

Proposed Rules

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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 929

[Docket No. FV01-929-2 PR]

Cranberries Grown in the States of Massachusetts, et al.; Establishment of Marketable Quantity and Allotment Percentage; Reformulation of Sales Histories and Other Modifications Under the Cranberry Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on whether to establish volume regulation on cranberries and if so, at what level. If a volume regulation is implemented, it would limit the volume of cranberries handlers may purchase from, or handle for, growers during the 2001-2002 crop year, which begins on September 1, 2001, and ends on August 31, 2002. The Cranberry Marketing Committee (Committee), the agency responsible for local administration of the cranberry marketing order, recommended a marketable quantity of 4.7 million barrels, an allotment percentage of about 67 percent, and an exemption for fresh and organically-grown cranberries. An alternative, supported by a number of independent growers, includes a marketable quantity of 4.0 million barrels, an allotment percentage of about 54 percent, and no exemption for fresh and organically-grown cranberries.

Both levels of regulation are intended to stabilize marketing conditions, help reduce burdensome inventories, and improve grower returns. A third option is to issue no volume regulation at all. This rule also proposes adding a date by which transfers of sales histories on leased acreage must be completed, deleting the Committee review process in the sales history appeal procedure, and giving fresh fruit growers whose fruit has to be used for processing priority in the allocation of excess

allotments. Finally, this action proposes amending a proposed rule published on January 12 to revise the sales history reformulation calculation, and withdraw the proposed reinstatement of the June 1 allotment notification date. These additional actions are designed to improve the operation of the producer allotment provisions of the order.

DATES: Comments must be received by May 29, 2001.

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) 720-8938 or E-mail: moab.docketclerk@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 or can be viewed at the following website: www.ams.usda.gov/fv/moab.html.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Kenneth G. Johnson, DC Marketing Field Office, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, Maryland 20737; telephone: (301) 734-5243, Fax: (301) 734-5275; or Anne Dec or George Kelhart, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-8938.

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) 720-8938, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Order No. 929 (7 CFR Part 929), as amended, regulating the handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. The 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."

Question and Answer Overview

What Does This Rule Propose?

This rule invites comments on whether a volume regulation should be in place for the 2001 cranberry crop. Comments are requested on whether a volume regulation should be established and if so, at what level. This proposal includes two levels of regulation that have been widely discussed within the cranberry industry in recent months. It also proposes a number of administrative changes designed to improve the producer allotment program under the cranberry marketing order.

Who Would Be Affected by This Action?

Growers and handlers/processors located in the 10-State production area would be affected by this action. The 10-State production area covers Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York.

Why Is Volume Control Being Recommended For This 2001 Crop?

The Committee recommended volume control the 2001-02 crop year to address the oversupply situation being experienced by the industry. Specifically, the Committee recommended a marketable quantity of 4.7 million barrels, an allotment percentage of about 67 percent, and an exemption for fresh and organically-grown fruit. For the 2001 crop year, continued low grower prices are expected to accompany high production and inventories. Many cranberry growers are experiencing difficulties dealing with current market conditions.

What Is The Marketable Quantity and Allotment Percentage?

The marketable quantity is defined as the number of pounds of cranberries needed to meet total market demand and to provide for an adequate carryover into the next season. The Committee determined that the marketable quantity for the 2001-2002 crop year should be established at 4.7 million barrels. This proposed rule also contains a proposal

for a marketable quantity of 4.0 million barrels.

The allotment percentage equals the marketable quantity divided by the total of all growers' sales histories. Total growers' sales histories were estimated by the Committee to be 7.4 million barrels including all sales, and 7.0 million barrels if it includes only processed sales. The latter figure is intended to be used if fresh fruit is exempt from volume regulation.

How Are Growers' Annual Allotments Calculated?

A grower's annual allotment is the result of multiplying the individual grower's sales history by the allotment percentage.

Why Is the Department Soliciting Comments on Alternative Proposals?

A number of growers favor a marketable quantity of 4.0 million barrels because they expect that it will bring grower returns closer to the cost of production more quickly than the Committee's 4.7 million barrel recommendation. The Department is soliciting comments on both levels of regulation because both levels have been determined to have the potential to improve grower returns and establish more orderly conditions in the cranberry market. Comments are also being solicited on not establishing volume regulations and allowing growers and handlers to voluntarily and individually decide how much fruit to market.

Why Are Additional Comments Being Requested on the Proposal To Recalculate Sales Histories?

A proposed rule to reformulate sales history calculations for the 2001–2002 crop year was published in the **Federal Register** on January 12, 2001, with a comment period ending February 12, 2001. The main feature of that proposal was to provide additional sales history for acres planted in 1995 or later. At the Committee meeting on February 5, 2001, concerns were raised that the proposed formula would give an unfair advantage to growers who only have acres with 1 to 3 years of sales history (as opposed to growers with a combination of mature acres and new or replanted acres).

Under the January 12 proposal, actual sales histories for growers with only newer (or replanted) acreage would be computed by dividing total sales by the actual number of years plus an adjustment based on the year planted. A grower with a combination of mature and newer acres would have his/her sales divided by 4 before the adjustment was added. At its meeting on February

5, the Committee recommended a modification of the sales history calculations so that all growers' sales histories would be divided by 4 before the new acreage adjustment is added. The January 12 proposal is proposed to be amended to include the sales history modification, to withdraw a proposal to reinstate the June 1 annual allotment notification date, and to correct an inadvertent error.

How Can I Comment on This Action?

Interested persons have 15 days from the date of publication of this proposed rule to file written comments. Such comments should be sent to: Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, room 2525–S, P.O. Box 96456, Washington, DC 20090–6456; Fax: (202) 720–8938 or E-mail: moab.docketclerk@usda.gov. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**.

When Will This Action be Effective?

After analyzing all comments received, the Department will make a final decision. We could choose to issue a final rule to set a regulation or withdraw this proposal and have no volume restriction in place for the 2001 crop. Any final rule issued would be effective for the 2001–2002 crop year, which begins on September 1, 2001.

Executive Orders 12866 and 12988

The Department of Agriculture (Department) is issuing this proposed rule in conformance with Executive Order 12866. This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, a marketable quantity and allotment percentage may be established for cranberries during the crop year. This proposed rule invites comments on the volume of cranberries that handlers may purchase from, or handle for, growers during the 2001–2002 crop year beginning September 1, 2001, through August 31, 2002. This proposal would also add a date by which transfers of sales histories must be made; streamline the sales history appeal process; and give fresh fruit handlers priority in allocating excess allotment. It would also modify a previously-issued proposed rule to revise the sales history calculations, withdraw a proposed reinstatement of the annual allotment notification date, and correct an inadvertent error. This proposal 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.

The Committee met on February 5, 2001, to discuss implementing a volume regulation to restrict the marketing of the 2001 cranberry crop. Because the Committee was divided on the volume of cranberries that should be released to market, it established a subcommittee to consider volume regulation alternatives to help the industry overcome its oversupply situation. Since 1996, cranberry production has been greater than demand by increasing margins. Large carryover inventories and higher production yields have resulted in a market burdened by large supplies and low grower prices. Grower returns have fallen 73 percent from 1997 to 2000, dropping from \$65.90 to \$15–20 per barrel.

During the 1999 crop year, production totaled 6.34 million barrels, a 17 percent increase over 1998. Market demand has not kept up with mounting carryover inventories and production.

The subcommittee, comprised of independent and cooperative growers, and a representative of the public, explored various options for helping to stabilize market supply and demand conditions in 2001–02. After analyzing various alternatives, the subcommittee decided to recommend the establishment of a marketable quantity of 4.0 million barrels applicable to all sales. The public representative on the subcommittee developed an econometric model showing that a marketable quantity of 4.0 million barrels would eliminate excess inventories in a single year and bring grower prices closer to the cost of production. A marketable quantity at this level would permit growers to deliver an estimated 54 percent of their sales history to handlers, keeping

approximately 46 percent of their sales history off the market.

