certification Forms, and four Claim Forms); for the subsequent years of participation, the annualized cost is \$173.60 (four Claim Forms). Entities needing to account to an FMMO by filing a Report of Receipts and Utilization Form will experience an additional annual burden of \$21.70 in the first year only (one response). EDOs also are required to maintain books and records for 3 years to be made available to AMS upon request in conjunction with an audit to verify the donations the EDO received reimbursement for were made. These records are part of normal business records and do not require additional records to be created. Such records include production records to verify yield computations and product code dates for donated manufactured products, or delivery documentation to verify the EDO incurred a transportation expense.

E-Government Act

USDA is committed to complying with the E-Government Act (44 U.S.C. 3601, *et seq.*) by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. Forms can be found at <http://www.ams.usda.gov/ddp> and filed through email at ddp@usda.gov.

Statutory and Regulatory Authority

Section 762 of the Consolidated Appropriations Act of 2021 mandates that AMS establish and administer a Dairy Donation Program (7 CFR part 1147). The program is intended to facilitate the timely donation of eligible dairy products and prevent and minimize food waste.

Executive Orders 12866 and 13563

USDA is issuing this rule in conformance with Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health,

and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. AMS has determined this action, mandated by Congress, meets the requirements set forth in the Consolidated Appropriations Act of 2021 to facilitate donation of eligible dairy products and prevent and minimize food waste.

The interim final rule sought public comment on the economic impacts of this action on the industry, including availability of information or data that may demonstrate if and how DDP reimbursements affect the market. As discussed earlier, AMS received four comments, of which three were germane to this rulemaking. One comment was received on manufacturing costs for Class I and II products. Another comment requested additional flexibility concerning reporting requirements. One additional comment expressed support of the positive economic impact the program has on the dairy industry and consumers alike.

Regarding regional economic differences, AMS considered alternative methods for allocating available funds under the program, including whether to allocate reimbursements equally across all the geographic areas of the United States or to target specific regions in need of milk donations. Ultimately, AMS determined that because the program's primary purpose is to reduce waste associated with the disposition of surplus milk, the industry would be best served by allowing those with the capacity to process surplus milk and who are in a position to make donations to apply for the program without consideration of geographic location.

AMS continues to find that this rule does not have any quantified cost or benefits, rather the rule results in transfers consistent with the following table, adjusted from the interim final rule with actual expenditures during the first fiscal year of program operation and accordingly, an expanded range for the time period covered. As participants become more accustomed to the program and due to the decreased burden for participants in subsequent years after their Plans are approved, AMS reasonably expects the transfer value to increase 25 percent, year-over-year, for the first 7 years, and held constant in the out years.

¹² Mean hourly wage for a bookkeeping, accounting, and auditing clerk in 2021, according

to the Bureau of Labor Statistics: <https://www.bls.gov/oes/current/oes433031.htm>.

TABLE 1—ACCOUNTING STATEMENT

	Primary estimate	Year dollar	Discount rate (%)	Period covered
Benefits—				
Annualized Monetized (\$millions/year)	0	2022	7	FY 2022–2038
	0	2022	3	
Costs—				
Annualized Monetized (\$millions/year)	0	2022	7	FY 2022–2038
	0	2022	3
Transfers—From the Federal Government to an eligible partnership				
Annualized Monetized (\$millions/year)	\$21.04	2022	7	FY 2022–2038
	\$21.84	2022	3	

As the program is voluntary, eligible partnerships are expected to participate if they deem it beneficial depending on their individual circumstances. The transfers will be reimbursements in the form of Federal payments to program participants to help offset costs associated with eligible dairy product donations.

In the normal course of transporting, delivering, and processing milk, a small volume of milk is “lost” each month. In the FMMO system, “normal losses” are estimated to be 0.25 percent of the total participating milk annually. Under certain conditions, an additional volume of milk cannot make it to market due to extraordinary circumstances, such as extreme weather, plant capacity issues, and market disruptions. This volume above “normal losses” is identified as “excess losses” in this analysis.

According to FMMO statistics, “excess losses” averaged 0.08 percent of the annual volume of milk participating in the FMMO program from 2015 through 2019, excluding the outlying pandemic-influenced years of 2020 and 2021. During these years, the COVID–19 pandemic resulted in higher levels of milk not making it to market, amounting to 0.32 and 0.27 percent, respectively, of the milk that participated in the FMMO program. In the interim final rule, AMS included 2020 in the “excess loss” average, but 2020 distorted the value, leading to an overestimate of the amount of milk available to be made into donated products for normal years. In conducting an economic analysis, AMS presumed milk classified as “excess losses” could be made into eligible dairy products and donated under the DDP.

