

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. FV97-930-4 IFR]

#### Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of Proviso for Exporting Juice and Juice Concentrate; Establishment of Regulations for Handler Diversion

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule and temporary suspension of order provisions with request for comments.

**SUMMARY:** This interim final rule implements provisions of the Federal tart cherry marketing order (order) by establishing regulations concerning handler diversion, including diversion credit for exempt uses, and by defining certain terms relating to exemptions. In addition, this rule temporarily suspends language in a provision of the order which would result in allowing handlers to receive diversion credit for exporting juice and juice concentrate to eligible countries for the 1997-98 crop year only. Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement when volume regulation is in effect by diverting cherries or cherry products rather than by placing them in an inventory reserve.

**DATES:** Effective January 7, 1998; comments received by February 5, 1998 will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456, Fax #

(202) 720-5698. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:**

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, room 2530-S, P.O. Box 96456, Washington, DC 20090-6456, telephone: (202) 720-5053, Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491; Fax: (202) 720-5698.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Order No. 930 (7 CFR part 930) regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the "order." This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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 the Secretary 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 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 the Secretary 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 the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

The tart cherry marketing order was recently promulgated and the Cherry Industry Administrative Board (Board) met March 12-13, June 26-27, and September 11-12, 1997, to establish, and recommend to the Secretary, rules and regulations to implement the order authorities, and to consider volume regulation for this crop year. On or about July 1 of each crop year the Board is required to review sales data, inventory data, crop forecasts and market conditions in order to establish an optimum supply volume which is then used in calculating a preliminary free market tonnage percentage. In the event that a restricted percentage is recommended and imposed, handler diversion is one method under the order that handlers can utilize to meet restricted percentage requirements. The Board established and announced the optimum supply level and preliminary free and restricted percentages for the 1997-98 crop year as required by the order. On September 11-12, 1997, the Board reviewed its marketing policy and previous recommendations, and recommended a 55 percent final free market tonnage and a restricted percentage of 45 percent for this crop year.

All handlers were notified of this recommendation pursuant to section 930.50(h) of the order. Pursuant to § 930.50, final percentages for volume regulation are required to be recommended to the Secretary by September 15. Whenever it is found by the Secretary that it would be appropriate to set free market tonnage and restricted percentages for cherries acquired by handlers, volume regulations would be issued through informal rulemaking.

This rule establishes procedures for handler diversion. Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products. Volume regulation is intended to help the tart cherry industry stabilize supplies and

prices in years of excess production. The volume regulation provisions of the order provide for a combination of processor owned inventory reserves and grower or handler diversion of excess tart cherries. Reserve cherries may be released for sale into commercial outlets when the current crop is not expected to fill demand. Under certain circumstances, such cherries may also be used for charity, experimental purposes, nonhuman use, and other approved purposes.

Section 930.59(b) of the order provides for the designation of allowable forms of handler diversion. These include: uses exempt under § 930.62; contribution to a Board approved food bank or other approved charitable organization; acquisition of grower diversion certificates that have been issued in accordance with § 930.58; or other uses, including diversion by destruction of the cherries at the handler's facilities.

A new § 930.159 is added to the rules and regulations concerning handler diversion. One method of diversion available to handlers is by destruction of cherries at the handler's facility. Disposal at the handler's facility will take place prior to placing the product into the processing line. This is to ensure that the product diverted is not simply an undesirable by-product of processing. Handlers electing to divert cherries or cherry products must first notify the Board and submit a plan for approval. Such notification and plan shall include an agreement that diversion will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision is to be paid by the handler. USDA inspectors will supervise diversion of cherry products at the current hourly rate of \$41.00 under USDA's inspection fee schedule (7 CFR § 54.42). Board employees will supervise diversion at the same rate. Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming 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 rules and regulations governing the issuance of grower diversion certificates (§ 930.100, 62 FR 44881, August 25, 1997). Diversion by means other than destruction of cherries at handlers' facilities would also be subject to supervision as found necessary by the Board. Fees would be charged as discussed above.

Once diversion is satisfactorily accomplished, handlers will receive diversion certificates stating the weight of cherries diverted. Such diversion certificates can be used to satisfy handlers' restricted percentage obligations. Cherries and cherry products which have been diverted shall not be subject to assessment.

