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April 8, 2005

Ms. Kathleen M. Finn
United States Department of Agriculture
Marketing Order Administration Branch, Fruit and Vegetable Programs
1400 Independence Avenue SW
Stop 0237
Washington, DC 20250-0237

Re: Nectarines and Peaches Grown in California; Hearing on Proposed Amendment of Marketing Agreement Nos. 124 and 85 and Order Nos. 916 and 917, 70 Fed. Reg. 4041 (January 28, 2005)

Dear Ms. Finn:

The Center for Progressive Regulation (CPR), a nonprofit organization of scholars with expertise in regulatory issues, submits these comments in opposition to the proposed amendments to the Nectarine and Peach Marketing Orders. The direct economic effect of proposed changes, if implemented, would not only be inimical to consumer well-being, they would also have an adverse effect on the health of low-income consumers. As importantly, the indirect effects of the proposal on the health of farmworkers and their families and on the environment generally has not been evaluated and, if not evaluated, will not be properly considered in the decisionmaking process.

CPR is an organization of academics specializing in the legal, economic, and scientific issues surrounding federal regulation. CPR supports regulatory action to protect health, safety, and the environment and seeks to inform policy debates on these issues through research and commentary.

The Nectarine and Peach proposal under consideration by USDA is the result of a procedure under which a task force established by two committees composed primarily of representatives of large growers who have an economic interest in keeping the prices of those fruits up by restricting supplies of those fruits. Although the putative purpose of the proposal is to enhance the quality of marketed fruit, the proposal would have the effect of limiting marketable supplies of California peaches and nectarines by imposing stringent standards for cosmetic appearance of individual pieces of fruit. While this would have the advantage of ensuring "pretty" fruit that might (or might not) be more attractive to high-end domestic consumers and consumers in foreign companies, it would force growers to destroy perfectly wholesome and edible "utility grade" fruit. It would also provide an incentive to all growers to increase the use of pesticides for purely cosmetic purposes, and this would result in the needless exposure of farmworkers, their families and the environment to toxic chemicals.

At the outset, it is not at all clear that high-end consumers, either in the United States or abroad, have a strong preference for blemish-free fruit. For example, although organically grown fruit is typically not blemish-free, it usually commands a higher price than conventionally grown fruit. This strongly suggests that appearance is not what is determining the purchasing decisions of the consumers who have the money to pay for higher priced organic fruit. Indeed, it is likely that the orders under consideration in these proceedings will limit the availability of organic fruit and thereby drive those prices even higher.

Regulatory theory teaches that government-sanctioned cartels are created precisely for the purpose of maintaining prices at higher than market-determined levels by limiting supplies of the relevant commodities. Economist Roger Noll, for example, notes that “marketing orders for controlling supplies of some agricultural commodities . . . convert a competitive market into one in which sellers have considerable bargaining power.”^a Other economists bluntly describe marketing orders as “cartels [that] use quantity controls and quality standards to raise prices of fresh produce.”^b It cannot credibly be denied that a powerful direct effect of the orders under consideration will be to keep the price of fruit higher than it would otherwise be.

The orders under consideration will directly limit the amount of “utility grade” peaches and nectarines that is available for purchase by consumers who do not care whether the tasty and nutritious fruit that they buy is cosmetically pure. Just last January, USDA and the Department of Health and Human Services released the new “Dietary Guidelines for Americans 2005,” which were intended to “provide science-based advice to promote health and to reduce risk for major chronic diseases through diet and physical activity.”^c The Guidelines specifically recommended that individuals consume “a sufficient amount of fruits and vegetables while staying within energy needs.” For a person using 2000 calories per day, the Guidelines recommend at least two cups of fruit per day.^d

It is supremely ironic that at the same time USDA is with one breath urging all consumers to eat two cups of fruit per day, it is with the next breath taking regulatory action to limit the amount of low cost utility grade fruit that is available to low income consumers. At the same time that USDA is urging healthier diets to confront the obesity epidemic, it is proposing to keep healthy fruit out of the reach of low income consumers. The rule will disadvantage the poor for the benefit of wealthy growers and perhaps a few rich consumers who cannot be bothered to pick out sufficiently unblemished fruit from the produce shelf. This is not just wrong headed, it is just plain wrong.

The proposal will also predictably have adverse effects on human health and the environment. The Creator does not make all fruit unblemished. In the natural state of the world, fruit attracts fungi that can cause discoloration and even damage the skin. These fungi can be removed, and the discoloration and damage do not necessarily render the fruit inedible. To raise fruit that are not damaged by fungi, growers have to create an unnatural state of the world in which fungicides are used to reduce the incidence of blemished fruit. Fungicides are toxic chemicals. They are designed to kill living organisms. They can also kill and injure wildlife and human beings.

^a Handbook for Reform: Breyer on Regulation, 83 Colum. L. Rev. 1108, 1113 n.12 (1983).

^b Darren Filson, Edward Keen, & Thomas Borchering, Market Power and Cartel Formation: Theory and an Empirical Test, 44 J. Law & Econ. 465 (2001).

^c USDA/HHS, Dietary Guidelines for Americans 2005, Executive Summary (2005), available at <http://www.health.gov/dietaryguidelines/dga2005/document/html/executivesummary.htm>.

^d Id.

One human population that is especially at risk consists of the farmworkers who apply the fungicides and harvest the crops. It is well known that field workers can bring fungicides home with them on their clothing and thereby expose their families to the same chemicals. Agricultural pesticides are also notorious for causing adverse effects on plants and wildlife in the environment. There is no indication whatsoever in the *Federal Register Notice* initiating these proceedings that USDA plans to engage in even a rudimentary analysis of the indirect health consequences of the predictable increase in pesticides that will result from the implementation of this proposal.

The National Environmental Policy Act provides that "to the fullest extent possible" all agencies of the federal government "shall . . . include in every recommendation or report on proposals for major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on" the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that the action would entail.^e The Council for Environmental Quality, which was created by NEPA, has promulgated regulations that are binding on all federal agencies, including the Department of Transportation and the FMCSA.^f

The CEQ regulations provide that federal agencies "shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."^g The regulations require agencies to prepare an "environmental assessment" providing "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact."^h The preamble to the proposed rule here makes no mention of an environmental assessment or any finding of no significant impact (FONSI). Since it is clear that the proposal will have indirect impacts on human health and the environment, a full-fledged environmental impact statement is required absent an adequately supported FONSI. Either an EIS or a FONSI should, in fact, have accompanied the proposal so that the public could have commented on those impacts. It will not be sufficient for the agency to publish a post hoc FONSI for which public comment would be superfluous.

In sum, this ill-considered proposal will benefit very few, if any, consumers, and it will directly harm low-income consumers at the same time that it cause perhaps irreversible damage to human health and the environment. All of these consequences will flow from the perceived, but undocumented desire of Japanese consumers for unblemished fruit and the understandable, but entirely illegitimate desire of large growers for higher prices than the market would otherwise dictate. USDA should withdraw the proposal and allow the markets in peaches and nectarines to function as they have in the past.

Sincerely,

Thomas O. McGarity
President
Center for Progressive Reform

^e 42 U.S.C. § 4332(2)(C).

^f 40 C.F.R. §§ 1500, et seq.

^g 40 C.F.R. § 1501.2.

^h 40 C.F.R. § 1508.9.