To estimate the volume of excess milk potentially donated under the program in this final rule, a 5-year average rate of 0.08 percent for 2015–2019 period is applied to the projected 2023 U.S. milk production volume. Under this assumption, approximately 183 million

pounds of milk would be available for dairy processors to make into eligible dairy products for donation to eligible distributors. As in the interim final rule, AMS lacks data to estimate the amount of bulk commodity product available for secondary processors to purchase and further process into eligible dairy products for donation to eligible distributors, so that scenario is not considered in the economic analysis.

AMS estimated the amounts of butterfat and skim solids in the forecasted product volumes available for donation. The product mix includes fluid milk, soft products, cheese, butter, and nonfat dry milk powder volumes, based on the volume of available dairy farmer milk. The set of products utilizes nearly all the butterfat and skim solids present in the milk available for donation. In the case of butter and nonfat dry milk powder, both products can be made from a given amount of milk. Butter requires a large amount of butterfat, while powder utilizes very little butterfat but a large amount of the nonfat solids.

The DDP reimburses EDOs for eligible dairy product donations for the input cost paid for the fluid milk or bulk dairy commodity product, manufacturing cost, and transportation cost. In the interim final rule, AMS estimated the maximum annual reimbursement value given the program’s parameters that total reimbursement must be between the highest FMMO Class I value (Dade County, Florida) and the Class IV value (assumed the lowest classified value). Using the same methodology, AMS estimates a maximum reimbursement value of \$63 million, using forecasted 2023 FMMO class prices and volume available for donation based on the .08 percent excess loss assumption and USDA’s November 2022 *World Agricultural Supply and Demand Estimates* (WASDE).

In practice, AMS expects actual reimbursement expenditures to be lower. During the first year of operation,

DDP expended \$5,834,353,¹³ representing 22,562,669 pounds of donated dairy products (equivalent to 27,576,312 milk pounds). Therefore, for this final rule, AMS determines it more appropriate to estimate annual DDP expenditures based on actual spending. Accordingly, expenditures are estimated to be 125 percent of the previous year and held constant after 7 years. This is a reasonable assumption given reduced participant burden and increased awareness and familiarity with the program is expected to increase participation.

In addition, normal fluctuation in market prices may contribute to increased donations in times of low milk prices, and subsequently higher program expenditures. For example, it is normal for excess milk to be made into storable products such as butter. Relatively high butter prices in 2022 indicated a tight butter market resulting in excess milk made into butter to be sold in the marketplace instead of donated through the DDP. USDA expects butter prices to be lower in 2023, as compared to 2022, due to weaker demand and lower international prices, thus increasing DDP expenditures as the possibility rises that surplus milk used for butter is made available for donation.

As described above, AMS estimates that 183 million pounds (0.08 percent of projected 2023 production) of excess milk could be available to be processed and donated through the DDP. Consequently, AMS does not anticipate this small additional processing volume will impact milk prices. AMS anticipates dairy processors already donating dairy products to non-profit feeding organizations will become eligible for reimbursement through DDP. These donations are not new production

¹³ This figure represents Reimbursement Claims submitted in the first year of DDP operation (October 1, 2021, through Sept 30, 2022), for product donated from January 1, 2020, to September 30, 2022.

volume to be priced as they represent dairy products already processed and priced somewhere in the dairy supply chain. The DDP does not intend to reimburse for the full cost of processing and delivering donated dairy products but rather encourages excess milk to be used.

This program is expected to have a negligible impact on retail dairy product

sales. Typically, populations that receive dairy products from non-profit feeding organizations do so when they cannot buy dairy products at retail outlets. Since the DDP reimbursement rate does not cover all processing and transportation costs it is not a financially prudent decision to divert milk from retail outlets to donations.

The following table provides examples of costs included and excluded from reimbursement under the DDP. This is not an all-inclusive listing but is intended to demonstrate how dairy product donations through this program are not expected to be a substitute for retail dairy product sales.