A handler will have one crop year to fulfill the diversion plan which was submitted and approved by the Board. The details of the plan shall show, among other things, the name and address of the handler, the total product processed at-plant, cherries diverted at-plant, in-orchard diversion certificates redeemed, and anticipated donations to charitable outlets. A handler will also have one crop year to dispose of cherries or cherry products for exempt uses approved by the Board, unless granted a renewal. By February 5, 1998 for the 1997 crop year only, and November 1 for subsequent crop years, each handler must submit on Board Form No. 4 the details of how such handler will satisfy the restricted percentage obligation. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. The November 1 date corresponds with the date that grower diversion certificates are no longer valid (this date is extended by this action to February 5, 1998 for the 1997-98 crop year). Other reports detailing the inventory reserve summary are also due by February 5, 1998 for the 1997 crop year only, and November 1 for subsequent crop years. Any information obtained by the Board which is of a confidential and/or proprietary nature would be protected from disclosure pursuant to § 930.73 of the order.

Section 930.59(b) which specifies the diversion options for handlers, includes uses exempt under § 930.62. Section 930.62 provides that the Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41, 930.44, 930.51, 930.53, and 930.55 through 930.57 cherries which are diverted in accordance with section 930.59, which are used for new product and new market development, which are used for experimental purposes, or which are used for any other purpose designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized. One such use which may be designated as an exempt use and granted diversion credit is the exportation of cherries. Tart cherries used for exempt purposes are not

subject to certain marketing order provisions. These provisions include assessment, quality control, volume regulation, and reserve provisions.

For the purposes of the regulation concerning exempt uses, the Board has recommended that certain terms be defined. Also, the Board recommended that handlers who use cherries or cherry products for approved exempt purposes receive diversion credit pursuant to section 930.59(b).

Thus, a new section 930.162 is added to the rules and regulations defining exempt use terms and authorizing exemptions under the marketing order. Terms defined include new product development, new market development, development of export markets, and experimental purposes.

The first term defined is "new product development." New product development includes the production or processing of a tart cherry product using a technique not presently being utilized commercially in the tart cherry industry. For example, a handler may ask for an exemption for product such as ground meat in combination with raw tart cherries to form a leaner meat product. The Board determined that when a new product is commercially viable, which is defined as the time when total industry utilization for the product exceeds 2 percent of the five year average production of tart cherries, the exemption shall terminate. Therefore, the Board has recommended that when the utilization of the product exceeds 2 percent of the five year average production, the product has received consumer acceptance and should no longer be eligible for a new product development exemption.

The second term which is defined is "new market development." Under the definition, new market development means the development of markets for cherry products which are not commercially established markets and which are not competitive with commercial outlets presently utilized by the tart cherry industry. For example, a handler may seek to establish sales of cherry preserves to India or China, currently undeveloped markets. The Board determined that a new market becomes commercially established when the total industry utilization in that market exceeds 2 percent of the five year average production of tart cherries.

The third term which is defined is "development of export markets." This is defined as exports to countries other than Canada, Mexico and Japan, including the development of sales for new or different tart cherry products or the expansion of sales for existing tart cherry products. An example of

development of sales for new or different tart cherry products could be a handler seeking to establish sales of dried cherries in Germany, which is primarily a hot pack market. Board members and meeting participants discussed the favorable export market this season. Handlers have exports to many countries, including Italy, France, Belgium, Germany and The Netherlands and have enjoyed a significant increase in volume of exports into these countries. Handlers have indicated that exports of tart cherry products have increased significantly over previous years' exports. Board members indicated that last year's exports totaled about 10 million pounds. This year, handlers are expected to experience the largest volume of exports on record, estimated at up to 50 million pounds. Handlers have been able to expand existing export markets and establish new markets for the future. Board members also commented that hot pack product (canned tart cherries) have been shipped to export markets that have never received such product before. Contributing to their success is the excellent quality of this year's crop. Growers and handlers have experienced high quality fruit due to favorable growing conditions for tart cherries this season. This high quality fruit has resulted in high quality products which are very competitive in export markets. The availability of such high quality cherry products increases the likelihood of maintaining such markets in future seasons. Handlers also have experienced a growth in IQF (Individually Quick Frozen) sales in the export market this season. If handlers are not able to use this option, more product might be destroyed to avoid the possibility of processing and storage costs associated with placing cherries into an inventory reserve. Exports to Mexico, Canada, and Japan are not included in this exemption because, according to the Board, tart cherry markets are well established in those countries.

