DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 929

[Docket Nos. AO–341–A6; FV02–929–1]

Cranberries Grown in the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Agreement and Order No. 929

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions on proposed amendments to the marketing agreement and order for cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. The amendments were proposed by the Cranberry Marketing Committee (Committee), which is responsible for local administration of the order, and other interested parties representing independent growers and handlers. The proposed amendments would: Revise the volume control provisions; Add authority for paid advertising; Authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts; Clarify the definition of handle; and incorporate administrative changes. The proposed amendments are intended to improve the operation and functioning of the cranberry marketing order program.

DATES: Written exceptions must be filed by May 28, 2004.

ADDRESSES: Written comments should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081–S, Washington, DC 20250–9200, FAX number (202) 720–9776. Four copies of all written exceptions should be submitted and they should reference the docket numbers and the date and page number of this issue of the **Federal Register**, or you may send your comments by the electronic process available at Federal eRulemaking portal at *http://www.regulations.gov*. Comments can be viewed at: *http://www.ams.usda.gov/fv/moab.html*.

FOR FURTHER INFORMATION CONTACT: Kathleen M. Finn, 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 April 23, 2002, and published in the May 1, 2002, issue of the **Federal Register** (67 FR 21854); Secretary's Decision on partial amendments issued on December 4, 2003, and published in the December 12 issue of the **Federal Register** (68 FR 69343).

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

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreement and Order No. 929, regulating the handling of cranberries in 10 States (hereinafter referred to as the order), and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Kathleen Finn whose address is listed above.

This action is issued 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 orders (7 CFR part 900).

The proposed amendment of Marketing Agreement and Order No. 929 is based on the record of a public hearing held in Plymouth, Massachusetts on May 20 and 21, 2002; in Bangor, Maine on May 23, 2002; in Wisconsin Rapids, Wisconsin on June 3 and 4, 2002; and in Portland, Oregon on June 6, 2002. Notice of this hearing was published in the **Federal Register** on May 1, 2002. The notice of hearing contained numerous proposals submitted by the Committee, other interested parties and one proposed by the Agricultural Marketing Service (AMS). A Secretary's Decision and Referendum Order on 6 of the proposals determined necessary to be expedited was published in the **Federal Register** on December 12, 2003. This action recommends amendments on the remainder of the proposals.

The proposed amendments included in this proceeding would: Authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts; simplify criteria considered and set forth more appropriate dates in establishing the Committee's marketing policy; revise the formula for calculating sales histories under the producer allotment program in § 929.48; allow compensation of sales history for catastrophic events that impact a grower's crop; remove specified dates relating to when information is required to be filed by growers/handlers in order to issue annual allotments; clarify how the Committee allocates unused allotment to handlers; allow growers who decide not to grow a crop flexibility in deciding what to do with their allotment; allow growers to transfer allotment during a year of volume regulation; authorize the implementation of the producer allotment and withholding programs in the same year; require specific dates for recommending volume regulation; add specific authority to exempt fresh, organic or other forms of cranberries from order provisions; allow for greater flexibility in establishing other outlets for excess cranberries; update and streamline the withholding volume control provisions; modify the buy-back provisions under the withholding volume control provisions; add authority for paid advertising under the research and development provision of the order; modify the definition of handle to clarify that transporting fresh cranberries to foreign countries is considered handling and include the temporary cold storage or freezing of withheld cranberries as an exemption from handling; relocate some reporting provisions to a more suitable provision and streamline the language relating to verification of reports and records; and Delete an obsolete provision from the order relating to preliminary regulation.

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 to the effectuated amendments.

Five proposed amendments are not being recommended for adoption and are discussed in this decision.

Thirty-two witnesses testified at the hearing. These witnesses represented cranberry growers and handlers in States currently covered by the order

and in Maine. Some witnesses supported the proposed amendments, while others were opposed to the recommended changes or suggested modifications to them.

At the conclusion of the hearing, the Administrative Law Judge fixed August 9, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing on proposal numbers 1, 3, 7 and 13. The Administrative Law Judge fixed September 13, 2002, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on evidence received at the hearing on all other proposals. This briefing period was extended until September 20, 2002. A total of 17 briefs were filed, of which 7 related to the proposals being addressed in this decision.

The Committee filed a brief in support of its proposed amendments. Stephen L. Lacey, attorney for Clement Pappas & Company and Cliffstar Corporation, filed a brief in support of his and other proposals, in opposition to some proposals or suggestions for modifications. Linda and Paul Rinta filed a brief in support of many proposals and suggesting modification to others. The Cape Cod Cranberry Growers' Association (CCCGA) filed a brief opposing one proposal, supporting others, and suggesting modifications to others. All discussions in briefs pertaining to the proposals being recommended in this decision have been considered.

Introduction

The U.S. cranberry industry is experiencing an oversupply situation. Recent increases in acreage and yields have resulted in greater supplies, while demand has remained fairly constant. The result has been building inventories and reduced grower returns.

The cranberry industry has operated under a Federal marketing order since 1962. The order's primary regulatory authority is volume regulation. At that time, production was trending sharply upward, due primarily to improving yields, and demand was not keeping pace. The intent of the program was to limit the volume of cranberries available for marketing in fresh market outlets in the United States and Canada, and in all processing outlets, to a quantity reasonably in balance with the demand in such outlets. This method of controlling volume was the ''withholding'' provisions whereby ''free'' and ''restricted'' percentages would be established. Growers would deliver all contracted cranberries to their respective handlers. Free cranberries could be marketed by handlers in any outlet, while restricted berries would have to be withheld from handling and, if possible, diverted by handlers to noncompetitive markets. The withholding program has not been used since 1971.

The order was amended in 1968 to authorize another form of volume regulation—producer allotments. The intent was to discourage new plantings and allow growers to remove surplus berries in a more economical manner, by reducing their production to approximate the marketable quantity or by leaving excess berries unharvested.