TABLE 2—EXAMPLES OF COSTS INCLUDED AND EXCLUDED

Cost factor	Includes	Does NOT include
Input	<ul style="list-style-type: none"> Minimum classified price of milk used in the donated eligible dairy product. 	<ul style="list-style-type: none"> Any contractually obligated monies, over the minimum classified value, due to producers. Assessments for promotion and research programs, if applicable.
Manufacturing	<ul style="list-style-type: none"> Applicable FMMO manufacturing make allowance, representative of the following costs: <ul style="list-style-type: none"> Processing Labor Utilities Non-Labor General and Administrative Packaging into a commodity volume 	<ul style="list-style-type: none"> Additional ingredient costs (i.e., fruit for fruit-flavored yogurt). Storage and inventory costs. Costs of participating in the mandatory Dairy Product Mandatory Reporting Program.
Transportation	<ul style="list-style-type: none"> Fuel: Shortest hard surface mileage * monthly diesel price * 6.1 miles per gallon. 	<ul style="list-style-type: none"> Vehicle maintenance. Vehicle depreciation. Licensing and other administrative fees.

In addition, DDP is a voluntary program and reimbursements occur after donations are made. Donations made through this program are made privately without donation volumes being announced in advance, reducing the impact on dairy markets compared to making advanced announcements on expected donation volume.

Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612), AMS has considered the economic impact of the action on small entities. Accordingly, AMS prepared this Regulatory Flexibility Analysis (RFA).

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so small businesses will not be unduly or disproportionately burdened. Small dairy farms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those businesses having annual gross receipts of \$3.75 million or less. The SBA’s definition of small agricultural service firms, which includes dairy processors, varies based on the type of dairy product manufactured. Small dairy processors are defined as having between 750 and 1,250 or fewer employees depending on the products made.

According to the 2017 USDA National Agricultural Statistics Service (NASS) Census Report, the most recent report,

there were 39,303 farms with milk sales. AMS estimates 36,158 farms, or 92 percent, are considered small businesses. Dairy farmers of all sizes may benefit from the program as it encourages donations of dairy products which contain milk purchased from them. DDP is designed to reduce food waste by providing alternative outlets for milk to be utilized in donated products instead of being dumped due to oversupply. Often milk is dumped from smaller dairy farms that are more costly to service because their pickups may be less than a full tanker load and/or they may be located farther from major trucking routes. By providing cost reimbursement for donated products, the DDP incentivizes processors to pick up and process the milk into products for donation rather than having it dumped.

AMS estimates approximately 3,000 plants, owned by approximately 1,500 entities, manufacture dairy products in the United States. According to AMS calculations, about 10 percent are operated by dairy farmer cooperatives, while the remaining are independently owned. AMS believes 1,500 to be the universe of EDOs that could participate in the DDP. Of the potential EDOs, 90 percent would be considered small businesses based on total employee numbers.

Participating in the DDP will not unduly or disproportionately burden small dairy processing entities. All

entities, regardless of size, can apply for the program if they file a report with an FMMO and incur a qualified expense as defined by program provisions. Program provisions are administered without regard to business size. The paperwork required to participate asks for information that is part of normal business records.

The definition of an eligible distributor is a public or private non-profit feeding organization that distributes or coordinates distribution of donated eligible dairy products to recipient individuals and families. Eligible distributors, regardless of size, can voluntarily participate in the DDP if they form a partnership with an EDO. The information collection burden for eligible distributors is minimal as they must only complete the Certification Form with the partnering EDO. The voluntary nature of the program allows any eligible distributor to stop participating if they find the program causes an undue or disproportionate burden.

AMS has determined this program does not have a significant economic impact on small entities. Program provisions are applied uniformly to both large and small businesses and are not expected to burden small entities unduly or disproportionately.

Executive Order 13175

In the interim final rule, AMS assessed the impact of this program on

Indian Tribes and determined it would not have Tribal implications requiring consultation under Executive Order 13175. Since the final rule does not include any changes affecting Tribal implications of the DDP, additional review is not necessary. Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on: (1) policies that have Tribal implication, including regulation, legislative comments, or proposed legislation; and (2) other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

Tribal governments operating non-profit organizations feeding recipient individuals and families can qualify as eligible distributors and thus benefit from participation in the DDP. The regulatory burden from participating is minimal, estimated at 15 minutes for completing an Eligible Distributor Certification Form.

AMS hosts a quarterly teleconference with Tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about the final rule will be shared in an upcoming quarterly call. AMS will continue to work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided as needed with regards to the DDP.