The fourth term which is defined is "experimental purposes." Uses for experimental purposes include preliminary and/or developmental activities, such as a handler working with cereal companies to develop a cereal using dried cherries. 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 purposes shall be limited in scope, duration, and volume which the applicant 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. The Board has recommended that the five year or 100,000 pound raw product equivalent per handler limits are sufficient to determine whether such cherries for experimental purposes can be developed into new products or uses.

To qualify for an exemption under section 930.62, a handler must apply to the Board for a new exemption or for renewal of an existing exemption by November 1 for the next succeeding year. Handlers may apply for an exemption through February 5, 1998 for the 1997 year only, and by November 1 for subsequent crop years. These dates were changed from the Board's recommendation of June 1 in order to provide handlers ample time to harvest and assess their crop each year. When applying to the Board for an exemption, the handler must detail the nature of the product or market, how it differs from current, existing products and/or markets and the estimated short and long term sales volume for the exemption. In addition, in order to obtain diversion credit for cherries used for exempt purposes, the application must also contain an agreement that the proposed exempt use diversion is to be carried out under the supervision of the Board, and that the cost of any such supervision that is needed is to be paid by the applicant. The fees for such USDA or Board supervision, as previously stated, will be the current hourly rate of \$41.00 under USDA's inspection fee schedule (7 CFR 54.42). The information which is provided will allow Board staff to assess the request for exemption and render a determination concerning its approval. Any information received by the Board which is of a confidential and/or proprietary nature would be protected from disclosure pursuant to section 930.73 of the order.

The Board discussed providing assistance to its staff with reviewing applications pertaining to exemptions. The Board recommended that a subcommittee be formed to assist staff members to ensure that exemptions are properly reviewed and granted. The Board suggested that a subcommittee of three persons, which could include the manager, a public member and one industry member who is not on the Board, be established. Handlers whose requests for exemption or renewal of exemption are denied would be able to appeal such denial to the Deputy Administrator, Fruit and Vegetable Programs.

Each handler that is granted an exemption must submit to the Board an annual progress report, due May 1 of each 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 the Board may request.

As previously discussed, the Board has recommended that exports to countries other than Canada, Mexico and Japan be exempted pursuant to § 930.62. The Board has also recommended that diversion credit be granted for such exports. Handlers wishing to receive diversion credit for exports must provide to the Board on-board bill of lading documentation or other documentation to verify export before the Board will issue diversion credit.

The Board will grant diversion credit for exempted products after it has received the necessary information concerning the particular exemption and when it is satisfied that the handler requesting the diversion credit has satisfied all the requirements relevant to the exemption. The Board recommended for the 1997 season (July 1, 1997 through June 30, 1998) only, that handlers receive diversion credit for up to one million pounds of exempted products per handler for new market development and new product development. The Board believes this will provide adequate flexibility for individual handlers to obtain diversion credit for exempt uses this season, but recommended providing some restriction on the absolute volume of such allowable diversions until more experience with the program has been obtained. However, the one million pound limit for exempted products per handler does not apply to handlers desiring to receive diversion credit for exports. As stated previously, this is the first season this program is in effect and handlers have exported or contracted to export tart cherry products. Some of these handlers may have shipped in excess of the one million pound limit. Allowing full diversion credit for the amount of product shipped abroad, will prevent both growers and handlers from incurring financial losses. The Board is continuing to review the issue of what limits to impose on exempted products.

Handlers desiring to receive diversion credit for donations to charitable organizations should follow the requirements specified in the regulations. 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.

