Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AO–370–A9; 11–0093; AMS–FV–10–0087; FV10–930–5]

Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This is a recommended decision regarding proposed amendments to Marketing Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. These amendments were proposed by the Cherry Industry Administrative Board (CIAB), which is responsible for local administration of the order. These amendments would revise: Section 930.10, the definition of ''Handle,'' Section 930.50, ''Marketing Policy,'' and Section 930.58, ''Grower Diversion Privilege.''

The proposed amendments are intended to improve the operation and administration of the order. This recommended decision invites written exceptions on the proposed amendments.

DATES: Written exceptions must be filed by November 25, 2011.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031–S, Washington, DC 20250–9200, *Fax*: (202) 720–9776 or via the Internet at *http://www.regulations.gov*, or to Parisa Salehi at the Email address provided in the **FOR FURTHER INFORMATION CONTACT** section. All comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Parisa Salehi, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC; *Telephone:* (202) 720–9918, *Fax:* (202) 720–8938, or *Email: Parisa.Salehi@ams.usda.gov;* or Martin Engeler, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Fresno, California, *Telephone:* (559) 487–5110, *Fax:* (559) 487–5906, or *Email: Martin.Engeler@ams.usda.gov*.

Small businesses may request information on this proceeding by contacting Laurel May, Marketing Order Administration Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; *Telephone:* (202) 205–2830, *Fax:* (202) 720–8938, *Email: Laurel.May@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Notice of Hearing issued on March 4, 2011, and published in the March 14, 2011, issue of the **Federal Register** (76 FR 13528).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment to Marketing Order 930 regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Parisa Salehi, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act'', and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held April 20 and 21, 2011, in Grand Rapids, Michigan, and on April 26, 2011, in Provo, Utah. Notice of this hearing was published in the **Federal Register** on March 14, 2011 (76 FR 13528).

The proposed amendments were recommended by CIAB and submitted to USDA on September 22, 2010.

The proposed amendments recommended by CIAB are summarized below.

1. Amendment 1 would revise the term ''handle'' within the order. This proposal would revise existing § 930.10, Handle, to exclude handler acquisition of grower diversion certificates from the definition of handle.

2. Amendment 2 would revise the ''marketing policy'' provisions in § 930.50 of the order so that grower-diverted cherries are not counted as production in the volume control formula.

3. Amendment 3 would revise the existing § 930.58, so grower-diverted cherries are not treated as actual harvested cherries.

In addition to the proposed amendments to the order, AMS proposed making any additional changes to the order as may be necessary to conform to any amendment that may result from the hearings.

Eighteen industry witnesses testified at the hearing. These witnesses represented tart cherry producers and handlers in the production area, as well as CIAB staff, and all supported the proposed amendments.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of June 28, 2011, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. CIAB requested an extension of time to submit its brief. Its request was granted and the date for submission of briefs was set to July 8,

2011. One brief was filed; it supported the proposed amendments.

Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the order to exclude grower diversion certificates from the definition of handle;

(2) Whether to amend the order so that grower diverted cherries are not counted as production in the volume control formula;

(3) Whether to amend the order so that grower diverted cherries are not treated as actual harvested cherries.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1—Definition of Handle

Section 930.10 of the order should be amended to exclude handler acquisition of grower diversion certificates from the definition of handle.

Under Section 930.10 of the order, the current definition of ''handle'' includes the converting of cherries commercially into a processed product, and obtaining grower diversion certificates. Under the order, a ''handler'' is any person who first handles cherries. Marketing order obligations are applicable to handlers, and are based upon the quantity of cherries handled by handlers.

Volume control provisions under the order provide a mechanism for the industry to set aside crop in large crop years to help stabilize supply and prices. When volume control is in effect, free and restricted percentages are established. These percentages are applied to cherries and grower diversion certificates acquired by handlers from growers. Handlers can market free percentage cherries to any market. To meet their restricted percentage obligation, handlers have three options: place cherries in inventory reserve, acquire grower diversion certificates, or divert cherries themselves.

