Federal Register

Friday,
November 4, 2005

Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 82

Regulations Governing the California Clingstone Peach (Tree Removal) Diversion Program; Final Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 82

[Docket No. FV05–82–01 FR]

RIN 0581–AC45

Regulations Governing the California Clingstone Peach (Tree Removal) Diversion Program

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule provides procedures for a California Clingstone Peach Diversion Program. The program will be voluntary and consist entirely of tree removal. The program will be implemented under clause (3) of Section 32 of the Act of August 24, 1935, as amended. Based on 2003 and prior season acreage, production, supply, and marketing information for California clingstone peaches, this program is expected to bring the domestic canned peach supply more in line with the market and provide relief to growers faced with excess acreage and supplies, and with low prices. The program will ensure that removal is not part of the normal process of tree replacement.

EFFECTIVE DATE: November 5, 2005.

FOR FURTHER INFORMATION CONTACT: George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491; Fax: (202) 720–8938; or e-mail: *George.Kelhart@usda.gov.*; or Kurt Kimmel, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; Telephone: (559) 487–5901; Fax: (559) 487–5906; or e-mail: *Kurt.Kimmel@usda.gov.*

Small businesses may request information on the proposed diversion program by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491; Fax: (202) 720–8938; or e-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB). In accordance with Executive Order 12866, the Department of Agriculture (USDA) has prepared a detailed regulatory impact cost-benefit assessment, which can be obtained by contacting the person(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this rule. USDA also prepared a civil rights impact analysis. This document also can be obtained by following the same procedure.

Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State and local governments and the private sector. Under section 202 of the UMRA, the Agricultural Marketing Service (AMS) generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State and local governments, in the aggregate, or by the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires federal agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State and local governments or the private sector of $100 million or more in any one year. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions, or which will otherwise impede its full implementation. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V published at 48 FR 29115 (June 24, 1983).

Executive Order 12612

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government.

Authority for a Diversion Program

This program is intended to reestablish the purchasing power of California clingstone peach growers who suffered from excess acreage, supplies, and low prices in 2003. Programs to reestablish the purchasing power of U.S. farmers are authorized by clause (3) of Section 32 of the Act of August 24, 1935, as amended (7 U.S.C. 612c), hereinafter referred to as ''Section 32.'' Clause (3) authorizes USDA to ''* * * reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption.'' Section 32 also authorizes USDA to use Section 32 funds ''* * * at such times, and in such manner, and in such amounts, as USDA finds will effectuate substantial accomplishments of any one or more of the purposes of this section.'' Furthermore, ''Determinations by USDA as to what constitutes * * * normal production for domestic consumption shall be final.''

Need for a Diversion Program

Domestic production of clingstone peaches is concentrated in California. Although there are more than 200 peach varieties, there are two basic types: Clingstone and freestone. Clingstone peaches—so named because their flesh ''clings'' to the stone, or pit—are almost exclusively canned due to their ability to retain flavor and textural consistency. Other relatively minor uses include frozen peaches, baby food, and fruit concentrate for juice. Freestone peaches—so named because their flesh is readily removed from the stone—are primarily produced for the fresh market, with secondary outlets including the frozen and dried fruit market.

Although peaches are grown commercially in more than 30 states, the National Agricultural Statistics Service (NASS) reported that, in 2003, California produced about 74 percent of all peaches grown in the U.S. Other significant peach producing states, including South Carolina, Georgia, New

Jersey, Pennsylvania, and Washington, had a combined production of a little less than 17 percent of the U.S. total. As noted earlier, clingstone peach production is concentrated in California, which claims over 95 percent of the domestic production.

NASS reports that U.S. production of all peaches in 2004 totaled a little over 1.279 million tons, of which 949 thousand tons were produced in California. In comparison, California clingstone peach production in 2004 totaled 539 thousand tons.

The U.S. is the largest producer of canned peaches in the world. However, foreign imports of canned clingstone peaches are providing an increasingly important volume of competition for the U.S. industry. Greece, the world's second largest producer of canned peaches, has been the largest exporter to the U.S., followed by Spain, South Africa, China, and Thailand (re-manufactured product). According to a February 2001 report by the Foreign Agricultural Service, the U.S. has become a net importer of canned peaches, with exports averaging around 20 thousand tons and imports averaging approximately 21 thousand tons.

The California Canning Peach Association (CCPA) requested the diversion program on behalf of the clingstone peach industry. Established in 1922, the CCPA is a nonprofit cooperative bargaining association, owned and directed by its member growers. The CCPA negotiates an annual grower price and otherwise operates on behalf of its nearly 600 members, who produce approximately 80 percent of the clingstone peaches grown in California.

Specifically, the industry requested that USDA provide funding for a tree removal program during 2004. Implementation was not possible at that time, but the diversion program will begin November 5, 2005 and grower applications to participate will be due on November 30, 2005. After receiving the CCPA's written notification approving grower tree pull applications, growers may participate in the program. The tree removals will have to be completed by June 1, 2006. CCPA believes that the program will provide relief to the peach growers who have been displaced from domestic and international markets. CCPA cited continuing market disruption and deteriorating economic conditions during 2003 for peach growers as reasons for the diversion program. The CCPA stated that the steadily increasing supply of low-priced foreign canned peaches, as well as high production costs and high levels of domestic production have resulted in record amounts of unsold fruit.

The industry's difficulty is due in part to the high cost of domestic production coupled with high levels of plantings between 1998 and 2002, and in part to the increased supply of low-priced canned peaches from other nations. Labor costs (more than ⅔ of growers' direct production costs), as well as the costs of energy, chemicals, fertilizer, and equipment have climbed dramatically over the last few years. Producer prices have not kept pace with these increases. Moreover, as processing costs have increased, canners have been forced to raise their selling prices, thus providing a more attractive domestic market for low-priced imports and a more attractive market for clingstone peaches in countries traditionally supplied by the U.S. industry (Mexico, Canada, and Japan, for example).

