Proposed Rules

Federal Register
Vol. 65, No. 238
Monday, December 11, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket Nos. AO–370–A6; FV98–930–2]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Agreement and Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes amendments to the marketing agreement and order (order) for tart cherries and provides growers and processors with the opportunity to vote in a referendum to determine if they favor the proposed amendments. The proposed amendments were submitted by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. One amendment would clarify the current limitation on the number of Board members that may be from, or affiliated with, a single ''sales constituency'' by amending the definition of that term. Another would simplify the method used to establish volume regulations for tart cherries. The proposed changes are intended to improve the operation and functioning of the tart cherry marketing order program.

DATES: The referendum shall be conducted from January 15 through January 26, 2001. The representative period for the purpose of the referendum herein ordered is June 1, 1999, through May 31, 2000.

FOR FURTHER INFORMATION CONTACT: Anne M. Dec, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, Washington, DC 20250–0200; telephone: (202) 720–2491, or 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 Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax (202) 720–5698.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on November 12, 1998, and published in the November 17, 1998, issue of the **Federal Register** (63 FR 63803). Recommended Decision and Opportunity to File Written Exceptions issued on December 29, 1999, and published in the **Federal Register** on January 5, 2000 (65 FR 672).

This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

The proposed amendments were formulated on the record of a public hearing held in Grand Rapids, Michigan on December 1, 1998, and in Salt Lake City, Utah on December 3, 1998. The hearing was held to consider the proposed amendment of Marketing Agreement and Order No. 930, regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to collectively as the ''order.'' The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the Act, and the applicable rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders (7 CFR part 900). The Notice of Hearing contained amendment proposals submitted by the Board and the U.S. Department of Agriculture.

The Board proposed two amendments. One would amend the current order provision which defines the term ''sales constituency'' in order to clarify the intent of the Board membership limitation regarding sales constituency affiliation. The second would simplify the method used to establish volume regulations for tart cherries.

Also, the Fruit and Vegetable Programs of the Agricultural Marketing Service (AMS), U.S. Department of Agriculture, proposed to adopt such changes as may be necessary to the order, if either or both of the above amendments are adopted, so that all of its provisions conform with the proposed amendment. No conforming changes have been deemed necessary.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of the Agricultural Marketing Service (AMS) on December 29, 1999, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by February 4, 2000.

Five exceptions and briefs were filed during the period provided regarding the two proposed revisions to the order. Two of those supported the conclusions reached in the Recommended Decision concerning the proposed revision of the definition of ''sales constituency''—those filed by the Board and by James R. Jensen, President, CherrCo, Inc. Three were opposed to that amendment—those filed by Timothy O. Brian, Smeltzer Orchard Co.; Terry Dorsing, President, Washington Tart Cherry Products, Inc.; and Lee Schrepel, Chair, Oregon Tart Cherry Association. With regard to the second amendment, the proposed revision of the optimum supply formula, the Board supported and Mr. Dorsing did not object to this amendment.

The specific issues raised in the exceptions are discussed in the Small Business Considerations and Findings and Conclusions sections of this document.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less

than $500,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than $5,000,000. Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses.

The record indicates that during the 1998–99 crop year, approximately 41 handlers were regulated under Marketing Order No. 930. In addition, there were about 896 producers of tart cherries in the production area. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

The 1998–99 tart cherry crop was about 340 million pounds. The record indicates that of the 41 tart cherry handlers, 12 had processed tonnage of more than 10 million pounds (or 29 percent of all handlers); 4 had between 5 and 10 million pounds (10 percent); 15 had between 1 and 5 million pounds (37 percent); and the remaining 10 had less than 1 million pounds of processed tonnage (24 percent). Handlers accounting for 10 million pounds or more would be classified as large businesses. Thus, a majority of tart cherry handlers could be classified as small entities. The majority of tart cherry processors are located in Michigan. Many handle cherries grown in more than one district. Michigan accounted for 76.4 percent of the production, followed by Utah with 9.6 percent, Wisconsin with 4.3 percent, Washington with 4.0 percent, New York with 3.9 percent, Pennsylvania with 1.2 percent, and Oregon with 0.6 percent. By State, about 72.5 percent of the growers are in Michigan, 9.9 percent in New York, 5.3 percent in Utah, 4.5 percent in Wisconsin, 3.6 percent in Pennsylvania, 2.5 percent in Oregon, and 1.7 percent in Washington.