Executive Order 12988

The interim final rule was reviewed under Executive Order 12988—Civil Justice Reform. Since the final rule does not include any changes affecting the civil justice implications of the DDP, additional review is not necessary. This final rule may have a retroactive effect. Claims submitted after the effective date of this final rule for donations made starting January 1, 2020, are eligible for reimbursement under this rule's amended provisions if the eligible partnership's Dairy Donation and Distribution Plan is approved and if the partnership met all other program requirements. Dairy donations made prior to 2020 are not eligible for reimbursement under the program. The provisions amended by this final rule are not retroactive to Claims already submitted and processed prior to this rule's effective date. There are no administrative procedures that must be exhausted prior to judicial challenges to the provisions of this rule. The DDP does not preempt any state or local

laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

Civil Rights Review

AMS considered the potential civil rights implications of this rule on minorities, women, and persons with disabilities to ensure no person or group shall be discriminated against on the basis of race, color, national origin, gender, religion, age, disability, sexual orientation, marital or family status, political beliefs, parental status, or protected genetic information. This review included persons that are employees of the entities who are subject to these regulations. This final rule does not require affected entities to relocate or alter their operations in ways adversely affecting such persons or groups. Further, this rule does not deny any persons or groups the benefits of the program or subject any persons or groups to discrimination.

AMS found no evidence this voluntary program and the associated final rule causes adverse or disproportionate impacts on minorities, women, and persons with disabilities. The AMS analysis found no evidence of potential impacts affecting dairy farmers or processors in any protected groups, or that these impacts will be different than any participating general population of dairy farmers and processors.

Executive Order 13132

AMS examined the effects of provisions in this final rule on the relationship between the Federal Government and the States, as required by Executive Order 13132 on "Federalism." The DDP reimburses EDOs for eligible dairy products donated to eligible distributors. The DDP does not preempt any State or local laws, regulations, or policies pertaining to the sale, manufacturing or distribution of milk or dairy products within States.

List of Subjects

7 CFR Part 1146

Milk, Donations, Reporting and recordkeeping requirements.

7 CFR Part 1147

Dairy, Donations, Food waste, Emergency, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR chapter X is amended as follows:

PART 1146—MILK DONATION REIMBURSEMENT PROGRAM

■ 1. The authority for part 1146 continues to read as follows:

Authority: Sec. 1431, Pub. L. 113–79, 128 Stat. 695, as amended.

■ 2. Amend § 1146.102 by revising paragraph (a) to read as follows:

§ 1146.102 Dairy donation and distribution plans.

* * * * *

(a) The physical address(es) of the eligible dairy organization's processing plant(s), co-pack facility(ies), and distribution center(s), and the eligible distributor's distribution site(s);

* * * * *

■ 3. Amend § 1146.106 by revising paragraph (a)(1)(ii) to read as follows:

§ 1146.106 Reimbursement Claims.

(a) * * *

(1) * * *

(ii) The physical address(es) of the plant(s) or co-pack facility(ies) that processed and, if applicable, distribution center(s) that stored the donated dairy products;

* * * * *

PART 1147—DAIRY DONATION PROGRAM

■ 4. The authority for part 1147 continues to read as follows:

Authority: Sec. 762, Pub. L. 116–260, 134 Stat. 1182.

■ 5. Amend § 1147.102 by revising paragraph (a) to read as follows:

§ 1147.102 Dairy donation and distribution plans.

* * * * *

(a) The physical address(es) of the eligible dairy organization's processing plant(s), co-pack facility(ies), and distribution center(s), and the eligible distributor's distribution site(s);

* * * * *

■ 6. Amend § 1147.106 by revising paragraph (a)(1)(ii) to read as follows:

§ 1147.106 Reimbursement Claims.

(a) * * *

(1) * * *

(ii) The physical address(es) of the plant(s) or co-pack facility(ies) that processed and, if applicable, distribution center(s) that stored the donated dairy products;

* * * * *

■ 7. Amend § 1147.108 by revising paragraphs (a)(2)(i) and (a)(3)(iii) to read as follows:

§ 1147.108 Reimbursement calculation.

(a) * * *

(2) * * *

(i) If a Class I product, the simple average of the Class III and Class IV manufacturing allowances applies;

* * * * *

(3) * * *

(iii) The fuel economy rate of 6.1 miles per gallon.