As previously noted, the U.S. has become a net importer of canned peaches due to several factors, including unfavorable exchange rates, subsidized Greek over-production, and low-cost Chinese production. The large increase in imports has resulted in a diminished need for domestic production with the consequence of record volumes of fruit not being sold. Imports are expected to continue to increase while the export of canned clingstone peaches, as well as clingstone peaches for canning, is anticipated to stay steady or decline. Exports to Mexico and other Central American countries—both canned peaches and peaches for canning—are being priced out by Greece, while exports to Asian markets are facing strong price competition from both Greece and China. Increasing levels of both domestic and foreign production coupled with diminished export demand (world demand for canned fruit is flat outside of the European Union) will lead to continued surplus situations for a number of years.

Young, recently planted clingstone peach trees are more productive than older trees. This results in actual production volume increasing rapidly in proportion to the increase in acreage. Due to an industry-wide belief that the canned peach market would be taking a turn for the better, farmers planted an average of 3,526 acres of clingstone peach trees per year between 1998 and 2002. Although much of this acreage has been offset with concurrent acreage reduction, the net result over the last ten years is an increase of about 4,000 acres. This extra peach acreage is not needed, however, because of the slow demand growth in the canned fruit sector and the increasing pressure from imports. The recent bankruptcy of Tri-Valley Growers (one of the major peach processors in California) has also greatly impacted the industry's ability to process the extra peach production.

Once planted, it takes clingstone peach trees 3 years to produce fruit in commercial quantities. Once a peach grower has committed funds to the planting and maintenance of an orchard, it is difficult to reverse those decisions and recoup cost. Because supply is slow to adjust to changing market conditions, without some remedial action the industry anticipates many years of production outpacing demand, resulting in a continuation, if not a worsening, of disruptive market conditions.

Industry Self-Help Initiatives

The California clingstone peach industry has taken a number of steps on its own to deal with oversupply issues. Since 1993, the industry has spent over $17 million to remove more than 10,000 acres of trees. In fact, the industry sponsored a tree pull in the spring of 2005 resulting in the removal of 2,000 additional acres. Although the CCPA administered some industry initiated acreage removal programs that compensated growers, many growers carried the costs of tree removal themselves. As noted earlier, even with aggressive tree removal, net acreage is currently up by about 2,000 acres over what it was a decade ago. Ten years ago, the number of acres was 28,100. The CCPA has also initiated and helped fund research projects aimed at reducing labor costs in the orchards, funded export incentive programs, and, as of 2004, its growers have limited new plantings to the lowest level in more than 50 years (only 580 acres planted in 2004, and an estimated 890 acres will be planted in 2005). To further improve its long-term market position, the California peach industry plans on developing new processing technology as well as new and innovative uses for clingstone peaches other than canning.

Despite these recent self-help efforts at mitigating the supply and demand imbalance, production of clingstone peaches has continued to be significantly greater than normal market needs. In fact, during both 2001 and 2002 50 million pounds of clingstone peaches were harvested but could not be sold, and in 2003 the unutilized quantity was 61 million pounds. The unsold portions represented 5.3, 4.5, and 5.9 percent, respectively, of the total crops in each of those years. In 2004, all of the clingstone peach production harvested was utilized.

The California clingstone peach industry is in need of the immediate relief USDA can provide. A diversion

program wholly consisting of a reduction in acreage through the removal of bearing trees will assist the industry in restoring a more balanced supply-demand situation for the clingstone peach industry in the short- and long-term.

Tree Removal Diversion Program

The industry is requesting $5 million in federal funds to fund a voluntary tree removal program, including administrative costs. In addition, a total of $2 million from CCPA assessments on its grower-members (to be collected and remitted by processors based on 2005 season deliveries) will be used to augment the federal funds.

The industry expects to remove 4,000 bearing acres of clingstone peach trees, or a little over 13 percent of the 30,200 acres currently in production. A healthy peach tree lives for about 20 years and reaches peak production when between 8 and 12 years old. Many of the current bearing trees are reaching the age where the normal cycle of removing old trees followed by replanting will be considered. The diversion program will provide an incentive to growers to remove healthy, fruit bearing trees rather than those near the end of their productive life, while ensuring that those orchards are not replanted with clingstone peach trees.

To be eligible for the tree removal program, growers must have made deliveries to processors during 2005. Orchards that have been abandoned will not be eligible for participation. Growers will be paid $100/ton based on their actual 2005 peach deliveries to processors from the same acreage that is being removed, provided that payments will not exceed $1,700 per acre nor be less than $500 per acre. Trees will have to be removed prior to June 1, 2006, and to be eligible must be bearing and have been planted after 1987 and before 2003. Thus, trees removed under this program will be at least three years old but less than 18 years old.

Growers who participate in the diversion program and subsequently replant a clingstone peach tree in the same location, and within the 10-year period following removal of the trees, will be required to refund to USDA all payments received, plus interest, on replanted acreage. Because it takes new trees at least three years to be commercially productive, this provision will effectively remove the acreage participating in the diversion program from commercial production of clingstone peaches for at least 13 years.

As previously stated, the tree removal program is expected to reduce California clingstone peach acreage by up to 4,000 acres, which, based on the most recent 10-year average annual yield of 17.5 tons per acre, could reduce annual production by approximately 70,000 tons. This one-time decrease in production will help align supply with demand, while also ensuring an adequate supply. In addition, this program will provide the clingstone peach industry with the economic opportunity to concentrate its efforts on rebuilding demand for the future.

The diversion program will be administered by AMS and CCPA. Any California clingstone peach grower wishing to participate in the program will file an application with the CCPA on a form approved by OMB. The application period will begin after publication of the final rule announcing the terms and conditions of the program. Applications must be submitted by November 30, 2005.

