EXHIBIT 4
DATE 2-11-15
HB 397

BEFORE THE MONTANA DEPARTMENT OF LIVESTOCK

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In the matter of the amendment of ARM 32.8.101 and 32.8.202 pertaining to grade A pasteurized milk and time from processing that fluid milk may be sold for public consumption	)))))	**HEARING EXAMINER'S PROPOSED DECISION**

Pursuant to Mont. Code Ann. §§ 2-4-302 and 315, the hearing examiner presided over an evidentiary hearing in this rulemaking proceeding and issues this proposed decision for review and consideration by the Montana Board of Livestock.[1]

The evidentiary hearing in this matter was conducted over a period of six days: March 3, 4, and 5, 2010, April 26 and 27, 2010, and November 15, 2010. Following conclusion of the hearing, the parties submitted briefs and proposed findings of fact and conclusions of law. The final brief in this matter was submitted on August 8, 2011.

The Petitioner in this proceeding is Core-Mark International, Inc. (Core-Mark), represented by William K. VanCanagan and Trent N. Baker of the law firm of Datsopoulos, MacDonald & Lind, P.C., of Missoula, Montana. The position advocated by Core-Mark is also supported by Friends of Montana Retailers and Consumers, Inc. (Friends), represented by Timothy M. Bechtold of the Bechtold Law Firm, PLLC, Missoula, Montana. The Respondents include the Montana Department of Livestock (Department), represented by Norman C. Peterson of the Agency Legal Services Bureau of the Montana Department of Justice; the Montana Milk Producers Association (MMPA), represented by Mark D. Meyer of the law firm

[1] Under the Executive Reorganization Act of 1971, Mont. Code Ann. § 2-15-3101, the Board of Livestock is the Director of the Department of Livestock.

of Ugrin, Alexander, Zadick & Higgins, P.C., of Great Falls, Montana; and Dean Foods, d/b/a Meadow Gold Dairies (Meadow Gold), represented by Jock O. Anderson of the law firm of Gough, Shanahan, Johnson & Waterman, PLLP, of Helena, Montana. At one time, Country Classic Dairies, Inc. (Country Classic) was a Respondent; however, Country Classic withdrew as a party to the proceeding on August 11, 2010, as a result of Country Classic's merger with Northwest Dairy Association, Inc. Although not a party to this proceeding, the positions advocated by Core-Mark and Friends are supported by testimony of a number of witnesses employed by Darigold, which is a dairy processor owned by Northwest Dairy Association. Darigold operates a milk processing plant in Spokane, Washington, and Core-Mark distributes products produced by Darigold's Spokane plant in the State of Montana.

THE SUBJECT MATTER OF THIS PROCEEDING: MONTANA'S 12-DAY RULE

This proceeding deals with rules first adopted by the Montana Board of Livestock in 1980 "concerning the dating of milk containers for freshness." 11 Mont. Admin. Register 1603 (June 12, 1980). The rules in question are codified in Sub-Chapter 2 of Chapter 8, Title 32 of the Administrative Rules of Montana, which is entitled "Milk Freshness Dating." In the first rule, designated ARM 32.8.202, the Board determined that grade A milk may not be sold or otherwise offered for public consumption more than 12 days after the milk has been pasteurized. The second rule, which deals with the labeling of milk containers to show the "last day of legal sale," requires that grade A pasteurized milk must be marked with a "sell-by" date showing the last day on which the milk may be sold. Together, these rules require that grade A milk sold in Montana must be labeled with a "sell-by" date 12 days after the date of

pasteurization, and retail sellers of grade A milk must remove that milk from their shelves upon expiration of the 12-day "sell-by" date. These rules are known as the Montana 12-day rule.[2]

THE BACKGROUND CONCERNING CORE-MARK'S CHALLENGE TO THE 12-DAY RULE

In 2002, Inland Northwest Dairies, a Darigold milk processor, requested that the Department allow "dual dating" of milk produced in Inland's Spokane plant for distribution into western Montana. This request was granted by the Department, on the condition that Inland abide by the 12-day rule for milk sold in Montana. The effect of the agreement was that Inland's milk would be allowed to bear two code dates: one used by Inland for milk sales in states other than Montana and the Montana 12-day "sell-by" date. *See* Core-Mark Exhibits 6 and 8. Under the agreement, the Department required that "Montana retailers must be aware that it is their responsibility to make sure the dairy products offered for sale in their stores meet the Montana date code requirement and that the Washington State date code does not apply." Core-Mark Exhibit 8.

In 2008, the Board of Livestock rescinded the exemption granted to Inland and required, instead, that all milk offered for sale in Montana must meet the requirements of the Montana 12-day rule. Core-Mark Exhibit 10. At the time, the wholesale distribution of Inland's milk products to Montana retailers was being handled by Core-Mark, a Spokane-based wholesale distributor.

In response to the Board's revocation of the "dual-dating" exemption, Core-Mark filed suit against the Department in federal district court. In this lawsuit, Core-Mark requested, among other things, that the Montana 12-day rule be declared unconstitutional and enjoined.

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[2] One other rule implicated in this proceeding is the definition of the "sell-by" date applicable to grade A milk products, which is contained in ARM 32.8.101(1)(e). This rule provides that: "A 'sell-by' date is defined as the 12th consecutive day, never to exceed 288 hours, following pasteurization of a unit of milk."

See Mont. Admin. Register Notice No. 32-9-200 (Nov. 12, 2009), p. 2097. In the fall of 2008, Core-Mark and the Department entered into a settlement agreement of the federal court action, pursuant to which the Department agreed to conduct hearings on a proposal by Core-Mark to repeal or amend the 12-day rule. *Id.* One of the hearings agreed to by the Department was an evidentiary contested case proceeding presided over by a hearing examiner. *Id.*, pp. 2095, 2097. This proposed decision involves the contested case hearing agreed to between the Department and Core-Mark.