Handlers desiring to receive diversion credit for cherries diverted under § 930.59, including uses exempt under § 930.62, but who fail to meet the terms and conditions in the regulation for such diversion would not receive diversion credit for the cherries or cherry products. Any cherries not properly diverted in accordance with Board Form No. 4 must be placed into the handler's secondary reserve if one has been established or the primary reserve if a secondary reserve has not been established. The primary reserve is the first reserve where handlers in volume regulated districts can place tart cherries or tart cherry products to hold from primary markets in order to meet restricted percentage obligations. The primary reserve is limited to a capacity of 50 million pounds. A secondary reserve is established only after the primary reserve has been filled to the 50 million pound capacity. The secondary reserve is where the balance of reserve cherries or cherry products are held. There is no maximum capacity for the secondary reserve. Both primary and secondary reserves are operated at the handler's expense and no cherries can be removed from the secondary reserve until the primary reserve has been depleted. Upon termination of an exemption, any volume of tart cherry products that were exempted from order requirements but which were not utilized should be placed into the secondary inventory reserve if one has been established, or into the primary reserve. It is the handler's responsibility to fulfill the restricted percentage obligations established by volume regulation. A handler may fulfill the restricted percentage obligation by either transferring cherries from his/her own inventory, purchasing additional cherries or cherry products or obtaining diversion certificates from other handlers to meet such obligation.

In addition to the recommendation already discussed, the Board, at its March meeting, also recommended that the Department modify the optimum supply formula by deducting exports from the calculation. The Department is

not proceeding with this recommendation since the order promulgation record indicates that average sales should include sales to all markets, including exports.

At its meeting in March, when discussing exports, the Board also recommended that juice and juice concentrate, to countries other than Canada, Mexico, and Japan, receive diversion credit. During the production and processing of the crop, handlers have exported, or have contracted to export, tart cherry juice or juice concentrate for this season. Many of these exports were for the purpose of expanding existing markets or developing new markets. According to the Board, if diversion credit is not allowed for export juice or juice concentrate, some of these handlers could suffer substantial financial losses since they would have to pack or purchase additional cherries to place in their inventory reserves or default on contracts. These costs would likely be passed on to growers. Therefore, the Board recommended at its September 11-12, 1997, meeting that the proviso in § 930.59(b) of the order be suspended for this year only and that diversion credit for exports of juice and juice concentrate be allowed for the 1997-1998 crop year. The temporary suspension of the proviso for the 1997-98 crop year would allow handlers to receive diversion credit for juice and juice concentrate exported to countries other than Canada, Mexico and Japan.

New export sales of juice and juice concentrate this crop year are estimated to be in the range of 4-7 million pounds. While significant to the handlers making such sales, traditional sellers of juice and juice concentrate products in established domestic and export markets have not indicated any undue increase in competition. This is because the bulk of the new export sales of juice and juice concentrate probably represent sales to new markets or expansion of existing markets. Therefore, the Board has recommended that diversion credit be granted this crop year only to those handlers exporting juice and juice concentrate to eligible countries. This action is not intended to establish a precedent for future seasons. It will be used to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate, to prevent disorderly marketing conditions and unnecessary financial losses by handlers. Not proceeding with the suspension this season could result in disorderly marketing in the domestic market, since, in addition to the problems already

mentioned, juice and juice concentrate intended for export would likely have to be sold domestically. This situation will be avoided in subsequent seasons since handlers should be fully aware of the order's restrictions.

### **The Regulatory Flexibility Act and Effects on Small Businesses**

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this initial regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) would allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the order and approximately 1,220 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000. The majority of handlers and producers of tart cherries may be classified as small entities.

Section 930.59 of the tart cherry marketing order provides authority for handler diversion. Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirements which may be in effect in full or in part through diversion of cherries or cherry products in a program approved by the Board, rather than placing cherries in an inventory reserve. Handlers can divert by destruction of

the cherries at the handler's facility, making charitable donations, and using cherries or cherry products for exempt purposes, or by redeeming grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board. Once diversion is satisfactorily accomplished, handlers will receive a diversion certificate stating the weight of cherries diverted. Such diversion certificates can be used to satisfy the handler's restricted percentage obligation. This enables handlers to either place cherries into an inventory reserve or select the diversion option most advantageous to their particular business operation. Costs for supervision of such actions will take place under the supervision of the USDA Processed Products Inspection Service or Board employee inspectors, and that the costs of such supervision is to be paid by the handler. USDA inspectors will supervise diversion of cherry products at the current hourly rate of \$41.00 under USDA's inspection fee schedule (7 CFR 54.42). Board employees will supervise diversion at the same rate. Diversion may also be accomplished by handlers donating cherries to charitable organizations, utilizing cherries in exempt outlets, or redeeming 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 rules and regulations governing the issuance of grower diversion certificates (§ 930.100, 62 FR 44881, August 25, 1997). Diversion by means other than destruction of cherries at handlers' facilities would also be subject to supervision as found necessary by the Board. Fees would be charged as discussed above. Providing such options allows handlers to minimize processing and storage costs associated with meeting restricted percentage obligations. Such cost savings may also be passed on to growers and consumers. Thus, providing these options accomplishes the purposes of the order and the Act.