The econometric model also shows that inventories would decline to 2.2 million barrels, and that grower prices would increase to \$31 per barrel. The estimated average cost of production is \$35 per barrel, although the range in individual costs is quite broad, being as low as \$15 and as high as \$45 per barrel.

The subcommittee presented its recommendation to the full Committee at a March 4–5, 2001, meeting. At that meeting, the full Committee discussed the 4.0 million barrel marketable quantity. It indicated that it is supportive of raising grower prices and reducing excessive inventories. However, it believed that a restriction this large would be harmful to the industry in the long run. The Committee believes that a more gradual correction in inventory and grower prices is necessary to allow efforts to expand demand through the introduction of new products and foreign market development. It further believes that a substantial price increase in a single season could result in buyers substituting other commodities for cranberries in their products. It is also the Committee's view that the more restrictive level of regulation could result in a less than desirable carryover into the 2002 season. It is preferable to freeze and store cranberries for several months after harvest in October before processing them. Sales for the first 3 months of the season are estimated at about 2.0 million barrels.

In addition, a large number of independent handlers oppose a regulation of this magnitude. There is concern that under a 4.0 million barrel marketable quantity there will not be enough excess fruit to fill their needs. If independent handlers were short of fruit, and not able to meet the needs of their customers, they could lose market share.

While acknowledging that bringing grower prices to profitable levels is necessary as soon as possible, the Committee also believes that it is very important to provide enough fruit for market growth. The Committee ultimately recommended a marketable quantity of 4.7 million barrels to be implemented through an allotment program that would permit producers to move about 67 percent of their sales history to handlers, applied to processed fruit only. This would result in about 33 percent of sales histories being held off the market as opposed to approximately 46 percent under the 4.0 million barrel proposal. Fresh and organic sales would be exempt under this recommendation and add about

300,000 barrels to the available marketable supply.

The Committee believes that a 4.7 million barrel marketable quantity is a sustainable solution to eliminating the surplus, because it would contribute toward reducing supplies in the short term and provide enough fruit to increase demand in the long term. The Committee believes that supply reduction and market growth are important to the long term viability of the industry.

After reviewing these alternative proposals, the Department believes that each could help the industry solve its oversupply problems and improve grower prices. Therefore, the Department is soliciting comments on both levels of regulation. The Department is also soliciting comments on not establishing volume regulations and allowing growers and handlers to voluntarily and individually decide how much fruit to market.

At the March 4–5, 2001, meeting, the Committee also recommended adding a date by which transfers of sales histories on leased acreage must be completed, deleting the Committee review process from the sales history appeals procedures, and giving fresh fruit growers priority in the allocation of excess allotment. The Committee also recommended revising a sales history reformulation calculation contained in a proposed rule published on January 12. The Department is proposing withdrawing a proposal to reinstate a June 1 grower allotment notification date.

Introduction

Section 929.49 of the order currently provides that if the Secretary finds from the recommendation of the Committee or from other available information, that limiting the quantity of cranberries purchased from or handled on behalf of growers during a crop year would tend to effectuate the declared policy of the Act, the Secretary shall determine and establish a marketable quantity for that year. In addition, the Secretary would establish an allotment percentage which shall equal the marketable quantity divided by the total of all growers' sales histories.

Section 929.49(b) of the order provides that the marketable quantity be apportioned among growers by applying the allotment percentage to each grower's sales history. Handlers can only purchase or handle cranberries that are covered by the grower's annual allotment.

Total growers' sales histories have been estimated by the Committee to be about 7.0 million barrels if they include

only processed sales, and 7.4 million barrels if they include all sales (fresh and processed). If fresh fruit sales are exempt from volume regulation, it is intended that the 7.0 sales history figure be used. Otherwise, the 7.4 million barrel sales history would be used.

Growers are required to file a form with the Committee by April 15 each year if they wish to receive an annual allotment. Among other things, growers also must notify the Committee of any new acreage that will be coming into production for the upcoming crop year. The Committee notifies each grower of his or her annual allotment and notifies each handler of the annual allotment that can be handled for each grower whose total crop will be delivered to such handler. In cases where a grower delivers a crop to more than one handler, the grower may determine how to apportion the annual allotment among those handlers.

A grower who does not produce cranberries equal to his or her annual allotment must transfer any unused allotment to such grower's handler(s). The handlers are then required to equitably allocate the unused allotment to growers with excess cranberries (those not covered by allotment) who deliver to those handlers. Unused allotment remaining after all such transfers have taken place are transferred to the Committee.

Handlers who receive more cranberries than are covered by their growers' annual allotments have excess cranberries. The Committee is required to equitably distribute any unused allotment it receives to those handlers that have excess cranberries.

The Committee's Marketing Policy for the 2001 Crop

Section 929.46 of the order requires the Committee to develop a marketing policy each year prior to May 1. In its marketing policy, the Committee projects expected supply and market conditions for the upcoming season, including an estimate of the marketable quantity (defined as the number of pounds of cranberries needed to meet total market demand and to provide for an adequate carryover into the next season).

At its February 2001 meeting, the Committee estimated 2001–2002 domestic production of cranberries at 5,675,000 barrels. Carryin as of September 1, 2001, is estimated at 3,325,000 barrels. Foreign production (primarily Canada) is projected at 835,000 barrels. Allowing for shrinkage of approximately 2 percent on carryin and 4 percent on production (327,000 barrels), the total adjusted available

supply of cranberries is expected to be 9,508,000 barrels. Based in large part on historical sales figures, the Committee estimated utilization of processing fruit at 5,198,000 barrels and of fresh fruit at 310,000 barrels. The carryout as of August 31, 2002, is projected to be 4 million barrels.

A summary of the marketing policy follows:

CRANBERRY MARKETING POLICY
[2001 crop year estimates]

	Barrels
Carryin as of 9/1/2001	3,325,000
Domestic production	5,675,000
Foreign production	835,000
Available supply (sum of the above)	9,835,000
Minus shrinkage	327,000
Adjusted Supply	9,508,000
Fresh Fruit	310,000
Processing fruit	5,198,000
Total Sales and Usage	5,508,000
Carryout as of 8/31/2002	4,000,000

The industry is expected to enter the 2001–2002 crop year with inventories estimated at about 3,325,000 barrels (assuming USDA purchases 1.0 million barrels). This level of inventory, coupled with the industry’s current capacity to produce in excess of estimated demand, has resulted in the industry debating two volume regulation levels for the 2001–2002 crop year. These alternatives are discussed below.

Option 1

Proposed Establishment of a Marketable Quantity of 4.0 Million Barrels and an Allotment Percentage Applicable to All Sales

As mentioned earlier, in early February 2001, the Committee established a volume regulation subcommittee to discuss volume regulation methods available under the order. This subcommittee was comprised of growers. The subcommittee discussed several issues involving the upcoming season and how the order could be used to address industry needs. One of the subcommittee’s main concerns was that grower prices be increased to cover production costs.

The subcommittee met with handlers in the industry to also try and address their concerns for the upcoming season. Some handlers, who do not have a large inventory of cranberries, expressed that if there were a very restrictive volume regulation, they would not have adequate supplies of cranberries to meet their market needs and would have to

purchase cranberries from their competitors. Moreover, these handlers were concerned about availability and about the prices they would have to pay for such cranberries.

