DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV99–930–2 FIR]

Tart Cherries Grown in the States of Michigan, et al.; Revision of the Sampling Techniques for Whole Block and Partial Block Diversions and Increasing the Number of Partial Block Diversions Per Season for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, without change, the provisions of an interim final rule revising the sampling techniques for whole and partial block diversions and increasing the number of allowable partial block diversions under the Federal marketing order for tart cherries. This rule continues in effect making the voluntary grower diversion program more flexible for grower participants. 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).

EFFECTIVE DATE: October 20, 1999.

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 complying with this regulation 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.Guerber@usda.gov.

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 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 the date of the entry of the ruling.

This rule continues in effect modifications to the handling regulations that revise the sampling techniques used in determining the amount of production diverted from whole blocks and partial blocks of cherry trees, and increases the number of allowable partial block diversions per season under the order. Whole block diversion results when an entire orchard block is left unharvested. Partial block diversion occurs when a contiguous portion of a definable block is diverted. An orchard block is defined as a group of cherry trees of similar age, with rows aligned in the same direction, and having definable boundaries (e.g., roads, ditches, or other permanent landmarks).

Section 930.58 of the tart cherry marketing order provides authority for voluntary grower diversion. Growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would be subject to volume regulation. One of the ways handlers can satisfy their restricted percentage obligations is by redeeming grower diversion certificates. After the Board confirms that the grower diverted his/her crop, the Board issues a diversion certificate to the grower stating the weight of cherries diverted. The grower can present the certificate to a handler in lieu of actual cherries. The handler, in turn, can present the certificate to the Board. The Board then applies the weight of cherries represented by the certificate against the handler's restricted percentage obligation, which reduces the handler's restricted obligation.

Section 930.158 provides rules and regulations for grower diversion. Included in this section are procedures and deadline dates for applying for diversion and choosing the type of diversion available to growers. There are four types of diversion-random row, whole block, partial block, and in-orchard tank. This rule only makes changes to the whole and partial block diversion.

Grower applications for diversion must be filed by April 15 and growers must inform the Board by July 1 whether they elect to whole or partial block divert their tart cherries. If whole block or partial block diversion is not selected by July 1, the grower would have to choose the random row method or the in-orchard tank methods of diversion.

In whole and partial block diversion, the quantity of the fruit diverted is determined by application of a statistical sampling protocol. Prior to the issuance of the interim final rule published June 7, 1999, (64 FR 30229), § 930.158 specified that, if a block had 5 rows or less, 3 rows were randomly chosen to be sampled. If a block had 6 to 15 rows, 4 rows were randomly chosen to be sampled. If a block had 16 or more rows, 5 rows were randomly chosen to be sampled. The rows chosen had to be contiguous, and 10 contiguous tree sites were sampled from each row.

During its review of the grower diversion program the Board concluded that the sampling procedure mentioned above, which is based solely on the number of rows in a block, required more trees to be sampled on smaller blocks or on blocks that had shorter rows than was necessary to accurately determine the amount of tart cherries diverted. The Board determined that a sample size of approximately 10 to 15 percent, which had been taken on larger orchard blocks with more trees in a row, was adequate to accurately calculate the quantity of fruit diverted from such orchard blocks. Therefore, the Board recommended that the regulations be amended so that the sample taken from both large and small orchard blocks would be about 10 to 15 percent.

To achieve this goal, the Board recommended that the sampling procedure be revised by taking into account the number of rows and number of tree sites in each particular block. The sampling method used would be

the one requiring the smaller number of trees. A tree site is a planted tree or an area where a tree was planted and may have been uprooted or died. The revised sampling procedure continues in effect as follows: If a block has 5 rows or less, or 200 or less tree sites, 3 rows would be randomly chosen to be sampled. If a block has 6 to 15 rows or 201–400 tree sites, 4 rows would be randomly chosen to be sampled. If a block has 16 or more rows and greater than 400 tree sites, 5 rows would be randomly chosen to be sampled. This procedure is expected to result in a sample size of about 12 to 15 percent whether the orchard block has long rows or short rows.

For example, under the old sampling criteria, if a grower had 10 rows with 20 tree sites per row (10×20 equals 200 tree sites), 4 rows would have to be sampled. Under the revised rules in effect, only 3 rows would have to be sampled since there are 200 tree sites.

As required, prior to sampling, the grower must notify the Board to allow observation of the sampling process by a compliance officer. The sampling method used would continue to be the one requiring the smaller number of trees to be sampled. The compliance officer will use an orchard map in determining how many trees to sample.

To determine the yield for whole block diversion when five rows are to be sampled, 10 contiguous tree sites in each of the five rows are sampled. A total of 50 tree sites would be sampled ((10 original tree sites) $\times$ (5 rows)=50 trees). If a total of 4,600 pounds is harvested from the sample trees and this is divided by 50 tree sites, a yield of 92 pounds per tree site will be obtained. The yield for the block is found by multiplying the calculated 92 pounds per tree site yield by the 880 trees that were mapped in the block to yield 80,960 pounds for that block.