The Board also recommended granting handlers diversion credit for cherries used for exempt purposes under section 930.62. Those purposes include cherries used for new product development, for the development of export markets, for experimental purposes, and the export of cherries and cherry products, including juice or juice concentrate, to approved countries.

In order to provide for juice and juice concentrate as a diversion outlet, the Board recommended that the proviso under § 930.59 (b) of the order be

suspended. Therefore, this rule temporarily suspends language in the proviso under § 930.59 (b) of the order. The suspension would temporarily remove a prohibition against allowing diversion credit for juice and juice concentrate for this crop year only. However, the Board would only grant diversion credit for juice or juice concentrate exported to eligible countries. The Board recommended this suspension be used to correct any misunderstandings that have occurred in the industry about order operations concerning juice and juice concentrate, to prevent disorderly marketing conditions and unnecessary financial losses by handlers.

The temporary suspension of the juice and juice concentrate proviso was discussed at the most recent Board meeting. It was the Board's view that if the proviso is not suspended, affected handlers will have to expend additional funds to meet their restricted obligations by placing products that they could have sold in export markets into an inventory reserve or at-plant divert. The costs of these actions would likely be passed on to growers.

New export sales of juice and juice concentrate this crop year are estimated to be in the range of 4-7 million pounds. While significant to the handlers making such sales, traditional sellers of juice and juice concentrate products in established domestic and export markets have not indicated any undue increase in competition this season. This is because the bulk of the new export sales of juice and juice concentrate probably represent sales to new markets or expansion of existing markets, rather than an increase in competition among sellers for previously developed markets. As previously stated, handlers have indicated that exports of tart cherry products have increased significantly over previous years' exports. Board members indicated that last year's exports totaled about 10 million pounds. This year, handlers are expected to experience the largest volume of exports on record, estimated at up to 50 million pounds. Handlers have been able to expand existing export markets and establish new markets for the future. Board members also commented that hot pack product (canned tart cherries) have been shipped to export markets that have never received such product before. Contributing to their success is the excellent quality of this year's crop. Growers and handlers have experienced high quality fruit due to favorable growing conditions for tart cherries this season. This high quality fruit has

resulted in high quality products which are very competitive in export markets. The availability of such high quality cherry products increases the likelihood of maintaining such markets in future seasons. Not proceeding with the suspension this season could result in disorderly marketing in the domestic market.

The impact of this rule would be beneficial to growers and handlers. Authorizing various diversion outlets and allowing diversion credit for exempt uses means handlers will not be required to divert excess cherries at their plants. Instead, fruit can be processed into a usable form, thereby promoting the development of new products and the expansion of new markets for tart cherries. Authorizing exemptions for various uses of tart cherries should also promote such market development and expansion, as well as making cherries available for charitable purposes. Suspending an order provision for this season only will allow handlers to take advantage of export markets and obtain diversion credit for such exports, increasing the utilization of this season's crop and grower and handler returns.

The Board considered alternatives to these recommendations. With respect to handler diversion and diversion credit for exempt uses, if volume regulation is imposed this season and diversion credits are not granted, handlers would have to divert cherries by other means or place cherries in an inventory reserve, which may not be desirable for some handlers since storage costs of the reserve are borne by the handler. For example, the Board discussed not granting handlers diversion credit for at-plant diversion. However, the Board felt that providing such a diversion option increased handler flexibility to process and pack the best cherries available during a year when volume regulation is in effect and to reduce the costs of processing and storing reserve cherries.