A companion proceeding, involving an opportunity for members of the public to appear and present testimony, presided over by the Board of Livestock, was conducted on March 4, 2010. *Id.*, p. 2095. The hearing examiner did not attend the companion proceeding, nor has the hearing examiner been provided with or informed of any of the documents or testimony submitted to the Board during the companion proceeding.

In the contested case proceeding and the companion proceeding referred to above, Core-Mark was provided an opportunity to submit for consideration proposed amendments to the 12-day rule. A copy of the proposed amendments submitted by Core-Mark is attached to this proposed decision as Exhibit A. Under the proposal tendered by Core-Mark, milk processors would be allowed to set their own sell-by dates, as long as those dates "reasonably protect the health and safety of Montana consumers." In addition, under the Core-Mark proposal, the Board of Livestock would have the authority to require milk processors "to engage in product testing to determine a reasonably protective sell-by date determination methodology," if the Board "reasonably determines that the processor's sell-by date determination methodology does not reasonably protect the health and safety of the consumer."

THE INFORMATION SUBMITTED AS A PART OF THIS CONTESTED CASE PROCEEDING

The transcript of the testimony submitted as a part of this contested case proceeding is available for review by the Board of Livestock and consists of 1,180 pages of oral testimony and arguments of counsel. In addition, all parties submitted extensive documentary evidence, as well as extensive post-hearing legal briefs and proposed findings of fact and conclusions of law. The hearing examiner heard first-hand the 1,180 pages of testimony. In preparing this proposed decision, the hearing examiner reviewed all of the documentary evidence, the briefs, and the proposed findings and conclusions submitted by the parties. At the time this proposed decision was issued, the hearing examiner returned the complete record of this contested case hearing to counsel for the Department so that it will be available to the Board of Livestock for its review of this proposed decision.

For ease of reference in following the transcript citations contained in this proposed decision, set forth below is a list of the witnesses who testified in this contested case proceeding. This list includes a description of their position, identification of the party on whose behalf they provided testimony, and the pages of the hearing transcript at which their testimony may be found.

Name	Position	Called on Behalf of (Party)	Transcript Page(s)
Floyd W. Bodyfelt	Professor Emeritus of Food Science & Technology, Oregon State University	Core-Mark	40-185
Chris Burrows	Quality Director of Darigold	Core-Mark	185-273
Mike Nygaard	Technical Director for Ingredients Division of Darigold	Core-Mark	273-341
Michael L. Campbell	Director of Regulatory Compliance of Darigold	Core-Mark	341-371

Name	Position	Called on Behalf of (Party)	Transcript Page(s)
Jeff Kragt	Senior Director of Co-Processing & Manufacturing of Organic Valley	Core-Mark	372-439
Larry Stein	President of a 5-store family-owned grocery company headquartered in Northern Idaho with two stores in Montana: Troy and Eureka	Friends of Montana Retailers & Consumers	441-492
Bruce Bennett	Director of Training & Special Projects of Darigold	Core-Mark	493-531
Bruce Senn	Plant Manager of Spokane Plant of Darigold	Core-Mark	531-562
Mark Huelskamp	Division President for Spokane Division of Core-Mark	Core-Mark	562-682
Pat Roylance	Director of Marketing for Sutey Oil Company (chain of 14 convenience stores in Southwest Montana d/b/a Thriftway Super Stops)	Friends of Montana Retailers & Consumers	683-723
Christian Mackay	Executive Officer to the Board of Livestock	Department of Livestock	752-900
Jodeen Meenderink	Director of Quality Assurance of Dean Foods	Meadow Gold	900-944
Robert Adamson	Montana General Manager of Dean Foods	Meadow Gold	945-1174
Scott Kiilsgaard	Plant Manager of Country Classic	Country Classic	Deposition
David Lewis	Dairy Farmer from Victor, MT - Big Creek Dairy and Secretary-Treasurer of the Board of Directors of Country Classic Dairies	Country Classic	Deposition

THE "FRESHNESS" OF MILK V. THE "SAFETY" OF MILK

The 12-day rule is not based on any regulatory need to protect the safety of consumers. This proposition, conceded by the Department (Dept. Response Br. 9 (July 8, 2011)) is based on two facts, neither of which is contested by any of the parties to this proceeding. First, as several witnesses noted, the pasteurization process required for milk is so effective in terms of eliminating harmful organisms, that milk will become unpalatable in terms of taste and smell before it will cause harm in terms of human safety. Bodyfelt 68-9, 126; Nygaard 294-95; Kragt 383-84, 397, 400; Mackay 777, 779; Meenderink 912-13. Meadow Gold also acknowledges that

> [D]ated milk is not a risk to human health and safety. In fact that opinion is universally shared in the industry. Code dating is about quality... [T]he fresher the milk the better it tastes and the better it is for you, but in no event is it a danger to health and safety.

Meadow Gold Response Br. 20-21 (June 13, 2011).

Second, it was agreed that the freshness, shelf life, and palatability of milk, which are essentially synonymous terms, is longer than 12 days. Bodyfelt 69; Burrows 200, 205-06; Kragt 404; Mackay 759-60, 779, 860-62; Meenderink 914, 916. In 1994, the administrator of the Department's Meat, Milk and Egg Division also acknowledged that "the 'milk freshness dating' rule has no public health significance at this point in time, 1994...." Ltr. from G.H. Sheets, D.V.M., Adm'r of Meat, Milk & Egg Div., Dep. of Livestock (Apr. 4, 1994), Core-Mark Supplemental Exhibit 7.