Dividing total production by the number of growers, the average grower produces about 380,000 pounds of cherries annually. With grower returns of about 20 cents per pound, average revenues would be $76,000. Thus, it is reasonable to conclude that most tart cherry growers are small entities.

At 20 cents per pound, a grower would have to produce 2.5 million pounds of cherries to reach the $500,000 receipt threshold to qualify as a large producing entity under the SBA's definition. No record evidence was provided to indicate how many tart cherry growers produce 2.5 million pounds or more. One witness testified, however, that an estimated 150 growers (about 17 percent of the total number of growers) produce in excess of 1 million pounds, with the remainder producing less than that. With a majority of growers producing less than 1 million pounds, it follows that a majority of growers produce less than 2.5 million pounds. This supports the conclusion that the majority of tart cherry growers are small businesses. By State, however, average grower size varies considerably. The average grower in Washington accounts for roughly 910,000 pounds of cherries. Next in size is Utah with 680,000 pounds, followed by Michigan (400,000 pounds), Wisconsin (370,000 pounds), New York (150,000 pounds) Pennsylvania (130,000 pounds), and Oregon (100,000 pounds).

This decision proposes two amendments to the tart cherry marketing order. One would clarify the current limitation on the number of Board members that may represent a single ''sales constituency.'' The second would simplify the method used to establish volume regulations for tart cherries. Both amendments would be beneficial to business entities, both large and small.

Definition of Sales Constituency

Section 930.20 of the tart cherry marketing order provides for an 18-member Cherry Industry Administrative Board to assist the Department in administering the program. That section also divides the production area into nine districts for purposes of representation on the Board and allocates membership among those districts. Five of the nine current districts, including all districts subject to volume regulation, are allocated more than one member. Those five districts are Northern Michigan (four members), Central Michigan (three members), Southern Michigan (two members), New York (two members), and Utah (two members). The four districts with one member each are Oregon, Pennsylvania, Washington, and Wisconsin. (The eighteenth Board member is selected to represent the general public, and need not be from any specific area.)

Section 930.20 further provides that for those districts allocated more than one member, only one of those members can be affiliated with a single sales constituency. Section 930.16 currently defines a sales constituency to mean a common marketing organization or brokerage firm or individual representing a group of handlers or growers.

The proposed amendment to § 930.16 would provide that an organization that receives consignments of cherries but does not direct where those cherries are sold would not be considered a sales constituency. The growers and handlers affiliated with such an organization would not be limited in their representation on the Board.

The record shows that one of the Board's primary responsibilities is to recommend regulations to implement the marketing order's authorities relating to supply management, or volume regulation. Volume regulations benefit all industry members, both large and small, by matching demand in primary markets with available supplies of tart cherries. These regulations also serve to expand sales in secondary markets. The result is improved grower and processor returns.

The record shows that approximately 11 of the current 18 members of the Board are affiliated in some way with CherrCo, the organization which raised the question of the intended meaning of the term sales constituency. Applying the current order limitation on the number of members representing a single sales constituency to CherrCo would result in five of the current Board members being declared ineligible to serve on the Board. All of these members represent regulated districts—four in Michigan and one in New York.

The record shows that CherrCo is a federated grower cooperative. It is comprised of 24 member cooperatives. CherrCo's members account for 75–80 percent of Michigan's tart cherry production, and a significant portion of the production in New York, Utah, Washington, and Wisconsin. CherrCo currently has no members in Oregon or Pennsylvania. The record indicates that the primary function of CherrCo is to establish minimum prices for certain tart cherry products. The record indicates that CherrCo is not directly involved in the actual sales of its members' products. There is intense competition among its members (as well as between its members and non-members) to sell tart cherries. The competition for sales is on the basis of individual handlers' reputations, on the quality and mix of the products they offer, on any special services they provide to their customers, and on whether or not their processing plants are certified to conform with certain sanitation standards.

