

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. FV99-930-1 IFR]

#### Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Additional Option for Handler Diversion and Receipt of Diversion Credits

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule adds a method of handler diversion to the regulations under the Federal tart cherry marketing order (order). 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. Under this additional method, handlers will be allowed to obtain diversion certificates when marketable finished tart cherry products are accidentally destroyed at a handler's facility. In addition, this rule removes a paragraph in the regulations which limits diversion credit for exempted products to one million pounds each crop year. The order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and is administered locally by the Cherry Industry Administrative Board (Board). **DATES:** Effective February 26, 1999; comments received by April 26, 1999, 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 to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456, Fax # (202) 720-5698 or E-mail:

moabdocket\_clerk@usda.gov. 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) 720-2491. Small businesses may request information on compliance with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491; Fax: (202) 720-5698, or E-mail:

Jay\_N\_Guerber@usda.gov. You may also view the marketing agreements and orders small business compliance guide at the following website: <http://www.ams.usda.gov/fv/moab.html>.

**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 or USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule adds a method of handler diversion to the regulations for the 1998-99 crop year beginning July 1, 1998 through June 30, 1999, and subsequent crop years. It also removes a provision from the regulation which limits diversion credit for exempted products to one million pounds for each

crop year. 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.

This rule provides for an additional method of handler diversion. Handler diversion is authorized under section 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 section 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 section 930.58; or other uses, including diversion by destruction of the cherries

at the handler's facilities as provided for in section 930.59(c).

Section 930.159 of the rules and regulations under the order allows handlers to divert cherries by destruction of the cherries at the handler's facility. At-plant diversion of cherries takes place at the handler's facility prior to placing cherries into the processing line. This is to ensure that the cherries diverted were not simply an undesirable or unmarketable product of processing. The additional method for handler diversion for finished tart cherry products accidentally destroyed should not be confused with at-plant diversion as previously mentioned.

The Board has unanimously recommended that handlers should receive diversion credit when marketable, finished cherry products are accidentally destroyed at a handler's facility. For the purposes of this rule, products will be considered destroyed if they sustain damage which renders them unacceptable in normal market channels. For example, finished, marketable cherry products could be accidentally destroyed in a fire, explosion, or freezer malfunction. In order to receive diversion credit under this added option, the Board recommended that the cherry products must: (1) Be owned by the handler at the time of accidental destruction; (2) be a marketable product at the time of processing; (3) be included in the handler's end of the year handler plan; and (4) have been assigned a Raw Product Equivalent (RPE) by the handler to determine the volume of cherries. In addition, the accidental destruction, as well as the disposition of the cherries must be verified by either a USDA inspector or Board agent or employee. Verification would be accomplished by having a USDA inspector or Board employee witness the disposition of the destroyed product. For the purpose of proper control and oversight, the measures recommended by the Board are considered to be appropriate.

At the Board meeting, there was a discussion that accidents may occur at a handler's facility after the processing of cherries has taken place. Freezers have collapsed and malfunctioned rendering the finished product unmarketable. The Board noted that one of the goals of the volume regulation program is to control the flow of marketable fruit in the marketplace. Therefore, it was the Board's recommendation that finished marketable products accidentally destroyed should be allowed diversion credit.

The Board also specifically mentioned an incident that had occurred in the

industry where a handler's finished goods were accidentally destroyed. In this incident, the handler's finished cherry products were stacked in containers on pallets in a freezer. A pallet broke and the stacked containers of cherry products toppled over and damaged the interior walls of the freezer rendering it inoperable. The cherries were unmarketable due to the contamination of the product as a result of the damaged freezer. This created a financial hardship for the handler. If diversion credit is allowed in cases of accidental destruction of products, such hardship could be avoided. For example, additional tonnage to meet any restricted percentage obligation amounts would not need to be obtained.

Handlers wishing to obtain diversion certificates for finished tart cherry products which are accidentally destroyed must apply for such diversion certificates and sign an agreement that disposition of the destroyed product will take place under the supervision of USDA's Processed Products Branch inspectors or Board inspectors. This will allow the Board to verify that finished product was unmarketable and that it was disposed of.