Core-Mark argues that the absence of health and safety considerations renders the 12-day rule invalid as beyond the scope of the Department's statutory rulemaking authority. In support of this argument, Core-Mark notes that the statute cited as authority for the 12-day rule, Mont. Code Ann. § 81-2-102, provides no explicit authority for the Department to regulate milk "freshness." In addition, Core-Mark points out that the regulatory function of the Department's

current Milk & Egg Bureau is to ensure, among other things, that milk sold in Montana is "fit for human consumption." ARM 32.1.101(2)(b)(i). According to Core-Mark, the 12-day rule is invalid because it does not implement and relate to an agency function "that is clearly and specifically included in a statute to which the grant of rulemaking authority extends." Mont. Code Ann. § 2-4-305(3)(b). Core-Mark contends that the Department has authority to regulate the production of milk for the protection of human health and safety, but not for the purpose of ensuring "freshness" or palatability.

Mont. Code Ann. § 81-2-102 is sufficiently broad to encompass considerations of health, safety, and what the parties in this proceeding refer to as "freshness," "palatability," and "shelf life." Subsection (1)(f) of Mont. Code Ann. § 81-2-102 empowers the Department to "adopt rules ... that it considers necessary or proper for ... the standards and sanitary conditions of ... milk and its byproducts...." The hearing examiner agrees with Core-Mark that the reference to "sanitary conditions" reasonably may be read as a reference to health and safety. However, the reference to "standards" is not so limited. When read in conjunction with other statutory authority, and by application of the common-sense understanding that most persons would agree that sour milk is not fit for human consumption, the hearing examiner concludes that the word "standards" is broad enough to encompass regulatory power to adopt milk freshness dating rules.

As to other statutory authority, the hearing examiner is persuaded that the above interpretation is correct in light of Mont. Code Ann. § 81-22-401, which makes it unlawful to sell milk for a food purpose if the milk "is found to be musty, ... rancid, ... with marked undesirable odors or flavors, ... or to contain ... excessive bacteria." In this provision, originally adopted in 1971, the reference to "excessive bacteria" is clearly one that relates to health and safety. Moreover, the additional and disjunctive references to matters involving smell and taste reasonably relate to considerations of what the parties in this proceeding refer to as freshness,

palatability, and shelf life. These references suggest, in the opinion of the hearing examiner, that it is reasonable and appropriate to interpret the word "standards" in Mont. Code Ann. § 81-2-102 to include standards that relate not only to health and safety concerns, but also to the taste and odor of milk. As the undisputed testimony in this proceeding demonstrates, these are the essential elements of milk "freshness."[3]

For the reasons stated above, the hearing examiner concludes that the Department does have the authority to adopt freshness dating rules for milk products offered for sale in Montana.

WHETHER THE 12-DAY RULE IS A VALID AND APPROPRIATE EXERCISE OF THE DEPARTMENT'S AUTHORITY

Although the Department has the authority to adopt rules relating to the "freshness dating" of milk products, the inquiry into the validity of the 12-day rule does not end here. In order for an administrative rule to be valid, it must also be consistent with, not in conflict with, and reasonably necessary to effectuate the purpose of the statutory grant of authority. Mont. Code Ann. § 2-4-305(6). For reasons stated below, the hearing examiner concludes that, in today's world, the 12-day rule is an impediment to and inconsistent with the Department's authority to regulate milk freshness.

A. The 12-day rule results in the waste and destruction of perfectly good milk.

One of the fundamental difficulties with the 12-day rule is that, in the name of ensuring that the consuming public is buying fresh milk, the rule mandates the waste and destruction of

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[3] Less compelling is the argument of the Department and Meadow Gold that authority for milk "freshness" regulation may be found in Mont. Code Ann. § 81-22-102. As Core-Mark correctly points out, this statute deals with the regulation of "persons operating dairies producing milk" and persons "engaged in the processing of manufactured dairy products." This statute does not refer to the sale of milk products, as does Mont. Code Ann. § 81-22-401. However, it does refer to the Department's authority to "establish sanitation and quality standards." The hearing examiner agrees that, to some extent, it is indicative of a legislative intent that "standards" can include considerations of "quality."

milk that is fresh, wholesome, safe, healthful, and entirely fit for human consumption. This fact was acknowledged by Christian Mackay, Executive Officer to the Board of Livestock, and was also admitted by Meadow Gold's quality control expert. Mackay 862-63; Meenderink 932-33. Mackay also admitted that he once acknowledged to a news reporter that as a result of the application of the 12-day rule, the consuming public pays for the loss attributable to having good milk thrown out. Mackay 865-66.[4]

The problem of the loss attributable to the 12-day rule is becoming worse, not better. This is because, in the time since the 12-day rule was adopted in 1980, there have been improvements in milk processing that have extended the shelf life of milk. One witness noted that in 1975, most milk processing plants were using 12- or 13-day code dates. Bennett 498. Mackay's recollection was that in 1980 code dates used in Montana ranged from 14 to 18 days. Mackay 779. Floyd Bodyfelt, Core-Mark's milk processing expert, testified that as a result of improvements in production and processing that have occurred since 1980, a shelf life of 21 days is now the going standard for the American and Canadian milk processing industry. Bodyfelt 53-62, 77. Mackay agreed that today it is generally accepted that milk remains fresh for approximately 21 days. Mackay 862. Country Classic's Plant Manager and designated expert, Scott Kiilsgaard, agreed that advances in production techniques since 1981 have extended milk shelf life to 20 to 21 days. Depo. Kiilsgaard 9, 17-18, 19 (Feb. 23, 2010). Mike Nygaard and Jeff Kragt also testified about improvements that have been made to milk processing that have extended milk shelf life. Nygaard 281-83; Kragt 379-81.