The subcommittee also discussed the idea of a buy-back provision in a producer allotment program which would allow a handler to buy back cranberries from the Committee to fulfill his/her needs. The Committee in turn would purchase free cranberries from another handler to replace those that were bought back. The subcommittee also discussed the possibility of using both of the volume control programs under the order, the producer allotment program and handler withholding program, in the same crop year. However, buyback is not authorized under an allotment program, and the simultaneous use of producer allotments and handler withholding is not authorized under current order provisions.

The subcommittee recommended to the full Committee on March 4, 2001, by a 6 to 2 vote, that a marketable quantity be set at 4.0 million barrels for the upcoming season with no exemption for fresh or organically-grown fruit. In recommending this level of regulation, the subcommittee stated that it would like to decrease excessive industry inventories to desirable levels in one year. It believes that by reducing inventories, grower prices and revenues will increase. It further believes that this level of marketable quantity balances supply with demand with a 2.325 million barrel carryout inventory which should sufficiently meet the next year’s demand until the new crop is properly frozen and stored. The subcommittee also believes that this level of regulation would bring grower prices closer to the average cost of production, and that this would allow growers, both large and small, to more easily obtain loans which are used to cover operating and planting expenses during the course of the season. Prices have been below the average cost of production for several years. Some in the industry have informed the Department that lenders are becoming reluctant to fund these losses.

A 4.0 million barrel marketable quantity would result in an allotment percentage of about 54 percent based on sales histories of about 7.4 million barrels. Sales histories would be set at 7.4 million barrels instead of 7.0 million barrels because fresh fruit and organic sales would not be deducted from sales histories. The subcommittee expects that a marketable quantity at this level would increase grower returns to about \$31 per barrel. The estimated average

cost of production is \$35 per barrel, although the range in individual costs is quite broad, being as low as \$15 and as high as \$45. The subcommittee also felt that a fresh fruit exemption was not necessary, and that it could lead to an oversupply of fresh fruit and decrease the value of such product.

The Committee believes that under a 4.0 million barrel marketable quantity, there would not be enough carryover fruit in inventory to meet market demand early next season (2002–2003). They also expressed the belief that a significant increase in grower returns in one season may make growers more reluctant to reduce production at this time.

Option 2

Establishment of a Marketable Quantity of 4.7 Million Barrels and an Allotment Percentage Applicable to Processed Sales Only

The subcommittee’s recommendations were not adopted by the Committee. Instead, the Committee chose to recommend a higher marketable quantity of 4.7 million barrels applicable to processed sales only. This would add an estimated 300,000 barrels to the available marketable supply and set a less restrictive allotment percentage (67 percent instead of 54 percent).

Most independent handlers have indicated that they do not have inventories of cranberries to carry into the 2001 season. The Committee felt that a restriction based on a marketable quantity of 4.7 million barrels applicable to processed sales only would allow handlers to purchase additional cranberries if they needed them from other handlers, while having adequate supplies to expand markets with new products. Some handlers have indicated that they cannot support volume regulation unless they have assurances that they will have sufficient supplies to meet their customers’ needs. They contend that a 4.0 marketable quantity applicable to all sales would not allow them to meet their customers’ needs, which could result in giving up market share. However, there is no mechanism in the order which could provide such assurances.

The Committee determined that the marketable quantity for the 2001–2002 crop year should be established at 4.7 million barrels. The Committee recommended this volume regulation level by a 6 to 2 vote. With sales history estimated at 7 million barrels of processed fruit, the allotment percentage would be about 67 percent. Fresh fruit sales are not included in the

sales history figure because fresh fruit would not be covered by the allotment percentage. The fresh fruit exemption would add about 300,000 barrels to the available marketable supply. The Committee determined that a 5.0 million barrel available marketable supply (4.7 million-barrel marketable quantity plus about 300,000 barrels of fresh fruit) is an appropriate amount to deplete some of the existing inventory but not short the handlers from supplying market needs. Exports are expected to increase and enough marketable quantity must be available to meet this demand.

Those voting against this level of regulation wanted a more restrictive volume regulation. Those Committee members were also of the opinion that cheap and abundant cranberries allow handlers to undercut product prices in order to build market share without increasing total industry sales or grower returns.

Fresh and Organic Fruit Exemption Recommended by the Committee

The Committee also recommended that fresh fruit and organically-grown cranberries be exempted from regulation this season. Fresh and organically-grown fruit would be exempt pursuant to § 929.58 of the order which provides that the Committee may relieve from any or all order requirements cranberries in such minimum quantities as the Committee, with the approval of the Secretary, may prescribe.

Under current marketing practices, there is a distinction between cranberries for fresh market and those for processing markets. Cranberries intended for fresh fruit outlets are grown and harvested differently. Fresh cranberries are dry picked while cranberries used for processing are water picked. When cranberries are water picked, the bog is flooded and the cranberries that rise to the top are harvested. Dry picking is a more labor intensive and expensive form of harvesting. Cranberry bogs are designated as "fresh fruit" bogs and are grown and harvested accordingly. Only the lower quality fruit from a fresh bog goes to processing outlets.

Fresh fruit accounts for less than 6.0 percent of total production. The Committee estimated that about 310,000 barrels will be sold fresh this year, compared to 280,000 barrels sold last season. All fresh cranberries can be marketed and do not compete with processing cranberries. Fresh cranberries are seasonal (due to their limited shelf life) and are not a part of the growing industry inventories. The Committee concluded that fresh

supplies do not contribute in any meaningful way to the current cranberry surplus. Therefore, the Committee recommended that such cranberries be exempt from the allotment percentage this rule proposes.

The Committee addressed the impacts of having a sales history that includes only processed fruit, and how the allotment percentage would be applied. In the fresh fruit industry, there are instances when growers deliver fresh fruit that fails the handler's fresh fruit specifications and therefore is used as processing fruit. In this case, if a grower has an inadequate processing fruit allotment to cover the rejected fruit, the handler can allocate unused allotment from other growers to cover the excess. Each handler should give priority to these growers when allocating unused allotment to cover excess cranberries. This would allow the grower to deliver the rejected fruit for processing. This proposal would be implemented by adding a new paragraph (f) to § 929.149 of the order's rules and regulations.

Organically-grown cranberries comprise an even smaller portion of the total crop than fresh cranberries. The Committee estimated that about 1,000 barrels of organic fruit will be sold this season, compared to 450 barrels last season. Organic cranberries are a growing niche market and regulating them could have an adverse effect on the production and marketing of this product. Like fresh cranberries, demand for organic cranberries is in line with the current limited production. Thus, organic cranberries do not contribute in any meaningful way to the current oversupply experienced with processing fruit. The Committee, therefore, recommended that organically-grown cranberries be exempt from volume regulation during the upcoming season. To be exempt, organic cranberries would have to be certified as such by a certifying organization acceptable to the Committee, as required under § 929.158 of the order's rules and regulations.

Option 3

Establish No Volume Regulation for the 2001-2002 Crop

USDA is also soliciting comments on issuing no volume regulation. Under this third option, cranberry growers and handlers would voluntarily and individually decide how much fruit to market.

Although this rule proposes two levels of regulation discussed within the industry, it is still possible that no volume regulations will be implemented for the 2001 crop.

To fully analyze the issue of an appropriate volume restriction for the 2001 cranberry crop, the Department has decided to solicit comments on both levels of regulation as well as issuing no volume regulation. Comments are invited on which option would be more feasible and why, in view of current demand in foreign and domestic markets, and which option would be more consistent with the short and long term goals of the industry to correct the oversupply situation in the interest of the industry and the public, and why.

Appeal Procedures

The Committee unanimously recommended that the Committee review step be removed from the sales history appeals process. Currently, § 929.125 provides that a grower may appeal to an appeals subcommittee within 30 days of receipt of the Committee's determination of his/her sales history. If the grower is not satisfied with the subcommittee's decision, the grower may further appeal to the full Committee. Such grower must notify the full Committee of his or her appeal within 15 days after notification of the subcommittee's decision. The Committee has 15 days to review the appeal. The grower may further appeal to the Secretary, within 15 days after notification of the full Committee's findings, if the grower is not satisfied with the Committee's decision. All decisions by the Secretary are final.

