DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket Nos. AO–370–A7; FV00–930–1]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin; Order Amending Marketing Agreement and Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the marketing agreement and order for tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. The amendments are based on those proposed by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. The amendments include making districts producing more than 6 million pounds per year subject to volume regulations (rather than 15 million pounds); making shipments of cherry juice and juice concentrate to certain markets eligible to receive diversion credit; changing provisions related to alternate Board members serving for absent members at Board meetings; making all processed cherries subject to assessments; and eliminating the requirement that different assessment rates be established for different cherry products. Remaining amendments pertain to allocation of Board membership; clarification of order provisions relating to exemption and diversion; release of cherries in the inventory reserve; and the use of crop estimates other than the official USDA crop estimate in developing the Board's marketing policy. The amendments are intended to improve the operation and functioning of the tart cherry marketing order program.

EFFECTIVE DATE: August 9, 2002.

FOR FURTHER INFORMATION CONTACT: Anne M. Dec, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone: (202) 720–2491, or Fax: (202) 720–8938. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; telephone (202) 720–2491; Fax (202) 720–8938.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on March 17, 2000, and published in the March 23, 2000, issue of the **Federal Register** (65 FR 15580); Recommended Decision and Opportunity to File Written Exceptions issued on January 15, 2002, and published in the January 24, 2002, issue of the **Federal Register** (67 FR 3540); and Secretary's Decision and Referendum Order issued May 3, 2002, and published in the **Federal Register** on May 10, 2002 (67 FR 31896).

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

Preliminary Statement

This final rule was formulated based on the record of a public hearing held in Rochester, New York on March 27 and 28, 2000; in Grand Rapids, Michigan on March 29, 30, and 31, 2000; in Kennewick, Washington on April 4 and 5, 2000; and in Salt Lake City, Utah on April 6, 2000. The hearing was held to consider the proposed amendment of Marketing Agreement and Order No. 930, regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to collectively as the ''order.'' The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the ''Act,'' and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900). The notice of hearing contained numerous proposals submitted by the Board, and one proposed by the Agricultural Marketing Service (AMS).

The Board's proposals included making all districts subject to volume regulations, rather than only those districts producing more than 15 million pounds per year; making shipments of cherry juice and juice concentrate to certain markets eligible to receive diversion credit; changing provisions related to alternate Board members serving for absent members at Board meetings; making all cherry shipments subject to assessments; and eliminating the requirement that different assessment rates be established for different cherry products. Other amendments proposed by the Board pertained to allocation of Board membership; clarification of order provisions relating to exemption and diversion; release of cherries in the inventory reserve; and the use of crop estimates other than the official USDA crop estimate in developing the Board's marketing policy.

The Fruit and Vegetable Programs of AMS proposed to allow such changes as may be necessary to the order, if any of the proposed amendments are adopted, so that all of the order's provisions conform with the effectuated amendments.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on January 15, 2002, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by February 13, 2002. Ninety-six exceptions were filed during the period provided.

A Secretary's Decision and Referendum Order was issued on May 3, 2002, directing that a referendum be conducted during the period May 20 through May 31, 2002, among growers of tart cherries to determine whether they favored the proposed amendments to the order. In the referendum, all amendments were favored by more than two-thirds of the growers voting in the referendum by number and volume.

The amended marketing agreement was mailed to all tart cherry handlers in the production area for their approval. The marketing agreement was approved by handlers representing more than 50 percent of the volume of tart cherries handled by all handlers during the representative period of June 1, 2000, through May 31, 2001.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit. Thus, both the RFA and the Act are compatible with respect to small entities.

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as

those with annual receipts of less than $5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that these amendments could result in additional regulatory requirements being imposed on some tart cherry handlers, while regulatory burdens on other handlers could be reduced. Overall benefits are expected to exceed costs.

The record indicates that there are about 40 handlers regulated under Marketing Order No. 930. In addition, there are about 905 producers of tart cherries in the production area.

The record indicates that of the 41 tart cherry handlers operating during the 1999–2000 season, 7 had processed tonnage of more than 10 million pounds (or 17 percent of all handlers); 8 had between 5.1 and 10 million pounds (20 percent); 12 had between 2.1 and 5 million pounds (29 percent); and the remaining 14 had less than 2 million pounds of processed tonnage (34 percent). Handlers accounting for 10 million pounds or more would be classified as large businesses. Thus, a majority of tart cherry handlers could be classified as small entities.

Twenty handlers are located in Michigan—nine in district 1 (Northern Michigan), eight in district 2 (Central Michigan) and three in district 3 (Southern Michigan). Of the remaining 21 handlers, 4 are in district 4 (New York), 3 are in district 5 (Oregon), 1 is in district 5 (Pennsylvania), 3 are in district 7 (Utah), 5 are in district 8 (Washington), and 5 are in district 9 (Wisconsin). Many handlers process cherries grown in more than one district.

Of the 904 growers who produced cherries in 1999, 368 were in Northern Michigan (41 percent), 149 were in Southern Michigan (16 percent), 129 percent in Central Michigan (14 percent), 84 in New York (9 percent), 65 in Wisconsin (7 percent), 38 in Utah (4 percent), 29 in Pennsylvania (3 percent), 27 in Oregon (3 percent), and 17 in Washington (2 percent).

During the 3-year period 1999–2001, production of tart cherries averaged 300.6 million pounds. By district, Northern Michigan accounted for 44.0 percent of the production, followed by Central Michigan with 22.4 percent, Southern Michigan with 8.7 percent, Utah and Washington each with 6.6 percent, New York with 5.3 percent, Wisconsin with 3.4 percent, Pennsylvania with 1.7 percent, and Oregon with 1.3 percent.

Dividing total production by the number of growers, the average grower produces about 332,500 pounds of cherries annually. With grower returns of about 20 cents per pound, average revenues would be $66,500. Thus, it is reasonable to conclude that most tart cherry growers are small entities.

At 20 cents per pound, a grower would have to produce 2.5 million pounds of cherries to reach the $500,000 receipt threshold to qualify as a large producing entity under the SBA's definition that was in effect at the time of the hearing. The evidence of record is that only 13 growers (or less than 2 percent of the total number of growers) produced 2.5 million pounds or more during the 1999–2000 crop year. Five of those growers (or 38 percent) were located in Northern Michigan (district 1) and three operated (23 percent) in Central Michigan (district 2). The remaining five growers in this category (38 percent) were distributed among the remaining seven districts. The distribution of large growers is thus in proportion to the overall distribution of growers among the districts.

A large majority (more than 98 percent) of the tart cherry growers falls into the previous SBA definition of a small entity (annual receipts of less than $500,000); it is reasonable to assume that an even greater majority qualify under the current SBA definition of a small grower (annual receipts of less than $750,000).

During the 3 years 1999 to 2001, the average grower accounted for about 333,000 pounds of cherries. By district, average grower size varies considerably. The average grower in Washington accounts for roughly 1,159,000 pounds of cherries. Next in size is Central Michigan with 530,000 pounds, followed by Utah (518,000 pounds), Northern Michigan (360,000 pounds), New York (191,000 pounds), Pennsylvania (179,000 pounds), Southern Michigan (177,000 pounds), Wisconsin (155,000 pounds) and Oregon (141,000 pounds).

This action amends the order: (1) To provide that all districts in the production area with annual production in excess of 6 million pounds be subject to volume regulation rather than only those with annual production in excess of 15 million pounds; (2) To allocate Board membership among districts based on levels of production and make a corresponding change in quorum requirements; (3) To authorize a Board member to designate any alternate to serve for that member at a Board meeting in the event the member and his or her alternate are unavailable; (4) To clarify the diversion and exemption provisions of the order by eliminating cross references among those provisions and adding general rulemaking authority to implement handler diversion provisions; (5) To add specific authority to the order to exempt or provide diversion credit for cherries exported to designated markets; (6) To provide diversion credit for shipments of cherry juice and juice concentrate to established diversion markets; (7) To add specific authority for the transfer of diversion credits among handlers; (8) To provide that grower diversions that take place in districts that are subsequently exempt from volume regulation qualify for diversion credit; (9) To allow cherries in the inventory reserve to be released for use in only certain designated markets; (10) To specify that the 10-percent reserve release for market expansion only applies during years when volume regulations are in effect; (11) To require assessments to be paid on all cherries handled, except for those that are diverted by destruction at a handler's facility and those covered by a grower diversion certificate; (12) To eliminate the requirement that differential assessment rates be established for various cherry products based on the relative market values of such products; and (13) To allow the Board to use an estimate other than the official USDA crop estimate in developing its marketing policy.

Industry Background

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 1995–96 through 1999–00, approximately 91 percent of the U.S. tart cherry crop, or 280.5 million pounds, was processed annually. Of the 280.5 million pounds of tart cherries processed, 62 percent was frozen, 29 percent was canned, and 9 percent was utilized for juice.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. In the ten-year period, 1987–88 through 1997–98, the tart cherry area decreased from 50,050 acres, to less than 40,000 acres. In 1999–00, approximately 90 percent of domestic tart cherry acreage was located in four States: Michigan, New York, Utah and Wisconsin. Michigan leads the nation in tart cherry acreage with 70 percent of the total. Michigan produces about 75 percent of the U.S. tart cherry crop each year. In 1999–00, tart cherry acreage in Michigan decreased to 28,100 acres from 28,400 acres the previous year.

In crop years 1987–88 through 1999–00, tart cherry production ranged from a high of 396.0 million pounds in 1995–96 to a low of 189.9 million pounds in 1991–92. The price per pound received by tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuations in the tart cherry industry are national in scope and impact. Growers testified during the order promulgation process that the prices they received often did not come close to covering the costs of production. They also testified that production costs for most growers range between 20 and 22 cents per pound, which is well above average prices received during the 1993–1995 seasons.

The industry demonstrated a need for an order during the promulgation process of the marketing order because large variations in annual tart cherry supplies tend to lead to fluctuations in prices and disorderly marketing. As a result of these fluctuations in supply and price, growers realize less income. The industry chose a volume control marketing order to even out these wide variations in supply and improve returns to growers. During the promulgation process, proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because many such growers and handlers had been going out of business due to low tart cherry prices. They also testified that, since an order would help increase grower returns, this should increase the buffer between business success and failure because small growers and handlers tend to be less capitalized than larger growers and handlers.