In today's world, and taking into account today's processing techniques and technologies, the 12-day rule effectively prohibits sellers of milk from selling milk products for 43% of the time (9 of the 21 days) during which milk is fresh and of good quality. This is a case

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[4] One retailer, who owns only two stores in Montana, estimated that his cost of good milk wasted as a result of the 12-day rule is $5,000 to $10,000 per year. Stein 447-48.

of over-regulating milk freshness to such an extent that it is inconsistent with and an impediment to the grant of authority to regulate milk freshness and palatability, as discussed above.

B. The 12-day rule impermissibly prevents consumers from being able to compare the "freshness" of different brands of milk.

Another fundamental problem with the 12-day rule is that it sets a uniform standard of freshness for products that are of different quality in terms of freshness and shelf life.[5] In other words, the rule sets an absolute limit of milk freshness for purposes of sale that fails to allow for differences between milk processors. This, in turn, prevents the consuming public from making an educated and knowing choice as to the freshness of one brand versus another. The failure of the 12-day rule is one that is contrary to the purpose of the legislative grant of authority to regulate freshness on behalf of the consuming public, because it impermissibly prevents consumers from knowing the freshness life span of the milk they buy.

C. Milk processors, not the Department, are in the best position to make correct decisions about the "freshness" labels of their own milk products.

In this region, the 12-day rule is a unique form of governmental regulation of milk freshness. Washington, Oregon, Idaho, California, Utah, Colorado, Nevada, and most other states do not require specific code dates, but instead allow milk processors to determine appropriate code dates based on the extensive testing done by each processor. Burrows 201; Meenderink 917-18. In post-hearing briefing, Meadow Gold acknowledged that only a small

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[5] It is not the hearing examiner's function to determine whether one brand of milk is of higher quality than another. However, it can be said that there is at least a reasonable probability that there are differences in quality from one producer to another. This is because the different milk processors who provided testimony in this proceeding acknowledged shelf life and code date differences of as much as five days, with the range applicable to milk sold in Montana being between 16 to 21 days. Meenderink 914 (16 days); Depo. Lewis 11 (Mar. 2, 2010) (19 days); Burrows 194 (18 days for half gallons, 21 days for gallons).

minority of other regulatory jurisdictions impose sell-by dates, including, for example, Pennsylvania, Florida, and New York City. Meadow Gold Response Br. 5.

All milk processors perform rigorous shelf-life testing of their products in order to set accurate and appropriate code dates in terms of product quality, freshness, palatability, and safety. Burrows 191-98; Kragt 384-94; Meenderink 913, 919-20. The Department, on the other hand, does no testing of milk products to determine milk freshness. Mackay 861-62. Because of the testing done by the individual milk processing plants, it is undisputed that they are in the best position to make determinations regarding the appropriate code dates for their own products. Kragt 393-94; Meenderink 926; Adamson 1105. Indeed, Meadow Gold acknowledged that "the processor is probably the only entity in a position to make a representation as to how long its milk will last since the processor is the only entity privy to its testing results." Meadow Gold Response Br. 4. The processors also agreed that it would be contrary to their own economic interests to put too long a code date on their milk products because if consumers do not have a good experience with a processor's milk, the processor will lose that consumer's business. Burrows 199; Kragt 403-04; Meenderink 926; Adamson 1111-12.

Meadow Gold suggests that code dates assigned by milk processors are problematic because processors have different business considerations. Although there may be some truth to this statement, the testimony in this proceeding demonstrates that code dates assigned by processors provide considerably more accurate information about milk freshness than the inflexible standard imposed by the 12-day rule. As noted above, processor code dates are dependent on rigorous processor testing. They are also regulated by marketplace forces that require processors to assign code dates with a high degree of accuracy or suffer the substantial risk of losing their customer base. This fact was uniformly acknowledged by all of the processor witnesses who testified in this proceeding. Burrows 199; Campbell 347; Kragt 403-04;

Meenderink 926-27; Adamson 1111-12. No witness testified that processor-assigned code dates allowed in states other than Montana have jeopardized milk quality. Meadow Gold and Organic Valley, which have processing plants in a number of states, agreed that allowing processors to set their own code dates has not resulted in milk-quality problems. Meenderink 927; Kragt 392, 400, 402, 403. Finally, it should be noted that to the extent the Department deems it appropriate, there is nothing to prevent the Department from maintaining a regulatory presence and role as to the tests used by milk processors in setting code dates for individual processing plants.

Both the Department and Meadow Gold argue that under processor-set code dates there will be as much waste as there is under Montana's 12-day rule. *See* Adamson 964-65. However, the "waste" that occurs under a processor-set code date is not waste at all; it is the disposal of milk that has reached the end of its useful life. In contrast, the waste that occurs under Montana's 12-day rule is waste of milk that has not reached the end of its useful life. Moreover, as discussed above, as time goes on and processing techniques and technology lengthen the shelf life of milk, the waste that occurs under the inflexible 12-day rule becomes more and more inconsistent with the statutory grant of authority to regulate milk freshness.

D. The asserted justifications for the 12-day rule cannot be sustained.

1. The 12-day rule is so restrictive that it cannot be justified as a guarantee of milk freshness.

According to Meadow Gold, one argument in support of the 12-day rule is that it guarantees consumers that milk will be fit for human consumption when it is sold. The same justification could be offered for a 3-day rule. As discussed above, one of the fundamental deficiencies of the 12-day rule is that the cutoff date imposed by the rule is inflexible. In today's world, with modern processing techniques, the cutoff date established by the 12-day rule is

unreasonable and unduly restrictive because it requires milk to be pulled from sale when it still has as much as 43% of its freshness-life remaining.