Grower diversion provisions under the order provide another method of managing supply by allowing growers the opportunity to undertake in-orchard diversion of cherries prior to or during harvest. When a grower chooses to divert cherries from production, the CIAB issues a grower diversion certificate to that grower representing the quantity of the diverted cherries that were left in the orchard. Growers can redeem the diversion certificates with handlers, who then use the certificates as one of their compliance tools to satisfy their restricted percentages.

Under current order provisions, handler acquisition of grower diversion certificates is treated the same as actual cherries delivered. Thus, when volume regulation is in effect, free and restricted percentages apply to the quantity of cherries (including grower diversion certificates) handled by each handler. As handlers acquire grower diversion certificates in order to help satisfy their restricted obligation, their restricted obligation increases. The result is a reduction in value to handlers of the grower diversion certificates, which in turn causes a disincentive for growers to divert cherries.

Because the current order provisions regarding handler acquisitions of grower diversion certificates reduces the value of grower diversion certificates to handlers, growers are less likely to divert cherries from production than they would be if handler acquisition of grower diversion certificates was not considered ''handling'', and handlers' restricted obligations did not increase with the acquisition of such certificates.

According to hearing evidence, currently, when a handler utilizes the grower diversion certificates, the handler compensates the grower at a reduced rate because the certificates' worth as a compliance tool to a handler is reduced. Witnesses testified that as a result, growers have less incentive to divert cherries and utilize grower diversion certificates. Data was presented at the hearing to illustrate the potential difference in costs associated with diverting cherries by leaving them un-harvested versus harvesting them. The data illustrates that costs to both growers and handlers would be reduced, if this amendment is implemented. A discussion of the costs and possible reimbursement to growers, as well as the benefits, is included in the Regulatory Flexibility Analysis section of this recommended decision.

Record evidence supports that if this amendment is implemented, it would satisfy its intent to increase the value of grower diversion certificates, and thus provide incentives for growers to leave some fruit un-harvested, as they would receive full credit for diverting a portion of their crops. According to the record, one of the primary reasons the order was established was to improve grower returns. The record indicates that while the order has benefited growers, prices in general do not reach the growers' costs of production in some years. The record further indicates, however, that if this proposal is implemented, it would provide additional benefits to growers, and help provide long-term sustainability of the industry.

Record evidence indicates that the current marketing order provisions discourage in-orchard diversions, especially in those years when the restricted percentage is large. Therefore, this aspect in the order should be restructured to better serve the needs of the tart cherry industry. Witnesses testified that if the term ''handle'' is amended according to this proposal, it provides an incentive for growers to divert a portion of their crop in high volume crop years. Grower diversion can reduce growers' costs of harvesting and transporting fruit. It can also help improve prices by decreasing the supply of cherries in handlers' inventories. When the available supply of cherries to the market is decreased, the price depressing effect of oversupply is no longer present, resulting in a positive effect for both growers and handlers.

Witnesses testified that the intent of this recommendation is to remove the disincentive for growers to divert cherries from production. The record indicates that increased grower diversion activity will help to reduce excess supply, which in turn is expected to positively impact grower returns. In addition, grower costs associated with harvesting and transporting cherries to handlers will be reduced as more cherries are diverted in orchard. Witnesses supported the idea that increasing the value of un-harvested cherries would improve the volume control provisions of the order, and would incentivize growers to divert their cherries in orchard. There was no opposition testimony against this proposed amendment. For the reasons stated herein, it is recommended that § 930.10, Handle, be amended to exclude the phrase ''or obtain grower diversion certificates issued pursuant to § 930.58.''

Material Issue Number 2—Marketing Policy

Section 930.50 of the order should be amended so that grower diverted cherries are not counted as production in the volume control formula. Section 930.50(d) of the order currently provides in part that ''No later than September 15 of each crop year the Board shall review actual production during the current crop year * * *.'' Section 930.50(d), would be revised to read as follows: ''No later than September 15 of each crop year the Board shall review the most current information available including, but not limited to, processed production and grower diversion of cherries during the current crop year.''