Aggregate demand for tart cherries and tart cherry products tends to be relatively stable from year-to-year. Similarly, prices at the retail level show minimal variation. Consumer prices in grocery stores, and particularly in food service markets, largely do not reflect fluctuations in cherry supplies. Retail demand is assumed to be highly inelastic which indicates that price reductions do not result in large increases in the quantity demanded. Most tart cherries are sold to food service outlets and to consumers as pie filling; frozen cherries are sold as an ingredient to manufacturers of pies and cherry desserts. Juice and dried cherries are expanding market outlets for tart cherries.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. In general, the farm-level demand for a commodity consists of the demand at retail or food service outlets minus per-unit processing and distribution costs incurred in transforming the raw farm commodity into a product available to consumers. These costs comprise what is known as the ''marketing margin.''

The supply of tart cherries, by contrast, varies greatly. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since most tart cherries are either canned or frozen, they can be stored and carried over from year-to-year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries are rarely in equilibrium. As a result, grower prices fluctuate widely, reflecting the large swings in annual supplies.

In an effort to stabilize prices, the tart cherry industry uses the volume control mechanisms under the authority of the Federal marketing order. This authority allows the industry to set free and restricted percentages.

The primary purpose of setting restricted percentages is an attempt to bring supply and demand into balance. If the primary market is oversupplied with cherries, grower prices decline substantially.

The tart cherry sector uses an industry-wide storage program as a supplemental coordinating mechanism under the Federal marketing order. The primary purpose of the storage program is to warehouse supplies in large crop years in order to supplement supplies in short crop years. The storage approach is feasible because the increase in price—when moving from a large crop to a short crop year—more than offsets the cost for storage, interest, and handling of the stored cherries.

The price that growers receive for their crop is largely determined by the total production volume and carry-in inventories. The Federal marketing order permits the industry to exercise supply control provisions, which allow for the establishment of free and restricted percentages for the primary market, and a storage program. The establishment of restricted percentages impacts the production to be marketed in the primary market, while the storage program has an impact on the volume of unsold inventories.

The volume control mechanism used by the cherry industry results in decreased shipments to primary markets. Without volume control the primary markets (domestic) would likely be oversupplied, resulting in low grower prices.

Recent grower prices have been as high as $0.20 per pound. At current production levels, the cost of production is reported to be $0.20 to $0.22 per pound. Thus, the estimated $0.20 per pound received by growers is close to the cost of production. The use of volume controls is believed to have little or no effect on consumer prices and will not result in fewer retail sales or sales to food service outlets.

Without the use of volume controls, the industry could be expected to continue to build large amounts of unwanted inventories. These inventories have a depressing effect on grower prices. The use of volume controls allows the industry to supply the primary markets while avoiding the disastrous results of oversupplying these markets. In addition, through volume control, the industry has an additional supply of cherries that can be used to develop secondary markets such as exports and the development of new products.

The free and restricted percentages established under the order release the optimum supply and apply uniformly to all regulated handlers in the industry, regardless of size. There are no known additional costs incurred by small handlers that are not incurred by large handlers. The stabilizing effects of the percentages impact all handlers positively by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all producers by allowing them to better anticipate the revenues their tart cherries will generate.

While the benefits resulting from operation of the marketing order program are difficult to quantify, the stabilizing effects of volume regulations impact both small and large handlers positively by helping them maintain markets even though tart cherry supplies fluctuate widely from season to season.

Districts Subject to Volume Regulation

The order currently covers cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. For purposes of regulation and allocation of Board membership, the seven-State production area is divided into nine districts. Michigan, the largest producing State, is divided into three districts—Northern Michigan, Central Michigan, and Southern Michigan. Each of the other States constitutes a single district.

A principal feature of the tart cherry marketing order is supply management through the use of volume regulations. Volume regulations are implemented through the establishment of free and

restricted percentages that are recommended by the Board and implemented by the Department through the public rulemaking process. These percentages are then applied to each regulated handler's acquisitions in a given season. ''Free market tonnage percentage'' cherries may be marketed in any outlet. ''Restricted percentage'' cherries must be withheld from the primary market. This can be accomplished by either placing the cherries into handlers' inventory reserves or by diverting them. Cherries may be diverted by leaving them unharvested in the orchard or by destruction at the processing plant; or by using them in secondary markets. These secondary markets include exports (except to Canada or Mexico), new products, new market development, experimental purposes, and charitable contributions. Shipments of restricted percentage cherries to these specified markets receive diversion credits which handlers use to fulfill their restricted obligation.

Section 930.52 of the order provides that volume regulations only apply to cherries grown in districts in which average annual production of cherries over the prior 3 years has exceeded 15 million pounds. Additionally, paragraph (d) of § 930.52 provides that any district producing a crop which is less than 50 percent of the average annual processed production in that district in the previous 5 years would be exempt from any volume regulation in the year of the short crop.

The Board proposed eliminating the 15-million pound threshold, and subjecting all 9 districts to volume regulation. No proposal was made to change the provision of § 930.52(d).

Most witnesses at the hearing addressed this issue. Growers and processors in Michigan, Utah and Wisconsin testified in support of the Board's proposal. Opposition was primarily from growers and handlers in Pennsylvania and Oregon. Some growers and processors in New York and Washington testified in support of the Board's proposal, while others were opposed to a change in the 15-million pound threshold.

The record shows that production levels in the nine districts vary considerably, with Northern Michigan consistently producing the largest volume of tart cherries, and Oregon the least. The following table shows tart cherry production by district for the 5 years 1997 through 2001 (all figures are in million pound units). The data for the first 3 years (1997 through 1999) were introduced on the hearing record. The statistics for 2000 and 2001 became available subsequent to the hearing and may be found in reports compiled by the Board and retained by the Department.

District	1997	1998	1999	2000	2001
No. Michigan	140.7	187.8	107.7	107.5	182.0
Central Mich.	68.7	58.2	47.2	70.8	84.0
So. Michigan	14.4	17.4	28.6	20.3	30.1
New York	13.3	13.1	16.9	16.5	14.6
Oregon	2.4	2.2	5.1	4.0	2.2
Pennsylvania	5.6	4.0	6.9	5.3	3.5
Utah	17.5	32.5	14.5	32.5	12.0
Washington	11.8	13.7	16.6	17.4	25.2
Wisconsin	11.2	14.7	7.9	9.7	12.7
Total	285.4	343.6	251.4	284.0	366.3

Using the above figures, the following 3-year averages (used to determine which districts are subject to volume regulation) were computed.

District	Average		
	1997–99	1998–00	1999–01
No. Michigan	145.4	134.3	132.4
Central Mich.	58.0	58.7	67.3
So. Michigan	20.1	22.1	26.3
New York	14.4	15.5	16.0
Oregon	3.2	3.8	3.8
Pennsylvania	5.5	5.4	5.2
Utah	21.4	26.5	19.7
Washington	14.0	15.9	19.7
Wisconsin	11.3	10.8	10.1
Total	293.5	293.0	300.6

The above table shows that for each of the 3-year periods, the three Michigan districts and Utah consistently exceeded the 15-million pound threshold. Production in Oregon, Pennsylvania and Wisconsin was below the threshold in all periods, while New York and Washington each exceeded the 15-million pound threshold in two out of three of the periods.

The order became effective in 1996, based on a series of hearings that began in December 1993 and ended in January 1995. Proponents of the order supported the 15-million pound threshold as a criterion for determining which districts would be subject to volume regulation. At the time the order was implemented, the three Michigan districts, New York and Utah had average annual production in excess of 15 million pounds. These five districts accounted for 92 percent of U.S. production in 1995, and 89 percent of U.S. production in 1996.

Proponents of the order also supported a provision that a district not meeting the 15-million pound threshold would become covered by regulation when it reached a production level equal to 150 percent of its average annual production during the period

1989 through 1992. The purpose of this provision was to catch surges in production that occasionally occur in order to more equitably distribute the burden of supply control. It was also to make sure that when smaller producing districts expand production capacity, they do not take advantage of the system and become free riders. This was intended to prevent a district from benefitting from the program without contributing to the effort to reduce surplus supplies.

After considering the record evidence in support of this provision, the Department decided not to include it in the order. The provision, as proposed, seemed to be overly complicated to administer and would possibly be inequitable to tart cherry growers and handlers. In addition, proponents indicated that it was not their intent to regulate States with small production volumes since their aggregate volume is not a critical amount when compared to the total volume of tart cherries produced.

Several witnesses at the amendatory hearing suggested that, had the 150 percent rule been incorporated into the initial order, the amendment to eliminate the 15-million pound threshold would now be unnecessary.

The following table shows production in the initially unregulated districts during the period 1989 through 1992.

	1989	*1990*	*1991*	*1992*	*Average*	*150%*
Pennsylvania	6.0	3.5	11.5	6.0	6.7	10.0
Wisconsin	7.6	4.8	7.8	9.1	7.3	10.9
Oregon	15.0	7.5	7.5	9.5	9.9	14.8
Washington	6.4	7.4	9.8	12.8	9.1	13.6

The record shows that neither Pennsylvania nor Oregon has reached a level of production equal to 150 percent of their production during this base period. Wisconsin first exceeded production of 10.9 million pounds (150 percent of its average annual production in the base period) in 1997, and Washington exceeded production of 13.6 million pounds (150 percent of its production during the base period) in 1998.

If the order were implemented as proposed by the proponents during the promulgation, all districts but Pennsylvania and Oregon would currently be regulated. As it is, for the 2001 season, Wisconsin is also unregulated. In the 1999 crop year, Pennsylvania and Oregon together accounted for 4.9 percent of the U.S. tart cherry crop. In 2000, they accounted for 3.3 percent of the total, and in 2001, only 1.6 percent. Adding production in Wisconsin during those years brings the percentages in the 3 years 1999 to 2001 to 8 percent, 7 percent and 5 percent respectively.