2. The 12-day rule does not ensure consumers a "reasonable" time to consume milk beyond the expiration of the 12-day sell-by date.

According to the Department and Meadow Gold, the main justification for the 12-day rule is that it ensures consumers they will have a "reasonable" time of seven to ten days to consume milk after it is purchased. Mackay 757-60. According to this argument, the 12-day rule effectively regulates freshness by mandating that all freshness existing after 12 days belongs to the consumer. This argument has several fundamental defects.

First, the 12-day rule does not ensure milk freshness beyond the twelfth day of pasteurization. If milk were to go sour on the thirteenth day, there would be no violation of the 12-day rule and no regulatory recourse for the consumer. Although Meadow Gold asserts that the 12-day rule gives consumers the ability to compare freshness on an "apples to apples" basis, that is not accurate because differences exist between processors and the shelf lives of their milk. As Core-Mark correctly notes, the 12-day rule whitewashes all distinctions in quality between processors by subjecting all processors to the same artificially short sell-by date. Instead of allowing consumers to make informed choices about product quality among various processors, the 12-day rule actually prevents consumers from making accurate comparisons of milk quality from one brand to another.

Giving the consumer a "reasonable" time to consume milk after it is purchased is regulatory fiction. This is because, as the Department and Meadow Gold witnesses conceded, the 12-day rule provides no information to consumers about how long milk will actually last beyond the 12-day code date. Mackay 881; Adamson 978. *See also* Meadow Gold Response Br. 21 (stating that "sell-by dates don't directly convey representations as to how long the milk might last"). In fact, as Meadow Gold's witnesses Meenderink and Adamson acknowledged,

the 12-day rule prohibits processors from communicating to consumers information about the actual shelf life of the milk they purchase. Meenderink 933-34; Adamson 978.

The 12-day rule prohibits processors from providing consumers with the accurate freshness information they have in their possession from the testing they perform on their products. Therefore, in the guise of ensuring freshness, the 12-day rule actually operates in a manner contrary to the legislative grant of authority to regulate milk freshness by prohibiting processors from telling consumers about the "freshness" qualities of their products. In short, the 12-day rule is based on an erroneous proposition of protecting consumers from knowing facts they are entitled to know in order to make appropriate comparisons between competing brands.

In the hearing examiner's judgment, consumers ought to be allowed to know the actual shelf life of the milk they purchase; they ought to be allowed to compare the actual shelf lives of milk from different processors; and they ought to be allowed to decide within the time period of milk's actual shelf life just how fresh they want their milk to be and how long they need their milk to last after they buy it. The 12-day rule provides none of those opportunities for the consumer. Instead, in the name of protecting consumers from bad quality milk, the rule mandates that the choice of milk quality in Montana will be made by the Department instead of the consumer. This is a regulatory approach inconsistent with the purpose of affording consumers information about, and reasonable protection against, poor quality milk.

If the Department's approach were to be endorsed as consistent with the legislative grant of authority to regulate freshness, one would expect there would be similar regulations on other perishable food products requiring that they too be pulled from the market shortly after the expiration of approximately half their useful life. The absence of other comparable regulatory examples speaks volumes about the 12-day rule's lack of consistency with sound regulatory principles.

3. The 12-day rule cannot be justified on the basis of Montana's rural population.

During the hearing, the Department suggested that the 12-day rule is justified by Montana's rural population which requires that there be an extended period of time from the date milk is sold to the expected expiration of the milk's shelf life. Mackay 759. The predicate of this justification is that rural customers shop infrequently and need to be able to buy milk that will last for a week or longer after it is purchased. The flaw in this argument is that the 12-day rule does nothing to ensure that milk will be palatable a single day beyond its purchase date. Moreover, this justification assumes that consumers are well-served by a sell-by date that does not allow accurate information to be conveyed about the actual shelf life of the milk being purchased. Other states with similar rural populations allow open code dating of milk products as opposed to the inflexible sell-by date enshrined in the 12-day rule. These states include Utah, Idaho, Colorado, Minnesota, Iowa, and Texas. Kragt 404-05. Oregon, Washington, Wyoming, and Nevada also have rural populations comparable to Montana, and also allow open code dating. The evidence was undisputed that open code dates allowed in all of these other states with rural populations have not led to the sale of poor quality milk in those jurisdictions. Kragt 392, 400, 402; Meenderink 927; Adamson 1113, 1125-26.

4. The 12-day rule cannot be justified on the basis that the rule relieves consumers of the "burden" of having to check the dates on the milk they purchase.

Another suggested justification for the 12-day rule is that it relieves consumers of the "burden" of having to check the code dates on the milk they purchase. Again, this justification is based on the assertion that the 12-day rule ensures consumers they will have time to consume milk after they buy it. As stated above, the premise that the 12-day rule ensures milk freshness beyond the twelfth day is erroneous because the rule in fact provides no such assurance.

This purported justification for the rule is inconsistent with consumer needs and practices today and also when the rule was originally adopted in 1980. According to the administrative record relating to the adoption of the 12-day rule in 1980, the Department conducted a statewide survey of prepackaged foods and learned that "Consumers in stores were looking close at the dates of milk, cheese and meat products." DOL Exhibit 1, testimony of Everett Tudor, Chief of the Department's Milk and Egg Bureau. The Department survey of Montana consumers was consistent with findings of the U.S. Department of Health, Education and Welfare based on a Consumer Food Labeling Survey conducted in 1978. Among the findings of that survey were that 94% of consumers noticed dates on food packages and 74% have used those dates in making purchase decisions. In addition, the survey found that 82% of those aware of freshness information use it.