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.

In addition, this rule removes a paragraph in the regulations which limits diversion credit for exempted products to one million pounds each crop year. Currently, section 930.159 provides for diversion credit of up to one million pounds of exempted products each crop year. Exempted products can include products used in new product development and new market development. Exempted products can also include those that are used to expand the use of new or different products or the sales of existing products, or those that are exported to countries other than Canada, Mexico, and Japan, provided that, such cherry products can not include juice or juice concentrate.

The supplementary information in the rulemaking which implemented section 930.159 on January 6, 1998, (63 FR 399; interim final rule) and April 22, 1998, (63 FR 20012; final rule), states that during its deliberations, the Board discussed its view that allowing diversion credit for exempt uses would provide adequate flexibility for individual handlers to ship cherries. The Board, however, recommended providing some restriction on the

absolute volume of such allowable diversions until more experience with the program had been obtained, and that restriction was set at one million pounds. The one million pound limit on exempted product did not apply to those products receiving export diversions. The Board also indicated that it would be continuing to review the issue of what limits to impose on exempted products.

During the 1997 season, 2.7 million pounds of exempted products for new market and product development received diversion credit. In recent seasons, sales to export markets have risen dramatically. In 1997, export sales of 61.1 million pounds represented 379 percent of 1994 sales (16.1 million pounds). There was also an increase in export sales to those destinations exempt from volume regulation (countries other than Canada, Japan, and Mexico), rising from 12.2 million pounds to 48.7 million pounds. In view of the dynamics taking place in the cherry industry, and particularly the expanding markets and opportunities, the Board does not believe that the one million pound exemption should be continued. The removal of the one million pound limitation on exempted products should continue to encourage the further development of new markets and new tart cherry products and should have no detrimental affect. Therefore, section 930.159(f) of the regulations is removed.

#### **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 or regulatory 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 includes 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.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced and pureed. During the period 1993/94 through 1997/98, approximately 89 percent of the U.S. tart cherry crop, or 281.1 million pounds, was processed annually. Of the 281.1 million pounds of tart cherries processed, 63 percent was frozen, 25 percent canned and 4 percent utilized for juice. The remaining 8 percent was dried or assembled into juice packs.

The Board reported that for the 1997-98 crop year 48.7 million pounds of cherries received export diversion and 7.1 million pounds were diverted at handlers' facilities.

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 requirement 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 selling cherry products in exempt outlets 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. This rule will provide for handler diversion certificates in cases where marketable, finished tart cherry products are accidentally destroyed and thus rendered unacceptable in the marketplace. 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. Providing such diversion 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, this amendment accomplishes the purposes of the order and the Act, one of which is to increase grower returns and stabilize supplies with demand.

The impact of this rule will be beneficial to growers and handlers. Allowing this additional diversion option, will prevent financial hardships if marketable finished tart cherry products are destroyed by accident. An alternative to this rule would be to not grant diversion credit for such products. However, this is not in the best interest of the industry. The marketing order's volume regulation feature was designed to increase grower returns by stabilizing supplies with demand. Providing for handler diversion is one of the mechanisms employed to accomplish this goal. Handlers may divert cherries by destroying them at their facility. Therefore, allowing diversion credit for products which are accidentally destroyed, will not be inconsistent with the overall regulatory scheme.

In addition, this rule removes a paragraph in the regulations which limits diversion credit for exempted products to one million pounds each crop year. Currently, section 930.159 provides for diversion credit of up to one million pounds of exempted products each crop year, with the exception of exported products for the 1997 season. The Board had recommended providing some restriction on the absolute volume of such allowable diversions until more experience with the program has been obtained. The one million pound limitation for exempted products did not apply to diversion credit for exports for the 1997 season. The Board continued reviewing the issue of what limits, if any, to impose on exempted products.