With respect to New York, witnesses concurred that with the 15-million pound threshold, that district would likely be subject to regulation only about 50 percent of the time in the future. That is because production in that State is close to the threshold, ranging from 13.1 to 16.9 million pounds over the last 5 seasons. Concern was also expressed that Utah could fall below the established threshold in upcoming years and become unregulated. Washington was expected to continue to increase its production and become subject to regulation in the near future. (Washington did exceed the threshold during the period 1998–2000, and was subject to the volume regulation implemented for the 2001 crop). Witnesses agreed that production in Oregon, Pennsylvania and Wisconsin was likely to remain below 15 million pounds.

The conclusion by proponents of the Board's proposal was that with the order as currently written, a greater proportion of U.S. production could become unregulated. This would dilute the effectiveness of the program and, more important, increase the amount of regulation imposed on the remaining regulated districts.

Since the order became operational, volume regulations have been implemented for four crop years—1997, 1998, 2000, and 2001. No regulation was deemed necessary for the 1999 crop. The following table shows the level of regulation implemented in 1997, 1998, 2000 and 2001. With the exception of the restricted percentages, all figures are in million pound units.

	1997	1998	2000	2001
U.S. Crop	285.0	344.0	284.0	366.3
Carry-in	70.0	38.8	87.0	39.0
Total Available Supply	355.0	382.8	371.0	405.3
3-Year Average Sales	269.9	288.6	277.0	217.0
Target Carry-out	0.0	0.0	0.0	0.0
Economic Adjustment	(23.0)	(31.4)	(22.0)	50.0
Optimum Supply	246.9	257.2	257.0	267.0
Surplus	108.1	125.6	116.0	138.3
Production in Regulated	.....	.....	.....	.....
Districts	240.0	309.0	232.0	335.9
Restricted Percentage	45	41	50	41

If all districts had been subject to regulation, the surplus would have been divided by total production rather than by production in the regulated districts. Had this been done, the restricted percentage in 1997 would have been 38 percent rather than 45 percent; the restricted percentage in 1998 would have been 37 percent rather than 41 percent; the restricted percentage in 2000 would have been 41 percent rather than 50 percent; and the restricted percentage in 2001 would have been 39 percent instead of 41 percent. The difference is relatively small for the 2001 crop year because production in Utah (12 million pounds) was less than 50 percent of its prior 5-year average, so that district was unregulated in the 2001 crop year.

One of the primary arguments made by supporters of the Board's proposed amendment was that of fairness. These witnesses stated that all tart cherry

growers benefit from the operation of the order, but the burden of regulation is borne only by those in the regulated districts. They testified that revenues received by growers of similar size varied considerably due solely to where a particular grower's farm was located. They concluded that no growers in the regulated districts receive gross returns equal to those received in non-regulated districts.

To illustrate, an agricultural economist from Michigan State University (who was a witness testifying in support of the Board's amendment) presented an analysis of the economic impacts of the program on growers in regulated versus non-regulated districts. This analysis compared gross farm income for growers of the same size in regulated and non-regulated districts. It assumed a grower who produces 200 tons on 40 acres, or 10,000 pounds per acre. Estimates of likely returns for the 1998 crop were used.

For purposes of this analysis, it was assumed that the grower in the non-regulated district could sell all of his or her production in primary market outlets. In the case of the grower in the regulated district, it was assumed that his or her crop utilization would be allocated in accordance with the overall industry averages in 1998. For example, about 3 percent of the tonnage would be placed in the inventory reserve, 11 percent would be exported, and 13 percent would be diverted through non-harvest.

Prices for free market cherries were USDA estimates of 14 cents per pound for the regulated districts and 13.5 cents per pound for the non-regulated districts.

Returns for market growth factor cherries were expected to be somewhat lower (12 cents per pound) because these cherries tend to be sold later in the year, or perhaps in a subsequent year. A conservative figure of 6 cents per pound was used for reserve cherries because of the many uncertainties as to what those cherries might return (for example, the timing of their release and prevailing prices that might exist). Export sales were estimated by industry leaders to average about 9 cents per pound in 1998. For new product development, an estimate of 11 cents per pound was used, taking into account the considerable variation of returns for new cherry products depending upon the processor and the circumstances surrounding the new products. For non-harvested cherries, a savings of 3 cents per pound in variable costs (e.g., harvesting and trucking) was used. Finally, no return was recorded for cherries diverted through at-plant diversions.

The income for a grower in a regulated district, based on the analysis of the witness, is shown below:

	Lbs.	Percent	Price	Income
Open Market	240,000	60	$0.14	$33,600
Market Growth	36,000	9	0.12	4,320
Inventory Reserve	12,000	3	0.06	720
Exports	44,000	11	0.09	3,960
New Products	8,000	2	0.11	880
Non-Harvest	52,000	13	0.03	1,560
At-Plant Diversion	8,000	2	0.00	0
Total Production	400,000	100	.....	45,040

For a grower in a non-regulated district, income was estimated as follows:

	Lbs.	Percent	Price	Income
Open Market	400,000	100	$0.135	$54,000

In summary, the grower in the non-regulated district would receive revenues of $54,000, about 20 percent more than the grower in the regulated district. Both growers would benefit from any strengthening of prices through the use of volume regulations.

Opposition to the Board's proposal was expressed primarily by industry members in unregulated districts. One of the arguments made was that growers in these districts would be much more severely impacted by a volume regulation because yields in those districts are so low compared to those in regulated districts.

One witness used the analysis given above, but used different yields per acre. For the grower in a regulated district, he used 40 acres with a yield of 7,400 pounds per acre. This resulted in total production for that grower of 296,000 pounds and revenues of about $33,330. For the grower in a non-regulated district, he again used 40 acres, but used a yield of 2,400 pounds per acre. This provided total production of 96,000 pounds and revenues of only $2,960. Had the second grower been subject to volume regulation, his or her revenues would have been even lower.

The following table shows yields per acre in the States covered by the order for the years 1997 through 2000. The annual yields are from USDA statistics, while the average yield for Washington for the 4-year period was obtained from a processor survey in that State. All figures are in pounds per acre.

State	1997	1998	1999	2000	Average
Utah	6,250	11,790	5,360	11,800	8,800
Michigan	7,920	9,260	6,580	7,020	7,695
New York	5,580	5,380	6,850	7,550	6,340
Pennsylvania	5,420	3,500	6,000	5,080	5,000
Wisconsin	4,670	6,580	4,350	4,350	4,988
Oregon	2,850	2,150	4,080	3,380	3,115
Washington	NA	NA	NA	NA	14,000

The above table shows that average yields do vary among the cherry producing States. It also shows that yields within the States vary considerably from year to year.

A witness supporting the Board's proposal stated that the use of average yields for an entire State is misleading. Michigan, for example, has a 4-year average yield of about 7,600 pounds per acre. The average yields for the three districts that comprise Michigan are quite different. In Northern Michigan, yields averaged about 13,000 pounds per acre, while in Central Michigan they averaged 5,000 pounds per acre and in Southern Michigan only 4,000 pounds per acre.

This witness further went on to state that variations in yields within a geographic district exceed the variations among the districts. He gave a personal example. The witness is a processor in Central Michigan. His organization deals with about 20 growers. Yields for those growers in 1998 ranged from 1,000 to 15,000 pounds per acre.

Therefore, it is reasonable to assume that the State in which a grower farms is not necessarily a good indicator of an individual grower's potential yield per acre. While weather conditions affect yields (e.g., susceptibility to freezes), weather conditions can vary as much within a district as between districts. Also, there are many other variables that contribute to a grower's yield per acre. These include the density of trees planted per acre, the age of the trees, and cultural practices undertaken by individual growers to care for their orchards. However, the table showing yields per acre does indicate that there is a definite difference in yields among the various States.

Regarding the age of trees, the record indicates that tart cherry trees start losing optimum productivity at about 20 years. Growers testified that they typically replant their trees when they are between 20 and 25 years old. The following table shows the percentage of acreage in each State that contained older trees in 1998.

State	Percent acreage 21–25 years	Percent acreage 26+years	Total percent 21+ years
Michigan	15	6	21
Utah	8	1	9
New York	24	7	31
Wisconsin	20	15	35
Washington	18	5	23
Pennsylvania	30	6	36
Oregon	30	48	78

Oregon, consistently the lowest yielding producing district, has substantially more older trees planted than other States. Because older trees tend to produce less fruit, and Oregon has a high percentage of older trees, this is likely to explain in part why Oregon's yields are, on average, lower than in other areas. Pennsylvania had the second largest percentage of older trees.

Another argument against eliminating the 15 million-pound threshold was that unregulated districts like Oregon and Pennsylvania had already ''done their part'' to reduce the surplus of tart cherries by reducing their acreage. Any continued surpluses were attributable to the major producing State, Michigan. It was therefore argued that State should bear the consequences of its actions and not impose its problems on the smaller districts.

The record shows that U.S. tart cherry bearing acreage had declined from a high of 50,050 acres in 1987, to 39,880 acres in 2000. All producing States recorded acreage reductions during this period. On a percentage basis, the greatest reduction was in New York (down 52 percent), followed by Oregon (down 36 percent), Utah (down 30 percent), Pennsylvania (down 25 percent), Washington (down 24 percent), and Wisconsin (down 17 percent). Michigan had the lowest percentage decrease (down 15 percent), but the largest decline in total number of acres (a reduction of 5,140 acres).

The record evidence is that acreage in all districts have declined over the past decade. Decisions to reduce acreage were made by individual growers based on their assessments of the best use of their land. While opportunities for alternative land uses vary somewhat by State, they also vary within the States.

In determining whether a surplus of tart cherries exists, total U.S. supplies are compared to total demand in the primary market. Production in each district contributes to the total supply, and thus to any surplus that may exist. However, Michigan accounts for such a large proportion of the total, that production in that State alone can warrant a volume regulation. Additionally, the evidence is that production in the smallest producing State—Oregon—is negatively correlated to production in Michigan. That is, when production in Michigan is high, production in Oregon is generally low. Thus, it is likely that with elimination of the production threshold, Oregon would be regulated in years when its production is below normal. This could result in a heavier burden being placed on growers in Oregon as a result of volume regulation than is true in the other producing districts.

Additionally, the record shows that the benefits of the supply management provisions of the order accrue to the entire U.S. tart cherry industry. The short-run benefits arise when surplus supplies are reduced, and market prices (due to the inelastic demand for tart cherries) rise to levels that are closer to growers' typical costs of production. Longer range gains are also expected from the encouragement to expand market demand through new market and new product development.

