

would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as hereby 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 sweet cherries grown in the production area; and

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

(b) *Determinations.* It is hereby determined that:

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping sweet cherries covered by the order as hereby amended) who, during the period April 1, 2000, through March 31, 2001, handled 50 percent or more of the volume of such cherries covered by said order, as hereby amended, have signed an amended marketing agreement; and

(2) The issuance of this amendatory order is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period April 1, 2000, through March 31, 2001 (which has been deemed to be a representative period), have been engaged within the production area in the production of such cherries, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

Order Relative to Handling of Sweet Cherries Grown in Designated Counties in Washington

It is therefore ordered, That on and after the effective date hereof, all handling of sweet cherries grown in designated counties in Washington shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed marketing agreement and order amendments contained in USDA's Decision issued by the Administrator on March 1, 2001, and published in the **Federal Register** on March 6, 2001, shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

List of Subjects in 7 CFR Part 923

Marketing agreements, Cherries, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, 7 CFR part 923 is amended as follows:

PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

1. The authority citation for 7 CFR part 923 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 923.4 to read as follows:

§ 923.4 Production area.

Production area means the counties of Okanogan, Chelan, Kittitas, Yakima, Klickitat in the State of Washington and all of the counties in Washington lying east thereof.

3. Amend § 923.14 by revising paragraphs (a) and (b) to read as follows:

§ 923.14 District.

* * * * *

(a) *District 1* shall include the Counties of Chelan, Okanogan, Douglas, Grant, Lincoln, Spokane, Pend Oreille, Stevens, and Ferry.

(b) *District 2* shall include the counties of Kittitas, Yakima, Klickitat, Benton, Adams, Franklin, Walla Walla, Whitman, Columbia, Garfield and Asotin.

4. Amend § 923.20 as follows:

a. In the first sentence remove the word “fifteen” and add the word “sixteen” in its place;

b. In the third and fourth sentences remove the word “five” and add the word “six” in its place;

c. In the fifth sentence, remove the words “four” and “six” and add the word “five” in their place; and

d. In the sixth sentence, remove the word “two” and add the word “three” in its place.

5. Revise § 923.25 to read as follows:

§ 923.25 Acceptance.

Any person prior to selection as a member or an alternate member of the committee shall qualify by filing with USDA a written acceptance of willingness to serve on the committee.

6. Revise § 923.41 by adding a new paragraph (c) to read as follows:

§ 923.41 Assessments.

* * * * *

(c) If a handler does not pay any assessment within the time prescribed by the committee, the assessment may be subject to an interest or late payment charge, or both, as may be established by USDA as recommended by the committee.

§ 923.52 [Amended]

7. In § 923.52, paragraph (a)(3) is amended by adding the word “markings,” after the word “dimensions,”.

8. Amend § 923.54 as follows:

a. Remove the words “(including shipments to facilitate the conduct of marketing research and development projects established pursuant to § 923.45),” in paragraph (b) and add a new sentence at the end of the paragraph; and

b. Add a new sentence at the end of paragraph (c) to read as follows:

§ 923.54 Special purpose shipments.

* * * * *

(b) * * * Specified purposes under this section may include shipments of cherries for grading or packing to specified locations outside the production area and shipments to facilitate the conduct of marketing research and development projects established pursuant to § 923.45.

(c) * * * The committee may rescind or deny to any packing facility the special purpose shipment certificate if proof satisfactory to the committee is obtained that cherries shipped for the purpose stated in this section were handled contrary to the provisions of this section.

Dated: November 15, 2001.

A. J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 01–29116 Filed 11–20–01; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV01–930–4 FR]

Tart Cherries Grown in the States of Michigan, et al.; Temporary Suspension of a Provision Regarding a Continuance Referendum Under the Tart Cherry Marketing Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule temporarily suspends an order provision which requires a continuance referendum to be conducted on the marketing order for tart cherries during March 2002. The suspension will enable the U.S. Department of Agriculture (USDA) to postpone conducting the continuance referendum until the completion of

amendatory order proceedings. The Cherry Industry Administrative Board (Board) recommended a delay in holding the continuance referendum to allow the industry to evaluate the results of any approved amendments.

EFFECTIVE DATE: This final rule becomes effective on December 21, 2001.

FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, Maryland, 20737, telephone: (301) 734-5243; Fax: (301) 734-5275; or George J. 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) 720-9038.

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 final rule is issued under Marketing Order No. 930 (7 CFR part 930) (order) regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. 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."

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

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA 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 USDA 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 USDA's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

This action will temporarily suspend the provision in § 930.83(d) of the order which specifies when a continuance referendum should be conducted to determine if producers and processors favor continuance of the tart cherry marketing order. This action was unanimously recommended by the Committee at its January 25, 2001, meeting.