The Board also discussed not granting exemptions, and diversion credit for such exemptions, for exports to eligible countries (including juice and juice concentrate), other exempt uses, and charitable donations. However, the Board felt this would not be in the best interest of the industry or the public. As previously discussed, the Board expressed that not allowing the export and other exemptions would have a detrimental effect on the market this season if free and restricted percentages are imposed. Without such exemptions and diversion credits for export sales, new market development and other specified uses, about 50 million pounds of cherries would not be removed from

the domestic market this season, depressing grower returns for all cherries. The marketing order was designed to increase grower returns by stabilizing supplies with demand as well as stabilizing prices and creating a more orderly and predictable marketing environment. Expanding markets and developing new products is key to meeting this marketing order's goals.

Not granting exemptions and diversion credit for exports to countries other than Canada, Mexico, and Japan was also discussed at Board meetings. However, the Board expressed that this recommendation is very important to creating stable conditions in the export marketplace this season and would encourage future market growth. The Board further stated that such action will improve returns to growers because of the tremendous growth in the export market this season.

This rule imposes certain reporting and recordkeeping requirements on tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any relevant Federal rules which duplicate, overlap or conflict with this rule.

#### **Paperwork Reduction**

In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104-13), the information collection and recordkeeping requirements imposed by the order have been previously approved by OMB and assigned OMB Number 0581-0177. This includes the requirements contained in this regulation (i.e. progress reports, applications). The components of the Handler Reserve Plan and Final Pack Report which handlers must submit to utilize at-plant and exempt use diversion and the requirements for other reports related to handler diversion and handlers meeting their restricted percentage obligations (i.e., Inventory Reserve Summary, Cherries Acquired from Producers, Handler Reserve Plan and Final Pack Report, and Inventory Location Report) have received approval by OMB. It was anticipated that as many as 45 handlers might be regulated if volume regulations are established. Many reports are submitted a single time each season, while some are submitted more frequently. In addition, the bulk of the information handlers must report is obtained during the normal course of their business

operations. It would take handlers approximately 15 minutes per report to complete for a total of 60 minutes per handler and approximately 2,700 minutes annually for the estimated 45 handlers. 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.

The Board's meetings were widely publicized throughout the tart cherry industry and all interested persons were invited to attend them and participate in Board deliberations. Like all Board meetings, the March, June, and September 1997, meetings were public meetings and all entities, both large and small, were able to express their views on these issues. The Board itself is composed of 18 members, of which 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations. The Board's Diversion Subcommittee met on March 12, 1997, and discussed handler diversion in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views. A majority of these entities expressed that, in their opinion, the recommendations made by the Board would have a positive impact on both small and large entities. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

Pursuant to section 930.50 of the order, the Board met on June 26-27, 1997, to formulate a 1997-98 marketing policy using a USDA crop estimate of 242 million pounds. The Board met on September 11-12, 1997, and revised its marketing policy based on actual 1997-98 tart cherry production of 284 million pounds.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim final rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is also found that, for the 1997-98 crop year only, the proviso under § 930.59(b), which prohibits handlers from receiving diversion credit for juice and juice concentrate, should be suspended since such proviso does not tend to effectuate the declared policy of the Act.

This rule invites comments on the establishment of rules and regulations for handler diversion and granting exemptions from certain order

provisions, allowing diversion credit for exempt uses and charitable donations, the suspension of an order provision in section 930.59(b), and the possible impacts of these actions on both small and large entities.

Pursuant to 5 U.S.C. 553, it is found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This is the first season the marketing order has been in effect and regulations are needed to implement its authorities; (2) these rules need to be in place this season since the industry is marketing its crop currently and that the crop year began on July 1, 1997; (3) the Board unanimously recommended these changes at public meetings and interested parties had an opportunity to provide input; (4) handlers need to know the procedures in order to operate their plants this season; and (5) this rule provides a 30-day comment period and any comments received will be considered prior to finalization of this rule.

#### **List of Subjects in 7 CFR Part 930**

Marketing agreements, Tart cherries, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 930 is 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.

#### **§ 930.59 [Amended]**

2. In § 930.59, paragraph (b) the words, "*Provided, That* diversion may not be accomplished by converting cherries into juice or juice concentrate" are suspended through June 30, 1998.