The aggregate short-run benefits to the industry's growers from the use of volume regulation in 1997 and 1998 have been estimated to be at least $20 million per year. This has resulted because the smaller market surpluses have resulted in stronger grower prices which are estimated to be 7 to 9 cents per pound greater during those years.

The record shows that tart cherries, regardless of where grown in the U.S., are sold into markets that are essentially national markets with similar, closely interrelated prices throughout the country. Therefore, the somewhat higher prices that have resulted from the order's supply management features have accrued to all tart cherry growers in the United States.

However, the history of the order and the evidence on the record support the premise that the smallest producing districts should not be subject to volume regulation under the tart cherry marketing order. Further, there is an argument to be made for reducing the current 15-million pound threshold.

After considering all the testimony and other record evidence, the Department has concluded that a threshold of 6 million pounds would be more reasonable. This would result in all districts that have increased production over the past decade being subject to regulation, consistent with the original intent of the proponents of the order.

The record shows that the two districts that would not be regulated under a 6-million pound threshold—Oregon and Pennsylvania—produce insignificant volumes of tart cherries compared with total U.S. production. Production in these districts has not grown, nor is it anticipated that it will in the future. The evidence supports claims that these smaller producing districts would be more impacted by a volume regulation than other districts. Costs may be higher to growers in those areas than in others because they tend to have lower yields. Also, processing capacity in those districts tends to be limited, supporting the argument that production is unlikely to increase. In addition, processors in the smaller producing districts testified that they would have to shut down their facilities if those districts were subject to volume regulation because they would not be able to get sufficient supplies of cherries to run their operations efficiently. If the smaller producing districts do increase their production, they would become regulated once they reach the 6-million pound threshold.

The proponent evidence showed that while volume regulations have helped strengthen overall cherry prices, there are costs involved with complying with these regulations. Such costs include reduced returns for cherries that cannot be sold in primary markets. Imposing those costs on the smallest producing districts would not result in any higher overall price for tart cherries. Additionally, regulating the two smallest States would not reduce the volume of regulation imposed on cherries grown in the other States because of their low levels of production. In the four years that restricted percentages have been recommended by the Board, the percentage would not have changed at all in two of four years (by not including Pennsylvania and Oregon) and would have been marginally reduced in the other two years. Thus, it appears that the costs of regulating these minor districts would not be outweighed by any accrued benefits.

Allocation of Board Membership

Section 930.20 of the order provides for a Cherry Industry Administrative Board, appointed by the Secretary to locally administer the program. Among the Board's responsibilities is recommending regulations to implement marketing order authorities. The Board consists of 19 members: 18 tart cherry growers and handlers, and 1 public member.

For purposes of Board representation (among other things), the production area is divided into nine districts. Each district is allocated one to four Board members. Six of the nine current districts, including all districts subject to volume regulation, are allocated more than one member. Those five districts are Northern Michigan (four members), Central Michigan (three members), Southern Michigan (two members), New York (two members), Utah (two members), and Washington (two members). The three districts with one member each are Oregon, Pennsylvania, and Wisconsin. The nineteenth Board member is selected to represent the general public, and need not be from any specific area.

Section 930.20 further provides that if a district with a single member becomes subject to volume regulation, that district will get a second Board member position. There is no specific requirement that a district must lose a seat if it falls below the 15 million pound threshold and is no longer subject to regulation.

The Board proposed amending § 930.20 to provide that membership for each district be based on the average annual production for that district over the previous 3 years. Districts with up to and including 10 million pounds would be represented by one Board member; districts with more than 10 and up to and including 40 million pounds would have two members; districts with more than 40 and up to and including 80 million pounds would have three members; and districts with more than 80 million pounds would have four members.

The record shows that this amendment could result in a larger number of Board members. Using average annual production figures for the years 1999 through 2001, one district (Wisconsin) would have been entitled to an additional Board member position for the term of office that began July 1, 2000. Thus, the total number of Board members under this proposed amendment would have increased to 20 members (versus 19 members under the provisions currently in effect).

An increase in the number of Board members would result in a marginal increase in Board expenses. This is because the Board reimburses members for costs incurred in attending Board meetings (travel costs, etc.). Since Board expenses are funded through handler assessments, all handlers would be impacted by slightly higher assessments.

However, these slight cost increases will be offset by better industry representation on the Board. Reallocating membership on an annual basis will allow membership to more closely reflect changing production trends in the industry. This should lead to better decision making by a more representative administrative body.

Designation of a Temporary Alternate to Act for an Absent Board Member

As previously discussed, the Board is composed of 19 members, with the industry members allocated among nine districts. Each Board member has an alternate who has the same qualifications as the member. Industry Board members and alternates are nominated by their peers in the district they represent.

Section 930.28 of the order provides that if a Board member is absent from a meeting, his or her alternate will act in that member's place. There is no provision for a situation in which both the member and that member's alternate are unavailable.

The Board proposed changing § 930.28 as follows. If both a member and his or her alternate cannot attend a Board meeting, the member or the alternate (in that order) could designate another alternate member to act in their stead. If neither the member nor the alternate chooses to make such a designation, the Board's chairperson would be free to do so (with the concurrence of a majority of present members).

The record supports the concept of allowing more flexibility for alternates to fill in for absent Board members. However, the Department revised the Board's proposal. A Board member can designate an additional alternate to act in his or her place when that member and that member's alternate are unable to attend a Board meeting. However, if the member chooses not to name an additional alternate, that decision does not then revert to the Board or its chairperson.

This amendment will allow more flexibility for Board members who cannot attend a Board meeting. It should also encourage a full contingency of voting members at Board meetings, while maintaining adequate representation among the districts comprising the production area. No additional costs should be incurred as a result of this change.

Clarification of Diversion and Exemption Provisions

As previously discussed, a primary feature of the tart cherry marketing order is supply management through the establishment of free and restricted percentages. These percentages are applied to each regulated handler's acquisitions of cherries. Free percentage cherries may be sold in any market, while restricted percentage cherries must be diverted by a grower or handler or placed in the inventory reserve.

Section 930.58 of the order provides for grower diversions. Under this section, growers may receive diversion certificates for cherries used for animal feed and cherries left unharvested in the orchard. Growers may also receive diversion certificates for ''uses exempt under § 930.62.'' A grower's diversion certificates can then be transferred to that grower's handler and used to meet the handler's restricted obligation.

Section 930.59 provides for handler diversions. Handlers may receive diversion credits for cherries used in such forms as the Board may designate, with approval of USDA. These forms may include destruction at the handler's facility; use in Board approved food banks or other approved charitable organizations; acquisition of grower diversion certificates; and uses exempt under § 930.62. Handlers desiring to use the first three forms must notify the Board prior to diverting cherries. Use of the fourth form requires application to and approval by the Board prior to diversion.

Section 930.62 provides that certain cherries may be exempt from volume regulation upon Board recommendation and USDA approval. Such cherries would also be exempt from assessment obligations and any established quality standards. Section 930.62 currently provides that exemptions may be provided for cherries diverted in accordance with § 930.59 (Handler diversion privilege); used for new product and new market development; or used for experimental purposes or for any other use designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries was utilized.

The record indicates that the industry supports continuation of both the authority to exempt certain cherries from regulation, and the authority to provide diversion credits for cherries used for certain purposes. The application of each provision is different, however. An example provided at the hearing illustrates the difference. Assume a restricted percentage of 20 percent has been established, a regulated handler acquires 10 million pounds of cherries, and that handler uses 2 million pounds of those cherries for new market development. This handler would have a restricted obligation of 2 million pounds of cherries (20 percent of the 10 million pounds of cherries acquired).

If cherries used for new market development were eligible for diversion credit, this handler would have met his or her restricted obligation by using 2 million pounds for that purpose. The handler could thus market the remaining 8 million pounds of his or her cherries as free percentage cherries in any outlet he or she chose. If, however, cherries used for new market development were exempt from regulation, the restricted percentage would be applied to that handler's total acquisitions (10 million pounds), less the volume of cherries exempt from regulation (2 million pounds). Thus, this handler would have a restricted obligation of 1.6 million pounds (20 percent of 8 million pounds), which would have to be diverted in forms approved by the Board as eligible for diversion credit.

Cross references between §§ 930.59 and 930.62 have proved to be confusing. Thus, these sections are amended by deleting those cross references. Also, uses listed under § 930.62 as possible exempt uses are being listed under § 930.59 as possible uses eligible for handler diversion credit. Rulemaking will be required to designate whether a particular use would be exempt from regulation or would constitute an approved diversion outlet. Such rulemaking would be based on Board recommendations, following its assessment of the impact exemptions or diversions would have on the tart cherry industry.

This amendment is a clarification of the current order and its operation. It does not introduce new or different concepts. To the extent that it makes the order easier for growers and handlers to understand, it should be of benefit to the industry.

Exemption or Diversion Credit for Export Shipments

As discussed in the previous material issue, §§ 930.59 and 930.62 provide for handler diversions and exemptions, respectively. Certain uses of cherries are listed as eligible for diversion credit or exemptions. Under the authority in these sections (specifically, that for market development), diversion credits have been made available to handlers during recent crop years for shipments to export markets, excluding Canada and Mexico. Canada and Mexico were not included because of their proximity to the United States and concern about compliance matters.

The record indicates that allowing export shipments to receive diversion credits resulted in stronger export sales. Exports in 1997–98 were unusually high (around 50 million pounds), although they declined during the next season to 34 million pounds. Witnesses stated that the tart cherry industry needs to expand demand for its product through, among other things, development of new markets.

The Board proposed adding specific authority to §§ 930.59 and 930.62 to allow diversion credits or exemptions for such export markets as recommended by the Board and approved by the Secretary. This is a clarifying change only. It imposes no new or different regulatory requirements on the tart cherry industry.

Diversion Credit for Juice and Juice Concentrate

Section 930.59 of the order relates to how handlers may receive diversion credits to offset their restricted obligations. Paragraph (b) of that section states that diversion may not be accomplished by converting cherries into juice or juice concentrate.

The Board recommended that the order be amended by deleting the prohibition in § 930.59 (b) that shipments of cherry juice and juice concentrate to approved diversion outlets be eligible for diversion credit.