Section 930.83(d) of the order currently provides that USDA shall conduct a referendum within the month of March every six years after the order became effective to ascertain whether continuance of the order is favored by tart cherry producers and processors. The order became effective in September 1996. A continuance referendum is therefore scheduled to be conducted in March 2002.

Section 930.83(b) authorizes USDA to terminate or suspend the operation of any or all provisions of this part whenever USDA finds that such provisions do not tend to effectuate the declared policy of the Act.

In 1998, the Board recommended several proposed amendments to the tart cherry marketing order to improve the administration of the order and more accurately reflect how the program is operated. It also requested that public hearings be held on the proposed amendments. The amendatory process can be lengthy depending on the complexity of the amendments and the level of support for the amendments.

Under the applicable rules of practice (7 CFR part 900), the amendment process consists of several steps. The first step is the public hearing at which evidence (pro and con) is presented on the recommended amendments. After the public hearings are completed, a Recommended Decision, based on the evidence presented, is issued by USDA, with a request for written comments. Next, USDA considers the evidence of record including any exceptions to the Recommended Decision and then issues a USDA Decision and, if warranted, a Referendum Order. A Referendum Order would be issued if USDA determines that the amendments to the order would tend to effectuate the declared policy of the Act.

Initially, the Board intended to proceed with all of its proposed amendments in a single amendatory proceeding. However, after discussion

with USDA, the Board agreed to split its proposed amendments to the order into two proceedings. The less complex amendments were handled first followed by the more complex amendments. An amendment referendum for the first series of amendments was held in January 2001. Those amendments were approved and published in the **Federal Register** on July 10, 2001 (66 FR 35891). The formal rulemaking process for the second series of amendments, has begun, and is expected to be completed in the spring of 2002.

The Board recommended that the provision requiring the March 2002 continuance referendum be temporarily suspended to allow USDA to complete the amendatory proceedings. The temporary suspension will allow USDA to postpone the next continuance referendum for the tart cherry marketing order until March 2003.

Delaying the continuance referendum will allow for the completion of the amendatory proceedings and an evaluation by the completion of the amendatory proceedings and an evaluation by the industry of any approved amendments at least a year before producers and processors are asked to vote on continuing the order. A later continuance referendum should be a better indicator of the support for the order.

The Regulatory Flexibility Act and Effects on Small Businesses

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules thereunder, are unique in that they are brought about through

group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. The majority of handlers and producers of tart cherries may be classified as small entities.

This rule temporarily suspends the provision in § 930.83(d) of the order which specifies the month in which a continuance referendum should be conducted to determine if producers and processors favor the continuance of the tart cherry marketing order. Pursuant to this provision, the next continuance referendum is scheduled for March 2002. Section 930.83(b) authorizes USDA to terminate or suspend the operation of any or all of the provisions of this order whenever USDA finds that such provisions do not tend to effectuate the declared policy of the Act.

One alternative to this action will be to continue the status quo. However, without a postponement of the continuance referendum, USDA will have to conduct two referenda closely together, for the second series of amendments and one for a continuance referendum. The problem with proceeding in this manner is that growers and processors will not have had time to determine how any amendments that are adopted could affect order operations and evaluate the results. A temporary delay in holding the continuance referendum will allow the amendments to be evaluated by growers and processors. Thus, the vote on continuance will be a more reliable determiner of industry support for the order.

Discussion of Comments

A proposed rule concerning this action was published in the **Federal Register** on May 15, 2001 (66 FR 26813). Copies of the rule were mailed and sent via facsimile to all Board members and handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register, and USDA. A 60-day comment period ending on July 16, 2001, was provided to allow interested persons to respond to the proposal.

Forty-three comments were received during the comment period in response to the proposal. Forty comments were received in opposition to the proposal and three comments favored the proposal. The comments received were mainly from growers.

The three comments favoring the proposal strongly supported the proposed action. However, one supporter disagreed with the March 2003 date for the continuance referendum. The commenter asserted that the industry should be allowed to operate a full season with the new amendments before the continuance referendum is held. The commenter stated that completion of the formal rulemaking process could extend into the 2002–2003 season and a referendum in March 2003 would not afford producers and processors the opportunity for a full season's review of the new amendments.

One commenter opposed to the proposal stated that a continuance referendum provides a measurement of support and effectiveness of the order, and, therefore, should not be delayed until after any changes to the order are implemented. The commenter believes that the tart cherry industry should be allowed to vote whether or not it supports or disfavors the marketing order based on the order as it has been operating over the past five years, without regard to any amendatory proceedings.