Each applicant will provide information needed by the CCPA to operate the program. This will include, for example, the location of the orchard from which trees will be removed, the acreage to be removed, and the tonnage harvested off the applicable acreage in 2005. Applicants will also certify that all equity holders in the participating acreage consent to the filing of the application, and will agree not to replant clingstone peach trees on the same acreage for 10 years after the trees were removed. The CCPA will review each application for completeness, and will make every reasonable effort to contact growers to obtain any missing information.

Each approved applicant will be notified by the CCPA on another form approved by OMB. The approved grower will be required to fill out a portion of this ''notification'' form, certifying to the CCPA that he/she had removed the clingstone peach trees, and the date of removal. The remainder of this form will be filled out by a CCPA staff member. The staff member will verify that the approved block of clingstone peach trees had been removed, list the equivalent 2005 delivery tons removed, and indicate the total amount of money due to the grower. To verify that trees are eligible for the program, a CCPA representative may sample one or more trees in the block by taking a cross section of the base of the tree after it has been cut down and counting the tree rings to determine the age of the tree. In addition, the CCPA and USDA may verify the age of the trees in the block by relying on grower records, and may use any other means deemed necessary to confirm the eligibility of the trees.

As noted earlier, the USDA will provide $5 million to fund the tree removal program, including administrative costs. Applications will be approved until the available USDA and CCPA funds have been committed. Each participating grower will have until June 1, 2006, to remove trees from their land.

Growers will be paid $100 per ton based on their actual peach deliveries to processors of peaches that were harvested in 2005 from the acreage involved in the tree removal program. Based on the conditions of program participation, payments to growers will range from $500 to $1,700 per acre, which should cover most of the costs of removing the trees as well as preparing the land for other uses. Thus, even if a grower had a yield greater than 17 tons per acre on the acreage selected for removal, payment will not exceed the maximum of $1,700 per acre established by this rule.

Conversely, if a selected block of land had a 2005 yield of 5 tons per acre or less, the grower will receive the minimum of $500 per acre. The $100 per ton payment, as well as the upper and lower limits to the amount paid per acre, are considered necessary to help ensure that enough growers participate in the tree removal program. The costs of participating in the program will vary depending on the number of acres removed. Some cost savings may accrue when larger blocks of acreage are removed.

Estimated costs for tree removal, including the removal of roots and associated debris, range from $325-$525 per acre. In addition, costs associated with preparing the ground for other crops, including leveling, fumigation, and weed control could cost between $1,050 and $1,875. Based on these estimates, grower costs associated with tree removal could total as much as $2,400 per acre. The $500-$1,500 per acre payment under the program will offset a significant portion of each grower's costs associated with tree removal.

Further offsetting the costs of tree removal will be the economic opportunities afforded the grower associated with being positioned to plant alternative crops on the cleared acreage. Additionally, the current economic conditions within the industry, specifically weak demand, reduced per capita consumption, stagnant domestic shipments and exports, increasing low-priced imports, and declining grower prices and revenues will appear to limit the incentives for replanting acreage to clingstone peach trees.

Final Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to actions in order that small businesses will not be unduly or disproportionately burdened.

There are about 700 growers of clingstone peaches in California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $750,000. Based on 2003 data from the California Agricultural Statistics Service, all of the growers will be considered small growers with annual incomes under $750,000. Thus, the majority of the growers are considered small entities under SBA's definition.

This rule will establish a tree removal diversion program for California clingstone peaches. Authority for this program is provided in clause (3) of Section 32 of the Act of August 24, 1935, as amended.

Participation in the diversion program is voluntary, so individual producers, both large and small, can weigh the benefits and costs for their own operations before deciding whether to participate in the program.

Economic Assessment of the Diversion Program

To assess the impact a tree removal program will have on prices growers receive for their product, impacts on grower prices and inventories with a tree removal program and without a tree removal program were estimated. This economic assessment compares the benefits and costs of a tree removal program to the alternative of not having a tree removal program. An econometric model was also developed for the purpose of estimating nominal season average grower prices under both scenarios.

Although a tree removal program will directly reduce the number of bearing acres, the impact of the program will not be apparent until after the 2006 crop harvest. In 2004, bearing acres are estimated at 31,740 acres. The industry has indicated that no additional net plantings of clingstone peach trees are occurring at this time. However, trees planted in 2002 through 2004 will enter production in 2005 through 2007.

The tree removal analysis assumes that 4,000 acres of clingstone peach orchards will be removed through this program. This results in the reduction in bearing acreage from 31,740 to 30,480. This number is estimated by taking the bearing acreage of 31,740, subtracting the proposed tree removal acreage (4,000) and adding the acreage planted in 2002 (2,740 acres), which will start producing in 2005. Subsequent years' bearing acreage is estimated using the same process; i.e., adding estimated acres planted three years earlier to existing bearing acreage.

Under the proposed program, acreage in 2010 is estimated to total 28,256. It is assumed that the industry will only replant trees that were removed due to old age. However, it is not likely that all trees removed due to age will be replaced, and further, that trees removed due to age will not be involved in the tree removal program.

Production for 2004 is reported by NASS at 539,000 tons. Carryin inventory for 2004 was reported by CCPA to be 3.44 million cases (24 No. 2½ size cans; No. 2½ cans have a net weight of 27–29 ounces).

Based on historical pack-out and per capita consumption, CCPA has estimated that demand for the 2005 clingstone peach crop could approximate 460,000 tons. Subsequent demand for canned peaches is estimated to increase by about one percent a year for 2006 through 2010. This assumes that per capita consumption remains constant while demand increases with the level of population.

The 2005 clingstone peach production, however, is estimated at 530,000 tons based on the reduced acreage projection of 30,480 acres and an estimated yield of 18.53 tons per acre. For this analysis, the estimated carryin is 3 million cases (24 No. 2½ basis) for 2005 and 2 million cases (24 No. 2½ basis) for 2006 through 2010, which is the desirable level favored by the industry.