3. A new § 930.159 is added to read as follows:

#### **§ 930.159 Handler diversion.**

(a) *Methods of diversion.* Handlers may divert cherries by redeeming grower diversion certificates, by destroying cherries at handlers' facilities (at-plant), by donating cherries or cherry products to Board approved charitable organizations, or by using cherries or cherry products for exempt purposes

under § 930.162, including export to countries other than Canada, Mexico and Japan. Once diversion is satisfactorily accomplished, handlers will receive diversion certificates stating the weight of cherries diverted. Diversion credit may be used to fulfill any restricted percentage requirement in full or in part. Any information received of a confidential and/or proprietary nature pursuant to this section will be protected from disclosure pursuant to § 930.73 of the order.

(b) *Board notification and handler plan.* Any handler intending to divert cherries or cherry products pursuant to § 930.59 of the order (except through exempt uses under § 930.62 of the order) must notify the Board of such intent and provide a plan by November 1 which shows how the handler intends to meet the restricted percentage obligation, except that, for the 1997-98 season only, the deadline is February 5, 1998. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. A handler will have one year to fulfill such plan. The details of the plan shall include, but not be limited to, the name and address of the handler, the total product processed at-plant, product diverted at-plant, in-orchard diversion certificates redeemed, anticipated donations to charitable outlets, disposition to exempt outlets or uses and detailed plans for how and where such disposition will be made, and inventory reserve amount. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by the handler. Supervision of diversion by means other than destruction of the cherries at a handler's facility will be subject to supervision as found necessary by the Board. USDA inspectors or Board employees will supervise diversion of cherry products at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42). Any cherries not diverted in accordance with the handler's plan will be placed into the secondary inventory reserve or the primary inventory reserve if a secondary inventory reserve has not been established.

(c) *At-plant diversion.* Diversion by disposal at-plant will take place prior to placing the cherries into the processing line. Such diversion will take place under the supervision of USDA Inspection Service or Board employee inspectors. USDA inspectors or Board employees will supervise diversion of cherry products at-plant at the current

hourly rate under USDA's inspection fee schedule (7 CFR 52.42).

(d) *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.

(e) *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 diversion certificates will be valid until February 5, 1998.

(f) *Exempt uses.* To receive diversion credit for cherries used for exempt purposes, handlers must meet the terms and conditions specified in § 930.162. Each handler may receive diversion credit for up to one million pounds of exempted products each crop year, except that, for the 1997 season only, the one million pound exemption limitation for diversion credit does not apply to handlers exporting juice or juice concentrate.

4. A new § 930.162 is added to read as follows:

#### § 930.162 Exemptions.

(a) *General.* Tart cherries which are used for the purpose of new product development, for new market development, for development of export markets, for experimental purposes, for export (including juice, juice concentrate or puree, for the 1997-98 crop year only) to countries other than Canada, Mexico and Japan, 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.* 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. Once total industry utilization for a new product exceeds 2 percent of the five year average production of tart cherries, the product shall no longer be considered under development and not eligible for a new product development exemption.

(2) *New market development.* 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). A new market becomes commercially established, when total industry utilization in the market exceeds 2 percent of the five year average production of tart cherries.

(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, Mexico, and Japan: *Provided*, That such cherry products cannot include juice or juice concentrate: *Provided further*, That the exclusion of juice or juice concentrate shall not apply for the 1997 season only (through June 30, 1998).

(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 through June 30, 1998 only) in countries other than Canada, Mexico and Japan, 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.

(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.

Dated: December 30, 1997.

**Enrique E. Figueroa,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 98-283 Filed 1-5-98; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 9 CFR Parts 94 and 96

[Docket No. 97-127-1]

#### Restrictions on the Importation of Ruminants, Meat and Meat Products From Ruminants, and Certain Other Ruminant Products

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending the regulations governing the importation into the United States of ruminants, meat and meat products from ruminants, and other ruminant products to restrict the importation of live ruminants, meat and meat products from ruminants, and certain other ruminant products from countries in which bovine spongiform encephalopathy (BSE) may exist. This action is necessary to ensure that animals and animal products affected with BSE are not imported into the United States.

**DATES:** Interim rule effective December 12, 1997. Consideration will be given only to comments received on or before March 9, 1998.

**ADDRESSES:** Please send an original and three copies of your comments to Docket No. 97-127-1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comments refer to Docket No. 97-127-1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Dr. Julia Sturm, Supervisory Staff Veterinarian, Products Program, National Center for Import and Export, VS, APHIS, USDA Center, Unit 40, 4700 River Road, Riverdale, MD 20737-1231, (301) 734-3399.