The appeals procedure as described above could take 60 or more days to complete. Last season, the Committee recommended and the Department approved, removing the Committee's review from the procedures to shorten the process. Growers were able to take their appeals directly to the Secretary for a final decision if they were not satisfied with the appeals subcommittee's determinations.

The Committee recommended for this season and future seasons that the full Committee review step of the appeals process described in the rules and regulations be removed in order to expedite the process. The appeals subcommittee reviewed over 250 appeals for the 2000-2001 crop year. This required many hours of meetings and recalculations of appealed sales histories, when warranted. The Committee determined that the appeal process, absent Committee review, was efficient and provided the grower with a quicker response than would have otherwise occurred. Therefore, the Committee recommended that the Committee review of sales history appeals is not needed and should be removed from the procedures.

Transfers of Sales Histories on Leased Acreage

The Committee also unanimously recommended that, during a year of volume regulation, transfers of sales histories through partial or total leases of acreage only be recognized by the Committee during the period January 1 through July 31 of each crop year. The appropriate paperwork would have to be received in the Committee's office by close of business on July 31.

Currently, § 929.50 provides that, during a year of regulation, no transfer or lease of cranberry producing acreage, without accompanying sales history, shall be recognized until the Committee is in receipt of a completed transfer or lease form. The Committee has found through experience last season that many growers were delaying these adjustments until the busy harvest season. The review and approval of such transfers required a great deal of time and this placed an added burden on the Committee's staff, especially during the busy harvest season. Therefore, the Committee recommended that all transfers must be received by close of business on July 31 during a year of volume regulation. This change would be implemented for the 2001–2002 season, which begins September 1, 2001. This would allow sales histories to be distributed in a more equitable manner and also allow the Committee to complete the transfers prior to the busy harvest season. All forms associated with this issue have been previously approved by the Office of Management and Budget under OMB No. 0581–0103.

This proposal would be implemented by adding a new paragraph (d) to § 929.110 of the order's rules and regulations.

Amendment of Proposed Rule Published on January 12, 2001

A proposed regulation to reformulate sales history calculations for the 2001–2002 crop year was published in the **Federal Register** on January 12, 2001 (66 FR 2838), with a comment period ending February 12, 2001. The January proposal would modify the current sales history formula to apportion sales histories more equitably among producers. The January proposal also would clarify the exemption provisions for fresh cranberries under the volume regulation provisions, modify the outlets for excess cranberries and reinstate the dates for the Committee to notify growers and handlers of their allotments. The final rule will include a determination on the January proposals as well as the proposals contained in this rule.

This action proposes amending the January proposal to revise the sales history reformulation, and withdraw the proposed reinstatement of the June 1 allotment notification date. This action also corrects an inadvertent error in the January proposal regarding the definition of commercial crop.

Reformulation of Sales History Calculations for the 2001–2002 Crop Year

Under the January proposal, actual sales histories for growers with only

newer or replanted acreage were proposed to be computed by dividing the total sales by the actual number of years plus an adjustment based on the year planted. A grower with a combination of mature and newer acreage would have his/her sales divided by 4 before the adjustment was added.

At a Committee meeting on February 5, 2001, concerns were raised that the proposed formula would give an unfair advantage to growers who only had acres with 1 to 3 years of sales history (as opposed to growers with mature acres combined with new or replanted acres). The Committee believed that these growers would be provided an adjusted sales history in excess of average yields. The Committee recommended that the proposal be modified to be more equitable to all growers by providing that growers with acreage with 1 to 3 years of sales histories divide their total sales by 4 instead of all available years and then be provided additional sales history in accordance with the formula which is provided in the proposed rule for adjusting sales history.

The Committee's recommendation to modify how sales histories are calculated would not change the formula that provides the additional sales history. The additional sales history would still be calculated using the figures in Table 1.

TABLE 1.—ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE

	Expected 2001 yield (bbl/acre)	Average sales history (bbl/acre)	Additional 2001 sales history per acre (bbl/acre)
Date Planted:			
1995	275	226	49
1996	275	158	117
1997	252	95	157
1998	222	39	183
1999	156	0	156
2000	75	0	75

The Committee recommended changing the way the actual sales histories are calculated. The January proposal states that for growers with 7 or more years of sales a new history would be computed using an average of the highest 4 of the most recent 7 years of sales. If the growers have acreage with 6 years of sales history, a new sales history would be computed by averaging the highest 4 of the 6 years.

For growers with acreage with 5 years of sales history which was planted prior to 1995, a new sales history would be computed by averaging the highest 4 of the 5 years.

For growers with acreage of 5 years or less of sales history planted in 1995 or later, the sales history is proposed to be computed using the average of all available years and adjusting it by providing additional sales history in accordance with the formula. For

growers with acreage with no sales history or for the first harvest of replanted acres, the sales history was proposed to be 75 barrels per acre for acres planted or re-planted in 2000 and first harvested in 2001, and 156 barrels per acre for acres planted or re-planted in 1999 and first harvested in 2001.

The portion of the proposal that the Committee is concerned with is the calculation for growers with 1 to 3 years of sales history (and no mature acres)

whose total sales from that acreage are divided by all available years. The Committee believes that the formula already compensates these growers by providing additional sales history as if the grower also had mature acres and

divided the sales history by 4. The recommendation of February 5 proposed that these growers also divide by 4, like every other grower is expected to do under this scenario. At the

meeting, the following examples were used to explain the situation:

Example 1

A grower with two acres has the following sales history:

	Sales history						
	1994	1995	1996	1997	1998	1999	2000
Planted 1992	156	222	252	275	275	275	275
Planted 1996	156	222	252
Total Sales	156	222	252	275	431	497	527

Under the proposal of January 12, 2001, this grower's sales history would be calculated by totaling the highest 4 years of sales and dividing by 4 (275+431+497+527/4) or 432.5 barrels. Using the table for assigning additional sales history, this grower would be

provided an additional 117 barrels for the one acre planted in 1996 for a total sales history of 549.5 barrels. This grower's sales history represents approximately 275 barrels per acre for each of the two acres, which is a

reasonable average for acreage of that age.

Example 2

A grower with one acre has the following sales history:

	Planted			
	1996	1998	1999	2000
Sales	156	222	252

Under the proposal of January 12, 2001, this grower's sales history would be the total of the 3 years divided by all available years (156+222+252/3) or 210. Using the table for assigning additional sales history, this grower would be provided an additional 117 barrels for a total of 327 barrels of sales history for 1 acre. The amount of 327 barrels is far in excess of the average yield for acreage of that age. If the total sales were divided by 4 (156+222+252/4), the actual sales history would be 157.5 barrels. Using the table for assigning additional sales history, this grower would be assigned the same 117 barrels for a total of 274.5 barrels of sales history. The Committee believes this number is more in line with average yields.

Therefore, the Committee's recommendation would require modifying § 929.149 in the following manner: For growers whose acreage has 5 years of sales history and was planted in 1995 or later, the sales history would be computed by averaging the highest 4 of the 5 years and adjusting in accordance with Table 1; For growers whose acreage has 4 years of sales history, the sales history would be computed by averaging all 4 years and adjusting in accordance with Table 1; For growers whose acreage has 1 to 3 years of sales history, the sales history would be computed by dividing the total years sales by 4 and adjusting in accordance with Table 1.