For partial block diversion, the yield for the partial block is found by multiplying the calculated pounds per tree site yield by the number of trees in the rows mapped in the partial block. Partial blocks shall consist of contiguous rows.

After harvest, the compliance officer could again visit the grower's orchard to verify that diversion actually took place. A diversion certificate would be issued for an amount equal to the volume of cherries diverted. The grower could then present the certificate to a handler to be redeemed.

The second change to the regulations that continue in effect increased the number of partial blocks that growers may divert each season. Partial block diversion is when a contiguous portion of a definable block is diverted. Using this method of diversion, a grower having a block with 35 rows could divert contiguous rows 1 through 22 and harvest rows 23 through 35. Section 930.158(b)(3) previously limited the number of partial block diversions to one partial block diversion for each grower per year. This limitation was intended to alleviate the time that compliance officers needed to spend observing sampling and diversion activities at growers' orchards and the administrative costs involved.

After one year of diversion under these rules, the Board reevaluated the program and determined that the number of partial block diversions per grower per year could be increased from one to five, or 50 percent of a producer's total number of blocks. For example, if a grower had 12 separate orchard blocks mapped by the Board, such grower would now be able to divert up to 6 partial blocks. After reviewing last year's operations, the Board believed that its administrative costs would not increase materially by making this change. Because this method of diversion allows growers to divert cherries based on quality, the Board further believed that the ability to take advantage of partial block diversion on a larger scale would continue to foster increased participation in the voluntary program.

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 final 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 900 producers of tart cherries in the regulated area. The number of reported tart cherry producers in the regulated area is lower this crop year than in previous years (down from 1,220 producers) due to the Board receiving more accurate producer information. 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.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following website: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

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 1994/95 through 1998/99, approximately 90 percent of the U.S. tart cherry crop, or 288.3 million pounds, were processed annually. Of the 288.3 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.

In 1998, 37.7 million pounds of cherries were diverted in the orchard. Of that total, 16.3 million pounds were whole block diversions and 8.4 million were partial block diversions. The balance of the grower diversions was random row and in-orchard tank diversions.

Section 930.58 of the tart cherry marketing order provides authority for voluntary grower diversion. Growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would be subject to volume regulation. One of the ways handlers can satisfy their restricted percentage obligations is by redeeming grower diversion certificates. After the Board confirms that the grower diverted his/her crop, the Board issues the grower a diversion certificate stating the weight of cherries diverted. The grower

can then present the certificate to a handler in lieu of actual cherries. The handler, in turn, can present the certificate to the Board. The Board then applies the weight of cherries represented by the certificate against the handler's restricted percentage obligation, which reduces the handler's restricted obligation.

Section 930.158 provides rules and regulations for grower diversion. Included in this section are procedures and dates for applying for diversion. There are four types of diversion. However, this action only makes changes to the rules and regulations for whole and partial block diversion.

Grower applications for diversion must be filed by April 15 and growers must inform the Board by July 1 whether they elect to whole or partial block divert their tart cherries. If whole block or partial block diversion is not selected by July 1, the grower would have to choose the random row method or the in-orchard tank methods of diversion.

In whole and partial block diversion, the quantity of the fruit diverted is determined by application of a statistical sampling protocol. Prior to the issuance of the interim final rule published June 7, 1999, (64 FR 30229), § 930.158 specified that, if a block had 5 rows or less, 3 rows were randomly chosen to be sampled. If a block had 6 to 15 rows, 4 rows were randomly chosen to be sampled. If a block had 16 or more rows, 5 rows were randomly chosen to be sampled. Ten contiguous tree sites were sampled from each row.

During its review of the grower diversion program, the Board concluded that the sampling procedure mentioned previously, which was based solely on the number of rows in a block, required more trees to be sampled on smaller blocks or on blocks that had shorter rows than was necessary to accurately determine the amount of tart cherries diverted. The Board determined that a sample size of approximately 10 to 15 percent, which had been taken on larger orchard blocks with more trees in a row, was adequate to accurately calculate the quantity of fruit diverted from such orchard blocks. That sample size could easily be twice as large in small orchards having fewer trees per row. Therefore, the Board recommended that the regulations be amended so that the sample taken from both large and small orchard blocks would be about 10 to 15 percent.

To achieve this goal, the Board recommended that the sampling procedure be revised by taking into account the number of rows and number of tree sites in each particular block. The sampling method used would be the one requiring the smaller number of trees. A tree site is a planted tree or an area where a tree was planted and may have been uprooted or died. The revised sampling procedure continues in effect as follows: If a block has 5 rows or less, or 200 or less tree sites, 3 rows would be randomly chosen to be sampled. If a block has 6 to 15 rows or 201–400 tree sites, 4 rows would be randomly chosen to be sampled. If a block has 16 or more rows and greater than 400 tree sites, 5 rows would be randomly chosen to be sampled. This procedure is expected to result in a sample size of about 12 to 15 percent whether the orchard block has long rows or short rows.

The second change to the regulations that continue in effect increased the number of partial blocks that growers may divert each season. Partial block diversion is when a contiguous portion of a definable block is diverted. Using this method of diversion, a grower having a block with 35 rows could divert contiguous rows 1 through 22 and harvest rows 23 through 35. Section 930.158(b)(3) previously limited the number of partial block diversions to one partial block diversion for each grower per year. This limitation was intended to alleviate the time that compliance officers needed to spend observing sampling and diversion activities at growers' orchards and the administrative costs involved.