Section 930.50 provides the parameters for computing volume control percentages under the order. The CIAB must meet on or about July 1 of each crop year to review sales data, inventory data, current crop forecasts, and market conditions. From this information, the CIAB computes an optimum supply, which essentially represents the desirable amount of cherries needed to satisfy market demands for the upcoming crop year. The CIAB also considers the carryin inventory and production for the upcoming crop year to determine if the supply of cherries is expected to exceed the optimum supply. If the expected supply exceeds the optimum supply, free and restricted volume control percentages are computed and implemented. Under current order provisions, cherries that have been diverted from production by growers are considered as part of the production when computing volume control percentages, because they are considered to be ''handled'' when they are acquired by handlers, as discussed under Material Issue Number 1. This proposed amendment would require the CIAB to consider the quantity of grower diversion certificates acquired by handlers when computing volume control percentages, under the optimum supply formula (OSF) and is consistent with the proposed amendment under Material Issue Number 1.

Through the volume control provisions of the order, the supply and demand of tart cherries are brought into proper relationship with each other. When the supply of tart cherries available to the market exceeds the average demand for them in the domestic or ''free'' market, the crop is restricted in terms of what may move into the free market. The restricted cherries therefore are kept out of the domestic market. A restricted percentage is calculated pursuant to Section 930.50 of the order and each handler's acquisition of cherries and grower diversion certificates is subject to that percentage.

The volume control mechanism under the order involves growers diverting cherries from production by leaving them unharvested in the orchard. Handlers can coordinate with their growers during large crop years by encouraging them to divert cherries from production. Handlers can then acquire from the growers the diversion certificates issued to growers by the CIAB and use them as credit against their restriction or reserve obligation.

As previously discussed, handlers must currently include the pounds of cherries represented by the grower certificates they acquire as part of their ''handling,'' as though these cherries had been delivered and processed. This results in grower-diverted cherries being included as part of production when the CIAB computes volume control percentages.

Witnesses testified that grower diversion certificates contribute to the supply for the purpose of the OSF. Consequently, grower in-orchard diversions effectively increase the supply of restricted cherries in any given year, even though none of these cherries are delivered or processed. A restricted percentage is calculated pursuant to the OSF, and each handler's handle of restricted cherries is subject to that percentage.

Witnesses testified that the fluctuation of the restriction percentage and its impact upon grower diversion certificates creates considerable uncertainty. This uncertainty stems from the fact that grower diversions are part of the supply calculation in the OSF, currently and contribute to restriction determination.

If these amendments are implemented, grower diversion certificates would not be included as part of production in the volume control formula. This is because, if the cherries are diverted, they would not be added to the supply and would therefore not be part of OSF.

An additional change will be made to this section to the factors that the CIAB considers when it computes the preliminary and interim percentages or determines the final percentages to recommend to the Secretary. Section 930.50(e) will be amended to include an additional factor and phrase: ''to be the quantity of grower-diverted cherries during the crop year.'' The order currently includes only nine factors. A new section 930.50(e) would include an additional factor, ''(10) The quantity of grower-diverted cherries during the crop year.'' This change will require the CIAB to consider grower diversion of cherries in OSF when it computes final percentages.

For the reasons stated above, it is recommended that § 930.50, Marketing Policy, be amended to exclude grower diverted cherries from the calculation of actual production in the volume control formula, and to include an additional factor when computing preliminary or interim percentages, or determining final percentages for recommendation to the Secretary, by the CIAB. No opposition testimony was given regarding this proposed amendment, and it is thus recommended for adoption.

Material Issue Number 3—Grower Diversion Privilege

Section 930.58 provides parameters for grower diversion of cherries under the order. Section 930.58(a) of the order provides that grower delivery of diversion certificates to a handler shall be treated as though they were actual harvested cherries. Section 930.58(a) should be modified to eliminate the phrase ''as though there were actual harvested cherries'' to correspond to the proposed definition of handle.