Since this recommendation directly relates to the 2001–2002 volume regulation, the Committee's recommendation to modify the sales history calculations is being incorporated into this proposal so that interested parties are provided the opportunity to comment on this modification. This proposed modification to the sales history formula should be more equitable to growers in the event volume regulations are implemented for the 2001–2002 season.

Twenty-five comments were received on the January 12, 2001 proposed rule. Three comments supported the recalculation of sales history as proposed, five comments supported that proposal but recommended modifying the way sales histories are calculated as recommended by the Committee at its meeting on February 5, 2001, and three comments opposed the proposal on sales history reformulation. The remaining comments received concerned other changes proposed in the January 12, 2001, issue of the **Federal Register**. These comments will be considered along with any additional comments received during this comment period prior to issuing a final rule.

Reinstatement of Allotment Notification Date

The proposal of January 12, 2001, proposed reinstating the June 1 deadline for the Committee to notify growers and

handlers of their annual allotments. Section 929.49 of the order provides, that in any year in which an allotment percentage is established by the Secretary, the Committee must notify growers of their annual allotment by June 1. That section also requires the Committee to notify each handler of the annual allotments for that handler's growers by June 1. The June 1 date was indefinitely suspended in the final rule establishing a volume regulation for the 2000–2001 crop year (65 FR 42598) to allow adequate time for interested parties to comment on the volume regulation proposal for that season and for the Department to give due consideration to the comments received and issue a final rule.

The Department has determined that this time is needed again for this year's proposed volume regulation. Therefore, the proposal to reinstate the June 1 deadline date is being withdrawn.

Definition of Commercial Crop

The proposal to remove § 929.107 from the rules and regulations is not being modified in any way from the proposed rule published January 12, 2001. However, in the proposed rule, the removal of this section was inadvertently not included in the amendatory text. This section would be removed, and that change is included in this document.

The Regulatory Flexibility Act and Effects on Small Businesses

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action and alternatives considered on small entities. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions, in order that small businesses are not 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. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

According to the Small Business Administration (13 CFR 121.201) small handlers are those having annual receipts of less than \$5,000,000 and small agricultural producers are defined as those with annual receipts of less than \$500,000. Based on recent years' price and sales levels, AMS finds that nearly all of the cranberry producers and some of the handlers are considered small under the SBA definition. Of the 1,100 cranberry growers, between 86 and 95 percent are estimated to have sales equal to or less than \$500,000. Fewer than 60 growers are estimated to have sales that would have exceeded this threshold in 2000. Thus, the consequences of this proposed rule would apply almost exclusively to small entities.

Six handlers handle over 97 percent of the cranberry crop. Using Committee data on volumes handled, AMS has determined that none of these handlers qualify as small businesses under SBA's definition. The remainder of the crop is marketed by about a dozen grower-handlers who handle their own crops. Dividing the remaining 3 percent of the crop by these grower-handlers, all would be considered small businesses.

This rule invites comments on whether to establish volume regulations and if so, at what level. Two alternatives for volume regulation contained in this document would establish a marketable quantity and an allotment percentage for cranberries in a 10-State production area during the crop year from September 1, 2001, through August 31, 2002.

Handlers would only be allowed to handle those cranberries that are covered by annual allotment. This action proposes two levels of volume regulation with the requisite marketable quantities and allotment percentages as well as no volume regulation. One level

of volume regulation includes an exemption for fresh and organic cranberries, and the other does not. This proposed rule would also add a deadline date by which requests for transfers of sales histories on leased acreage must be filed with the Committee, delete the Committee review step in the sales history appeal process, and give fresh fruit growers whose fruit had to be used for processing due to quality or other problems first priority over other growers when excess allotment is allocated. Finally, this rule would amend a previously issued proposed rule to change the way in which sales histories are reformulated, and withdraw a proposal to reinstate a June 1 allotment notification date. The RFA analysis in the previous proposal discussed the impacts and alternatives relevant to the previously proposed amendments. These actions are designed to improve grower returns, establish more orderly marketing conditions for cranberries, and improve the operation of the volume regulation program.

Industry Profile

Cranberries are produced in 10 States, but the vast majority of farms and production are concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Massachusetts was the number one producing State until 1990, when Wisconsin took over the lead. Since 1995, Wisconsin has been the top producing State. Together, both States account for over 80 percent of cranberry production.

Average farm size for cranberry production is very small. The average across all producing States is about 33 acres. Wisconsin's average is twice the U.S. average, at 66.5 acres, and New Jersey averages 83 acres. Average farm size is below the U.S. average for Massachusetts (25 acres), Oregon (17 acres) and Washington (14 acres).

Small cranberry growers dominate in all States: 84 percent of growers in Massachusetts harvest 10,000 or fewer barrels of cranberries, while another 3.8 percent harvest fewer than 25,000 barrels. In New Jersey, 62 percent of growers harvest less than 10,000 barrels, and 10 percent harvest between 10,000 and 25,000 barrels. More than half of Wisconsin growers raise less than 10,000 barrels, while another 29 percent produce between 10,000 and 25,000 barrels. Similar production patterns exist in Washington and Oregon.

About 94 percent of the cranberry crop is processed, with the remainder sold as fresh fruit. In the 1950's and

early 1960's, fresh production was considerably higher than it is today, and in many years, constituted as much as 25 to 50 percent of total production. Fresh production began to decline in the 1980's, while processed utilization and output soared as cranberry juice products became popular. Today, fresh fruit claims only about 5 to 6 percent of total production. Three of the top five States produce cranberries for fresh sales. New Jersey and Oregon produce fruit for processed products only.

Historical Trends and Near Term Outlook

The cranberry industry has operated under a Federal marketing order since 1962. For many years, the industry enjoyed increasing demand for cranberry products, primarily due to the success of cranberry juice-based drinks. This situation encouraged additional production. Between 1960 and 1999, production increased from 1.34 million barrels (one barrel equals 100 pounds of cranberries) to a record 6.3 million barrels. This represents a 370 percent increase from 1960 and a 17-percent gain from the 1998 crop year. Production in the 2000 crop year declined to 5.5 million barrels, due to the use of volume control by the industry and a decrease in yields in some production areas due to adverse weather conditions during the growing season.

While production capacity continues to rise, demand has leveled off. Over the past several years, per capita consumption of cranberries in the United States has averaged 1.69 pounds. Per capita consumption peaked in 1994 at 1.80 pounds and began trending downward. In 1999, per capita consumption was 1.68 pounds. Associated with these per capita consumption figures is the fact that total domestic sales also peaked in 1994 at 4,692,507 barrels but declined to 4,506,632 barrels in 1999.

In 1998, sales totaled 5.1 million barrels, slightly above the prior 5-year average. In 1999, sales were 5.5 million barrels, and sales for 2000 are estimated at 5.9 million barrels. Most of the recent increase in sales can be attributed to stronger activity in export markets.

Increased total supplies in excess of demand have resulted in large inventories. Carryin inventories have grown from 883,773 barrels in 1988 to 3,058,921 barrels in 1999, to 4,273,067 barrels in 2000. From 1988 through 1997, carryin as a percent of production ranged from 21 to 36 percent. However, in 1998, carryin as a percent of production increased to 40 percent; in 1999 it increased to 49 percent. Carryin

inventory for the 2000 season exceeded 4 million barrels for the first time in the industry's history. Carryin for the 2001 crop is estimated at 3.3 million barrels.

When supply outpaces demand, resulting in high levels of carryover inventories, grower prices can be negatively impacted. Grower prices rose from \$8.83 per barrel in 1960 to a peak level of \$65.90 per barrel in 1996. These rising price levels provided an incentive for producers to expand planted acres and to increase yields. In recent seasons, prices have declined dramatically. In 1998, grower prices decreased to \$36.60 per barrel. The returns for the 1999 crop year were \$17.70 per barrel. Returns for the 2000 season are expected to be between \$15 and \$20 per barrel. The cost of production ranges from \$15 to \$45 per barrel.