The record indicates that in the promulgation proceeding, handlers from Oregon and Washington were concerned that juice concentrate could be established as a use eligible for diversion credit. Those handlers indicated that they processed all or a majority of their cherries into juice concentrate. Cherries produced in that area of the country have a high brix (sugar content) level desirable for juice concentrate. Concern was expressed that if the Board decided to allow diversion credit for juice concentrate, an increase in the volume of juice in the marketplace and an accompanying reduction in juice prices could result. This would unduly harm the industry in the Washington and Oregon. USDA therefore inserted the provision to prohibit the use of juice or juice concentrate for diversion credit.

However, the use of juice and juice concentrate for export was allowed under the exemption provisions of the order for the 1997–98 season. The 1997–98 season was the first season of operation for the cherry order, and its

provisions were new to the industry and complex to administer. Handlers unfamiliar with order's diversion provisions had exported or contracted to export tart cherry juice or juice concentrate to eligible countries with the intention of applying for and receiving diversion certificates for those exports. If those handlers had been prohibited from receiving diversion certificates for those sales, the handlers would have incurred severe financial difficulties. Thus, the prohibition against exports of juice and juice concentrate was suspended for the 1997–98 season only.

The record shows that until 1997, the juice market was distressed. One reason was that there had been large volumes of concentrate produced in the preceding years in the Western United States—volumes that exceeded market demand. In 1995 particularly, there was a very large crop of tart cherries (a record 395.6 million pounds), and a large portion of that crop was processed into concentrate. An oversupply situation occurred, which led to low prices and a large carry-over of concentrate.

Witnesses claimed that the operation of the order has helped address the cherry oversupply situation, including the surplus of juice. Allowing exports of juice to receive diversion credits in 1997–98 was quite successful. The industry exported more than 4 million pounds (raw product equivalent) of juice concentrate that year, comprising about 10 percent of total exports qualifying for credit. At 9 cents per pound for the raw fruit, growers received about $382,500 in revenue from these sales. Handlers, whose value-added component is about $5.00 per gallon (or $.056 per pound), received $236,000 in revenue. In total, the industry gained at least $618,000 from export sales of juice concentrate in 1997–98.

Providing diversion credits for exports of juice concentrate by handlers in the regulated districts encouraged more exports of this product. The higher levels of exports of concentrate helped reduce heavy inventories and reduced the supplies available in the domestic market. This led to an increase in the domestic price for juice concentrate of about $4.00–$6.00 per gallon. Producers whose cherries were processed into concentrate benefitted from the strengthening of domestic juice prices.

In 1998, diversion credits were no longer authorized for exports of juice and juice concentrate. Witnesses stated that this hurt the U.S. cherry industry. Demand for juice concentrate in Europe was strong, but domestic processors could not export juice concentrate in a way that was economically feasible. Some processors exported raw juice stock to Europe so the raw stock could be juiced overseas. This meant that the added value of converting the stock to juice concentrate was lost to U.S. processors. It also meant higher freight costs for the raw product (versus concentrate). When juice stock was exported, the freight cost to Europe was about 10 cents per pound. Growers received little for cherries exported as raw juice stock, while grower returns for exported juice concentrate were positive.

Further, this restriction resulted in shorting the export juice market. Witnesses stated that if you are unable to supply a market consistently, that market looks for a more reliable source of supplies. When a market is lost to the U.S. industry for this reason, it is difficult to regain. This is particularly detrimental to the tart cherry industry as it seeks to expand markets for its heavy supplies of product.

As previously indicated, the prohibition on diversion credits for juice and juice concentrate was in response to concerns expressed by the industry in the Northwest. At the time the order was promulgated, it was represented that more than 85 percent of the crop in Washington was processed into juice. During recent years, less than half of the Washington crop was used for juice. Most of the rest of the crop was used for 5 + 1 cherries (25 pounds of cherries to 5 pounds of sugar). Additionally, the record shows that in 1993 there were 7 pitters in the State; by 2000, that number had grown to 20. This supports the conclusion that processors in Washington are able to pack a wider variety of finished products. Cherries grown in Washington have increasingly been processed into products other than juice and juice concentrate.

Also, production in the State of Washington has grown, and a number of witnesses at the hearing held in early 2000 expressed their belief that Washington would soon produce in excess of 15 million pounds annually and thus would become subject to volume regulation. In fact, production in Washington for the 3 years 1998 to 2000 averaged 15.9 million pounds, and Washington became subject to volume regulation in 2001. It was critical for handlers in Washington to be able to receive diversion credits for exports of juice and juice concentrate. This was particularly true because 5+1 cherries do not generally sell in export markets because they contain sugar and are thus subject to increased tariffs when exported. For these reasons, the Board unanimously recommended suspension of the prohibition on receiving diversion credit for exports of cherry juice and juice concentrate. This suspension became effective August 1, 2001 [66 FR 39409, July 31, 2001].

An additional benefit of allowing diversion credits for exported juice and juice concentrate is that it would ensure that the domestic market is adequately supplied in short crop years. In years when the crop is small, most available tart cherries will be used to supply higher value finished products rather than juice concentrate. If the industry does not have a supply of concentrate in reserve, the juice markets, both domestic and foreign, could go unsatisfied. In order to have supplies available in short crop years, there needs to be an incentive to have tart cherries stored as juice concentrate. Making juice and juice concentrate eligible for diversion credit would create an incentive to produce and store concentrate, which would ensure that markets for those products are adequately supplied. It could also result in fewer cherries being diverted in the orchard. This would benefit growers through enhanced revenues, because they receive more for cherries that are processed and sold than for cherries that are diverted in the orchard.

This amendment would result in additional options for handlers in meeting their restricted obligations under the order. It should also encourage expansion of markets for U.S. tart cherry products, which would benefit the industry as a whole. It will not adversely impact the sale of juice and juice concentrate in primary markets; in fact, it could tend to strengthen prices in those markets. This is because more juice will likely be exported, which would reduce the supply available in the domestic market.

Handler Transfers of Diversion Credits

Section 930.59 of the order provides for handler diversion credits. Those diversion credits are used by handlers to meet their restricted obligations. That provision of the order is silent with respect to the ability of handlers to transfer diversion credits among themselves to meet their restricted obligations.

The Board proposed adding a new paragraph (e) to § 930.59 to provide that a handler who acquires diversion certificates representing diverted cherries during any crop year may transfer such certificates to another handler or handlers.

The record shows that allowing transfers of diversion certificates

provides additional flexibility to tart cherry growers and handlers in meeting program requirements, without changing the amount of tart cherries available to be marketed as free percentage cherries. This can also result in the processing of the highest quality cherries available in any crop year, which would benefit the industry as a whole.

One witness at the hearing explained as an example that Handler A may acquire a very high quality of tart cherries in a given year, and would want to process and sell a higher percentage of those cherries than his or her free percentage would allow. Handler B may be in a situation where he or she receives more diversion credits than needed because most of that handler's pack is for export. (We are assuming that export sales are eligible for diversion credits.) Handler B might want to transfer those excess credits to Handler A.

Additionally, there may be a situation in which Handler C's growers have low quality cherries due to adverse growing conditions. These growers may choose to use in-orchard diversions to a greater extent than they normally would. Handler C could wind up with more diversion credits than needed and may want to transfer those credits to Handler A. A simple example to illustrate this situation follows. In this example, we will assume a restricted percentage of 40 percent has been established.

Handler	Receipts (pounds)	Restricted obligation (pounds)	Exports (pounds)	Grower diversions (pounds)	Excess diversion credits (pounds)
A	100,000	40,000	0	0	(40,000)
B	100,000	40,000	70,000	0	30,000
C	100,000	40,000	0	50,000	10,000

In this case, Handler A needs diversion credits totaling 40,000 pounds to meet his or her restricted obligation, while Handlers B and C have excess credits representing 40,000 pounds of cherries. If Handler A could receive Handler B's and C's excess diversion credits, he or she could use them to fulfill Handler A's restricted obligation. Otherwise, Handler A would have to divert 40,000 pounds of cherries (by destroying them, for example) or put them in the inventory reserve. With the ability to transfer diversion credits, Handler A could acquire excess credits from Handlers B and C. Handler A would benefit by being able to process all of his or her cherries for free use. Handlers B and C (and their growers) would benefit by being compensated for their diversions, including those above the required amount.

Both the transferring handlers' and the receiving handler's growers would benefit. Also, the overall quality of the crop marketed could be improved. This would serve to increase consumer confidence and acceptance, thereby strengthening demand for tart cherries. This would benefit the U.S. tart cherry industry as a whole.

Additionally, if the transfer of diversion credits were not allowed, the market could be shorted. This would have a detrimental impact on the tart cherry industry. Again, we will use the above illustration and assume these three handlers comprise the entire industry.

Handler	Receipts	Restricted obligation	Excess diversions	"Free" sales	
				With transfers	Without transfers
A	100,000	40,000	(40,000)	100,000	60,000
B	100,000	40,000	30,000	30,000	30,000
C	100,000	40,000	10,000	50,000	50,000
Total	300,000	120,000	0	180,000	140,000

With a 60 percent free percentage, it would be expected that 180,000 pounds of cherries would be available for sale as free percentage cherries (60 percent of total receipts of 300,000 pounds). As shown above, without the ability to transfer diversion credits, the total volume of ''free'' cherries available to market would be only 140,000 pounds. This would be well below the 180,000 pounds deemed necessary to meet market demand. This would hamper the industry's efforts to expand markets for its products. Allowing transfers of diversion certificates therefore has a positive impact on the industry.

Grower Diversion Certificates

Section 930.58 provides that a grower may voluntarily choose to divert all or a portion of his or her cherries. Typically, this is accomplished by leaving cherries in the orchard unharvested, although other means are provided as well. Upon diversion in accordance with order provisions, the Board issues the grower a diversion certificate which the grower may then offer to handlers in lieu of delivering cherries. Handlers may then redeem those certificates to meet their restricted obligations.

Section 930.52(d) of the order provides that any district producing a crop which is less than 50 percent of the average annual processed production in that district in the previous 5 years is exempt from any volume regulation in that year. This provision was included in the order to help relieve a district from the burdens of the order in a year in which its processors and growers were already suffering from a severely short crop.