As discussed under Material Issue Numbers 1 and 2, the proposed amendments to section 930.10 and section 930.50 would change how grower diversion of cherries are accounted for under the order. Grower diversion certificates acquired by handlers would no longer be counted as handled cherries, and would also not be included as production in the volume control formula. The proposed amendment to section 930.58(a) would make reference to the treatment of grower diversion certificates consistent with the proposed amendments to sections 930.10 and 930.50 by removing the reference that grower diversion certificates are treated as handled cherries.

No testimony opposing this proposal was provided at the hearing. For the reasons stated above, it is recommended that a § 930.58, Grower diversion privilege, be revised so that grower diverted cherries would not be considered and accounted for as actual harvested cherries.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

There are approximately 40 handlers of tart cherries subject to regulation under the order and approximately 600 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small

agricultural producers are defined as those having annual receipts of less than $750,000. A majority of the tart cherry producers and handlers are considered small entities under the SBA standards.

The geographic region regulated by the order includes the states of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According to data presented at the hearings, bearing acreage in 1987–88 totaled 50,050 acres; by 2010–11 it had declined to 35,650 acres. Michigan accounts for 73 percent of total U.S. bearing acreage with 26,200 bearing acres. Utah is second, with a reported 3,300 acres, or approximately nine percent of the total. The remaining states' acreage ranges from 600 to 1,800 acres. The order includes authority for (1) Volume regulation, (2) promotion and research, and (3) grade and quality standards. Volume regulation is used under the order to augment supplies during low supply years, with product placed in reserves during large supply years.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supply presents a marketing challenge for the tart cherry industry because demand for the product is relatively inelastic, meaning a change in supply has a proportionately larger change in price.

According to data presented at the hearing, production has ranged from a low of 62.5 million pounds in 2002–03 to a high of 395.6 million pounds in 1995–96. For 2010–11, Michigan accounted for 71 percent of total U.S. production with 135 million pounds. Utah is second, with a reported 23 million pounds, or approximately twelve percent of the total. The remaining states produce between 15.4 and 1.2 million pounds.

During the hearings, multiple witnesses testified that they did not believe that the proposed amendments would have any adverse impacts on small agricultural service firms or small agricultural producers as defined by the SBA. According to the record, the proposed amendments would help agricultural businesses and growers by encouraging growers to divert some of their tart cherries in the orchard during years of extremely large supply. The proposed amendments would result in higher grower returns during years of extremely large supply. Processors would not incur the cost of processing and storing excess tart cherries. Furthermore, the growers who divert their crop do not incur harvest and transportation costs. The proposed amendments would result in a lower possibility of market saturation. Overall the supply of tart cherries in extremely large supply years result in higher returns for growers.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to improve its operation and administration. Record evidence indicates that the proposed amendments are intended to benefit all producers and handlers under the order, regardless of size.

There are three proposed amendments. Amendment one would amend Section 930.10 of the order to change the definition of ''handle,'' so that handler acquisition of grower diversion certificates is not considered handling. Amendment two would amend the ''marketing policy'' provisions in Section 930.50 of the order so that grower-diverted cherries are not counted as production in the OSF. Amendment three would amend section 930.58 of the order so that grower-diverted cherries are not treated as actual harvested cherries. The proposed amendments would modify how grower diversions are accounted for under the order.

Evidence presented when the order was promulgated indicated that a grower diversion program could benefit the industry by managing fluctuating supply. Witnesses indicated that the order has been successful in this regard. However, the record indicated that the order should be more flexible in addressing how grower diversions are utilized under the order.

The most efficient method to deal with a surplus is at the lowest level of the production and processing chain. The industry wastes the least amount of resources if it diverts cherries in the orchard. Once they are harvested, chilled, washed, de-stemmed, sorted, pitted, and packed, significantly higher costs are incurred and there is a greater risk of waste. Diverting surplus cherries in the orchard is the most cost effective method of dealing with a surplus situation and provides the largest benefit to growers through lower costs.