Acreage removed after 2006 is estimated based on an econometric model. Despite the removal of 4,000 acres in the diversion program, the industry will conceivably continue to remove acreage on its own due to normally aging orchards.

The analysis also estimates yields based on an autoregressive model of order two that allows for some fluctuations up and down. Yields under the proposed tree removal program are adjusted upwards by 0.2 tons per acre due to the removal of lower yielding trees which will result in higher average yields than will happen without a program. Estimated production, computed by multiplying acreage times yield, fluctuates accordingly.

As carryin inventories are reduced, the total available supply will moderate for 2006 through 2010, relative to the situation without a tree removal program. This results in estimated season average grower prices ranging from $224 to $245 per ton during that same time span. This estimated price is slightly more than the total estimated cost of production. It should be noted that the margin of error for these estimates becomes very large for future years.

Even though season-average grower prices per ton increase under the tree removal program, all product produced is not necessarily of marketable quantity. Costs are incurred on all of the production, but revenue is received only on product actually marketed. Thus, the economic effect of the tree removal program on a per acre basis is to dramatically reduce losses and bring producer returns closer to a break-even level. With the level of imports anticipated to continue to increase and with the level of exports anticipated to continue to decrease, there should be only a limited incentive to further expand production as a result of the tree removal program. It will remain for growers to control costs and to expand demand to ensure their longer-term economic stability and viability.

Grower prices are a small component of the marketable canned peach product and are not closely associated with movements in retail prices. However, the increases in grower prices estimated for 2006 through 2010 may have an impact on retail prices. The extent of any retail price increases will depend on processor and retailer margins, as well as the pricing and availability of substitute canned fruit products. It should be noted that clingstone peach prices are estimated to increase with or without a tree removal program, but the magnitude of the grower price increase is greater with the program. This increase in retail price may have a slight negative impact on the quantity demanded. Such a decrease in the quantity demanded is not taken into account in this analysis.

Without a tree removal program in place, the number of bearing acres is also estimated to decrease, although at a rate slower than with a tree removal program. This decrease in bearing acreage is estimated by taking the number of producing acres during the prior year, subtracting the number of acres removed from production and then adding the number of acres planted three seasons previously. For 2006 through 2010, production is estimated to decrease due to the decline in the number of bearing acres. However,

marketable production will continue to be above the estimated 460,000 tons desired by the industry and carryin inventories are estimated as high as 3.5 million cases (24 No. 2½ basis).

In addition, abandonment of some product is estimated to occur for 2005 through 2010. Under this scenario, 2005 grower prices are estimated at $220 per ton. With high inventories and low grower prices, market forces are assumed to induce growers to remove less productive acres and the number of bearing acres is estimated to decline from to 31,740 to 29,068. Even with the decline in bearing acres, production and inventories remain excessive from 2006 through 2010. Under this scenario, grower prices are estimated to remain below or equal to the cost of production until 2010 when prices are estimated to be just above the cost of production.

Under both scenarios, grower prices increase. However, adjustments to inventories and prices occur more rapidly under a tree removal program. This will accelerate benefits to growers until market forces could bring about a slow correction.

In addition to the direct impact a tree removal program will have on grower price and revenue, there are indirect impacts. A tree removal program assists in decreasing the volume of fruit that is harvested but subsequently not utilized or simply not harvested. Without a tree removal program, large quantities of clingstone peaches could be produced and harvested but not utilized by packers. Growers will have to cover the total cost of production, harvest, and transportation but only receive payments on fruit actually canned. Further, in an attempt to sell the excessive inventories, packers might reduce f.o.b. prices, which in turn leads to market share battles and lower prices being passed back to producers. A more balanced supply and demand situation allows growers and packers to jointly continue developing markets in ways that benefit the entire industry.

Benefits of the Program

The economic assessment of the tree removal program indicates that it is expected to benefit growers (particularly small, under-capitalized growers), canners, and others associated with the clingstone peach industry. The per ton sales price is projected to increase over the next six years, thus reducing losses and moving grower returns closer to break-even levels. The benefit to growers from reduced losses is projected to total approximately $50 million over the six-year period. The benefits over the six-year period will average nearly $8 million annually.

Costs of the Program

The major direct cost of the program will be the payment to growers for removing their clingstone peach trees. A total of $5 million, less the costs associated with local administration of the program, will be made available by USDA for the tree removal program. Administrative costs for reviewing applications and verifying tree removals are expected to be about $125,000. Major expense categories for administration include costs for salaries and benefits, vehicle rental and maintenance, and insurance, overhead, and supplies.

Total grower costs associated with the completion of diversion program applications, payment requests, and record maintenance for the period specified after tree removal are expected to be about $530.

Overall Assessment of the Program

Payments made through this program could help California clingstone peach growers by addressing the oversupply problem that is adversely affecting their industry. The implementation of a tree removal program could reduce available supply more quickly than if the industry relied on market forces alone. While market forces could also result in supplies being reduced, such an adjustment may occur more slowly, with resultant economic hardships for growers and processors. In addition, a tree removal program could be beneficial in reducing the risk of loan default for lenders that financed clingstone peach growers. This program could also help small, under-capitalized growers stay in business.

Increasing the level of profitability also should provide opportunities for the industry to engage in additional demand-enhancing activities, especially directed at the domestic market. Even a moderate increase in domestic per capita consumption will have a significant, positive impact on grower returns.

Costs for the program will include the $7 million ($5 million provided by USDA and $2 million by the industry) to be paid to growers and to the CCPA for administrative costs. Additionally, growers will incur costs totaling $500 to comply with the application and record-keeping requirements of the program.