Production had continued to increase, and the industry was reluctant to recommend a sufficient restricted percentage under the withholding regulations. Under the producer allotment program, growers were issued base quantities. Base quantity was the quantity of cranberries equal to a grower's established cranberry acreage multiplied by such grower's average per acre sales made from the acreage during a representative period. If the allotment base program were activated, each handler would be allowed to acquire for normal marketing only a certain percentage of each grower's base quantity. This authority was used to establish a regulation for the 1977–78 season, but that regulation was subsequently rescinded.

In 1992, the producer allotment provisions were amended to change the method of calculating growers' annual allotments from the base quantity method to a sales history method. Under this amendment, a grower's sales history is calculated based on a grower's actual sales, expressed as an average of the best 4 of the previous 6 years of sales. There were concerns that base quantities did not accurately reflect actual levels of sales because as growers' acreage increased or decreased, the base quantity did not change. It was concluded that basing allotments on actual sales off acreage would be a more realistic and practical way to determine annual allotments. These provisions were first used in the 2000–2001 season and again in 2001–2002. No volume regulations were implemented in 2002–2003.

In recent years, the Committee has been considering ways in which the marketing order could be improved to better address the oversupply situation. Although the regulations implemented for volume regulation were as flexible as the order would allow, the Committee believed there were improvements that could be made through the amendment process. The Committee appointed an amendment subcommittee to analyze the marketing order and make recommendations to the Committee on proposed amendments. The subcommittee considered the volume control provisions as well as other provisions of the order, such as Committee structure, production area, and promotion authorities. The Committee's proposals are the result of years of discussions on improvements to the marketing order. In addition, other interested parties included proposed amendments in the proceeding.

Material Issues

The material issues of record addressed in this decision are as follows:

Administrative Body

(1) Whether to authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts.

Volume Regulations

(2) Whether to simplify criteria considered and set forth more appropriate dates in establishing the Committee's marketing policy.

(3) Whether to revise the formula for calculating sales histories under the producer allotment program in § 929.48. The revision includes providing additional sales history to compensate growers for expected production on newer acres. This proposed change to § 929.48 would also: allow for more flexibility in recommending changes to the formula; and add authority for segregating fresh and processed sales.

(4) Whether to allow compensation of sales history for catastrophic events that impact a grower's crop.

(5) Whether to remove specified dates relating to when information is required to be filed by growers/handlers in order to issue annual allotments.

(6) Whether to clarify how the Committee allocates unused allotment to handlers.

(7) Whether to authorize growers who choose not to grow a crop during a year of volume regulation to not assign their allotment to their handler.

(8) Whether to allow growers to transfer allotment during a year of volume regulation.

(9) Whether to authorize the implementation of the producer allotment and withholding programs in the same year.

(10) Whether to require the Committee to recommend volume regulations by specified dates.

(11) Whether to add specific authority to exempt fresh, organic or other forms of cranberries from order provisions.

(12) Whether to allow for greater flexibility in establishing other outlets for excess cranberries. This includes whether to clearly define what countries are authorized for foreign development with excess cranberries and whether to establish a limit on foreign markets eligible for shipments of excess berries.

(13) Whether to update and streamline the withholding volume control provisions.

(14) Whether to revise the buy-back provisions under the withholding provisions, including allowing growers to be compensated if any funds are returned to handlers by the Committee.

(15) Whether to incorporate a handler marketing pool or buy-back provisions under the producer allotment program to allow handlers without surplus access to cranberries to meet customer needs.

(16) Whether to authorize an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower.

Production Area

(17) Whether to add Maine, Delaware and the entire State of New York to the production area.

Paid Advertising

(18) Whether to add authority for paid advertising under the research and development provision of the order.

Definition of Cranberry

(19) Whether to add the species *Vaccinium oxycoccus* to the definition of cranberry.

Definition of Handle

(20) Whether to modify the definition of handle to clarify that transporting fresh cranberries to foreign countries is considered handling and include the temporary cold storage or freezing of withheld cranberries as an exemption from handling.

Reporting Requirements

(21) Whether to relocate some reporting provisions to a more suitable provision and streamline the language relating to verification of reports and records.

Deletion of Obsolete Provision

(22) Whether to delete an obsolete provision from the order relating to preliminary regulation.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1—Reestablishment of Districts and Reapportionment of Committee Membership Among Districts

The order should be amended to add authority to reestablish the geographic districts set up for purposes of grower representation on the Committee and to reapportion membership among those districts.

Section 929.20 of the order establishes the Cranberry Marketing Committee, comprised of 13 growers and 1 public member. Grower membership is allocated among two groups—growers affiliated with the major cooperative marketing organization and all other growers. One grower member represents the production area-at-large, while the remaining grower members are apportioned among four districts as shown below.

District	No. of grower members
1—Massachusetts, Rhode Island, and Connecticut	4
2—New Jersey and New York	2
3—Wisconsin, Michigan, and Minnesota	4
4—Oregon and Washington	2

Currently, there is no authority under the order to reestablish the districts or to reapportion membership among the districts. Testimony indicated that adding such authority would allow the Committee to address, in a timely fashion, situations wherein changes are needed to the districts' makeup to more appropriately align the districts or the representation of the districts. Adding this authority would allow the Committee to recommend changes to be made through informal rulemaking rather than through an order amendment.

The Committee manager testified that before any recommendations could be made by the Committee regarding reestablishment of districts or reapportionment of membership, several criteria should be considered. The criteria to be considered would be: (1) The relative volume of cranberries produced in each district; (2) the relative number of cranberry producers within each district; (3) cranberry acreage within each district; and (4) other relevant factors.

This proposed amendment would allow the Committee to recommend realigning district boundaries (for example, moving a State from one district into another); to modify the number of districts; and to change the number of grower members to represent each district. The four criteria established would need to be considered prior to any Committee recommendation.

This proposed amendment would not allow an increase or decrease in the total number of members on the Committee. It also would not allow increases or decreases in the total number of members allotted to each group (growers affiliated with the major cooperative marketing organization and other growers).