Similarly, grower revenues have dropped from a high of \$350 million in 1997 to \$112 million in 1999. Grower revenues declined by 68 percent in just two growing seasons. Grower revenues are expected to be less than \$100 million for the 2000 crop year, potentially the first time that grower revenues will be less than \$100 million since the 1980 crop year.

Impacts of Volume Control

To help stabilize market supply and demand conditions, volume regulation was introduced in 2000, marking the first time in 30 years that such regulation was implemented. This, in addition to a planned government purchase of up to 1,000,000 barrels, assisted somewhat in relieving market

pressures. Also, yields in parts of the production area were below normal due to adverse weather during the growing season.

In an industry such as cranberries, where the product can be stored for long periods of time, volume control is a method that can be used to reduce supplies so that they are more in line with market needs. Large inventories are costly to maintain and, with the outlook for continued high production levels, these inventories would be difficult to market. Producers may not receive full payment for cranberries delivered to storage for several years, and storage costs are deducted from their final payment.

The demand for cranberries is inelastic. A producer allotment program results in a decrease in supply because producers can only deliver a certain portion of their past sales history. With an inelastic demand, a small shift (decrease) in the supply curve results in relatively large impacts on grower prices. An allotment program results in increasing grower prices and grower revenues.

The level of unsold inventory, the current capacity to produce in excess of expected demand, and continuing low grower prices have resulted in the industry debating various alternatives under their marketing order.

Level of Volume Restriction for the 2001 Crop

As previously discussed, two levels of volume regulation for the 2001 crop have been widely discussed within the

cranberry industry in recent months and are included in this proposed rule. Also included is a proposal to have no volume regulation. The Department believes that the two levels of volume regulation proposed could tend to further the goals of the Act—that is, improve grower returns and establish more orderly conditions in the cranberry market. One of these levels would establish a marketable quantity of 4.0 million barrels and an allotment percentage of 54, applicable to all fruit. The second would establish a marketable quantity of 4.7 million barrels and an allotment percentage of 67, with an exemption for fresh and organically-grown fruit.

To assist in our initial analysis of these options, the Department has relied upon an econometric model developed by the University of Wisconsin and widely discussed industry to project the impact of each on grower returns and revenues for the 2001 crop. We looked at both levels of regulation recommended by the industry as well as what might occur with no regulation. In making our projections, we used figures from the Committee's marketing policy. For example, carryin inventory is estimated at 3.325 million barrels, domestic production is estimated at 5.675 million barrels, imports are projected at 0.835 million barrels, and total sales for the 2001–02 crop year are projected at 5.508 million barrels. We used a figure of 1.8 million barrels for the desirable carryout into the 2002 crop year. The following table summarizes our findings.

MARKETABLE QUANTITIES

[In millions of barrels]

	No volume control	4.0 with no fresh fruit exemption	4.7 with a fresh fruit exemption
Supply:			
Domestic production	5.675	4.000	5.000
Carrying Inventory	3.325	3.325	3.325
Imports	0.835	0.835	0.835
Shrink	0.327	0.327	0.327
Total Available Supply	9.508	7.83	8.833
Demand:			
Processed Domestic and Export Sales	5.198	5.198	5.198
Fresh Fruit	0.310	0.310	0.310
Total Sales	5.508	5.508	5.508
Carryout Inventories	4.000	2.325	3.325
Desirable Carryout	1.800	1.800	1.800
Surplus	2.200	0.525	1.525
Allotment Percentage	0	54	67
Estimated Price per Barrell	\$10.00	\$31.00	\$19.50
Estimated Total Revenue (millions)	\$56.750	\$124.000	\$97.500

As shown above, ample supplies are expected to be available during the upcoming year, and prices will likely continue to fall in 2001 without some form of market intervention. Absent any regulation in 2001, the estimated grower price per barrel is projected to decline to \$10, grower revenue would drop to \$56.75 million, and ending inventories would grow to 4 million barrels. Heavy inventories would put downward pressure on grower prices for ensuing seasons.

The second column of the table shows that a 4.0 million barrel marketable quantity would result in inventories declining to 2.325 million barrels, and the grower price increasing to \$31 per barrel. Total grower revenue under this option is projected to reach \$124 million. Under this option, sales would have to reach 6.0 million barrels to reach the desirable carry out level of 1.8 million barrels. A marketable quantity of 4.0 million barrels applicable to total sales history of an estimated 7.4 million barrels would result in an allotment percentage of about 54 percent.

As shown in the last column, the 4.7 million barrel alternative would result in carryout inventories remaining at 3.325 million barrels. The grower price would be an estimated \$19.50 per barrel, and revenues would total \$97.5 million. With a marketable quantity of 4.7 million barrels, sales would have to increase to 6,723,000 barrels to reach the desirable carry out inventory level of 1.8 million barrels. Under this option, total growers' sales histories are estimated at 7.0 million barrels of processed sales. Using the formula established under the order (4.7 million barrels divided by 7.0 million barrels), the annual allotment percentage would be about 67 percent.

The econometric model looks at the short-term impact of reducing supplies at the grower level. According to the above table, of the three options presented, the 4.0 million barrel marketable quantity alternative would result in the highest grower price for the upcoming season, and the lowest level of carry out inventories. However, in deciding whether to issue a volume regulation for the 2001 crop, and at what level, other factors need to be considered as well.

As long as production capacity exceeds market demand, the cranberry industry will continue to be in a surplus situation. An alternative solution to reducing supply through regulation would be to increase demand. Supporters of the 4.7 million barrel proposal argue that a more restrictive regulation would thwart planned market expansion activities. They argue that a

more gradual correction in prices is needed to increase demand through the introduction of new products and export market development. A substantial increase in product cost from one season to the next may hinder these expansion efforts, and result in a loss of current customers as well.

Supporters of the 4.0 million barrel proposal argue that until inventories are reduced to more desirable levels, grower prices will remain low. With cheap cranberries, handlers destructively undercut prices to ingredient customers in an attempt to build market share without increasing the overall demand for cranberries.

The probable impact of these alternatives at the handler level also needs to be considered. While carry-in inventories are estimated at 3.325 million barrels, these supplies are expected to be concentrated in the hands of only some of the major handlers. The handlers without substantial inventories claim that a reduction of their growers' crops at the 46 percent level would leave them without enough fruit to supply their customers. Overly restricting this year's crop would therefore hurt their competitive position by requiring them to surrender market share to other handlers. They claim that any losses they incur will be passed on to their growers.

Grower prices are a small component of the cost of finished cranberry products, and are not closely associated with movements in retail prices. Neither level of volume regulation is expected to have a meaningful impact on the retail price of cranberry products.

We are soliciting comment on all three alternatives, including the short term and longer range impacts of these alternatives at the grower, handler, and consumer levels.

Exemption for Fresh and Organically-Grown Fruit

The Committee also recommended that organic cranberries be exempt from volume regulations. Fresh and organically-grown fruit would be exempt pursuant to ' 929.58 of the order which provides that the Committee may relieve from any or all requirements, cranberries in such minimum quantities as the Committee, with the approval of the Secretary, may prescribe.

Fresh fruit accounts for about 6 percent of the total production. The Committee estimated that about 310,000 barrels will be sold fresh this year, compared to 280,000 barrels sold last season. All fresh cranberries can be marketed and do not compete with processing cranberries. Fresh

cranberries are seasonal (due to their limited shelf life) and are not part of the growing industry inventories. The Committee recommended that such cranberries be exempt from the proposed allotment percentage.

