

§930.162

included in the handler's end of the year handler plan, and have been assigned a Raw Product Equivalent (RPE) by the handler to determine the volume of cherries. In addition, the accidental or voluntary destruction and disposition of the product must be verified by either a USDA inspector or Board agent or employee who witnesses the disposition of the accidentally or voluntarily destroyed product. Products will be considered as accidentally destroyed if they sustain damage which renders them unacceptable in normal market channels. Products which are voluntarily destroyed must have deteriorated in condition to such an extent that they are not acceptable for use in normal market channels.

(e) *Contributions to approved charitable organizations.* When diverting by donating cherries or cherry products to charitable organizations, handlers should follow the requirements specified herein. For contributions to qualify for diversion credit, the contributed product should be marked clearly "NOT FOR RESALE". The receiving organization must be approved by the Board as a qualified recipient of contributions of tart cherry products. Such organizations must be tax-exempt, must not sell the donated products and must be noncompetitive with other tart cherry industry sales outlets. Once products are donated to an organization, the Board must receive satisfactory documentation of the transaction. Handlers should provide the Board with information on how the product was used and the volume of product used.

(f) *Grower diversion certificates.* To satisfy restricted percentage obligations by redeeming grower diversion certificates handlers must present to the Board grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with the applicable rules and regulations governing the issuance of grower diversion certificates. For this crop year July 1, 1997, through June 30, 1998, grower di-

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version certificates will be valid until February 5, 1998.

[63 FR 404, Jan. 6, 1998, as amended at 63 FR 20019, Apr. 22, 1998; 64 FR 9268, Feb. 25, 1999; 64 FR 33009, June 21, 1999; 65 FR 35267, June 2, 2000; 69 FR 41385, July 9, 2004; 71 FR 16985, Apr. 5, 2006]

§930.162 Exemptions.

(a) *General.* Tart cherries which are used for the purpose of new product development, for new market development and market expansion, for the development of export markets, for experimental purposes, for export to countries other than Canada, and Mexico, or which are donated to charitable organizations may be granted an exemption by the Board and will be exempt from §§930.41, 930.44, 930.51, 930.53, and §§930.55 through 930.57, subject to the following terms and conditions. Any information received of a confidential and/or proprietary nature included in this application will be protected from disclosure pursuant to §930.73 of the order.

(b) *Definitions.* The terms in paragraph (a) of this section shall have the following meaning:

(1) *New product development.* This term includes the development of new tart cherry products or of foods or other products in which tart cherries or tart cherry products are incorporated which are not presently being produced on a commercial basis. New product development can also include the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry; an end product of the processing of raw tart cherries done by the industry at pack time either for resale or for re-manufacturing which has not been manufactured previously by the industry; or a processed, value-added item that includes tart cherry products as an ingredient which has never been marketed to consumers either by a handler within the industry or by a food manufacturer. In addition, the maximum duration of any credit activity is three years from the first date of shipment.

(2) *New market development and market expansion.* This includes the development of markets for tart cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry (including the development of new export markets): *Provided*, That these markets are a geographic area into which tart cherries or products derived from them have not been previously sold. The term "market expansion", includes activities that incrementally expand the sale of either tart cherries or the products in which tart cherries are an ingredient, such as, but not limited to: Expansions of the geographic areas into which tart cherries or tart cherry products are marketed; product line extensions; significant improvements to or revisions of existing products; packaging innovations; segmentation of markets along geographic, demographic, or other definable characteristics; and product repositionings.

(3) *Development of export markets.* The sale of cherries or cherry products, including the development of sales for new or different tart cherry products or the expansion of sales for existing tart cherry products, to countries other than Canada, and Mexico.

(4) *Experimental purposes.* The use of cherries or cherry products in preliminary and/or developmental activities intended to result in new products, new applications and/or new markets for tart cherry products. Any exemption for experimental work shall be limited in scope, duration and volume based on information supplied by the applicant at the time a request for exemption is made. In no case shall an individual exemption for experimental purposes last longer than five years or exceed 100,000 pounds raw product equivalent of tart cherries.

(c) *Obtaining approval for exempt uses.* In order to receive exemptions for cherries or cherry products utilized for exempt purposes, handlers must apply to the Board for a new exemption or for renewal of an existing exemption by November 1 for the next succeeding year, except for the 1997 year only, handlers may apply through February 5, 1998. A handler shall have one crop year to dispose of cherries or cherry

products to exempt outlets approved by the Board, unless granted a renewal. Handlers applying to the Board for a new exemption or for renewal of an existing exemption are subject to the following conditions:

(1) When applying to the Board for an exemption for new product development, handlers must detail the nature of their new product, how it differs from current, existing products and the anticipated short and long term sales volume for the exemption. It will be the Board staff's responsibility to analyze and investigate any request and upon completion of that analysis authorize or deny the exemption.