It is common knowledge that date information is presented today on thousands of food products and other items. If consumers did not want to know this information, product manufacturers would not provide it. The fact that they do so, and the extent to which this information is provided, demonstrates that it is information consumers want to know and are entitled to know.

At the hearing, Larry Stein, President of a five-store family-owned grocery company, with three stores in Idaho and two in Montana, presented credible evidence that consumers pay attention to the sell-by date on Montana milk and hesitate to buy the milk when it gets close to that date. Stein 446-47, 448. Stein has observed that his customers were willing to drive 30 miles from Troy, Montana, to Bonners Ferry, Idaho, to purchase milk with a longer code date even though the milk was produced by the same processor. Stein 442-44. This testimony supports Core-Mark's assertion that it is "more confusing and misleading to have the same sell-by date on one container of milk that the processor knows through testing has a shelf life of 16

days, as on another container of milk that the processor knows through testing has a shelf life of 21 days." Core-Mark Reply Br. 10.

The Department and Meadow Gold argue that if open code dating were to be allowed, older milk being sold would more likely go bad in consumers' hands because open code dating allows the retailer to "own" the entire spectrum of the life of milk as a tasteful product. However, the alternative required by the 12-day rule is that the consumer is not allowed to know what the producer of the milk guarantees as the life of the milk as a tasteful product.

From a regulatory standpoint, there is no problem with allowing milk to be sold throughout its entire useful life as long as the consumer is allowed to know what that useful life is. No good reason exists why a consumer should be prevented from buying milk on the date its "freshness" expires. That milk may well be offered at a discount the consumer should be allowed to take advantage of or the consumer may intend to use the milk on the day it is purchased. In terms of regulating freshness and product quality, consumers are far better served by being allowed to know the actual facts than by having the Department impose an inflexible and unduly restrictive rule of freshness that does not allow them to make informed and accurate comparisons of product freshness.

5. The 12-day rule misleads some consumers into believing that the sell-by date is the equivalent of an expiration date for milk freshness.

One final point deserves mention in assessing the validity of the Department's assertion that the 12-day rule assures the consuming public that milk has a "reasonable" useful life of seven to ten days beyond the expiration of the sell-by date. Credible testimony was presented in this matter that consumers interpret sell-by dates as being synonymous with other types of code dates such as "best by," "use by," and code dates with no accompanying descriptive language. Burrows 213-14; Nygaard 332-33; Stein 443-44, 448; Bennett 524-25; Roylance 717-18; Meenderink 931. This testimony demonstrates that a substantial number of

consumers read Montana's sell-by date as being the equivalent of the date until which milk is palatable and not, as the Department contends, a date beyond which a "reasonable" useful life of seven to ten days remains. Thus, the sell-by date not only fails to provide consumers with accurate information about product freshness, it misleads some consumers into believing that milk freshness is limited to the expiration of the sell-by date when in fact milk freshness extends far beyond that date and continues to be extended by milk processing improvements.

E. The issue is not one of the Department's regulatory prerogative, but of the consistency of the 12-day rule with the grant of authority to regulate milk freshness.

The Department contends that the ultimate issue in this case is whether the Department is allowed to make its own policy decisions. The hearing examiner disagrees. Instead, the real issue in this case is whether the 12-day rule is consistent with the legislative grant of authority to the Department to regulate milk freshness on behalf of the consuming public.

For the reasons stated above, the hearing examiner's conclusion is that the 12-day rule is inconsistent with this legislative purpose and in fact frustrates and obstructs the legislative grant of authority to regulate milk freshness.

WHETHER THE 12-DAY RULE PLACES IMPERMISSIBLE BURDENS ON INTERSTATE COMMERCE

Core-Mark also contends the 12-day rule places impermissible burdens on interstate commerce in violation of the commerce clause of the U.S. Constitution. In support of this claim, Core-Mark asserts that the 12-day rule increases producer costs because it requires producers to keep track of separate inventories and place Montana's unique sell-by requirement on Montana-bound milk products; that the 12-day rule allows Montana producers and retailers to maintain higher milk prices than surrounding states; that the 12-day rule limits product availability by discouraging out-of-state producers to ship into Montana due to the short time of sale allowed by the 12-day rule; and that the 12-day rule acts to protect Montana

producers from out-of-state competition. For the reasons stated below, the hearing examiner concludes that, on the record presented in this matter, there is insufficient evidence to sustain the commerce clause violations asserted by Core-Mark.

As a factual matter, the hearing examiner disagrees with Core-Mark's claims that the 12-day rule limits out-of-state competition and allows Montana producers and retailers to maintain artificially high milk prices. Even with the 12-day rule firmly in place, Core-Mark has been able to expand its Montana market for Darigold products to a state-wide presence. Huelskamp 593, 618, 641. Meadow Gold Exhibit 1 shows that from 2007 through 2009, Core-Mark's sales of milk products in Montana increased by huge margins. For example, sales of gallon containers of grade A Darigold 2% milk increased from 2,976 units in 2007 to 287,703 units in 2009. During the same time period, Core-Mark's sales of gallon containers of Darigold whole milk increased from 1,568 units in 2007 to 146,291 units in 2009.