The Board proposed an amendment to § 930.58(a) to provide that any grower diversions completed in a district subsequently exempt from regulation under § 930.52(d) will qualify for diversion credit.

Witnesses at the hearing testified that this is a needed change to the order to reduce the risk growers face in deciding whether or not to divert all or a portion of their crops. The reason such risk exists is primarily due to the difference between the time diversions must take place and the time a district's final production figure is known.

The Board is required to meet on or about July 1 of each crop year to develop its marketing policy and recommend preliminary free and

restricted percentages (if crop conditions so warrant). The marketing policy is typically a week or two after the release of the USDA tart cherry crop estimate in late June. Final free and restricted percentages are not recommended until after the actual crop production figure is available. This is typically not until September, after harvest is complete. This is also when a final determination is made as to whether a district will be covered by regulation in accordance with § 930.52(d).

The record shows that the tart cherry crop is harvested in late June or July. Growers must, therefore, make decisions as to whether to undertake diversion activities before they are certain whether or not their district will be covered by regulation. This occurred in Southwest Michigan in 1997. Based on the USDA estimate, it was expected that this district would be covered by volume regulation during the upcoming crop year. However, the actual crop came in at less than 50 percent of the prior 5-year average production in that district, and Southwest Michigan (District 3) was exempt from regulation.

Witnesses testified that growers who divert their crops in anticipation of a volume regulation should not be penalized for that decision because the USDA crop estimate indicates their district will be regulated, but it turns out it is not. If those growers' diversion certificates become invalid, they receive nothing for the cherries they diverted. If their diversions continue to qualify for credit, however, handlers who accept those diversion certificates compensate the growers for them.

Without this amendment, the record shows that growers in some districts (where application of volume regulation is uncertain) could be forced into harvesting their crops. This would be contrary to the program objective of balancing tart cherry supplies with market demand.

This amendment should benefit tart cherry growers who choose to divert cherries in anticipation of a volume regulation. It should also contribute to the supply management objectives of the program, which would benefit the U.S. tart cherry industry as a whole.

Release of Cherries in the Inventory Reserve

Section 930.51 of the order authorizes the issuance of volume regulations for tart cherries in the form of free and restricted percentages. Section 930.50(i) provides that a handler's restricted percentage cherries must be placed in an inventory reserve or diverted through non-harvest, destruction at a handler's facilities, or shipment into approved secondary outlets.

The order specifies three possible releases of inventory reserves under §§ 930.50 (g) and (j) and 930.54 (a). The first, under § 930.50 (g), releases an additional 10 percent (above the optimum supply level) of the average of the prior 3 years sales if such inventory is available. This release is for market expansion purposes.

The second release, under § 930.50 (j) occurs in years when the expected availability from the current crop plus expected carry-in does not fulfill the optimum supply (100 percent of the average annual sales in the prior 3 years plus the desirable carry-out). This release is made to all handlers holding primary inventory reserves and is a required release to be made by the Board if the above conditions are met and reserve cherries are available. This provision is intended to assure that inventory reserves are utilized to stabilize supplies available on the market. Under this authority, cherries released from the reserve can be sold in any market.

The third release is authorized under § 930.54 (a) which allows the Board to recommend to the Secretary a release of a portion or all of the primary (and secondary) reserve. To make this release, the Boards needs to determine that the total available supplies for use in commercial outlets do not equal the amount needed to meet the demand in such outlets.

The Board recommended an amendment to § 930.54 to provide a fourth option for a reserve release. Specifically, it proposed that a portion or all of the primary and/or secondary inventory reserve may be released for sale in certain designated markets.

Witnesses at the hearing suggested that the industry (through the Board) needs more flexibility in determining how to utilize inventory reserves. One witness opined that limited releases of reserves during years of non-regulation may be necessary to maintain markets that are available for diversion credits during years of regulation. The example given dealt with sales to export markets other than Canada and Mexico. In years of volume regulation, sales of cherries to these markets are eligible for diversion credits that handlers may use to meet their restricted obligations.

In developing its marketing policy and determining whether a surplus exists, the optimum supply is compared with available supplies. The optimum supply is defined as average sales over the last 3 years, minus sales qualifying for diversion credit. Thus, the optimum supply measures the volume of cherries needed to fill demand in the primary market. If anticipated supplies exceed demand in the primary market, a volume regulation may be issued. Restricted percentage cherries are then used to fill these secondary markets.

If anticipated supplies are reasonably in balance with demand in the primary market, no volume regulation would be issued. Since all of a handler's cherries would then be ''free'' percentage cherries, he or she would likely attempt to sell all those cherries in the primary market because returns tend to be higher in that market. This could result in few cherries being made available for sale in secondary markets (such as exports).

The record shows that the tart cherry industry needs to continue its efforts to expand markets. A critical aspect of this effort is to ensure that supplies are available to fill needs in developing markets. If, for example, an export market is developed over the course of time, and then cherries are not available to supply that market, that market may be lost to the industry. The Board's proposal would allow a release of inventory reserves to meet the needs of these specific markets. This should contribute to the long-run health of the industry.

Another witness suggested that a limited release should also be possible for specific types of cherry products. He stated that over time, the mix of products offered by the tart cherry industry has changed considerably. New product development should continue to be encouraged to expand marketing opportunities for the industry. Releases of inventory reserves can play a part in this endeavor.

The witness gave a hypothetical situation using dried cherries as an example. He said that if demand for dried cherries was very strong, and supplies of that product from the current year's crop were insufficient to meet that demand, releases of that product from the inventory reserve should be authorized.

This amendment should contribute to the industry's efforts to balance tart cherry supplies with market demand. It will give the Board more flexibility in determining when inventory reserve cherries should be released for use. It will not impose any additional regulatory requirements on tart cherry handlers.

Ten Percent Reserve Release for Market Expansion

Section 930.51 of the order authorizes the issuance of volume regulations for tart cherries in the form of free and restricted percentages. Section 930.50(i) provides that a handler's restricted

percentage cherries must be placed in an inventory reserve or diverted into approved secondary outlets.

Section 930.50 provides that any volume regulation make available as free percentage cherries an ''optimum supply'' of tart cherries. The optimum supply is defined as the average sales of the prior 3 years (minus sales of cherries qualifying for diversion credit) plus a desired carry-out. Section 930.50(g) further provides that in addition to the free market tonnage percentage cherries, the Board must make available tonnage equal to 10 percent of the average sales of the prior 3 years for market expansion.

The Board proposed amending § 930.50(g) to specify that the 10 percent reserve release only apply during years when volume regulation is in effect.

The record shows that the 10 percent reserve release provision was made a part of the order in large part due to USDA policy guidelines. The Secretary's Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders (Guidelines) state that, under volume control programs, primary markets should have available a quantity equal to 110 percent of recent years' sales in those outlets before the Secretary would approve secondary market allocation or pooling. This is to assure plentiful supplies for consumers and for market expansion while retaining the mechanism for dealing with burdensome supply situations.

Witnesses in support of the Board's proposal stated that allowing for and encouraging market growth in years of surplus supplies is sensible. In fact, several witnesses stated that an important objective of the tart cherry industry and the marketing order program is to expand markets for tart cherries. This is supported, for example, by the authorization of diversion credits for new product and new market development.

Several witnesses spoke against the 10 percent release during years of no volume regulation, however. Two concerns were expressed in this regard. First, the release of inventories in a year in which supplies and market demand are reasonably in balance results in an oversupply situation. This can be accompanied by reduced grower prices. Second, and probably more important, industry reserves can be depleted. One objective of keeping an inventory reserve is to aid in stabilizing annual supply fluctuations and safeguard against the detrimental impacts of a short crop year.

The record shows that the tart cherry industry experiences cycles in acreage and production. During the phase of the cycle with less bearing acreage and shorter supplies, a short crop year can result in significant shortages of available market supplies. This can curtail continued market demand and market growth. When supplies are short, they can be supplemented by reserve cherries. This would mitigate spikes in prices, which hinder long term market demand. Food manufacturing customers in particular demand a stable supply of product at reasonable prices. Absent a reliable supply, these customers tend to substitute other fruits in their products.

The use of the inventory release option also provides that some surplus supplies in a large crop year with low prices can be carried over to short crop, high price years. This results in improved revenues for growers and processors. The use of the inventory reserve option also provides an alternative to grower diversions (i.e., non-harvest).

Several witnesses used the 1999–2000 crop year to show the effects of a reserve release during a year of no regulation. During that year, the crop was 251.0 million pounds which, when added to a carryover from the previous crop year of 38.0 million pounds, yielded total available supplies of 289.0 million pounds. With the optimum supply at 285.0 million pounds, the Board found that supplies were reasonably in line with market demand, and recommended no volume regulation be implemented.

At the beginning of the crop year, industry reserves totaled 28.4 million pounds. Four million pounds were released early in the crop year to meet unanticipated demand, leaving 24.4 million pounds in the reserve when it came time for the release for market expansion. Ten percent of the 3-year average sales figure meant that 28.5 million pounds should have been released for market expansion; however, there were only 24.4 million pounds in the inventory reserve, so the entire reserve was released.

Witnesses claimed that the release of reserves in the current crop year may result in a surplus supply of cherries in the marketplace. This could put a downward pressure on price, and could result in a higher carryover into the next crop year. This could mean a greater surplus in 2000–2001, which could result in a higher restricted percentage and greater probability of cherries being left in the orchard unharvested.

Ultimately, these releases could result in less economic incentive to place cherries in the reserve because they could be released at the wrong time and return little to growers. With less incentive to participate in the inventory reserve, more cherries would likely be diverted by growers through non-harvest. Overall grower returns would be lower, and long term market losses may occur.

This amendment should contribute to the industry's efforts to balance tart cherry supplies with market demand. It will give the Board more flexibility in determining when inventory reserve cherries should be released for use. It will not impose any additional regulatory requirements on tart cherry handlers.

Assessments on All Cherries Handled

Section 930.40 of the order authorizes the Board to incur such expenses as the Secretary finds are reasonable and necessary for it to administer the tart cherry marketing order program. Section 930.40 further provides that the Board's expenses be covered by income from handler assessments.