An opponent of adding this authority testified that if this provision were adopted, unnecessary discord would occur in the industry. He provided an example using current independent grower membership. Growers not affiliated with the major cooperative are now allocated two members from District 1, one member from District 2, two members from District 3, and one member from District 4. The witness envisioned a situation where independent representatives from Wisconsin could want an additional seat on the Committee for their district based on volume produced and independent representatives from Massachusetts could want an additional seat for their district based on the number of growers in that district. It would take a Committee vote to recommend such an action, which would require a super majority of votes to pass (11 of 14 members if the public member chose to vote, 10 of 13 members otherwise). He testified that the decision would ultimately be made by members representing the major cooperative because the non major cooperative members would be split on their votes. He did not believe it would be fair to the group representing other than the major cooperative if the major cooperative decided which district is entitled to an additional independent seat. A Committee motion on this issue could polarize the members, he testified.

The witness testified that the current district makeup and allocation of membership is well thought out and well reasoned. He believed that any needs that arise to modify districts should be accomplished through the formal amendment process, where growers can vote in a referendum on this issue. He further testified that the industry structure does not change rapidly as evidenced by the last amendment on establishing districts, which occurred in 1978.

At the hearing, one witness testified that he believed that adding this authority would allow the Committee to add States not currently regulated under the order through informal rulemaking if the Committee determined it

necessary. This is not true. Any change in the production area would require an amendment of § 929.4 of the order through the formal amendment process. Adding this authority would not allow the Committee to expand the production area.

As an example of redistricting, there was much testimony on the significance of the State of New Jersey relative to the States of Wisconsin and Massachusetts. Some believe it is not equitable to provide a separate district and two seats to New Jersey based on the number of growers and volume of production in that State. While it has been determined that current Committee representation is reasonable, this situation could change in the future. The Committee should have the authority to recommend a modification in the district structure, either by increasing or decreasing the number of districts, reassigning geographic regions among the districts, or reallocating membership among the districts, without having to amend the order. The Committee would recommend the change to USDA and notice and comment rulemaking would determine if changes are warranted.

A witness stressed the importance of having the experience and knowledge on the Committee from every growing area. Because the industry is spread out across the United States, the educational aspect of representatives reporting Committee activities to growers in their district is critical, he testified. Although this witness supported modifying districts by order amendment, he was concerned with the smaller districts not having representation and the Committee not being able to address the problem quickly.

Record evidence supports adding the authority to reestablish districts and reapportion membership among the districts. This authority would give the Committee greater flexibility in responding to changes in grower demographics and district significance in the future. It is possible that if this amendment is adopted, the larger districts may attempt to attain an additional seat. Since the total number of seats on the Committee cannot be altered (except through amendment of the order), the only way to accomplish this would be to transfer a seat from another district or to eliminate a district and combine the States in that district with another district. Any recommendation to modify the districts or representation would need a Committee vote and USDA approval. Since all Committee actions require a super majority vote to pass, recommendations to change the districts would require support from both groups, including the major cooperative. These voting requirements were established to ensure that all Committee recommendations are supported by a majority of the industry, regardless of affiliation. A vote on district makeup would be no different than any other issue the Committee considers.

In addition to a Committee recommendation, notice and comment rulemaking would be necessary to implement any modifications in district representation on the Committee. All growers and handlers would be provided the opportunity to comment on the Committee recommendation before it was adopted. USDA considers all comments before issuing a final rule. Therefore, it is concluded that growers would have ample opportunity to be heard on issues concerning Committee representation.

Changes in industry structure could occur more quickly in the future than they have in the past. For this reason, it is deemed important that the Committee be provided the flexibility to address any changes in industry demographics by reestablishing districts and reapportioning membership.

Record evidence supports adding the authority to reestablish districts and reapportion Committee membership among the districts. Therefore, a new § 929.28 is proposed to be added to the order.

Material Issue Number 2—Development of Marketing Policy

Section 929.46 should be revised to simplify the criteria required to be considered in the Committee's annual marketing policy and eliminate obsolete dates.

Section 929.46 of the order requires the Committee to develop a marketing policy each year as soon as practicable after August 1. In its marketing policy, the Committee projects expected supply and market conditions for the upcoming season. The marketing policy should be adopted before any recommendation for regulation, as it serves to inform USDA and the industry, in advance of the marketing of the crop, of the Committee's plans for regulation and the bases therefore. Handlers and growers could then plan their operations in accordance with the marketing policy. Additionally, the marketing policy is useful to the Committee and USDA when specific regulatory action is being considered, since it would provide basic information necessary to the evaluation of such regulation.

Currently, § 929.46(b) states that as soon as practicable after August 1 of each crop year and prior to making any recommendations for a producer allotment or withholding program, the Committee shall submit a marketing policy which considers nine criteria. The nine criteria include: (1) The estimated total production of cranberries; (2) the expected general quality of the crop; (3) the estimated carryover, as of September 1, of frozen cranberries and other cranberry products; (4) the expected demand conditions for cranberries in different market outlets; (5) supplies of competing commodities; (6) trend and level of consumer income; (7) the recommended desirable total marketable quantity of cranberries, including an adequate carryover into the following crop year; (8) any volume regulation expected to be recommended by the Committee during the crop year; and (9) other factors having a bearing on the marketing of cranberries. The Committee proposed that numbers 5, 6 and 8 be deleted.

The proponents testified that there are really no directly competing commodities for cranberries since they are a fresh seasonal item for holiday use. Also, cranberry juice competes for shelf space, but the competition is between the branded companies and private label companies rather than with other types of juices. The trend and level of consumer income is another criterion that the Committee does not believe is of much value to consider. Proponents testified that there are different cranberry products available at different price levels that can be purchased by consumers depending on their wishes. Other factors are more important to consumers, however, in making food choices. Consumers may buy cranberry products based on health related issues, for example. The proponents recommended that these two items be deleted from the marketing policy criteria. However, the Committee may consider any factors it deems relevant under the language that allows the Committee to consider "other factors having a bearing on the marketing of cranberries.''

With regard to criterion number 8, no testimony was given in support of deleting this item. However, the record supports that the Committee's marketing policy should be adopted prior to any recommendation for volume regulation, and should serve as the justification for such recommendation. Therefore, it should be removed as a criterion to be considered in recommending a marketing policy.