After one year of diversion under these rules, the Board reevaluated the program and determined that the number of partial block diversions per grower per year could be increased from one to five, or 50 percent of a producer's total number of blocks without materially increasing administrative costs. Because this method of diversion allows growers to divert cherries based on quality, the Board further believed that the ability to take advantage of partial block diversion on a larger scale would continue to foster increased participation in the voluntary program.

The Board considered not changing the partial block diversion limitation as well as allowing an unlimited number of diversions. However, after much discussion, the Board decided that the diversion program could best be improved by increasing the opportunities for grower diversion, but believed a reasonable limit was needed to keep Board administrative costs as low as possible. Last year's experience showed that partial block diversion is the most flexible diversion option available to the grower because it allows growers to divert tart cherries based on quality. For example, if a grower observes that part of a block of tart cherries is of low quality, the problem rows can be diverted allowing the grower to deliver high quality fruit to a handler. The ability to choose in this manner benefits growers, handlers, and the industry as a whole.

At the end of the upcoming season, the Board plans to review the number of partial block diversions approved and decide if the number of such diversions is appropriate for upcoming crop years.

This rule does not require any new forms and will not impose any additional recordkeeping requirements on either small or large tart cherry diversion participants. 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 that duplicate, overlap or conflict with this rule.

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.

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 December 11–12, 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 whom 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review program issues and make recommendations.

An interim final rule concerning this action was published in the **Federal Register** on June 7, 1999. The Board's staff mailed copies of the rule to all Board members and cherry handlers. In addition, the Office of the Federal Register made the rule available through the Internet. That rule provided a 60-day comment period that ended August 6, 1999. No comments were received.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that finalizing this interim final rule, as published in the **Federal Register** (64 FR 30229), will tend to effectuate the declared policy of the Act.

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

Accordingly, the interim final rule amending 7 CFR part 930 which was published at 64 FR 30229 on June 7, 1999, is adopted as a final rule without change.

Dated: September 14, 1999.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 99–24437 Filed 9–17–99; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1131

[DA–99–05]

Milk in the Central Arizona Marketing Area; Suspension of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule; suspension.

SUMMARY: This document suspends certain provisions of the Central Arizona Federal milk marketing order (Order 131) from the day after publication in the **Federal Register** until the implementation of Federal order reform on October 1, 1999. The suspension eliminates the requirement that a cooperative association ship at least 50 percent of its receipts to other handler pool plants to maintain pool plant status of a manufacturing plant operated by the cooperative. United Dairymen of Arizona, a cooperative association that represents nearly all of the producers who supply milk to the market, requested the suspension. The suspension is necessary to prevent uneconomical and inefficient movements of milk and to ensure that producers historically associated with the market will continue to have their milk pooled under Order 131.

EFFECTIVE DATE: September 21, 1999, through September 30, 1999.

FOR FURTHER INFORMATION CONTACT: Clifford M. Carman, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2971, South Building, PO Box 96456, Washington, DC 20090–6456, (202)720–9368, e-mail address clifford.carman@usda.gov.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Notice of Proposed Suspension: Issued July 9, 1999; published July 15, 1999 (64 FR 38144).

The Department is issuing this final rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a 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 Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), 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 request modification or exemption from such order by filing 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 the law. A handler is afforded the opportunity for a hearing on the petition. After a 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 its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Small Business Consideration

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $500,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees. For the purposes of determining which dairy farms are ''small businesses,'' the $500,000 per year criterion was used to establish a production guideline of 326,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

For the month of March 1999, 100 dairy farmers were producers under Order 131. Of these producers, three were considered small businesses. For the same month, there were five regulated handlers under Order 131. Two of these handlers were considered small businesses.

This final rule will suspend the requirement that a cooperative association ship at least 50 percent of its receipts to other handler pool plants to maintain pool status of a manufacturing plant operated by the cooperative. This rule lessens the regulatory impact of the order on certain milk handlers and tends to ensure that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing. This rule will not result in any additional regulatory burden on handlers in the Central Arizona marketing area since this suspension has been in effect since April 1995.

Preliminary Statement

This order of suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and of the order regulating the handling of milk in the Central Arizona milk marketing area.

Notice of proposed rulemaking was published in the **Federal Register** on July 15, 1999 (64 FR 38144), concerning a proposed suspension of certain provisions of the order. Interested persons were afforded opportunity to file written data, views and arguments thereon. One comment supporting the proposed suspension was received from United Dairymen of Arizona.

After consideration of all relevant material, including the proposal in the notice, the comment received, and other available information, it is hereby found and determined that from the day after publication of this rule in the **Federal Register** through September 30, 1999, the following provisions of the order do not tend to effectuate the declared policy of the Act:

In § 1131.7, paragraph (c), the words ''50 percent or more of'', ''(including the skim milk and butterfat in fluid milk products transferred from its own plant pursuant to this paragraph that is not in