Section 930.41 provides that handlers pay their pro rata share of the Board's expenses. Each handler's share is determined by applying the established assessment rate(s) to the volume of cherries each handler handles during a crop year. Section 930.41 further provides that handlers are exempt from paying assessments on cherries that are diverted in accordance with § 930.59, including cherries represented by grower diversion certificates issued under § 930.58. Cherries devoted to exempt uses under § 930.62 are also free from assessments.

The Board recommended that § 930.41 be amended to provide that all cherries processed and sold by handlers be subject to assessments. The only cherries that would be exempt from assessments would be those diverted in-orchard by growers, and those diverted by handlers through destruction at their plants.

Proponent witnesses testifying in support of this change stated that all processed cherries should be subject to assessments because handlers profit from the sale of these cherries. This is because each pound of fruit processed increases the handler's overall profitability by reducing the per unit cost of processing. This is true even if the cherries are used in an outlet approved for diversion credit.

The record shows that handlers have different ways of meeting their restricted obligations. Their decisions are based on their own marketing strategies. Some handlers take advantage of marketing their products in eligible diversion outlets, while others either cannot or do not do so. Witnesses suggested that providing an exemption from assessments to handlers who choose to divert their cherries through

sales in those designated outlets creates a competitive advantage over their competitors who do not do so. It was their opinion that if a substantial volume of cherries is diverted by certain handlers, the burden of financing the program increases on other handlers. Those in support of assessing all processed cherries concluded that subjecting all processed cherries to the assessment provisions of the order would eliminate this unintended advantage.

Additionally, the record shows that a large portion of the Board's annual expenses is incurred for oversight of compliance activities related to diversion credits. For example, for those export sales eligible for diversion credit, handlers are required to submit proof of export. The documentation typically consists of warehouse receipts, bills of lading, overseas bills of lading, and other documents proving the cherries were exported. The Board staff reviews the documentation submitted by each handler for sufficiency, requests additional documentation if necessary, and issues diversion certificates upon proof of compliance with order requirements. Similar activities are undertaken with respect to sales in other designated diversion markets (e.g., new product development). Witnesses stated that those handlers who take advantage of these order provisions should pay their share of the costs of enforcing those provisions.

One witness also stated that an advantage of this amendment would be that it would broaden the assessment base under the order. This would lower the assessment rate needed to effectively administer the program.

This amendment would increase assessment obligations on handlers who choose to divert their restricted percentage cherries in approved outlets. However, it would also tend to result in a more reasonable assessment system.

Uniform Assessment Rate

As discussed in the preceding section, §§ 930.40 and 930.41 of the order provide that the Board may incur certain expenses, and that the funds to defray those expenses be paid by handlers through assessments. Section 930.41 also provides, among other things, that the assessment rate(s) recommended by the Board and approved by the Secretary must compensate for the differences in the amounts of cherries used for various cherry products and the relative market values of those products.

The Board recommended that § 930.41 be amended to provide that a uniform assessment rate be established for cherries used in any or all products. This would be true unless the Board decided to consider the volumes of cherries used for various products and their relative values; if that were the case, the Board could recommend differential assessment rates if warranted.

The record shows that at the time the order was promulgated, proponents of the program supported different assessment rates being established for cherries used for various products. In their testimony, they suggested that high value products such as frozen, canned or dried cherries be assessed at one rate, and low value products such as juice concentrate and puree be assessed at one-half that rate.

Proponents of the Board's recommended amendment stated that the order should not require one rate for certain products and twice that rate for others. They stated that while a two-tiered assessment rate scheme may be appropriate in some years, it may not be in others. They cited the fact that the absolute and relative market values of various tart cherry products fluctuate from year to year.

One witness testified, for example, that producer returns for cherries used for juice concentrate are comparable to those for other products. He stated that cherry juice concentrate was selling for about $17 per gallon. Subtracting estimated handling charges of $5.81 per gallon, the net return to the grower would be an estimated $11.19. In Washington, where about 50 pounds are required to make a gallon of concentrate, growers would receive 22 cents per pound. In Michigan, where it takes approximately 90 pounds of cherries to make a gallon of concentrate, growers would receive 12 cents per pound. This witness stated that grower returns in this range are comparable to returns available for other products.

The conclusion of the proponent witnesses was that the Board should have discretion in determining appropriate rates of assessment. They did not believe a two-tiered approach should be mandated.

An opponent of the proposed change stated that the order should continue to require the Board to consider the volume of raw product used in producing various cherry products as well as the relative value of those products in recommending annual assessment rates. He stated that he did not necessarily support two levels of assessment rates, but believed the Board should be required to give due consideration to relevant factors in making its recommendations.

The Department concludes that while there may be justification for establishing different assessment rates for different products, it should not be required under the order. Thus, the amendment to § 930.41 provides that in its deliberations pertaining to appropriate levels of assessment rates, the Board should consider the volume of cherries used in making various products and the relative market value of those products. The assessment rate established may be uniform or may vary among products, based on the Board's analysis.

Implementation of this amendment could result in a single, uniform assessment rate applicable to all cherries. Such action would likely increase the rate established for cherries used for juice concentrate and puree, and could result in a lower rate for cherries used for other products. The impact of any such action would be analyzed by the Board and USDA prior to its effectuation.

Crop Production Estimate

Section 930.50 of the order requires the Board to develop an annual marketing policy. This policy serves as the basis for determining the level of volume regulation needed in a given crop year. First, the Board determines the ''optimum supply'' which is defined as the average sales of cherries in the past three years plus the desirable carry-out. Next, the Board takes the crop forecast for the upcoming year and subtracts from it the optimum supply (less the carry-in). If the remainder is positive, it represents a surplus in supplies, supporting the use of volume regulation. Section 930.50 prescribes that the Board must use the official USDA crop estimate as its crop forecast.

The Board's amendment proposal would allow the Board to use a crop estimate other than the official USDA crop estimate in its marketing policy.

The record shows that USDA bases its pre-harvest estimate on two methods. In Michigan, an objective yield survey is done by the State. Such a survey is based on the actual count of fruit on the tree, the number of trees per acre, and the acres in production. In the other producing States, subjective yield surveys are done by those States. This method entails canvassing tart cherry growers and handlers to obtain their assessment of the upcoming year's crop.

The Michigan crop survey costs a total of $60,000 per year. Of this total, the Board pays $24,000. The Board's share was expected to increase to half of the total in 2001. Concern was expressed at the hearing that if the industry decides to no longer contribute

to the cost of the Michigan State survey, that State would likely discontinue its objective yield surveys and turn to subjective yield surveys. This could result in a less reliable crop estimate than is currently available. This is of particular concern because Michigan produces more than 70 percent of the U.S. tart cherry crop.

Witnesses in support of this proposal stated that, in some years, USDA's pre-harvest crop estimate may not be accurate enough due to quickly changing crop conditions. They stated that current order provisions prohibit the Board from using any other estimate even if the majority of Board members, with their years of experience in the industry, believe USDA's estimate in a given year is inaccurate. Using the most accurate crop estimate available in deriving preliminary free and restricted percentages is important because growers and handlers make decisions based in part on those percentages. For example, growers decide whether to divert or harvest their crops; these decisions are irrevocable. Handlers also make pack and marketing plans based in part on the expected level of regulation. If actual harvest varies significantly from the pre-harvest estimate, growers and handlers could suffer economic harm. Using the most accurate information available is therefore necessary to enhance industry decision making.

One witness pointed to the situation faced by district 3 (Southern Michigan) growers in 1997. As previously discussed under Material Issue Number 9, at the time the Board developed its marketing policy, indications were that district 3 would be regulated that year. Subsequent to harvest, however, it was determined that volume regulation would not apply to district 3 cherries that year. Growers who made decisions to divert their crops based on the Board's marketing policy estimates found themselves with diversion certificates that were of no value.

The record shows that the USDA estimate should be used by the Board unless two things happen. The first would be that the Board would have to agree that the USDA estimate was inaccurate. The second would be that the Board would have to agree on another estimate or estimates to use. Both these actions would require concurrence by at least two-thirds of the Board members. This would safeguard against the possibility of some members attempting to manipulate the crop estimate to impact the level of volume restriction.

In addition, witnesses testified that other estimates used by the Board would have to be from other reliable, independent sources, and would be averaged in with the USDA estimate. Currently available is an annual estimate made by the Michigan Food Processors Association. Other possible sources include the Michigan Agricultural Cooperative Marketing Association and individual State grower associations.

This amendment provides the Board with more flexibility in developing its marketing policy and recommending preliminary free and restricted percentages. To the extent that the Board's decision making improves, the entire U.S. tart cherry industry would benefit.

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

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

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

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

Civil Justice Reform

The amendments contained in this rule have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. The amendments will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

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

Findings and determinations

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

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

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

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

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

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

(3) The marketing agreement and order, as amended, and as hereby

further amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

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

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

(b) *Additional findings.*

It is necessary and in the public interest to make these amendments to the order effective not later than one day after publication in the **Federal Register**.

A later effective date would unnecessarily delay implementation of the amendments including the reallocation of Board membership. In addition, the informal rulemaking needed to implement order amendments requires additional time to complete. Therefore, making the effective date one day after publication in the **Federal Register** will allow the amendments, which are expected to be beneficial to the industry, to be implemented as soon as possible.

In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective one day after publication in the **Federal Register**, and that it would be contrary to the public interest to delay the effective date for 30 days after publication in the **Federal Register** (Sec. 553(d), Administrative Procedure Act; 5 U.S.C. 551–559).

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

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping tart cherries covered by the order as hereby amended) who, during the period June 1, 2000, through May 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 June 1, 2000, through May 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

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

The provisions of the proposed marketing agreement and the order amending the order contained in the Secretary's Decision issued by the Administrator on May 3, 2002, and published in the **Federal Register** on May 10, 2002, 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 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Amend § 930.20 as follows:

a. By revising paragraphs (a), (b), (d) and (e);

b. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h); and

c. Adding new paragraphs (f) and (i).

The additions and revisions read as follows:

§ 930.20 Establishment and membership.

(a) There is hereby established a Cherry Industry Administrative Board, the membership of which shall be calculated in accordance with paragraph (b) of this section. The number of Board members may vary, depending upon the production levels of the districts. All but one of these members shall be qualified growers and handlers selected pursuant to this part, each of whom shall have an alternate having the same qualifications as the member for whom the person is an alternate. One member of the Board shall be a public member who, along with his or her alternate, shall be elected by the Board from the general public.