The purpose of the sales constituency limitation is explained in § 930.20(f) of the order where it is stated that in order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or

affiliated with, a single sales constituency in those districts having more than one seat on the Board. The genesis of this limitation can be traced to the order promulgation record where it was stated that the limitation was designed to prevent the recurrence of a problem that existed under the previous tart cherry order which was in effect from 1971 through 1987. Under that order, there was no such limitation, and actions of the Board only required a simple majority vote, allowing representatives from a single sales organization to pass Board actions without support from other industry members. As was explained in the recommended decision published on January 5, 2000, concerning the amendments in this rulemaking, the tart cherry industry is comprised of many different organizations. Some were clearly meant to be covered by the sales constituency limitation, while others were not. It was clearly intended that an organization such as Cherry Central, Inc. (a cooperative) be covered. Its main purpose is to sell its members' cherries and other products. The recommended decision further explains that an organization such as the Cherry Marketing Institute was not intended to be subject to the sales constituency limitation. The formation of CherrCo, a federated grower cooperative which was not in existence when the present order was promulgated, has caused the Department and the industry to reopen this question and to consider an amendment to the definition of sales constituency. This is because an organization such as CherrCo lies somewhere between Cherry Central, Inc. and the Cherry Marketing Institute which has a primary function of conducting generic promotion activities to expand overall sales of cherries and funding and conducting research in processing techniques and product development.

Some of the exceptions and briefs filed raised issues and concerns in connection with material Issue Number 1, definition of a sales constituency, and small business considerations. The Board was of the view that this proposed amendment would not have any negative impact on small businesses and that it would in fact help small entities by allowing them to send a representative of their choice to the Board. The Board noted that the regulatory requirements of the proposed amendment were properly tailored to the size and nature of small businesses.

Two exceptions were filed that raised small business concerns. One exception from Terry Dorsing, President, Washington Tart Cherries Products, Inc., presented an overview of the functioning of the tart cherry marketing order since its inception. Mr. Dorsing stated that since the initial hearing to establish the order, it was his and his company's position that the Northwest and other small production areas would be dominated by the large production in Michigan and the impact of various provisions of the order would be detrimental to small entities. The exception also stated that a marketing order was not good for the small producer and for the tart cherry industry as a whole. While acknowledging the inclusion in the provisions of the order of a variety of safeguards to protect small producers and production areas, the exception concluded that the Board itself, in recommending further changes to the order (currently subject to a separate rulemaking action) was preparing to tear down the safeguards to the detriment of small entities.

Another exception from Lee Schrepel, Chair, Oregon Tart Cherry Association, raised concern about the size of CherrCo affiliates, noting that perhaps most of the large handlers in the industry were CherrCo affiliates. The exception argued that the proposal had the appearance of giving a greater proportion of Board control to larger handlers, as defined under the Regulatory Flexibility Act. The exception questioned whether the Department failed to make a thorough examination of all relevant small business considerations, as required by that Act. The exception also noted that there are several examples of how boards administering Federal marketing orders for other commodities have protected the small, the remote and the independent, with each of the orders limiting the degree of domination by a particular constituency in the governed industry. Finally, the exception stated the proposed amendment should be rejected, that the Department should refer the matter back to the Board for further study to craft a more suitable amendment, or that the Department should develop a compromise amendment itself taking into account the alternative proposals presented in the rulemaking proceedings. Alternatively, the exception stated that there should be an allowance for permanent exclusion of all producers and handlers in the Oregon district, an issue that has not been proposed in the proceeding.

Alternative proposals discussed at the hearing were considered and discussed in the Recommended Decision. It was determined that those proposals failed to properly address some of the fundamental issues faced by the tart cherry industry. One of these issues is that some districts are subject to volume control, while others are not. Another deals with the varying marketing and growing conditions. Probably the most important issue which alternative proposals failed to address was fair representation. Restrictions on an organization such as CherrCo could prevent growers in some of the highest volume producing areas from being adequately represented on the Board.