Although it is true, as Core-Mark argues, that milk prices are higher in surrounding states (Stein 454-55; Huelskamp 617-19) and that Meadow Gold has at times decreased its milk prices in Montana in response to lower milk prices offered by Core-Mark (Adamson 1135-36), there is insufficient evidence to demonstrate that the 12-day rule is the culprit for higher milk prices in Montana. Core-Mark's experience demonstrates that even with the 12-day rule, there can be competition by out-of-state processors for both product brands and lower prices. As Meadow Gold correctly points out, milk pricing is a complex matter. It involves governmental regulation of raw milk costs which change monthly and often dramatically; processor pricing; and different kinds of wholesale pricing depending on the extent of services provided by the wholesaler and whether the wholesaler agrees to repurchase expired milk.

The hearing examiner agrees that Core-Mark's entry into the Montana market benefitted Montana consumers because of Core-Mark's ability to offer Montana retailers an opportunity to sell milk at a lower price (Huelskamp 617-18); however, for reasons stated above, it cannot

be said with any reasonable degree of certainty that the 12-day rule is the cause of the price differential. It may be that there has been a lack of competition in the Montana market, whereas there may be significant competition elsewhere. It may be, as Meadow Gold argues, that Montana producers have historically defended their "market share" by matching or beating prices and service offered by out-of-state distributors. Adamson 1169-73. Whatever the reason, the fact is that competition in terms of both brand and price can and does exist side-by-side with the 12-day rule. That fact is demonstrated by Core-Mark's ability to offer Darigold milk products at a price lower than the price offered at times by Montana producers.

Evidence was presented that the 12-day rule imposes additional costs on producers in terms of labeling requirements and inventory control in order to comply with the unique requirements of the Montana rule. Bennett 525-26; Senn 540; Depo. Kiilsgaard 37-38. These costs, however, were not quantified in any meaningful way, and there was also credible evidence offered by Meadow Gold that the cost of compliance with the Montana rule is in fact relatively insignificant. Adamson 967-68, 1133-34.

There is also evidence that the 12-day rule operates to some extent to limit product availability and choice. A representative of Organic Valley credibly testified that it does not sell grade A organic milk in Montana because the 12-day rule does not allow the company to ship its product into Montana in a cost effective manner with a sufficient number of days remaining for sale. Kragt 397-98. If Montana were to adopt a rule allowing for open dating by the processor, Organic Valley would be able to sell its milk in Montana. Kragt 406. On the other hand, Kragt also acknowledged that the difficulty with the 12-day rule for organic milk products is to a large extent due to the fact that the scope of organic milk business is so small that they are unable to make production runs of organic milk on a daily basis at the facilities that do milk processing for Organic Valley. Kragt 397-98.

In post-hearing briefing, MMPA correctly points out that the 12-day rule does not per se discriminate against out-of-state producers. Instead, it applies to all milk sales in Montana, whether originating in-state or out-of-state. State regulations that operate even-handedly on both in-state and out-of-state commerce will survive a commerce clause challenge "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Because of conflicting evidence as to the extent of the additional costs for labeling and inventory control imposed by the 12-day rule and because the limitation on product availability as to organic products may be as much due to the limited market-share of those products as to the 12-day rule, the hearing examiner is unable to conclude that the 12-day rule imposes burdens on interstate commerce that are "clearly excessive." Moreover, the hearing examiner believes that it would be unwise to opine further on this issue in light of the conclusion that the 12-day rule is at odds with the Department's statutory authority to regulate the freshness of milk products. Instead, the better approach is to allow the Board an opportunity to address the issues relating to the defects in the 12-day rule during the rulemaking process that will follow the issuance of this proposed decision. Depending on the outcome of those proceedings, the parties may then consider whether any constitutional issues remain. The likely forum for that consideration will be a court, which is considerably better suited than the hearing examiner to assess and deal with constitutional issues.

CONCLUSIONS AND RECOMMENDATIONS

Based on the testimonial and documentary evidence in this contested case proceeding, together with the extensive briefs and arguments of counsel submitted herein, the hearing examiner makes the following conclusions:

1. The Department of Livestock has statutory authority to adopt and enforce rules setting standards for the freshness of milk sold within the State of Montana.

2. The 12-day rule, which requires that grade A milk may not be sold in Montana more than 12 days after it has been pasteurized and that grade A pasteurized milk must be marked with a "sell-by" date showing the last day on which the milk may be sold, is an invalid exercise of the Department's authority to set standards for the regulation of milk freshness.

3. There is insufficient evidence to determine that the 12-day rule violates the commerce clause of the U.S. Constitution.

Based on the above conclusions, the hearing examiner makes the following recommendations to the Board of Livestock for its consideration in adopting appropriate standards for the regulation of milk freshness:

1. The 12-day rule should be repealed and in its place a rule should be adopted allowing milk processors to set appropriate code dates based on the testing they perform to determine the freshness, palatability, taste, odor, and safety of the milk they produce.

2. If the Board is concerned that different processors may apply different testing methodologies, the Board may want to consider the adoption of rules setting minimum standards for testing methodologies.

3. The hearing examiner does not endorse or recommend the proposed rule amendments submitted by Core-Mark for two reasons. First, the Core-Mark proposal assumes that the extent of the Department's authority to regulate milk sales is limited to reasonable protection of "the health and safety of Montana consumers." As stated above, the Department's authority is broader than that and also includes authority to set standards for milk freshness. Second, the Core-Mark proposal would continue the use of "sell-by" dating which is a fundamentally flawed label designation in relation to milk freshness. As the testimony in this proceeding demonstrates, a "sell-by" label fails to convey accurate information about milk freshness. Moreover, a "sell-by" label is ambiguous at best and misleading at worst. For these

reasons, continued use of a "sell-by" date is, in the hearing examiner's opinion, an inappropriate tool for the regulation of milk freshness.