The Committee also proposed revising the dates by which the Committee must estimate the marketable quantity necessary to establish a producer

allotment program and the date by which the Committee shall submit its marketing policy to USDA for consideration. Currently, § 929.46(a) states the Committee shall estimate the marketable quantity for the following crop year each year prior to May 1. Section 929.46(b) states that as soon as practicable after August 1 of each crop year, and prior to making any recommendation for regulation, the Committee shall submit to USDA its marketing policy.

The proponents testified that May 1 is too late for cranberry producers to make informed decisions on the steps they may want to take if a producer allotment regulation were to be recommended based on the marketing policy. Witnesses testified that producers need to know the Committee's intentions as early as possible in the year so they can make decisions on whether or not to grow a crop, flood their bogs, and consider cultural practices that could save the producers money. For example, a producer may want to apply less fertilizer, herbicides, or pesticides to curtail production in the event of the implementation of a producer allotment program. The earlier that the decision is made by the Committee, the more information the producer has to plan for the necessary cultural practices for the upcoming crop. For these reasons, the Committee proposed that recommendations for producer allotment regulations be made no later than March 1.

Record testimony also establishes, however, that a withholding regulation would not have to be recommended quite as early in the year because such a regulation is imposed on handler acquisitions of cranberries rather than on the amount handlers can purchase from their growers. In the event such a regulation were contemplated, the marketing policy could be submitted later when more accurate information about the upcoming crop were available.

The dates by which recommendations for the different types of volume regulations must be made are being recommended for inclusion in § 929.51, Recommendations for regulation. This recommendation is discussed later as Material Issue Number 10.

The Committee also proposed that the Committee be required to forward its marketing policy for the following crop year prior to August 31. Currently, § 929.46(b) states that the marketing policy must be submitted to USDA after August 1 of each crop year. Although the August 31 date would allow the Committee to evaluate information that comes available in mid-August, it is inconsistent with the recommendation that any producer allotment regulation be recommended prior to March 1.

USDA is recommending that § 929.46 be amended by deleting both dates that currently appear in that section and by modifying the criteria to be considered in recommending a marketing policy as proposed by the Committee. The marketing policy would be submitted along with any recommendations for a producer allotment and/or a withholding regulation.

Material Issue Number 3—Revision of Sales History

Calculations

Section 929.48 of the order should be amended to change the way sales histories are calculated, provide more flexibility in making any further changes to the calculations, and authorize separate sales histories to be calculated for fresh and processed sales.

Section 929.49 of the order authorizes cranberry volume controls in the form of producer allotment regulations. That section provides that if USDA finds from a Committee recommendation or from other available information, that limiting the quantity of cranberries that can be purchased from or handled on behalf of growers during a crop year would tend to effectuate the declared policy of the Act, USDA shall determine and establish a marketable quantity for that year. (Marketable quantity is defined as the number of pounds of cranberries needed to meet total market demand and to provide for an adequate carryover into the next season.)

USDA would also establish an allotment percentage that is equal to the marketable quantity divided by the total of all growers' sales histories. The allotment percentage would then be applied to each grower's individual sales history to derive each grower's annual allotment. Handlers could not handle cranberries unless they are covered by a grower's annual allotment.

Section 929.48 of the order provides for computing growers' sales histories. Sales history is defined in § 929.13 as the number of barrels of cranberries established for a grower by the Committee. The Committee updates growers' sales histories each season. The Committee accomplishes this by using information submitted by the grower on a production and eligibility report filed with the Committee. The order sets forth that a grower's sales history is established by computing an average of the best 4 years' sales (out of the most recent 6 years) for those growers with existing acreage. For growers with 4 years or less of commercial sales history, the sales history is calculated by averaging all available years of such grower's sales. A new sales history for a grower with no sales history is calculated by using the State average yield per acre or the total estimated commercial sales, whichever is greater. This section also provides the authority for calculating new sales histories for growers after each crop year where a volume regulation was established using a formula recommended by the Committee and approved by USDA.

In recent years, cranberry production has exceeded market demand, resulting in building inventories and dramatic declines in grower prices. In 2000, the Committee recommended the use of a producer allotment volume regulation to bring supplies more in line with demand. A marketable quantity of 5.468 million barrels was established for the 2000–01 season, implemented through an allotment percentage of 85 percent. Many growers, particularly those with acreage 4 years old or less, indicated that the method of sales history calculation placed them at a disadvantage because they realized more production on their acreage than their sales history indicated. At that time, it was determined that approximately 30 percent of all cranberry acreage was planted in 1995 or later. With the volume of new acres within the industry, many growers were affected.

Because sales histories are based on an average of past years' sales, newer growers could be restricted to a greater extent than more established growers. This is because a cranberry bog does not reach full capacity until several years after being planted. Using an average of early years' sales (which are low) can result in sales histories below future sales potential. A more established grower, on the other hand, would have a sales history more reflective of his or her production capacity.

In recommending volume regulations for the 2000 season, the Committee considered the most equitable method of determining sales histories within the scope of the order. The final rule on volume regulation for the 2000 crop year was as flexible as the order would allow in alleviating the differential impact of the volume regulation on growers.

The Committee determined that something needed to be done to address concerns associated in the 2000 crop year with growers with newer acreage. As stated previously, there is authority under the order for calculating new sales histories for growers after each crop year where a volume regulation is established using a formula recommended by the Committee and

approved by USDA. In light of this authority, the Committee and USDA gave much thought to the most equitable method of determining sales histories in the event volume regulation was recommended in 2001. The method established specifically addressed growers' concerns by providing a more equitable determination of their sales histories. The method developed was based on industry and USDA analysis of average yields for acreage at different stages of growth. The method provides additional sales history for growers with newer acres to account for increased yields for each growing year up to the fifth year by factoring in appropriate adjustments to reflect rapidly increasing production during initial harvests. The adjustments were in the form of additional sales histories based on the year of planting.