Material Issue Number 1 concerns a proposed amendment that would clarify the current limitation on the number of Board members that may be from, or affiliated with, a single sales constituency. This proposal is intended to be inclusive rather than exclusive. The issue presented by this proposed amendment is whether an organization or entity, such as CherrCo, should be limited in terms of membership on the Board. The Department has fully reviewed this amendment consistent with the provisions of the Regulatory Flexibility Act as well as the statutory authority for this program. In doing so, it has concluded that this proposed amendment should be favorable to both large and small entities. The two exceptions received raising small business considerations are not in agreement with this conclusion.

The exceptions raised a variety of issues and concerns regarding the proposed amendment as well as the marketing order itself. The nature and structure of a board under a marketing order program reflects the industry that is regulated. Accordingly, a marketing order may provide for one or more provisions concerning board memberships. Such provisions would be tailored to reflect the attributes of a particular industry, as appropriate. In the case of the tart cherry marketing order, a provision was crafted to prevent any single sales constituency from having control of Board decision making. The proposed amendment would clarify the application of that provision, taking into account the current state of the industry as well as the present membership on the Board. As such, the original intent of the provisions would not be changed by the clarification. Looking at this amendment in terms of its impact, we continue to conclude that the proposed amendment should be favorable to both large and small entities.

With regard to the assertion that certain safeguards in the order could be eliminated to the detriment of smaller production areas, this cannot be done by Board action alone. Any such proposed changes would be subject to a formal rulemaking process, including public

hearings and a referendum, as well as an analysis and review by the Department.

Revision of the Optimum Supply Formula

A principal feature of the tart cherry marketing order is supply management through the use of volume regulations. Authority for such regulations appears in § 930.51 of the marketing order.

Volume regulations are implemented through the establishment of free and restricted percentages. Such percentages are recommended by the Board in accordance with § 930.50 of the order, and, if deemed appropriate, implemented by the Department through the public rulemaking process. These percentages are then applied to each regulated handler's acquisitions in a given season. ''Free market tonnage percentage'' cherries may be marketed in any outlet. ''Restricted percentage'' cherries must be withheld from the primary market. They may be diverted in the orchard or at the processing plant; placed into a reserve pool; or sold in secondary markets. These secondary markets include exports (except to North America), and new products. Sales of restricted percentage cherries to these specified exempt markets receive diversion credits which handlers use to fulfill their restricted obligation.

The record indicates that the primary objective of tart cherry volume regulations is to balance supplies with market demand, thereby stabilizing the market and improving grower and processor returns. A second objective is to encourage market growth by allowing restricted cherries to be sold in secondary markets (for example, most export markets). Witnesses attributed much of the improvement in recent cherry market conditions to the use of regulation in the 1997/98 and 1998/99 seasons.

The order currently sets forth, in § 930.50, an ''Optimum Supply Formula'' (OSF) which the Board must follow in its consideration of annual free and restricted percentages. The optimum supply is currently defined as 100 percent of the average sales of the prior 3 years, to which is added a desirable carryout inventory.

The record indicates that using 100 percent of prior years' sales results in an overstatement of the optimum supply. The record shows that including the sales of restricted cherries in the optimum supply understates the projected surplus and results in a higher free percentage than supply and market conditions warrant. This is because those total sales include not only sales to the primary market, but to secondary markets as well.

In the years that tart cherry volume regulations have been used, this issue has been addressed through use of an adjustment in order to achieve an optimum supply of cherries in the marketplace. Once a surplus has been computed (deducting the optimum from the available supply), the sales to secondary markets are added back to the surplus as an economic adjustment. The Board's recommended amendment would revise the procedures currently used in calculating the optimum supply. Under its proposal, the optimum supply would be equal to the 3-year average sales in primary markets (total sales less sales to markets eligible for diversion credit) plus the target carryout. This would simplify the method of arriving at an optimum supply figure and would be easier for tart cherry growers and processors to understand. Therefore, any regulatory impact on growers or handlers would be minimal or non-existent.

The record evidence supports the conclusion that this amendment would result in no extra costs to growers or processors in that any resulting level of volume regulation would be similar to what is currently in effect and its economic effect on the industry would be similarly analyzed in each instance. It would benefit industry members both large and small, however, because the process relating to the establishment of volume regulations would be less confusing and more readily understood by industry members. This process is used by growers and handlers in making seasonal decisions (including those relating to harvesting cherries). To the extent that this process is more readily understood, all in the industry should benefit.