Organically-grown cranberries comprise an even smaller portion of the total crop than fresh cranberries do. The Committee estimated that about 1,000 barrels of organic fruit will be sold this season, compared to 450 barrels last season. Organic cranberries are a growing niche market and regulating them could have an adverse effect on marketing this product. Demand for organic cranberries is in line with the current limited production. Thus, all organic cranberries can be marketed, and they do not contribute in any meaningful way to the current oversupply experienced with processing fruit. The Committee therefore recommended that organically-grown cranberries be exempt from volume regulation during the upcoming season.

The supporters of the 4.0 million barrel level of regulation felt that a fresh fruit exemption was not necessary and that it added administration problems for the Committee. Growers who delivered fresh and processed fruit last season were able to deliver all of their processed fruit since such grower's sales history contained processed and fresh fruit sales. They also believe that an exemption could result in an oversupply in the fresh fruit market.

Revision in the Appeals Process

The Committee also unanimously recommended that the appeals process be shortened by removing the Committee's review. Currently, § 929.125 provides an appeal procedure for growers that are dissatisfied with a determination made pursuant to § 929.48(a) and (b) of the order which describes the computation of a grower's sales history.

Currently, § 929.125 provides that a grower may appeal to an appeals subcommittee within 30 days of receipt of the Committee's determination of his/her sales history. If the grower is not satisfied with the subcommittee's decision, the grower may further appeal to the full Committee. Such grower must notify the full Committee of his or her appeal within 15 days after notification of the subcommittee's decision. The Committee has 15 days to review the appeal. The grower may further appeal to the Secretary, within 15 days after notification of the full Committee's findings, if the grower is not satisfied with the Committee's decision. All decisions by the Secretary are final.

The appeals procedure as described above could take 60 or more days to complete. Last season, the Committee recommended and the Department approved through rulemaking, the suspension of the Committee's review from the procedures to shorten the process. Thus, growers were able to take their appeals directly to the Secretary for a final decision if they are not satisfied with the appeals subcommittee's determinations. The Committee believes that this process would prove to be more efficient in considering grower appeals, and recommended that the Committee review be permanently removed from the appeals procedure.

Establishment of a July 31 Deadline for Transfers of Sales History

The Committee also unanimously recommended that, during a year of volume regulation, transfers of annual allotments through partial or total leases of acreage would only be recognized by the Committee through July 31 of each crop year. The appropriate paperwork would have to be received in the Committee's office by close of business on July 31.

Currently, § 929.50 provides that, during a year of regulation, no transfer or lease of cranberry producing acreage, without accompanying sales history, shall be recognized until the Committee is in receipt of a completed transfer or lease form. The Committee has found through experience last season that many growers were leasing acreage and transferring sales history many times throughout the season and even after harvest. Growers were able to take advantage of additional sales history through these transactions. In addition, such actions require a great deal of time on the part of Committee staff, and became particularly burdensome during the busy harvest season.

Therefore, the Committee recommended that all transfers must be received by close of business on July 31 during a year of volume regulation. This would allow sales histories to be distributed in a more equitable manner and also allow the Committee to complete the transfer prior to the busy harvest season.

Amendments to January Proposed Rule

The amendments to the sales history calculations proposed in this rule would benefit a majority of growers, and would be especially beneficial to growers who planted acreage in 1995 or later and growers who have a combination of mature acres and acreage planted in 1995 or later. Specifically, the amendment to the sales history

calculation modifies the way growers' sales histories are calculated so that the additional sales history provided is more in line with average acreage yields. The amendment also ensures that growers with mature acreage who also have newer acreage and growers with only newer acreage are treated equitably. Approximately 30 percent of all cranberry acreage was planted in 1995 or later and would be impacted by this proposed amendment.

The amendment to the January 12 proposal would also withdraw the proposed reinstatement of the June 1 allotment notification date. Reinstating this date would be impractical and therefore is being withdrawn from the proposal. The January proposal is also being amended to include the removal of the section on determining cranberry acreage which was inadvertently omitted from the January proposal. This amendment merely corrects that omission.

In the event volume regulations are implemented for the 2001–2002 crop year, these proposed further changes would have a positive effect on all growers and handlers because they would more equitably provide additional allotment for newer or replanted acreage, and clarify the present regulations.

Other Alternatives Considered

Withholding Volume Regulation

The marketing order provides for two methods of volume controls, the producer allotment and the withholding programs. Prior to recommending a producer allotment program for the 2001–2002 crop, the Committee also considered the benefits of a withholding program.

Unlike the producer allotment program which allows cultural practices to be changed at the grower level closer to harvest, growers deliver all their cranberries to their respective handlers under the withholding program. The handler is responsible for setting aside restricted cranberries and ultimately disposing of the cranberries in authorized noncommercial and noncompetitive outlets. This could result in a large volume of cranberries being disposed of and perhaps destroyed. In addition, the withholding provisions require that all withheld cranberries be inspected by the Federal or Federal-State Inspection Service, which would add costs. Although the benefits to growers under a withholding program are that all cranberries can be delivered to handlers, growers would generally only be paid by their handlers for unrestricted cranberries. In addition,

it would be expected that costs associated with disposal of withheld cranberries would be deducted from grower returns, further reducing grower revenues. This could result in grower returns well below cost of production.

As with the 2000–2001 volume regulation, the Committee again determined that the producer allotment method of volume regulation was preferable over the withholding method. The producer allotment program allows for less fruit to be produced and would not require the disposal of as many cranberries as with the withholding provisions. In addition, inspections are not required under the producer allotment method, which is more cost effective and would be simpler to administer. This helps growers reduce some of the variable costs associated with preparing and maintaining a bog for production and harvest.

Establishing a Cranberry Marketing Pool Under a Producer Allotment Program

A group of independent handlers indicate that any volume regulation cannot be supported unless there are some assurances that sufficient supplies of cranberries would be made available to meet their customer needs. Most independent handlers claim that they do not have inventories of cranberries to carry into the new season. Although handler to handler purchases are a normal business practice (with or without a volume regulation), a producer allotment restriction increases the need for handlers to purchase from handlers with inventories to maintain market share. Some handlers believe this places them in a vulnerable position, needing more fruit than normal from their competitors.

The marketing order does not contain a mechanism to provide the assurances some of the independent handlers are seeking. The amendment subcommittee is working towards amending the order to incorporate a handler marketing pool, whereby a specified amount of cranberries would be pooled to allow for handlers with little or no inventories to purchase cranberries at a price established by the Committee. However, amending the order in this manner cannot be accomplished prior to the 2001 season.

Using All or Part of Both Methods of Volume Regulation in the Same Year

Also considered by the Committee was utilizing both methods of volume regulation in the same year. Some growers and handlers believe that the producer allotment program does not adequately address all the concerns faced by the different segments of the

industry. It was thought that using the most useful parts of each program would address a broader range of issues. For example, under the withholding program, handlers can apply to the Committee for a release of their restricted cranberries. To receive a release, they have to deposit with the Committee an amount equal to the fair market value of the cranberries they want to be released. The fair market value is determined by the Committee. The Committee uses these funds to purchase an equal amount of free cranberries from other handlers and to dispose of those cranberries. This provision of the withholding program is referred to as the "buy-back" provision.

Some growers and handlers indicated if there were a buy-back provision under the producer allotment program, the concern of handlers without inventories having access to fruit would be specifically addressed. There is no authority in the marketing order to use both methods of volume control concurrently, and buy-back cannot be used under the producer allotment program. Additionally, the intent of a producer allotment program is to discourage production at the grower level so that less fruit is delivered to handlers. Establishing a "buy-back" under a producer allotment program is problematic for that reason. If growers believed that some of their excess fruit could eventually be "bought back", increased production could be encouraged, defeating the purpose of the program. Also, it is unclear exactly what amount would be "bought back".