The modified method of calculating sales histories was expected to address concerns associated with using a grower's actual sales history without taking into account anticipated production when calculating annual allotments. Ideally, in a year of volume regulation, all growers' actual crops would be reduced by the same percentage. Because of uncertainties in making crop predictions, annual allotment calculations based on averaging growers' sales histories alone does not provide any adjustment for new acres as they rapidly increase production during the first several harvests. Therefore, growers can be impacted differently depending upon their particular situation. The result is that sales histories for growers with a significant number of acres being harvested for the first, second, third, or fourth time can be below what the average crop for these growers is expected to be during the next harvest. The restriction percentages for these growers in a year of volume regulation could therefore exceed the average allotment restriction percentage. The method recommended by the Committee for the 2001–2002 season addressed that issue by minimizing the differential impact among growers with newer acreage.

The revised formula provided a specified amount of additional sales history for newer acreage based on USDA and industry analysis of cranberry production. The amount of such additional sales history depended on the year of planting. Also, the formula took into account different harvesting times for first year harvests by basing first year averages on the year planted.

The Committee recommended this method at its August 28, 2000, Committee meeting. The recommendation was set forth in a proposed rule published in the **Federal Register** on January 12, 2001, (66 FR 2838) with a comment period ending February 12, 2001.

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

At the February 2, 2001 meeting, the Committee also recommended using regulation again to continue the effort to restore economic health to the cranberry industry. The modification to the sales history calculations was incorporated into the proposed rule for volume regulation published in the **Federal Register** on May 14, 2001 (66 FR 24291) and was finalized with a publication in the **Federal Register** on June 27, 2001 (66 FR 34332). The marketable quantity for the 2001–2002 crop year was set at 4.6 million barrels and the allotment percentage was designated at 65 percent.

Specifically, the calculation of sales histories for the 2001–02 season were as follows:

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

For growers whose acreage had 5 years of sales history and was planted in 1995 or later, the sales history was computed by averaging the highest 4 of the 5 years and was adjusted with additional sales history in accordance with the formula. For growers whose acreage had 4 years of sales history, the sales history was computed by averaging all 4 years and was adjusted with additional sale history in accordance with the formula. For growers whose acreage had 1 to 3 years of sales history, the sales history was computed by dividing the total years sales by 4 and was adjusted with additional sales history in accordance with the formula.

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

In addition to the sales history for growers, additional sales history was assigned to growers specified above with acreage planted in 1995 or later. The additional sales histories depending on the date the acreage was planted are shown in Table 1.

TABLE 1.—ADDITIONAL SALES HISTORY ASSIGNED TO ACREAGE IN 2001

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

The Committee did not recommend volume regulations for the 2002–2003 crop year. The authority to use a new formula to calculate sales histories for growers is only applicable after a crop year where a volume regulation is established. Therefore, the next time the Committee recommends volume regulation, the Committee will not be able to use the formula developed for the 2001–2002 crop year. Sales history calculations would have to be accomplished using the best 4 out of 6 crop years, and no additional sales histories could be assigned to newer acreage.

The Committee's proposed amendment to § 929.48 would add to that section the formula for calculating sales histories that was used for the 2001–2002 crop year. In addition, the proposed amendments to this section include allowing more flexibility in recommending changes to the formula, adding authority to calculate fresh and processed cranberry sales histories separately, and modifying the way growers' sales histories can be adjusted to compensate for catastrophic events that impact growers' crops. This material issue will discuss all proposed

amendments to this section except for adjusting growers' sales histories to compensate for catastrophic events. That issue will be discussed in Material Issue Number 4.

Sales History Formula

The sales history formula used in the 2001–2002 crop year was specific to that particular season. The Committee developed generic language to include in § 929.48 that uses the principles of the 2001–02 formula, but can be applied to future crop years.

Under the proposed amendment, sales histories would be computed by the Committee in the following manner:

For growers with acreage with 6 or more years of sales history, the sales history would be computed using an average of the highest 4 of the most recent 6 years of sales. For growers with 5 years of sales history for acreage planted or replanted 2 years prior to the first harvest on that acreage, the sales history would be computed by averaging the highest 4 of the 5 years.

For growers with 5 years of sales history from acreage planted or replanted 1 year prior to the first harvest on that acreage, the sales history would be computed by averaging the highest 4 of the 5 years, and would be adjusted to provide additional sales history to compensate for increased production on the newer acreage. For growers with 4 years or less of sales history, the sales history would be computed by dividing the total sales from that acreage by 4, and would be adjusted to provide additional sales history to compensate for increased production on the newer acreage. These two groups of growers would be provided with additional sales history using a formula $x=(a-b)c$. The letter "x'' constitutes the additional number of barrels to be added to the grower's sales history. The value "a'' is the expected yield for the forthcoming year harvested acreage as established by the Committee. The value "b'' is the total sales from the acreage as established by the Committee. The value "c'' is the number of acres planted or replanted in the specified year. For acreage with 5 years of sales history: "a'' would equal the expected yield for the forthcoming sixth year harvested acreage (as established by the Committee); "b'' would equal an average of the most recent 4 years of expected yields (as established by the Committee); and "c'' would equal the number of acres with 5 years of sales history.

For growers with acreage having no sales history, or the first harvest of replanted acres, the sales history would be the average first year yield (depending on whether the first harvest is 1 or 2 years after planting or replanting) as established by the Committee, multiplied by the number of acres.

There are several variables in the Committee's proposed sales history formula that would have to be established through the informal rulemaking process prior to using the formula. These relate to the adjustments for newer acreage. Specifically, in the formula $x=(a-b)c$, the values of a and b would have to be established by the Committee. The value of c would be an actual acreage number, and x would be a computed value.

It is likely the Committee would use the results of the analysis performed prior to the 2001 season to set these values. However, appropriate adjustments could be made if better information becomes available in the future. Rulemaking to modify these numbers would be undertaken as necessary, and need not be done every year.

The Committee's proposed amendment of § 929.48 also provides that a new sales history would be calculated for each grower, after each crop year, using the above formula or another formula as determined by the Committee and approved by USDA. The proposed amendment further provides that the Committee, with USDA approval, may adopt regulations to alter the number and identity of years to be used in computing sales histories, including the number of years to be used in computing the average.