Further, in its brief, the Board noted that the Department considered the impact of Material Issue Number 2 on small businesses and concluded that there would be no negative impact. The Board stated that it considered several other approaches concerning the optimum supply formula and was of the view that the proposed amendment was the best alternative available.

The collection of information under the marketing order would not be affected by these amendments to the marketing order. Current information collection requirements for Part 930 are approved by OMB under OMB number 0581–0177.

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 Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

Board meetings regarding these proposals as well as the hearing dates were widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and the hearing and participate in Board deliberations on all issues. All Board meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues.

Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

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.

Findings and Conclusions; Discussion of Comments

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the January 5, 2000, issue of the **Federal Register** (65 FR 672) are hereby approved and adopted subject to the following additions and modifications:

Based upon the briefs and exceptions filed, the findings and conclusions in material issue number 1 of the Recommended Decision concerning whether the definition of ''sales

constituency'' should be revised are amended by adding the following eight paragraphs to read as follows:

In his exception, James R. Jensen, President of CherrCo, Inc., expressed agreement with the conclusions reached in the Recommended Decision, and requested that cherry growers and handlers be given the opportunity to express their views through the referendum process. This document calls for such a referendum to be conducted.

The Cherry Industry Administrative Board also agreed with the AMS recommendation on this issue, but requested one clarification. The Recommended Decision concluded that CherrCo should not be considered a sales constituency for the purpose of Board membership limitations. The Board requested that this conclusion be expanded to include all purposes regulated by the order. The term ''sales constituency'' is only used in the order with respect to Board membership. It has no relevance to other order provisions. Thus, the Board's recommendation is unnecessary, and its exception is denied.

The exceptions filed by Tim O. Brian, Lee Schrepel and Terry Dorsing asked that AMS revise its decision to conclude that CherrCo is a sales constituency and that its membership on the Board should be limited.

Mr. Brian and Mr. Schrepel took exception to the statement that CherrCo does not actively arrange sales of tart cherries. They supported their position by providing a Membership and Marketing Agreement dated March 31, 1997, containing the statement that CherrCo ''* * * may sell the Product itself or may license sales agents to sell the Product.'' Record evidence shows that CherrCo licenses sales agents to sell its members' cherries. These agents compete among themselves and with non-member sales agents to garner sales. CherrCo itself does not sell cherries. If, in the future, CherrCo takes on that function, such activities would be reviewed in light of the prohibition.

Mr. Brian also argued that CherrCo has taken on additional functions since the time of the hearing. First, it has purchased the label ''CherreX'' from a cherry export trading company. Second, it has been in the process of forming a supply cooperative. Whether any of the present or future activities would make industry members affiliated with CherrCo subject to the Board membership restriction would be determined on the facts in each instance. In any case, the definition amendment is generic and is not applicable only to CherrCo.

Mr. Schrepel and Mr. Dorsing claimed that CherrCo's membership should be limited because Board members affiliated with that organization have recently taken actions that are counter to the interests of industry members not affiliated with CherrCo. Both exceptions pointed to a group of marketing order amendment proposals submitted by the Board in October 1999. Included were proposals to eliminate the 15 million pound threshold used to determine whether a district is subject to volume regulation; allowing diversion credits for tart cherry juice and juice concentrate; setting assessments for all cherry products at the same level; and allowing the Board chairman to designate a person to vote at a Board meeting if neither a member nor his or her alternate is present. While it is true that a second set of amendment proposals has been recommended and an amendatory hearing was held in March and April 2000, those proposals are and will be considered in a separate formal rulemaking proceeding. Interested parties have and will be given the opportunity to express their viewpoints, and growers and handlers will be able to vote in referendum.