Benefits to growers under the tree removal program could total approximately $50 million. This is calculated by multiplying total marketable production for each of the next six years times the difference between grower price and variable cost, and then adding those figures. This calculation was done for each of the two scenarios (with and without a tree removal program). The $50 million difference between those figures represents an estimate of program benefits resulting from reduced grower losses.

Growers who participate in the tree pull program will likely remove older, less productive trees from production. Because younger trees are more productive, older trees typically have higher variable costs of production than younger trees, where the variable costs are spread over a higher yield. Accordingly, the $50 million benefit under the tree pull scenario is the result of both higher prices resulting from the tree pull combined with lower variable costs per ton of production.

This cost calculation assumes that the acreage on which trees are removed remains idle, and that growers will therefore absorb all fixed costs on that acreage. To the extent that the land is put to other productive uses, growers will not be absorbing all fixed costs of producing clingstone peaches, and grower benefits will be higher.

If growers are earning more income, it follows that processors will pay more to obtain the peaches from the growers. These higher costs could be passed on to consumers through higher retail prices or could be absorbed as reduced operating margins for processors, wholesalers, or retailers. An estimate of these costs is obtained by multiplying the estimated grower price over each of the next six years times annual shipments with the diversion program in place and without it in place. That figure, summed over the six years, is approximately $25 million. Processors, wholesalers, and retailers are anticipated to absorb the additional costs. Adjustments in retail prices, as well as retailer and processor margins, are anticipated to change with or without the program.

Another cost of the tree removal program is the reduced economic activity due to the growers purchasing fewer inputs (labor, chemicals, etc.) because of the reduction in the number of clingstone peach acres managed and harvested. Farm laborers and agricultural supply firms such as chemical manufacturers and distributors will realize less revenue because of the reduced need for their services and goods. To the extent that acreage removed is replanted in other crops, those costs could be somewhat offset by purchases of labor and supplies to produce the alternative crops. This cost of the tree removal program is difficult to quantify and is not included in this analysis.

Conclusion

Based on all of the information available, USDA has determined that there is a surplus of clingstone peaches, and that reestablishment of growers' purchasing power will be encouraged by using Section 32 funds to reduce supplies under a tree removal program for California clingstone peaches. USDA has further determined that this program will be a long-term solution to the oversupply situation that exists in the California clingstone peach industry, and that it will provide relief to growers.

Each grower participating in the program will agree not to replant clingstone peaches on the land from which the trees were removed for 10 years from the date the trees are removed. The non-planting promise is a guarantee by the participant that no one (not just the participant) will plant the land to clingstone peaches. Only those persons who are current owners of the land, and have not contracted to sell the land or destroy the trees, will be eligible to participate. Also, growers will guarantee that they have not made prior arrangements to sell the land or remove the trees for commercial purposes, like shopping centers, housing developments, or similar such purposes. Including such non-agricultural land in the program will not serve the purposes of the tree removal program.

Notice of this action was published in the **Federal Register** on August 3, 2005 (70 FR 44525). Interested persons were invited to submit written comments until September 2, 2005. Six comments were received. Two of those comments were received from the California Canning Peach Association, the association that requested financial support from USDA for the tree removal program. The other comments were received from a vendor of fruits and vegetables, and producers and processors of clingstone peaches.

In one of the association's comments, it requested several changes to the proposal. It pointed out that its original request specified that the maximum age of eligible trees was 18, but that the proposed rule changed that age to 17. The final rule has been modified to reflect the association's initial intent. A maximum clingstone peach tree age of 18 is expected to facilitate participation in the program. In addition, the association requested that two additional association office locations be listed to facilitate the receipt and review of grower applications in the production area. These office locations, telephone, and fax numbers have been added to the regulatory text. It also requested that the implementation process start immediately after tree removal applications have been approved. This was USDA's intent and this has been clarified in the final rule. In addition, USDA has added language regarding verifying the eligibility of trees to be removed. To verify that trees are eligible for the program, an association representative may sample one or more trees in the block by taking a cross section of the base of the tree after it has been cut down and counting the tree rings to determine the age of the tree. In addition, the association and USDA may verify the age of the trees in the block by relying on grower records, and may use any other means deemed necessary to confirm the eligibility of the trees.

In another comment, the association provided additional information in support of the diversion program. It indicated that it is much more cost effective for USDA to deal with the clingstone peach industry's supply/demand imbalance by funding the $5 million tree removal program than it would be to spend nearly $30 million per year buying surplus finished product (clingstone peaches) from processors.

One commenter stated that the program will be an effective solution to the industry's oversupply problem and will help growers survive in the long term. Another commenter stated that the industry's acreage exceeds market demand and the removal program will help bring the clingstone peach supply in line with market needs and reduce current high inventory levels.

Another commenter requested changes to the program to allow clingstone peach growers to remove trees by grafting their trees over to other fruits, such as nectarines or plums, rather than removing the trees entirely. The commenter states that considering grafting as removal under the program would be more enticing to him than removing an orchard. Grafting was not considered to be a method of removal when developing the program. The program contemplates removal of the trees and the roots of the trees, and the basis for calculating the payments per tree includes costs for removing the entire tree. Therefore, the definition of removal continues to exclude grafting as a method of removal.

One commenter did not support implementing the proposed program at this time. The commenter believes that implementation now might result in an overcorrection of the supply imbalance. According to the commenter, reducing the raw product supply too much could result in the increased importation of foreign produced peaches. This could displace domestic production and shrink the California peach grower base even more. Also, if fewer peaches are available for processors, this could increase manufacturing costs, and lead to decreased consumption and demand.

The commenter states that a significant reduction is forecasted for the 2005 peach crop due to weather changes and this already accounts for a reduction in volume that exceeds the proposed program. The commenter estimates that the 2005 harvest will be approximately 476,000 tons. The USDA projects this figure to actually be 530,000 tons and large enough to warrant implementation at this time without an overcorrection in supplies.