Other growers and handlers have indicated that if a producer allotment and a withholding program were recommended in the same year, growers would still be encouraged to reduce growing and handlers would be in a position to buy-back berries to meet market needs. For example, if a 20 percent restriction under a producer allotment were recommended in February for the upcoming season, growers would be encouraged to reduce production. If a withholding provision were recommended in August of the same year with a restricted percentage of 10 percent, handlers would have the opportunity to buy back cranberries to meet their marketing needs.

Section 929.52 of the order specifies that either a withholding or a producer allotment program may be implemented during any fiscal period, not both. Also, further discussion is needed to determine what problems would be associated with implementing both programs in one year, if authorized. The amendment subcommittee is

considering this as an amendment to the order.

The Committee recommendation for a 4.7 million barrel marketable quantity resulting in an allotment percentage of about 67 percent passed by a six to two vote. As discussed earlier, the persons voting against the recommendation wanted a more restrictive allotment percentage that would in turn increase returns to growers to cover production costs. All of the other recommendations were passed by unanimous votes. The other changes discussed in this document are designed to improve the operation of the volume regulation should volume regulation be implemented for the 2001–2002 season.

The subcommittee's proposal of setting the marketable quantity at 4.0 million barrels and an allotment percentage of about 54 percent passed by a 6 to 2 vote. Those voting against the recommendation favored a higher marketable quantity.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors.

As previously discussed in the proposed rule published on January 12, 2001, that proposed rule would necessitate reconfiguring one form currently approved by OMB. The form is entitled CMC–AL 1, Growers Notice of Intent to Produce and Qualify for Annual Allotment. Growers are required to supply the Committee with information relative to their cranberry acreage in order to qualify for an annual allotment. The information includes how many existing and new acres would be producing cranberries in the following season and who would be handling the cranberries. The estimated time for 1,285 growers to complete this form is 20 minutes, once a year, for total annual burden hours of 424.05. If the relevant portion of that proposed rule were implemented, the Committee would reconfigure this form to ensure that information relative to this proposal would be included, particularly the date of planting of the acreage. The burden hours of the form would not change and the reconfigured form would be submitted to OMB to replace the current form.

All of the forms associated with the transfer of sales histories associated with leases have been previously approved by OMB. There are also some other reporting and recordkeeping and other compliance requirements under the marketing order. The reporting and recordkeeping burdens are necessary for compliance purposes and for

developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. This rule does not change those requirements.

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 0581–0103.

The Committee's meetings were widely publicized throughout the cranberry industry and all interested persons were invited to attend them and participate in Committee deliberations. Like all Committee meetings, the March 4–5, 2001, meeting was a public meeting and all entities, both large and small, were able to express their views on these issues.

The Committee itself is composed of eight members, of which seven members are growers and one represents the public. Also, the Committee has a number of appointed subcommittees to review certain issues and make recommendations. The Committee manager also held several meetings with growers throughout the production area to discuss the methods of volume regulation and the procedures for regulation.

The Department has not identified any relevant Federal rules which duplicate, overlap or conflict with this rule.

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.

A 15-day comment period is provided to allow interested persons to respond to this proposal. Fifteen days is deemed appropriate because this rule, if adopted, needs to be in place as soon as possible to allow growers to implement cultural practices that could curtail the production of the crop should volume regulation be implemented for the 2001–2002 season. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 929 is proposed to be amended as follows:

PART 929—CRANBERRIES GROWN IN THE STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

1. The authority citation for 7 CFR Part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 927.107 [Removed]

- 2. Section 929.107 is removed.
- 3. Section 929.110(d) is added to read as follows:

§ 929.110 Transfers or sales of cranberry acreage.

* * * * *

(d) During a year of regulation, all transfers of growers' sales histories for partial or total leases of acreage shall be received in the Committee office by close of business on July 31.

4. Section 929.125 is revised to read as follows:

§ 929.125 Committee review procedures.

Growers may request, and the Committee may grant, a review of determinations made by the Committee pursuant to section 929.48, in accordance with the following procedures:

(a) If a grower is dissatisfied with a determination made by the Committee which affects such grower, the grower may submit to the Committee within 30 days after receipt of the Committee's determination of sales history, a request for a review by an appeals subcommittee composed of two independent and two cooperative representatives, as well as a public member. Such appeals subcommittee shall be appointed by the Chairman of the Committee. Such grower may forward with the request any pertinent material for consideration of such grower's appeal.

(b) The subcommittee shall review the information submitted by the grower and render a decision within 30 days of receipt of such appeal. The subcommittee shall notify the grower of its decision, accompanied by the reasons for its conclusions and findings.

(c) The grower may further appeal to the Secretary, within 15 days after notification of the subcommittee's

findings, if such grower is not satisfied with the appeals subcommittee's decision. The Committee shall forward a file with all pertinent information related to the grower's appeal. The Secretary shall inform the grower and all interested parties of the Secretary's decision. All decisions by the Secretary are final.

5. Section 929.149 is revised to read as follows:

§ 929.149 Determination of sales history.

A sales history for each grower shall be computed by the Committee in the following manner.

(a) For each grower with acreage with 7 or more years of sales history, a new sales history shall be computed using an average of the highest 4 of the most recent 7 years of sales. If the grower has acreage with 6 years sales history, a new sales history shall be computed by averaging the highest 4 of the 6 years. If the grower has acreage with 5 years of sales history and such acreage was planted prior to 1995, a new sales history shall be computed by averaging the highest 4 of the 5 years.

(b) For growers whose acreage has 5 years of sales history and was planted in 1995 or later, the sales history shall be computed by averaging the highest 4 of the 5 years and shall be adjusted as provided in paragraph (d). For growers whose acreage has 4 years of sales history, the sales history shall be computed by averaging all 4 years and shall be adjusted as provided in paragraph (d). For growers whose acreage has 1 to 3 years of sales history, the sales history shall be computed by dividing the total years sales by 4 and shall be adjusted as provided in paragraph (d).

(c) For growers with acreage with no sales history or for the first harvest of replanted acres, the sales history will be 75 barrels per acre for acres planted or re-planted in 2000 and first harvested in 2001 and 156 barrels per acre for acres planted or re-planted in 1999 and first harvested in 2001.

(d) In addition to the sales history computed in accordance with paragraphs (a) and (b) of this section, additional sales history shall be assigned to growers with acreage planted in 1995 or later. The additional sales histories depending on the date the acreage is planted are shown in Table 1.

TABLE 1.—ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE

Date planted	Additional 2001 sales history per acre
1995	49
1996	117
1997	157
1998	183
1999	156
2000	75

(e) Sales histories shall be calculated separately for fresh and processed cranberries. Fresh fruit sales history, in whole or in part, may be added to process fruit sales history with the approval of the Committee in the event that the grower's fruit does not qualify as fresh fruit at delivery because of quality reasons.

(f) If a grower's fruit does not qualify as fresh fruit upon delivery to the handler, and it is converted to processed fruit, the handler shall give priority to this grower when allocating unused allotment if the grower does not have sufficient processed sales history to cover the converted fruit.

6. A new section 929.251 is added to read as follows:

Option 1

§ 929.251 Marketable quantity and allotment percentage for the 2001–2002 crop year.

The marketable quantity for the 2001–2002 crop year is set at 4.7 million barrels and the allotment percentage is designated at about 67 percent. Fresh and organically grown fruit shall be exempt from the volume regulation provisions of this section.

Option 2

§ 929.251 Marketable quantity and allotment percentage for the 2001–2002 crop year.

The marketable quantity for the 2001–2002 crop year is set at 4.0 million barrels and the allotment percentage is designated at about 54 percent.

Option 3

Issue no volume regulation for the 2001–2002 crop year.

Dated: May, 8, 2001.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

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