The order establishes an opportunity for growers to undertake in-orchard diversions of cherries (§ 930.58). These diversions are done during harvest in accordance with procedures defined under the order and are overseen by the CIAB. The CIAB issues grower diversion certificates to the growers that represent the pounds of cherries that were left in the orchard.

Growers redeem the diversion certificates with handlers, who use them as one of their compliance alternatives to meet their reserve or restricted obligation. However, under the current order definition of ''handle,'' handlers must include the pounds of cherries represented by the certificates as part of the total cherries that have been delivered and processed.

Consequently, grower in-orchard diversions effectively increase the supply of restricted cherries even though none of those cherries were delivered for processing. Grower diversion certificates are considered to be part of the total quantity of cherries that a handler receives and processes, and contribute to the total supply of restricted cherries in the OSF. This creates confusion for both the growers and processors.

The OSF is the mechanism specified in the order and used by CIAB to determine the relationship between the demand and supply of tart cherries in a given year. When the supply of tart cherries exceeds the average demand, volume regulation is implemented.

In an effort to stabilize supply and prices, the tart cherry industry uses volume regulation which allows the industry to set free and restricted percentages. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage cherries are placed in a reserve inventory. The primary purpose of setting restricted percentages and placing cherries in a reserve inventory is to attempt to balance supply with demand.

A related component of OSF under the order involves growers diverting cherries by leaving them unharvested in the orchard. Handlers can coordinate with their growers in large crop years by encouraging them to divert cherries from production. Handlers can then acquire the diversion certificates issued to growers and use them as credit toward their restriction or reserve obligations.

The interaction of sections 930.10 and 930.50 of the order establishes that grower in-orchard diversion is subject to the restriction percentage calculated for the year. Because of this, grower diversion certificates have less value when growers redeem them with handlers. Therefore, when a handler utilizes the grower diversion certificates received from growers, the certificates have a reduced value as a compliance

tool in meeting the restricted obligation. Because the certificates have a reduced value growers will deliver most of their crop to handlers instead of diverting cherries in the orchard in large crop years.

The intent of these amendments is to remove the grower disincentive for in-orchard diversion. If the method grower diversions are accounted for is changed, the grower diversion program is expected to help mitigate the negative effects of oversupply, by increasing the amount of cherries diverted from production.

This action is expected to have a positive impact on growers with respect to the value of the grower diversion certificates. If the value of the certificates increases, grower diversion of cherries in large crop years is expected to increase. Increased grower diversion activity will help to reduce excess supplies, which in turn is expected to have a positive impact on grower returns. In addition, grower costs associated with harvesting and transporting cherries to handlers will be reduced as more cherries are diverted.

This action is also expected to have a positive impact on handlers. As more fruit is diverted in the orchard, handlers will avoid the processing and storage costs that they would otherwise incur if growers harvested and delivered the fruit. Reducing the available supply of cherries is expected to mitigate the price depressing effects that oversupply typically has on the market, resulting in a positive effect for both growers and handlers.

Testimony at the hearing supported that the amendments, which would encourage grower diversions, would not have a negative impact on small growers or handlers. The hearing record supported that these amendments would benefit small growers by providing better opportunities to divert cherries in the orchard in large crop years. Small handlers are not always able to ship to export markets or have as much new product activity as larger handlers. Small handlers would benefit from these amendments by providing diversion credits as a way to meet their restrictions.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0177 (Tart cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin). No changes in those requirements is necessary a result of this action. Should any change become necessary, it would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

The implementation of these requirements is not expected to have any additional costs on handler. In fact, these proposed changes are expected to reduce costs for both growers and handlers.