The other comments from growers in opposition to the proposal urged USDA not to suspend the continuance referendum pending completion of the amendatory proceedings. They contend that two important amendatory proposals have already been addressed. The first proposal involves subjecting production in all districts within the production area to volume regulation. With production shifts over the last few years, about 90 percent of the production would be subject to volume regulation during the 2001/2002 crop year. They believe that this lives up to the spirit of the proposed amendments to the order. The other important change allowing handlers to earn diversion credits for export sales of juice and juice concentrate was addressed by suspending order language through the informal rulemaking process.

The Board has the authority to recommend necessary changes to the order and the administrative rules and regulations to address evolving industry operations and changing crop year circumstances. It is important for the Board to address changing industry conditions to keep the marketing order current. The USDA further recognizes

the importance of continuance referenda in gauging the effectiveness and support for marketing orders within an industry.

However, neither USDA nor the tart cherry industry can be certain which, if any, of the proposed amendments to the order will be approved. Because of this uncertainty, USDA believes it appropriate to complete the amendatory proceeding before holding a continuance referendum. The USDA anticipates issuing a recommended decision on the amendatory proposals in 2001. If warranted, a grower and processor referendum on the proposals would be held in the spring of 2002.

Therefore, USDA has concluded that the temporary suspension should be issued and a continuance referendum should be conducted in March 2003.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements imposed by this order have been previously approved by OMB and assigned OMB Number 0581–0177. This action imposes no additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

The Board's meeting was publicized and all Board members and alternate Board members, representing both large and small entities, were invited to attend the meeting and participate in Board deliberations. The Board itself is composed of 18 members, of which 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations.

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.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Board, the comments received, and other available

information, it is hereby found that the provision temporarily suspended does not tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Tart cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 930.83 [Suspended in part]

2. In paragraph (d), the sentence “The Secretary shall conduct a referendum within the month of March of every sixth year after the effective date of this part to ascertain whether continuation of this part is favored by the growers and processors” is suspended effective March 1 through March 31, 2002.

Dated: November 15, 2001.

A. J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 01–29111 Filed 11–20–01; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV01–930–5 FIR]

Tart Cherries Grown in the States of Michigan, et al.; Suspension of Provisions Under the Federal Marketing Order for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (USDA) is adopting, as a final rule, without change, the provisions of an interim final rule suspending a provision in the Federal tart cherry marketing order (order) to allow handlers to receive diversion credit for exporting juice and juice concentrate to countries other than Canada and Mexico. The suspended provision does not allow diversion credit for domestic shipments of tart cherry juice or juice concentrate. The

Cherry Industry Administrative Board (Board) unanimously recommended this action to allow handlers of tart cherries to maintain and possibly expand market opportunities for juice and juice concentrate products in export outlets. The Board is responsible for local administration of the marketing order which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

EFFECTIVE DATE: December 21, 2001.

FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2AO4, Unit 155, 4700 River Road, Riverdale, Maryland 20737, telephone: (301) 734–5243, Fax: (301) 734–5275 or George Kelhart, Technical Advisor, 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 compliance with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; Fax: (202) 720–8938, or E-mail: Jay.Guerber@usda.gov.

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

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

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

The Act provides that administrative proceedings must be exhausted before

parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA 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. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA 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 USDA’s ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

The order authorizes the use of volume regulation. In years when volume regulation is implemented to stabilize supplies, a certain percentage of the cherry crop is required to be set aside as restricted tonnage, and the balance may be marketed freely as free tonnage. The restricted tonnage is required to be maintained in handler-owned inventory reserve pools. Under § 930.59, Handler diversion privilege, handlers in regulated districts may fulfill any restricted percentage requirements by diverting cherries or cherry products in programs approved by the Board. One form of diversion which the Board may authorize is the use of cherries for exempt purposes under § 930.62. That section states that the Board, with the approval of USDA, may exempt from various requirements of the order (such as assessments, and reserve pool obligations) cherries used for certain purposes such as experimental use or new market development.

Section 930.162 of the regulations under the order contains various approved forms of exemption and the procedure for applying for, and obtaining, exempt use approval from the Board as well as diversion credit. One of the exempt uses authorized by regulation prior to the issuance of the interim final rule was the use of cherries or cherry products in the development of export markets (other than Canada and Mexico) provided that such products do not include juice or juice concentrate. The interim final rule modified this section to make exports of juice or juice concentrate to countries other than Canada and Mexico an exempt use. When recommending provisions of the order, the industry considered Canada and Mexico to be premium markets for tart cherries, not outlets for which exemptions and