The opposing commenter also blames the dried prune/plum tree removal program in 2002 for the current low production in the industry. The dried prune/plum industry has experienced two years of extremely low yields due to unusual weather conditions during the bloom in spring. Yields in 2004 are reported by NASS at 0.70 tons per acre, which is a record low yield. Thus, the industry would have experienced a supply shortage even if the 17,448 bearing acres had not been removed in 2002.

From 1988 through 2003 total dried prune/plum shipments ranged from 170,000 to 180,000 tons. Given the expectation of production in excess of 200,000 tons, the industry faced a severe surplus situation. Supply is slow to adjust to changing market conditions given the substantial fixed investment in orchards. The tree removal program assisted the dried prune/plum industry in making the adjustment to lower production more rapidly than awaiting market adjustment.

The California clingstone peach industry faces a similar situation as dried prune/plum growers did in 2002. Over the past several years, the clingstone peach industry has suffered from record amounts of unsold product due to low-priced, imported canned peaches and high domestic production. This situation is leading to low grower prices and revenues that are expected to continue to deteriorate. During the 2001 and 2002 seasons, 50 million pounds of clingstone peaches were harvested but could not be sold, and 61 million pounds were unutilized in 2003. The percent of unutilized production for each of those years is 5.3 percent, 4.5 percent, and 5.9 percent.

Though there is indication of a decline in clingstone peach bearing acres for the 2005–06 crop year, there were a large number of trees planted from 1998 through 2002 that are only

starting to produce fruit and this situation is expected to adversely affect grower prices unless the tree removal program is implemented. Clingstone peach acres are expected to continue to decline but it's anticipated this will occur at a slower pace than with a tree removal program. The proposed program provides an incentive for growers to remove healthy, fruit bearing trees rather than those at the end of their productive life and ensuring those orchards are not replanted with clingstone peach trees for 10 years.

Although clingstone peach production may be down for the 2005–06 crop year (NASS final production information will not be available until January 2006), the tree removal program attempts to solve a long run over-production problem for a number of years. The program is expected to help align supply with demand and improve grower returns at a faster pace. The benefit to growers from reduced losses is projected to be approximately $50 million over the six-year period from 2005 to 2010, which is an average of nearly $8 million annually.

In view of the foregoing, and after considering all of the comments presented, the USDA has decided not to postpone the tree removal program, but as indicated has made changes where appropriate. The changes made based on the comments received are expected to improve the program and to help the program better accomplish the objectives intended. The only changes made by the final rule clarify eligibility and removal requirements as discussed above.

After consideration of all relevant matter presented, including the comments received, and other information, it is found that this final rule, as hereinafter set forth, will tend to effectuate the policy of 7 U.S.C. 612c.

Pursuant to 5 U.S.C. 553, it is further found that good cause exists for not postponing the effective date of this rule. Such delay will be contrary to the public interest because clingstone peach producers need to know as soon as possible whether they will be accepted into the program. Eligible interested producers want to begin removing the clingstone peach trees as soon as possible. In addition, further delay could jeopardize the successful removal of excess clingstone peach production.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the AMS has obtained approval from OMB of a new information collection, California Clingstone Peach (Tree Removal) Diversion Program, under OMB No. 0581–0232.

AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

As mentioned earlier, two forms will be needed for the administration of the tree removal program. Growers who wish to participate in the program will have to submit form FV–302, ''Application for Clingstone Peach Tree Removal Program,'' along with documentation, to the CCPA, which will administer the program. Upon receipt of FV–302, the CCPA will send the grower form FV–303, ''Notification of Clingstone Peach Tree Removal.'' The grower will fill out a portion of this form certifying that his/her approved block of clingstone peach trees was removed, and the date of removal. The remainder of this form will be filled out by a CCPA staff member, notifying the grower of his/her eligibility to receive a diversion payment. The form will also be used to notify USDA that the CCPA verified the grower's compliance with program regulations and recommend disbursement of Section 32 funds to the grower. Finally, participants will be required to retain records pertaining to the tree removal program for 10 years after the date the trees were removed.

We estimate that 100 growers may submit applications, and that it will take each grower about 30 minutes to complete, for a total burden of 50 hours. We also estimate that it will take the growers about 2 minutes to complete their portion of the notification form, for a total burden of 3 hours. The estimated one-time cost for all growers in completing the participation application and payment request statement (notification form), and maintaining records, is $530. This total cost was calculated by multiplying the estimated 53 burden hours by $10 per hour (a sum deemed reasonable, should the applicants be compensated for this time).

Comments were invited on the information collection in the August 3, 2005, notice of proposed rulemaking. The deadline for comments ended on October 3, 2005, and no comments were received.

List of Subjects in 7 CFR Part 82

Administrative practice and procedures, Agriculture, Peaches, Reporting and recordkeeping requirements, Surplus agricultural commodities.

■ For the reasons set forth in the preamble, Title 7, Subtitle B, Chapter 1 is amended as follows:

PART 82—[AMENDED]

■ 1. In Subtitle B, Chapter 1, Part 82 is added to read as follows:

PART 82—CLINGSTONE PEACH DIVERSION PROGRAM

Sec.
82.1 Applicability.
82.2 Administration.
82.3 Definitions.
82.4 Length of program.
82.5 General requirements.
82.6 Rate of payment; total payments.
82.7 Eligibility for payment.
82.8 Application and approval for participation.
82.9 Inspection and certification of diversion.
82.10 Claim for payment.
82.11 Compliance with program provisions.
82.12 Inspection of premises.
82.13 Records and accounts.
82.14 Offset, assignment, and prompt payment.
82.15 Appeals.
82.16 Refunds; joint and several liability.
82.17 Death, incompetency or disappearance.

Authority: 7 U.S.C. 612c.

§ 82.1 Applicability.