In addition, the meetings regarding these proposals as well as the hearing dates were widely publicized throughout the existing tart cherry production area and all interested persons were invited to attend the meetings and the hearings and participate in CIAB deliberations on all issues. All CIAB meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The CIAB itself is composed of members representing handlers, producers and the public. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

AMS is committed to complying with the E-Government Act, to promote 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.

Civil Justice Reform

The amendments to Marketing Order 930 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with the law, and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record, were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of tart cherries grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

3. The marketing order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give

due recognition to the differences in the production and marketing of tart cherries grown in the production area; and

5. All handling of tart cherries grown in the production area as defined in the marketing order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 15-day comment period is provided to allow interested persons to respond to this proposal. Fifteen days is deemed appropriate because these proposed changes have been widely publicized and implementation of the changes, if adopted, would be desirable to benefit the industry prior to the next crop year which begins on July 1, 2012. All written exceptions timely received will be considered and a grower referendum will be conducted before any of these proposals are implemented.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is proposed to be amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise the introductory paragraph in § 930.10 to read as follows:

§ 930.10 Handle.

Handle means the process to brine, can, concentrate, freeze, dehydrate, pit, press or puree cherries, or in any other way convert cherries commercially into a processed product, or divert cherries pursuant to § 930.59, or to otherwise place cherries into the current of commerce within the production area or from the area to points outside thereof: *Provided,* That the term handle shall not include:

* * * * *

3. Revise paragraphs (d) and (e) of § 930.50 to read as follows:

§ 930.50 Marketing Policy.

* * * * *

(d) *Final percentages.* No later than September 15 of each crop year, the Board shall review the most current information available including, but not limited to, processed production and grower diversions of cherries during the current crop year. The Board shall make such adjustments as are necessary between free and restricted tonnage to achieve the optimum supply and recommend such final free market tonnage and restricted percentages to the Secretary and announce them in accordance with paragraph (h) of this section. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent shall be the final restricted percentage. With its recommendation, the Board shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Board shall give consideration to the following factors:

(1) The estimated total production of cherries;

(2) The estimated size of the crop to be handled;

(3) The expected general quality of such cherry production;

(4) The expected carryover as of July 1 of canned and frozen cherries and other cherry products;

(5) The expected demand conditions for cherries in different market segments;

(6) Supplies of competing commodities;

(7) An analysis of economic factors having a bearing on the marketing of cherries;

(8) The estimated tonnage held by handlers in primary or secondary inventory reserves;

(9) Any estimated release of primary or secondary inventory reserve cherries during the crop year; and

(10) The quantity of grower-diverted cherries during the crop year.

* * * * *

4. Revise paragraph (a) of § 930.58 to read as follows:

§ 930.58 Grower Diversion privilege.

(a) *In general.* Any grower may voluntarily elect to

divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler. Any grower diversions completed in accordance with this section, but which are undertaken in districts subsequently exempted by the Board from volume regulation under § 930.52(d), shall qualify for diversion credit.

* * * * *

Dated: November 3, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Doc. No. AMS–FV–10–0025; FV10–987–1 PR]

Domestic Dates Produced or Packed in Riverside County, CA; Proposed Amendments to Marketing Order 987 and Referendum Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rule proposes seven amendments to Marketing Agreement and Order No. 987 (order), which regulates the handling of domestic dates produced or packed in Riverside County, California, and provides growers with the opportunity to vote in a referendum to determine if they favor the changes. Five amendments were proposed by the California Date Administrative Committee (CDAC or committee), which is responsible for local administration of the order. These proposed amendments are intended to improve administration of and compliance with the order and reflect current industry practices.

In addition to the committee's proposals, the Agricultural Marketing Service (AMS) proposes two amendments that would provide for a continuance referendum every six years, and would establish term limits of up to six consecutive years for committee members. These proposals would allow producers to indicate continued support for the order and provide all interested industry members the opportunity to serve on the committee.

DATES: The referendum will be conducted from January 16, 2012, through February 3, 2012. The representative period for the purpose of the referendum is October 1, 2010, through September 30, 2011.

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