(2) When applying to the Board for an exemption for new market development, handlers must detail the nature of their new market, how it differs from current, existing markets and the anticipated short and long term sales volume for the exemption. It will be the Board staff's responsibility to analyze and investigate any request and upon completion of that analysis authorize or deny the exemption.

(3) When applying to the Board for an exemption for the development of export markets for tart cherries or cherry products (including juice and juice concentrate) in countries other than Canada and Mexico, including the expansion of sales in existing export markets, handlers must detail the nature of their product, specify whether such product differs from current products being sold in export markets, and estimate the anticipated short and long term sales volumes for the requested exemption.

(4) When applying to the Board for an exemption for experimental purposes, handlers must indicate the preliminary and/or developmental experimental activity. Such experimental purposes should be intended to result in new products, new applications and/or new markets for existing tart cherry products. Any exemption for experimental work shall be limited in scope, duration and volume which the proposing party shall specify at the time a request for exemption is made. In no case shall an exemption for experimental purposes last longer than five years or exceed 100,000 pounds raw product

equivalent per handler of tart cherries during the duration of the experiment.

(5) To be eligible for new product, new market development and market expansion diversion exemptions, a handler must demonstrate involvement in the activity for which the exemptions are sought. The requesting handler must either be or have been involved in development of the product, the market, or market expansion activities for which the exemptions are sought or have had financial involvement in the activities. This involvement must be demonstrated and established to the satisfaction of the Board by the handler requesting the exemptions.

(d) *Review of applications.* A Board appointed subcommittee of three persons which shall include the manager (or a Board member acting in the Manager's stead), the public member and one industry person who is not on the Board, shall review applications for exemption or renewal of exemption and either approve or deny the exemption. Any denial of an application for exemption or renewal of an existing exemption shall be served on the applicant by certified mail and shall state the reasons for the denial. Within 10 days after the receipt of a denial, the applicant may file an appeal, in writing, with the Deputy Administrator, Fruit and Vegetable Programs, supported by any arguments and evidence the applicant may wish to offer as to why the application for exemption or renewal of exemption should have been approved. The Deputy Administrator upon consideration of such appeal will take such action as deemed appropriate with respect to the application for exemption or renewal of exemption.

(e) *Progress report.* Each handler that is granted an exemption must submit to the Board an annual progress report, due May 1 of each crop year. The progress report shall include the results of the exemption activity (comparison of intended activity with actual activity) for the year in its entirety, the volume of exempted fruit, an analysis of the success of the exemption program, and such other information as the Board may request.

(f) *Diversion credit; failure to meet terms and conditions of exemption.* Handler diversion certificates for exempt

uses shall be issued to handlers provided that terms and conditions applicable to exempt uses are satisfied. Diversion certificates will not be issued to handlers for any volume of tart cherry products for which such terms and conditions are not satisfied and such cherries would be subject to all of the terms and conditions of §§930.41, 930.44, 930.51, 930.53, and §§930.55 through 930.57.

(g) *Failure to meet terms and conditions for exemption.* Upon termination of an exemption, any volume of tart cherry products that were granted an exemption but were not utilized for the authorized exempt purpose would be subject to all of the terms and conditions of §§930.41, 930.44, 930.51, 930.53, and §§930.55 through 930.57.

[63 FR 405, Jan. 6, 1998, as amended at 65 FR 35267, June 2, 2000; 66 FR 39413, July 31, 2001; 69 FR 34553, June 22, 2004; 71 FR 16986, Apr. 5, 2006]

§930.163 Deferment of restricted obligation.

A handler may obtain a surety bond on restricted percentage cherries to be posted to temporarily defer the date that inventory reserves must be held. The surety bond must be posted at two times the market value of the quantity of cherries for which the holding obligation is being deferred. The Board can temporarily defer the date inventory reserve cherries must be held to any date requested by the handler. However, this date shall not be later than 60 days prior to the end of the crop year. The deferment shall be conditioned on the execution and delivery by the handler to the Board of a written undertaking within 30 days after the Secretary announces the final restricted percentage under §930.51. The written undertaking (required to be secured by a bond or bonds with a surety or sureties acceptable to the Board) must guarantee that on or prior to the deferment date requested by the handler the handler will have fully satisfied the restricted percentage obligation. On or prior to the deferment date requested by the handler, the handler will have to fully satisfy the restricted percentage obligation. In the event, a handler has posted the surety bond, reached the deferment date deadline