Pursuant to the authority conferred by Section 32 of the Act of August 24, 1935, as amended (7 U.S.C. 612c) (Section 32), the Agricultural Marketing Service (AMS) will make payment to California growers who divert clingstone peaches by removing trees on which the fruit is produced in accordance with the terms and conditions set forth herein.

§ 82.2 Administration.

The program will be administered under the general direction and supervision of the Deputy Administrator, Fruit and Vegetable Programs, AMS, United States Department of Agriculture (USDA), and will be implemented by the California Canning Peach Association (CCPA). The CCPA, or its authorized representatives, does not have authority to modify or waive any of the provisions of this subpart. The Administrator or delegatee, in the Administrator's or delegatee's sole discretion can modify deadlines to serve the goals of the program. In all cases, payments under this part are subject to the availability of funds.

§ 82.3 Definitions.

(a) *Administrator* means the Administrator of AMS.

(b) *AMS* means the Agricultural Marketing Service of the U.S. Department of Agriculture.

(c) *Application* means ''Application for Clingstone Peach Tree Removal Program.''

(d) *Calendar year* means the 12-month period beginning January 1 and ending the following December 31.

(e) *CCPA* means the California Canning Peach Association, a grower-owned marketing and bargaining cooperative representing the clingstone peach industry in California.

(f) *Diversion* means the removal of clingstone peach trees after approval of applications by the CCPA.

(g) *Grower* means an individual, partnership, association, or corporation in the State of California who grows clingstone peaches for canning.

(h) *Removal or removed* means that the clingstone peach trees are no longer standing and capable of producing a crop, and the roots of the trees have been removed. The grower can accomplish removal by any means the grower desires. Grafting another type of tree to the rootstock remaining after removing the clingstone peach tree will not qualify as removal under this program.

§ 82.4 Length of program.

This program is effective November 5, 2005, through November 9, 2015. Growers diverting clingstone peaches by removing clingstone peach trees must complete the diversion no later than June 1, 2006.

§ 82.5 General requirements.

(a) To be eligible for this program, the trees to be removed must be fruit-bearing and have been planted after the 1987 and before the 2003 calendar years. Abandoned orchards and dead trees will not qualify. The block of trees for removal must be easily definable by separations from other blocks of eligible trees and contain at least 1,000 eligible trees or an entire orchard. Clingstone peach tree removal shall not take place until the grower has been informed in writing that the grower's application has been approved.

(b) Any grower participating in this program must agree not to replant clingstone peach trees on the land cleared under this program through June 1, 2016. Participants bear responsibility for ensuring that trees are not replanted, whether by themselves, by successors to the land, or by any other person, until after June 1, 2016. If trees are replanted before June 1, 2016, by any persons, participants must refund all USDA payments, with interest, made in connection with this tree removal program.

§ 82.6 Rate of payment; total payments.

(a) Applications will be processed on a first-come, first-served basis. Growers will be paid $100 per ton based on their actual 2005 deliveries of clingstone peaches to processors from those acres of clingstone peach trees removed under this program, except that, regardless of actual 2005 deliveries, growers will receive a minimum of $500 per acre and a maximum of $1,700 per acre.

(b) Payment under paragraph (a) of this section will only be made after tree removal has been verified by the staff of the CCPA.

(c) The $100 per ton payment is intended to cover the costs of tree removal. USDA will not make any other payment with respect to such removals. The grower will be responsible for arranging, requesting, and paying for the tree removal in the specified acreage.

(d) Total payments under this program are limited to not more than $5,000,000 of Section 32 funds. No additional expenditures shall be made unless the Administrator or delegatee in their sole and exclusive discretion shall, in writing, declare otherwise.

§ 82.7 Eligibility for payment.

(a) If total applications for payment do not exceed $5,000,000, less administration costs, payments, as set forth in § 82.6, will be made under this program to any grower of clingstone peaches who complies with the requirements in § 82.8 and all other terms and conditions in this part.

(b) If applications for participation in the program authorized by this part exceed $5,000,000, less administration costs, the CCPA will approve the applications (subject to the requirements in § 82.8) in the order in which the completed applications are received in the CCPA office to the extent that funds are available. Applications received after total outlays exceed the amount of money available will be denied.

§ 82.8 Application and approval for participation.

(a) Applications will be reviewed for program compliance and approved or disapproved by CCPA office personnel.

(b) Applications for participation in the Clingstone Peach Diversion Program can be obtained from the CCPA office at 2300 River Plaza Drive, Suite 110, Sacramento, CA 95833; Telephone: (916) 925–9131; Fax: (916) 925–9030; at 335 Teegarden Avenue, Suite A, Yuba City, CA 95991; Telephone: (530) 673–8526; Fax: (530) 673–2673; or at 1704 Herndon Road, Ceres, CA 95307; Telephone: (209) 537–0715; Fax: (209) 537–1043.

(c) Any grower desiring to participate in the Clingstone Peach Diversion Program must file an application with the CCPA prior to November 30, 2005. The application shall be accompanied by a copy of any two of the following four documents: Plot Map from the County Hall of Records; Irrigation Tax Bill; County Property Tax Bill; or any other documents containing an Assessor's Parcel Number. Such application shall include at least the following information:

(1) The name, address, telephone number, and tax identification number or social security number of the grower;

(2) The location and amount of acreage to be diverted;

(3) The 2005 clingstone peach production from the acreage to be diverted;

(4) If the land with respect to which the clingstone peach trees will be destroyed is subject to a mortgage, statutory lien, or other equity interest, the grower must obtain from the holder of such interest a written statement that such party agrees to the enrollment of such land in this program to the extent determined necessary by AMS. Obtaining such assent shall be the responsibility of the applicant who shall alone bear any responsibilities which may extend to such third parties;

(5) A statement that the applicant agrees to comply with all of the regulations established for the clingstone peach diversion program;

(6) The applicant shall sign the application certifying that the information contained in the application is true and correct;

(7) The year that the clingstone peach acreage to be diverted was planted;

(8) The names of the processors who received the clingstone peaches from the grower in 2005.