(b) District representation on the Board shall be based upon the previous three-year average production in the district and shall be established as follows:

(1) Up to and including 10 million pounds shall have 1 member;

(2) Greater than 10 and up to and including 40 million pounds shall have 2 members;

(3) Greater than 40 and up to and including 80 million pounds shall have 3 members; and

(4) Greater than 80 million pounds shall have 4 members; and

(5) Allocation of the seats in each district shall be as follows but subject to the provisions of paragraphs (d), (e) and (f) of this section:

District type	Grower members	or	Handler members
Up to and including 10 million pounds	1		1
More than 10 and up to 40 million pounds	1		1
More than 40 and up to 80 million pounds	1		2
More than 80 million pounds	2		2

* * * * *

(d) The ratio of grower to handler representation in districts with three members shall alternate each time the term of a Board member from the representative group having two seats expires. During the initial period of the order, the ratio shall be as designated in paragraph (b) of this section.

(e) Board members from districts with one seat may be either grower or handler members and will be nominated and elected as outlined in § 930.23.

(f) If the 3-year average production of a district changes so that a different number of seats should be allocated to the district, then the Board will be reestablished by the Secretary, and such seats will be filled according to the applicable provisions of this part. Each district's 3-year average production shall be recalculated annually as soon as possible after each season's final production figures are known.

* * * * *

(i) The Board, with the approval of the Secretary, may establish rules and regulation's necessary and incidental to the administration of this section.

3. Revise 930.28 to read as follow:

§ 930.28 Alternate members.

An alternate member of the Board, during the absence of the member for whom that member serves as an alternate, shall act in the place and stead of such member and perform such other duties as assigned. However, if a member is in attendance at a meeting of the Board, an alternate member may not act in the place and stead of such member. In the event a member and his or her alternate are absent from a meeting of the Board, such member may designate, in writing and prior to the meeting, another alternate to act in his or her place: *Provided,* that such alternate represents the same group (grower or handler) as the member. In the event of the death, removal, resignation or disqualification of a member, the alternate shall act for the member until a successor is appointed and has qualified.

4. Amend 930.32 by revising paragraph (a) to read as follows:

§ 930.32 Procedure.

(a) Two-thirds of the members of the Board, including alternates acting for absent members, shall constitute a quorum. For any action of the Board to pass, at least two-thirds of the entire Board must vote in support of such action.

* * * * *

5. Amend § 930.41 by revising paragraphs (c) and (f) to read as follows:

§ 930.41 Assessments.

* * * * *

(c) As a pro rata share of the administrative, inspection, research, development, and promotion expenses which the Secretary finds reasonable and likely to be incurred by the Board during a fiscal period, each handler shall pay to the Board assessments on all cherries handled, as the handler thereof, during such period: *Provided,* a handler shall be exempt from any assessment only on the tonnage of handled cherries that either are diverted by destruction at the handler's facilities according to § 930.59 or are cherries represented by grower diversion certificates issued pursuant to § 930.58(b) and acquired by handlers as described in § 930.59.

* * * * *

(f) Assessments shall be calculated on the basis of pounds of cherries handled. The established assessment rate may be uniform, or may vary dependent on the product the cherries are used to manufacture. In recommending annual assessment rates, the Board shall consider:

(1) The differences in the number of pounds of cherries utilized for various cherry products; and

(2) The relative market values of such cherry products.

* * * * *

6. Amend § 930.50 by revising paragraphs (a), (b) and (g) to read as follows:

§ 930.50 Marketing policy.

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

(b) *Preliminary percentages.* On or about July 1 of each crop year, the Board shall establish a preliminary free market tonnage percentage which shall be calculated as follows: from the optimum supply computed in paragraph (a) of this section, the Board shall deduct the carry-in inventory to determine the tonnage requirements (adjusted to a raw fruit equivalent) for the current crop year which will be subtracted from the current year USDA crop forecast or by an average of such other crop estimates the Board votes to use. If the resulting number is positive, this would represent the estimated overproduction which would be the restricted tonnage. This restricted tonnage would then be divided by the sum of the crop forecast(s) for the regulated districts to obtain a preliminary restricted percentage, rounded to the nearest whole number, for the regulated districts. If subtracting the current crop year requirement, computed in the first sentence from the current crop forecast, results in a negative number, the Board shall establish a preliminary free market tonnage percentage of 100 percent with a preliminary restricted percentage of zero. The Board shall announce these preliminary percentages in accordance with paragraph (h) of this section.

* * * * *

(g) *Additional tonnage to sell as free tonnage.* In addition, the Board, in years when restricted percentages are established, shall make available tonnage equivalent to an additional 10 percent, if available, of the average sales of the prior 3 years, as defined in paragraph (a) of this section, for market expansion.

* * * * *

7. Amend § 930.51 by revising paragraph (c) to read as follows:

§ 930.51 Issuance of volume regulations.

* * * * *

(c) That portion of a handler's cherries that are restricted percentage cherries is the product of the restricted percentage imposed under paragraph (a) of this section multiplied by the tonnage of cherries, originating in a regulated district, handled, including those diverted according to § 930.59, by that handler in that fiscal year.

* * * * *

8. Amend § 930.52 by revising paragraph (a) to read as follows:

§ 930.52 Establishment of districts subject to volume regulation.

(a) The districts in which handlers shall be subject to any volume regulations implemented in accordance with this part shall be those districts in which the average annual production of cherries over the prior 3 years has exceeded 6 million pounds. Handlers shall become subject to volume regulation implemented in accordance with this part in the crop year that follows any 3-year period in which the 6-million pound average production requirement is exceeded in that district.

* * * * *

9. Revise § 930.54 to read as follows:

§ 930.54 Prohibition on the use or disposition of inventory reserve cherries.

Cherries that are placed in inventory reserve pursuant to the requirements of § 930.50, § 930.51, § 930.55, or § 930.57 shall not be used or disposed of by any handler or any other person except as provided in § 930.50 or in paragraphs (a), (b), or (c) of this section.

(a) If the Board determines that the total available supplies for use in commercial outlets are less than the amount needed to meet the demand in such outlets, the Board may recommend to the Secretary that a portion or all of the primary and/or secondary inventory reserve cherries be released for such use.

(b) The Board may recommend to the Secretary that a portion or all of the

primary and/or secondary inventory reserve cherries be released for sale in certain designated markets. Such designated markets may be defined in terms of the use or form of the cherries.

(c) Cherries in the primary and/or secondary inventory reserve may be used at any time for uses exempt from regulation under § 930.62.

10. Amend § 930.58 by revising paragraph (a) to read as follows:

§ 930.58 Grower diversion privilege.

(a) *In general.* Any grower may voluntarily elect to divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler, as though there were actual harvested cherries. Any grower diversions completed in accordance with this section, but which are undertaken in districts subsequently exempted by the Board from volume regulation under § 930.52(d), shall qualify for diversion credit.

* * * * *

11. Revise § 930.59 to read as follows:

§ 930.59 Handler diversion privilege.

(a) *In general.* Handlers handling cherries harvested in a regulated district may fulfill any restricted percentage requirement in full or in part by acquiring diversion certificates or by voluntarily diverting cherries or cherry products in a program approved by the Board, rather than placing cherries in an inventory reserve. Upon voluntary diversion and compliance with the provisions of this section, the Board shall issue to the diverting handler a handler diversion certificate which shall satisfy any restricted percentage or diversion requirement to the extent of the Board or Department inspected weight of the cherries diverted.

(b) *Eligible diversion.* Handler diversion certificates shall be issued to handlers only if the cherries are diverted in accordance with the following terms and conditions or such other terms and conditions that the Board, with the approval of the Secretary, may establish. Such diversion may take place in any form which the Board, with the approval of the Secretary, may designate. Tart cherry juice and juice concentrate may receive diversion credit but only if diverted in forms approved under the terms of this section. Such forms may include, but are not limited to:

(1) Contribution to a Board-approved food bank or other approved charitable organization;

(2) Use for new product and new market development;

(3) Export to designated destinations; or

(4) Other uses or disposition, including destruction of the cherries at the handler's facilities.

(c) *Notification.* The handler electing to divert cherries through means authorized under this section shall first notify the Board of such election. Such notification shall describe in detail the manner in which the handler proposes to divert cherries including, if the diversion is to be by means of destruction of the cherries, a detailed description of the means of destruction and ultimate disposition of the cherries. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by the handler. Uniform fees for such supervision may be established by the Board, pursuant to rules and regulations approved by the Secretary.

(d) *Diversion certificate.* The Board shall conduct such supervision of the handler's diversion of cherries under paragraph (c) of this section as may be necessary to assure that the cherries are diverted as authorized. After the diversion has been completed, the Board shall issue to the diverting handler a handler diversion certificate indicating the weight of cherries which may be used to offset any restricted percentage requirement.

(e) *Transfer of certificates.* Within such restrictions as may be prescribed in rules and regulations, including but not limited to procedures for transfer of diversion credit and limitations on the type of certification eligible for transfer, a handler who acquires diversion certificates representing diverted cherries during any crop year may transfer such certificates to another handler or handlers. The Board must be notified in writing whenever such transfers take place during a crop year.

(f) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

12. Revise § 930.62 to read as follows:

§ 930.62 Exempt uses.

(a) The Board, with the approval of the Secretary, may exempt from the provisions of § 930.41, § 930.44, § 940.51, § 930.53, or § 930.55 through § 930.57 cherries for designated uses. Such uses may include, but are not limited to:

(1) New product and new market development;

(2) Export to designated destinations;

(3) Experimental purposes; or

(4) For any other use designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized.

(b) The Board, with the approval of the Secretary, shall prescribe such rules, regulations, and safeguards as it may deem necessary to ensure that cherries handled under the provisions of this section are handled only as authorized.

(c) Diversion certificates shall not be issued for cherries which are used for exempt purposes; *Provided,* that growers engaging in such activities under the authority of § 930.58 shall be issued diversion certificates for such activities.

Dated: July 31, 2002.

A.J. Yates,

Administrator, Agricultural Marketing Service.

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