Mr. Schrepel argued that USDA did not adequately consider alternative proposals relating to Board membership. He pointed to the fact that other marketing orders (for example, those covering cranberries and almonds) limit the number of positions that can be held by a particular constituency. The record shows that this issue has been under consideration by the Board for many months, and this amendment was recommended as the best course of action. The public hearing held on this matter provided interested persons with the opportunity to present alternative plans related to Board membership. As previously discussed, alternatives presented at the hearing failed to address some of the fundamental issues faced by the tart cherry industry, such as adequate representation of growers in high volume producing areas. As such, AMS rejected those alternatives.

Mr. Schrepel also argues that USDA is not fulfilling its obligation under the U.S. Constitution and the Act when it permits an interest group to control the Board. He states that the percentage of Board members affiliated with CherrCo exceeds the proportion of the cherry crop CherrCo members handle. The marketing order does not guarantee CherrCo a specified number of seats on the Board. Membership is allocated among the established districts and among growers and handlers. Every tart cherry grower and handler has the opportunity to participate in the nomination process, and can vote on who should be his or her representative on the Board. All Board actions are subject to the approval of the Secretary, and any resultant rulemaking actions provide further opportunity for public participation.

Rulings on Exceptions

In arriving at the findings and conclusions and the regulatory provisions of this decision, the exceptions to the Recommended Decision were carefully considered in conjunction with the record evidence. To the extent that the findings and conclusions and the regulatory provisions of this decision are at variance with the exceptions, such exceptions are denied.

Marketing Agreement and Order

Annexed hereto and made a part hereof is the document entitled ''Order Amending the Order Regulating the Handling of Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered, That this entire decision be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400 *et seq.*) to determine whether the issuance of the annexed order amending the order regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin is approved or favored by growers and processors, as defined under the terms of the order, who during the representative period were engaged in the production or processing of tart cherries in the production area.

The representative period for the conduct of such referendum is hereby determined to be June 1, 1999, through May 31, 2000.

The agent of the Secretary to conduct such referendum is hereby designated to be Kenneth G. Johnson, Regional Manager, DC Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 4700 River Road, Unit 155, Suite 2A04, Riverdale, Maryland 20737; telephone (301) 734–5243.

List of Subjects in 7 CFR Part 930

Marketing agreements, Tart cherries, Reporting and recordkeeping requirements.

Dated: December 5, 2000.

Kenneth C. Clayton,

Associate Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin [1]

Findings and Determinations

Thefindings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the order; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) *Findings and Determinations Upon the Basis of the Hearing Record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the 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.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as hereby proposed to be amended, regulate the handling of tart cherries grown in the production area in the same manner as, and is applicable only to persons in the respective classes of commercial and industrial activity specified in the marketing order upon which hearings have been held;

(3) The marketing agreement and order, as hereby proposed to be amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act; and

(4) The marketing agreement and order, as hereby proposed to be amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of tart cherries grown in the production area; and

(5) All handling of tart cherries grown in the production area is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin, shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreement and the order amending the order contained in the Recommended Decision issued by the Administrator on December 29, 1999, and published in the **Federal Register** on January 5, 2000, shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

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 part 930, § 930.16 is revised to read as follows:

§ 930.16 Sales constituency.

Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

3. In § 930.50, paragraph (a) is revised to read as follows:

§ 930.50 Marketing policy.

(a) *Optimum supply.* On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years, reduced by the average sales that represent dispositions of restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is necessary to recommend otherwise with respect to sales of restricted percentage cherries, to which shall be added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

* * * * *

[FR Doc. 00–31455 Filed 12–8–00; 8:45 am]

BILLING CODE 3410–02–P

[1] This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[DEA–209P]

RIN 1117–AA59

Schedule of Controlled Substances: Placement of Dichloralphenazone Into Schedule IV

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule is issued by the Deputy Administrator of the Drug Enforcement Administration (DEA) to expressly list dichloralphenazone as a Schedule IV controlled substance under the Controlled Substances Act (CSA). This proposed action is based on the DEA's interpretation that dichloralphenazone is a compound containing chloral hydrate, a Schedule IV controlled substance under 21 CFR part 1308; by definition, dichloralphenazone is also a Schedule IV substance. If finalized, this action will impose the regulatory controls and criminal sanctions of Schedule IV on those persons who handle dichloralphenazone or products containing dichloralphenazone.

DATES: Comments must be received by February 9, 2001.