The Committee manager testified that § 929.48, as currently written, restricted the Committee from being able to make the best calculations of sales histories for the 2000–2001 crop year. With that section authorizing a new formula to calculate sales histories after a year of volume regulation, the Committee was able to develop a more equitable system of calculating sales histories for the 2001–02 crop year. However, the Committee did not recommend a producer allotment regulation for the 2002–2003 crop year, and as a consequence, the method of calculating sales histories reverts back to the method in which initial sales histories were calculated in 2000–2001.

The Committee manager testified that theory and practical application do not always coincide, and that as situations change, the Committee needs the opportunity to modify the regulations to correspond to industry practices, within the scope of order authority. He stated that with changing circumstances in the future, the Committee may want to consider calculating sales histories using different inputs. The proposed amendment is flexible enough to allow the Committee to modify how sales histories are calculated depending upon grower and handler practices while still maintaining the fundamental effectiveness of a producer allotment program.

Testimony indicated that providing the Committee with the flexibility to recommend changes to the formula may allow some producers, particularly those with newer or replanted acreage, to deliver additional fruit. This would improve returns to newer growers, as the recalculation of sales histories is most critical during periods when a producer allotment regulation has been established. Allowing growers additional sales history to recognize expected increases in yields on newer acres would provide these growers with a sales history more reflective of their actual sales potential.

A witness testified that a 20 percent reduction in sales history under volume regulation (through an allotment percentage of 80 percent) for growers with new acreage might actually reduce these growers' crops by 40 percent or more if most of their acreage is new. An example used was a grower with three years of harvests from one acre. In the first year he harvested 50 barrels, in the second year 90 barrels, and in the third year 130 barrels. His sales history would be an average of those years or 90 barrels. If a 20 percent volume regulation were implemented the next year, his allotment would be 72 barrels (80 percent of 90 barrels). There would not be sufficient sales history built up on that acre to allow for the fact that it could yield 250 barrels in the year of volume regulation. If this grower harvested 250 barrels and could only sell 72, a 20 percent volume regulation would be 70 percent to this grower.

The intent of the revised method is to predict what the production of new acreage would be during the upcoming year so that the crop reduction for growers with new acreage is similar to that of growers who do not have new acreage.

Some growers believed the revised formula was too restrictive while others thought it was not restrictive enough. A grower opposed to this method of computing sales histories testified that providing additional sales histories to newer growers encourages more production. She testified that because of strong prices, many new growers entered the cranberry business between 1990 and 1997 without looking at the long-range impact. This increase in acreage is what caused the current oversupply situation. This witness

believed that it was each grower's responsibility to guard against this impact. Growers should not be rewarded with additional sales history for making unwise business decisions.

The record indicates that in developing this method, the Committee assembled yield data on over 10,000 cranberry acres to understand what yields are typical for new acreage over the first 5 years after planting. This data provided the basis for establishing the sales history formula used for the 2001 season. This data also demonstrated the need for this change.

USDA worked with cranberry handlers in assembling data. Handlers were asked to provide information on growers' yield per acre for yearly harvests made 1, 2, 3, 4 and 5 years after planting for acres harvested over the past 5 years. The handlers were also asked to indicate which varieties were planted, specifying the proportion of total new acreage dedicated to each variety.

Two large handlers supplied detailed information relative to harvested acres. To supplement this information, data was also gathered from growers who delivered cranberries to other handlers. This additional data collection was accomplished to broaden the scope of the industry data used in the analysis.

The data combined grower information from all cranberry producing regions, as well as data for all varieties and years of birth (original date of planting). The data was analyzed to determine what an average grower, growing in average conditions, would experience in terms of yield per acre if he or she planted new acreage and then harvested it 5 consecutive years thereafter.

The results were divided into two categories: Group A (growers harvesting for the first time 1 year after planting) and Group B (growers waiting 2 years before the first harvest). The data included the first harvest and four subsequent harvest yields for groups A and B, respectively, and was analyzed to determine the average yields and rate of increase in yields over the first 5 harvests for each grower/bog category.

The analysis of yield progression over the first 5 harvests for groups A and B revealed significant differences in first harvest yields, but supported the conclusion that yield progression rates for subsequent years were comparable. Based on this observation, yield rates and expected yield/sales histories were averaged based on the sample size from each group. These averages were 50, 131, 197, 227 and 250 barrels per acre for acres harvested the first, second, third, fourth and fifth year after planting, respectively.

Since these numbers are based on average yields for the sample groups, it is reasonable to conclude that the yields of approximately 50 percent of the growers impacted by this proposal would be higher than the average. To accommodate as many growers as possible, it was agreed to adjust the averages upward by 25 barrels which would result in growers receiving a higher amount of additional sales history under the formula. This would also assure that first harvests (acreage with no sales history) which were provided the State average yield as a sales history in the 2000 crop year would receive a comparable sales history for 2001. The average expected yields for each year, increased by 25 barrels, were 75, 156, 222, 252 and 275 barrels per acre for acres harvested the first, second, third, fourth and fifth year after planting, respectively.

These yield figures were incorporated into the formula for determining the additional sales history per acre that growers would be provided, and were applied to acreage planted in 1995 or later.

In addition to the actual sales history, such growers were provided additional sales history to account for expected increased production in the forthcoming year.

The formula was a tool used to make an appropriate adjustment in sales histories for growers harvesting young acreage, which was not yet producing at optimal capacity. The formula was based on industry data from all growing areas and from all sizes of growing operations, and used a higher than mid range of this data.

USDA does not agree that new plantings would be encouraged by adding this authority to the order or that growers are being rewarded for making poor business decisions. Incorporating this method into the order would address equity concerns expressed during the volume regulations implemented in 2000 and 2001. The formula used in the 2001 season was an improvement from the formula used in 2000. However, the way the current order language is written, this improved method cannot be used the next time volume regulations are implemented because the revised formula can only be implemented after a year of volume regulation. The formula would compensate growers for anticipated production on recently planted acres that do not have sales histories reflective of current production potential. Accommodating the new acreage is an important element in any attempt to equitably implement a producer allotment volume regulation.