* * * * *

§ 1147.212 [Removed]**■ 8. Remove § 1147.212.****Erin Morris,**

Associate Deputy Administrator, Agricultural Marketing Service.

[FR Doc. 2023–18148 Filed 8–23–23; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION**10 CFR Parts 1, 2, 26, 32, 40, 50, 51, 52, 72, and 73**

[NRC–2022–0216]

RIN 3150–AK92

Miscellaneous Corrections**AGENCY:** Nuclear Regulatory Commission.**ACTION:** Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to make miscellaneous corrections. These changes include updating organizational information, revising an address, and correcting reference, spelling, and grammatical errors. The amendments also make updates to replace gendered terms with inclusive, gender-neutral language. This document is necessary to inform the public of these non-substantive amendments to the NRC's regulations.

DATES: This final rule is effective on September 25, 2023.

ADDRESSES: Please refer to Docket ID NRC–2022–0216 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2022–0216. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: Dawn.Forder@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC's Agencywide Documents Access and Management System*

(ADAMS): You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to PDR.Resource@nrc.gov.

- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Krupskaya Castellon, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–287–9221, email: Krupskaya.Castellon@nrc.gov.

SUPPLEMENTARY INFORMATION:**Table of Contents**

- I. Introduction
- II. Summary of Changes
- III. Rulemaking Procedure
- IV. Backfitting and Issue Finality
- V. Plain Writing
- VI. National Environmental Policy Act
- VII. Paperwork Reduction Act
- VIII. Congressional Review Act
- IX. Compatibility of Agreement State Regulations

I. Introduction

The NRC is amending its regulations in parts 1, 2, 26, 32, 40, 50, 51, 52, 72, and 73 of title 10 of the *Code of Federal Regulations* (10 CFR). The NRC is making these amendments to update organizational information, revise an address, and correct reference, spelling, and grammatical errors. This rule also makes updates to replace gendered terms with inclusive, gender-neutral language.

II. Summary of Changes*10 CFR Part 1*

Update Organization and Functions. In § 1.42 concerning the Office of Nuclear Material Safety and Safeguards, this final rule revises the introductory text for paragraph (b)(26). The rule also revises paragraph (b)(30) to list financial assurance activities and adds a new paragraph (b)(33) to list duties for environmental activities. This final rule updates the regulations to align more closely with Commission direction in SRM–SECY–15–0143, “Project Aim and Centers of Expertise,” dated February 22, 2016 (Agencywide Documents

Access and Management System ML16053A500) regarding Centers of Expertise.

Update Organizational Functions. In § 1.43, this final rule moves responsibility for review and evaluation related to reactor facilities insurance, indemnity, and antitrust matters from the Office of Nuclear Reactor Regulation to the Office of Nuclear Material Safety and Safeguards.

10 CFR Part 2

Revise Nomenclature. This final rule revises 10 CFR part 2 to replace gendered terms with inclusive, gender-neutral language.

Correct Reference. In § 2.1202(a)(1), this final rule removes the incorrect reference to 10 CFR 50.12 and replaces it with the correct reference 10 CFR 50.10.

10 CFR Parts 26, 50, 52, and 73

Revise Street Address. This final rule amends §§ 26.11, 50.4(a), 52.3(a), and 73.4(b) to add the mailing zip code for the hand delivery method for communications.

10 CFR Part 32

Correct Reference. In 10 CFR 32.72(a)(2)(i), this final rule removes the incorrect reference to 21 CFR 207.20 and replaces it with the correct reference 21 CFR 207.17(a).

10 CFR Part 40

Correct Spelling. This final rule amends Appendix A to part 40 to remove the text “meterology” and add in its place the text “meteorology.”

10 CFR Part 50

Correct Typographical Error. This final rule removes a duplicative phrase in the introductory text of § 50.55a(b)(2)(xlili).

Correct Reference. This final rule reverts an inadvertent change to a reference in Appendix H paragraph III.B.1 that occurred during a direct final rulemaking (85 FR 62199) by removing the incorrect reference to ASTM E 185 and replacing it with ASTM E 185–82.

10 CFR Part 51

Correct Reference. In § 51.77(a), this final rule removes the incorrect reference to appendix M and replaces it with the correct reference subpart F.

10 CFR Part 72

Correct Spelling. This final rule amends § 72.3 to remove the text “radioactive” and add in its place the text “radioactive.”