The solution to dealing with the 12-day rule is not to replace it with a "sell-by" rule of longer duration. This will do nothing more than continue the fundamentally deficient aspects of attempting to regulate milk freshness by imposition of an ambiguous and misleading "sell-by" date.

4. For reasons stated above, a "sell-by" date label should be prohibited because of its ambiguity and misleading nature in terms of providing useful information concerning milk freshness. Instead, milk processors should be allowed to use descriptive terms with code dates that bear some relationship to product freshness, such as "best by" or "best if used by."

Based on the testimony provided in this proceeding, the hearing examiner understands that many milk processors label their products with only a code date with no explanatory information about what the code date means in terms of product freshness. The Board may want to consider a regulation requiring milk processors who use only a code date, without further explanation, to provide some information on their milk packaging about what the code date means in terms of product freshness.

DATED this 27th day of October, 2011.

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HEARING EXAMINER

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing HEARING EXAMINER'S PROPOSED DECISION was served by mailing a true and correct copy thereof on **October 27th, 2011,** addressed as follows:

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32.8.101 DEFINITIONS AND ADOPTION OF GRADE A PASTEURIZED MILK ORDINANCE AND ASSOCIATED DOCUMENTS

(1) As used in chapter 8, unless the context otherwise requires, the following definitions shall apply:

(a) "Arabic numerals" are defined as numbers (not spelled out) such as 3/20 or 12/31.

(b) A "day" is defined as any 24 hour period beginning when pasteurization of a unit of milk is completed.

(c) "Milk" is defined as whole milk, reduced fat milk, lowfat milk, fat free milk, artificially flavored milk, whipping cream, half and half and/or any other pasteurized liquid milk product designed to be consumed in the form in which it is packaged, except buttermilk, eggnog, and ultra-pasteurized or aseptic processed milk products.

(d) "Pasteurized date" is the same date a unit of milk completes pasteurization.

~~(e) A "sell by" date is defined as the 12th consecutive day, never to exceed 288 hours, following pasteurization of a unit of milk.~~

(~~f~~e) "Standard abbreviations" are defined as a date code such as MAR 31, or NOV 12.

(~~g~~f) A "unit of milk" is a quantity of milk that is pasteurized during one pasteurization processing cycle.

(2) The department of livestock hereby adopts and incorporates by reference as rules of the department the following as they are now described and as they may from time to time be amended:

(a) "Grade A Pasteurized Milk Ordinance, 1978 Recommendations of the United States Public Health Service/Food and Drug Administration" (PMO) together with attached recommended administrative procedures, appendices, and index, except sections 9, 15, 16, and 17.

(b) "Methods of Making Sanitation Ratings of Milk Supplies," 1978 Edition issued by the U.S. public health service/food and drug administration (MMSR) .

(c) "Fabrication of Single-Service Containers for Milk and Milk Products, Sanitary Standards," 1978 Edition issued by the U.S. public health service/food and drug administration (SSCC) .

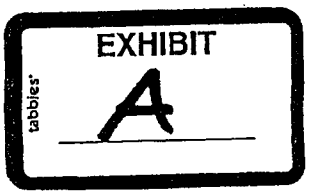
(d) "Evaluation of Milk Laboratories," 1978 Edition (EML) .

(e) "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey, 1978 Recommended Sanitation Ordinance for Condensed and Dry Milk Products and Condensed and Dry Whey used in Grade A Pasteurized Milk Products" (DMO) .

(f) "Procedures Governing the Cooperative State-Public Health Service/Food and Drug Administration Program for Certification of Interstate Milk Shippers," 1997 edition.

(3) These model codes and associated documents prescribe allowable methods of producing and processing Grade A milk and milk products and the methods by which compliance with the standards set forth are to be evaluated.

(4) Copies of related federal ordinances and associated documents are on file with the department and are carried by each sanitarian employed by the department.



§ 32.8.202. TIME FROM PROCESSING THAT FLUID MILK MAY BE SOLD FOR PUBLIC CONSUMPTION

(1) When ~~12 days or more have passed following pasteurization of~~ the sell-by date on a unit of Grade A milk has passed, there will be no quantities of that unit of milk sold or otherwise offered for public consumption.

(2) No Grade A pasteurized milk may be put in any container marked with a sell-by date which ~~is more than 12 days after pasteurization of the milk for sale in Montana~~ does not reasonably protect the health and safety of Montana consumers.

(a) The Board of Livestock may, upon a finding that a specific processor's sell-by date has materially failed to protect the health and safety of Montana consumers, provide notice to the processor of the specific facts indicating such failure and require the processor to submit a written explanation in response to such facts, which shall include the processor's description of its sell-by date determination methodology;

(b) If the Board of Livestock reasonably determines that the processor's sell-by date determination methodology does not reasonably protect the health and safety of the consumer, the Board of Livestock may require said processor to engage in product testing to determine a reasonably protective sell-by date determination methodology, and to modify accordingly the sell-by date said processor uses on its containers;

(c) During any product testing period described herein under subsection (2) (b) the processor shall be required to mark all containers of grade A pasteurized milk for sale in Montana with a sell-by date which is not more than 18 days after pasteurization of the milk until such time as the Board of Livestock determines that the processor has established (or modified its sell-by date determination process to ensure) that its sell-by date determination methodology and chosen sell-by date reasonably protects Montana consumer's health and safety.

(3) Unless otherwise agreed upon, the person who offers the milk for sale to the public is responsible for removing the milk at or before the expiration of ~~the 12 days.~~ the sell-by date marked on the container.

(4) No grade A pasteurized milk may be put in any container marked with more than one sell-by date unless the sell-by date for use by Montana retailers and consumers is marked as the Montana sell-by date in a manner that is reasonably clear to Montana retailers and consumers.