The proposal would also authorize the Committee, with USDA approval, to adopt recommendations to alter the number and identity of years to be used in computing sales histories, including the number of years to be used in computing the average. This would allow the Committee to have the flexibility to address unforeseen events that occur that would make it appropriate to modify the number of years used in computing sales histories.

Record evidence supports amending § 929.48 by changing the way sales histories are calculated as proposed by the Committee and allowing for more flexibility in recommending changes to the sales history formula. Therefore, this proposal is recommended for adoption.

Calculations of Fresh and Processed Cranberry Sales Histories

The Committee also proposed that sales histories, starting with the crop year following adoption of this amendment, should be calculated separately for fresh and processed cranberries. In a year an allotment percentage is set, that percentage would be applied only to a grower's processed sales history if fresh fruit is exempt from regulation (as it was in the recent 2 years of regulation). If fresh fruit was not exempt from volume regulation, the allotment percentage would be applied to a grower's total sales history (fresh and processed combined).

As proposed, the amount of fresh fruit sales history may be calculated based on either the delivered weight of the barrels paid for by the handler (excluding trash and unusable fruit) or on the weight of the fruit paid for by the handler after cleaning and sorting for the retail market. Handlers using the former calculation would allocate delivered fresh fruit subsequently used for processing to growers' processing sales. Fresh fruit sales history, in whole or in part, may be added to processed fruit sales history with the approval of the Committee in the event that the grower's fruit does not qualify as fresh fruit at delivery.

Testimony revealed that this proposal would address some of the inequities experienced in the last two volume regulations. Fresh and organic fruit were exempt from the 2000 and 2001 volume regulations under the authority of § 929.58 which provides that the Committee may relieve from any or all order requirements cranberries in such minimum quantities as the Committee, with the approval of USDA, may prescribe. It was determined that fresh and organic fruit did not contribute to

the surplus. Fresh cranberry sales constituted less than 5 percent of the cranberry market. Organically grown cranberries comprised an even smaller portion of the total crop, about 1,000 barrels sold annually. All fresh and organically grown cranberries could be marketed and did not compete with the processed market. For this reason, the Committee recommended that fresh and organically grown cranberries be exempt from volume regulations.

In both years, fresh fruit sales were deducted from sales histories and each grower's sales history represented processed sales only. In 2000, concerns were expressed that this exemption would give an unfair advantage to some cranberry processors (those that did not handle fresh fruit) and to their growers. Because of the timing of the rulemaking, it was decided by the Committee not to recommend any additional changes to the fresh fruit exemption for 2000. However, the Committee would consider the way fresh fruit is handled under a volume regulation in future years. In 2001, the fresh fruit exemption was still recommended to be deducted from sales histories but the exemption was clarified so that fresh fruit was handled as it was intended by the Committee.

In addition, in both years of volume regulation, in the event that the growers' fruit did not qualify as fresh fruit at delivery, the sales from that fruit were added to the growers' processed fruit sales histories. Testimony indicated that in the fresh fruit industry, there are instances when growers deliver fresh fruit that fails the handler's fresh fruit specifications and therefore is converted to processing fruit. In this case, the fruit not used as fresh would be applied to that grower's processed fruit sales history.

It is possible that exempting fresh fruit from volume regulation may not be appropriate in future years. Testimony indicated that because of the exemption from volume regulation, there was an increase in the amount of fresh fruit produced. Many growers took advantage of the exemption and sold fresh fruit when they normally would not. A fresh fruit handler testified that many handlers had more fresh fruit than could be sold. The price fell from 1999 to 2000 and remained stable for 2001.

For this reason and to have sales histories more reflective of actual sales, the Committee is recommending that the Committee begin calculating separate sales histories for fresh and processed sales. Testimony revealed that this proposal would address the inequities experienced in the last two volume regulations.

Testimony indicated the reason for incorporating language specifying that the amount of fresh fruit sales history may be calculated based on either the delivered weight of the barrels paid for by the handler (excluding trash and unusable fruit) or on the weight of the fruit paid for by the handler after cleaning and sorting for the retail market was because handlers process growers' fruit differently. For example, the major cooperative accounts for fresh fruit on a delivered basis. A major cooperative grower delivering 1,000 barrels of fresh fruit would be paid for 1,000 barrels of fresh fruit. Samples are taken at delivery and premiums are paid based on quality. On the basis of its packed out and sold fresh fruit, the cooperative assigns a fresh fruit sales history back through to its growers proportional to their original deliveries.

Independent handlers pay growers for fruit on a packed out basis and pay their growers based on their individual pack outs. If a grower delivers 1,000 barrels to an independent handler, and the pack out is 80 percent, the grower would be credited with 800 barrels of fresh fruit and 200 barrels of processed fruit.

It is not the intent of this proposal to force handlers to change the way they do business with their growers. Therefore, this language acknowledges the different ways handlers pack fruit and allows them to continue to do so.

The Committee would calculate the sales histories on fresh and processed sales separately every year, not just in years of volume regulation.

Record evidence supports modifying the formula for calculating sales histories, allowing for more flexibility in recommending changes to the formula, and adding authority for segregating fresh and processed sales. Therefore, it is recommended that these amendments to § 929.48 be adopted.

Material Issue Number 4—Catastrophic Events That Impact Growers' Sales Histories

The order should be amended to allow more liberal adjustments in growers' sales histories when they lose production due to catastrophic events.

The order currently provides in § 929.48(a)(4) that if a grower has no commercial sales from such grower's cranberry acreage for three consecutive crop years due to forces beyond the grower's control, the Committee shall compute a level of commercial sales for the fourth year for that acreage using an estimated production, obtained by crediting the grower with the average sales from the preceding 3 years during which sales occurred. Any and all relevant factors regarding the grower's lost production may be considered by the Committee prior to establishing a sales history for such acreage.

During the two recent seasons when volume regulations were in place, the Committee appointed an appeals subcommittee for growers who were dissatisfied with their sales histories as calculated by the Committee. Growers could appeal if they believed the figures used in the sales history calculation were incorrect or if they believed the calculation was incorrectly performed by Committee staff.