During the 1997 season, 2.7 million pounds of exempted products for new market and product development received diversion credit. In recent seasons, sales to export markets have risen dramatically. In 1997, export sales of 61.1 million pounds represented 379 percent of 1994 sales (16.1 million pounds). There was also an increase in export sales to those destinations exempt from volume regulation (countries other than Canada, Japan, and Mexico), rising from 12.2 million pounds to 48.7 million pounds. In view of the dynamics taking place in the cherry industry, and particularly the

expanding markets and opportunities, the Board does not believe that the one million pound exemption should be continued. The removal of the one million pound limitation on exempted products should continue to encourage the further development of new markets and new tart cherry products and should have no detrimental affect. Therefore, section 930.159(f) of the regulations is removed. This action will provide more flexibility to handlers by allowing them to expand markets and new product opportunities.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR Part 1320) which implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by this order have been previously approved by OMB and assigned OMB Number 0581-0177. Included in the OMB approval is 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. Handlers applying for diversion credit for marketable finished tart cherry products accidentally destroyed do not have to submit an additional Handler Plan and Pack Report to the Board. Handlers can make changes in their previously submitted Handler Plan and Final Pack Report to account for product accidentally destroyed.

Accordingly, this rule will not impose any additional recordkeeping requirements on either small or large 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.

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 September 1998 meeting was a public meeting 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 considered alternatives to its recommendations. These included

not granting diversion credit and continuing to impose limitations on the volume of exempted product receiving diversion credit. However, this was determined as not being in the best interest of the industry.

This rule invites comments on granting handlers diversion credit for accidentally destroyed marketable finished tart cherry products, and removing the one million pound limitation on exempted products. Also, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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.

Pursuant to 5 U.S.C. 553, it is also 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 60 days after publication in the **Federal Register** because: (1) This rule relaxes requirements by providing an additional opportunity for handlers to receive diversion credit and fulfill such handler's restricted obligation; (2) the Board needs this rule to be in place for the 1998-99 crop year beginning July 1, 1998, through June 30, 1999, so handlers can take advantage of this option; (3) the Board unanimously recommended this change at a public meeting and interested parties had an opportunity to provide input; and (4) this rule provides a 60-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, Reporting and recordkeeping requirements, Tart cherries.

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.

2. In section 930.159 paragraph (a) is revised, paragraph (f) is removed, paragraph (d) is redesignated as paragraph (e), paragraph (e) is redesignated as paragraph (f), and a new paragraph (d) 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 diverting cherry products accidentally destroyed at a handlers' facility, by donating cherries or cherry products to 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 has taken place, 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 of a confidential and/or proprietary nature included in this application would be held in confidence pursuant to § 930.73 of the order.

\* \* \* \* \*

(d) *Diversion of finished products.* Handlers may be granted diversion credit for diverting finished tart cherry products accidentally destroyed at a handler's facility. In order to receive diversion credit under this added option the cherry products must be owned by the handler at the time of accidental destruction, be a marketable product at the time of processing, be 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 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 destroyed product. Products will be considered destroyed if they sustain damage which renders them unacceptable in normal market channels.

\* \* \* \* \*

Dated: February 19, 1999.

**Robert C. Keeney,**

*Deputy Administrator, Fruit and Vegetable Programs.*

[FR Doc. 99-4727 Filed 2-24-99; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Airspace Docket No. 98-ASW-52]

#### Revision of Class E Airspace; San Angelo, TX

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Direct final rule; confirmation of effective date.

**SUMMARY:** This notice confirms the effective date of a direct final rule which revises Class E airspace at San Angelo, TX.

**EFFECTIVE DATE:** The direct final rule published at 63 FR 70330 is effective 0901 UTC, March 25, 1999.

**FOR FURTHER INFORMATION CONTACT:** Donald J. Day, Airspace Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, Fort Worth, TX 76193-0520, telephone: 817-222-5593.

**SUPPLEMENTARY INFORMATION:** The FAA published this direct final rule with a request for comments in the **Federal Register** on December 21, 1998 (63 FR 70330). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulations would become effective on March 25, 1999. No adverse comments were received, and thus this action confirms that this direct final rule will be effective on that date.

Issued in Fort Worth, TX, on February 18, 1999.

**Albert L. Viselli,**

*Acting Manager, Air Traffic Division, Southwest Region.*

[FR Doc. 99-4695 Filed 2-24-99; 8:45 am]

BILLING CODE 4910-13-M