(d) After the CCPA receives the applications, it shall review them to determine whether all the required information has been provided and that the information is correct.

(e) If the deliveries off the acreage to be removed in such applications, multiplied by $100 per ton (for actual 2005 deliveries on these acres, but within the constraints of a minimum payment of $500 per acre and a maximum payment of $1,700 per acre), exceed the amount of funds available for the diversion program, each grower's application will be considered in the order in which they are received at the CCPA offices.

(f) After the application reviews and confirmation of eligible trees are completed, the CCPA shall notify the applicant, in writing, as to whether or not the application has been approved

and the tonnage approved for payment after removal. If an application is not approved, the notification shall specify the reason(s) for disapproval.

§ 82.9 Inspection and certification of diversion.

When the removal of the clingstone peach trees is complete, the grower will notify the CCPA on a form provided by the CCPA. The CCPA will certify that the trees approved for removal from the acreage have been removed, and notify AMS.

§ 82.10 Claim for payment.

To obtain payment for the trees removed, the grower must submit to the CCPA by July 31, 2006, a completed form provided by the CCPA. Such form shall include the CCPA's certification that the qualifying trees from the acreage have been removed. AMS will then issue a check to the grower in the amount of $100 per eligible ton removed consistent with the minimum and maximum payments per acre earlier specified in this part.

§ 82.11 Compliance with program provisions.

If USDA or the CCPA determines that any provision of this part have not been complied with by the grower, the grower will not be entitled to diversion payments in connection with tree removal. If a grower does not comply with all the terms of this part, including the requirement specified in § 82.5(b), the grower must refund any payment made in connection with this program, and will also be liable for any other damages incurred as a result of such failure. The USDA may deny any grower the right to participate in this program or the right to receive payments in connection with any diversion previously made under this program, or both, if the USDA determines that:

(a) The grower has failed to properly remove the clingstone peach trees from the applicable acreage, regardless of whether such failure was caused directly by the grower or by any other person or persons;

(b) The grower has not acted in good faith, or has engaged in a scheme, fraud, or device, in connection with any activity under this program; or

(c) The grower has failed to discharge fully any obligation assumed by him or her under this program.

§ 82.12 Inspection of premises.

The grower must permit authorized representatives of USDA or the CCPA, at any reasonable time, to have access to their premises to inspect and examine the acreage where the trees were removed as well as any records pertaining to that acreage to determine compliance with the provisions of this part.

§ 82.13 Records and accounts.

(a) The growers participating in this program must keep accurate records and accounts showing the details relative to the clingstone peach tree removal, including the contract entered into with any firm removing the trees, as well as the invoices.

(b) The growers must permit authorized representatives of USDA, the CCPA, and the Government Accountability Office at any reasonable time to inspect, examine, and make copies of such records and accounts to determine compliance with provisions of this part. Such records and accounts must be retained for ten years after the date of payment to the grower under the program, or for ten years after the date of any audit of records by USDA, whichever is later. Any destruction of records by the grower at any time will be at the risk of the grower when there is reason to know, believe, or suspect that matters may be or could be in dispute or remain in dispute.

§ 82.14 Offset, assignment, and prompt payment.

(a) Any payment or portion thereof due any person under this part shall be allowed without regard to questions of title under State law, and without regard to any claim or lien against the crop proceeds thereof in favor of the grower or any other creditors except agencies of the U.S. Government.

(b) Payments which are earned by a grower under this program may be assigned in the same manner as allowed under the provisions of 7 CFR part 1404.

§ 82.15 Appeals.

Any grower who is dissatisfied with a determination made pursuant to this part may make a request for reconsideration or appeal of such determination. The Deputy Administrator of Fruit and Vegetable Programs shall establish the procedure for such appeals.

§ 82.16 Refunds; joint and several liability.

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under the application of this part, and if any refund of a payment to AMS shall otherwise become due in connection with the application of this part, all payments made under this part to any grower shall be refunded to AMS together with interest.

(b) All growers signing an application for payment as having an interest in such payment shall be jointly and severally liable for any refund, including related charges, that is determined to be due for any reason under the terms and conditions of the application of this part.

(c) Interest shall be applicable to refunds required of any grower under this part if AMS determines that payments or other assistance were provided to a grower who was not eligible for such assistance. Such interest shall be charged at the rate of interest that the United States Treasury charges the Commodity Credit Corporation (CCC) for funds, as of the date AMS made benefits available to such grower. Such interest shall accrue from the date of repayment or the date interest increases as determined in accordance with applicable regulations. AMS may waive the accrual of interest if AMS determines that the cause of the erroneous determination was not due to any action of the grower.

(d) Interest determined in accordance with paragraph (c) of this section may be waived on refunds required of the grower when there was no intentional noncompliance on the part of the grower, as determined by AMS. Such decision to waive or not waive the interest shall be at the discretion of the Administrator or delegatee.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed for, those claims which are addressed in 14 CFR part 1403.

(f) Growers must refund to AMS any excess payments, as determined by AMS, with respect to such application. Such determinations shall be made by the Administrator or delegatee.

(g) In the event that a benefit under this part was provided as the result of erroneous information provided by the grower, or was erroneously or improperly paid for any other reason, the benefit must be repaid with any applicable interest, subject to paragraphs (c) and (d) of § 82.6.

§ 82.17 Death, incompetency, or disappearance.

In the case of death, incompetency, disappearance, or dissolution of a clingstone peach grower that is eligible to receive benefits in accordance with this part, any person or persons who will, under 7 CFR part 707 of this title, be eligible for payments and benefits covered by this part, may receive such benefits otherwise due the actual producer, as determined appropriate by AMS.

Dated: October 31, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–21978 Filed 11–3–05; 8:45 am]

BILLING CODE 3410–02–P