Testimony revealed that in 2001, there was only one situation that actually met the 3 years of no production criteria. A grower's acreage in Massachusetts was destroyed from chemical contamination not of his doing and this grower was compensated with additional sales history.

The Committee's proposal would provide more flexibility in this provision by authorizing the Committee to recommend rules and regulations to adjust a grower's sales history to compensate for catastrophic events that impact a growers' crop for more than 2 years. At the hearing, Committee witnesses modified their proposal to make this provision more flexible by removing the requirement that a grower's crop had to be impacted for more than 2 years.

The Committee manager testified that growers do experience catastrophic events and forces beyond their control that do not totally destroy their ability to produce a portion of their crop. Using the current criteria of a total loss for 3 concurrent years, few growers, if any, would ever qualify for such an adjustment.

According to the record, there were many growers who had situations where their crop was not totally destroyed for 3 consecutive years, but the losses incurred negatively impacted their sales history. The Committee was unable to authorize any adjustments.

A grower testified that his crop was impacted by the State of Wisconsin Department of Natural Resources (DNR) land that borders on his property. The DNR applied a chemical on a high heat day that spread across the grower's property. This situation destroyed a good percentage of his marsh, and dramatically impacted his crop for two years. The Committee was unable to adjust his sales history because it was not a total loss that impacted his crop for 3 consecutive years.

Under this proposal, this grower could have been provided with additional sales history to compensate him for his losses. Specifically, this grower produced 20,000 barrels of

cranberries and his allotment was 9,000 barrels. The 2001–02 volume regulation thus had a greater impact on him than on other growers.

If the language was kept at more than 2 years of loss as originally proposed by the Committee, this grower would still not have been provided with additional sales history. This is one of the reasons the Committee recommended removing the more than 2-year requirement and leaving it to the Committee's discretion to establish guidelines through the rulemaking process to determine if the grower should be provided additional sales history. The reason the Committee included the more than 2 years restriction initially was because sales histories are based on the best 4 out of 6 years. A grower's calculation of initial sales history would allow the 2 lowest years to be excluded in the calculation. The Committee thought this would cover any situation involving 1 or 2 years of losses. However, the Committee believes unique situations could occur where the losses on a grower's crop for even a single year could warrant an adjustment to that grower's sales history.

Other discussions at the hearing on this proposal pertained to what would constitute a ''catastrophic'' event. The Committee recommended changing the terminology from the current language which states ''forces beyond the growers' control'' to ''catastrophic events'' because they wanted to ensure that normal agricultural problems that occur, such as long periods of rain that may have a detrimental impact on a grower's crop or hail damage, would not be situations where growers would be entitled to additional sales histories. It was testified that excessive rain or hail is an event that is beyond a grower's control, but it may not be a catastrophic event. Some of these situations would be covered by crop insurance, so the grower is already being compensated for his loss.

Testimony indicated that the intent of the proposal is to allow the Committee to recommend, through informal rulemaking, specific determinations of what catastrophic events would entitle growers to adjustments in their sales histories. The regulation should benefit growers by allowing them to understand what situations would entitle them to such adjustments. It could also help reduce the number of appeals filed and reduce administrative time and expenses in reviewing appeals.

Testimony also indicated that each case should be reviewed and considered on its own merits (within guidelines established through the rulemaking process) and that less than a 100 percent loss can significantly impact a grower's sales history. The proposed amendment addresses this situation by not requiring a grower to have suffered a total crop loss before being eligible for an adjustment in his or her sales history.

Testimony indicated that the proposed amendment would have a positive impact on producers, as the Committee would be in a position to compensate growers who experienced losses due to catastrophic events. The Committee would recommend procedures and guidelines to be followed in each year a volume regulation is implemented.

Allowing the Committee to make such recommendations through informal rulemaking would provide the flexibility to ensure the best interests of the growers are being served.

Record evidence supports allowing adjustments in sales histories for catastrophic events that impact a grower's crop. The procedures and guidelines would be recommended by the Committee and approved by USDA. Therefore, the addition of paragraph (e) to § 929.48 is recommended to be adopted.

Material Issue Number 5—Remove Specified Dates Relating To Issuance of Annual Allotments

Section 929.49, Marketable quantity, allotment percentage, and annual allotment, should be revised by removing specified dates relating to the issuance of annual allotment; clarifying the provision related to calculation of the allotment percentage; and updating information growers need to submit to the Committee to receive annual allotments.

Currently, § 929.49 provides that when a producer allotment regulation is implemented, USDA will establish an allotment percentage equal to the marketable quantity divided by the total of all growers' sales histories. The allotment percentage is then applied to each grower's sales history to determine that individual's annual allotment. All growers must file an AL–1 form with the Committee on or before April 15 of each year in order to receive their annual allotments. The Committee is required to notify each handler of the annual allotment that can be handled for each grower whose crop will be delivered to such handler on or before June 1.

Proponents testified that the Committee's experience during the 2000 and 2001 crop years has proven that maintaining a specified date by which growers are to file a form to qualify for their allotment and for the Committee to notify handlers of their growers' annual allotments has been difficult. The proposed amendment would delete the specified dates and allow a more appropriate date by which growers are to file forms and the Committee is to notify handlers of their growers' annual allotments to be established through informal rulemaking. The Committee would like to establish dates that the industry can realistically meet each season when a volume regulation is implemented. Because volume regulation was not recommended until the end of March, growers had difficulty in submitting the required reports in a timely manner. Additionally, the rulemaking process to establish the allotment percentage had not been completed by June 1. Therefore, the Committee was unable to notify handlers of their growers' allotment by the specified deadline. For these reasons, the Committee should have the flexibility to recommend other dates to USDA for approval that can realistically be met by the industry and serve the purposes of the marketing order. With this proposed amendment, reasonable filing dates could be established in line with the timing of the recommendation and establishment of volume regulation.

The Committee also recommended clarifying the explanation of how an allotment percentage is calculated. Currently, § 929.49(b) states that such allotment percentage shall equal the marketable quantity divided by the total of all growers' sales histories. It does not specify that ''all growers'' sales histories' includes the sales histories calculated for new growers. The Committee has proposed in this amendment proceeding that sales histories given to new growers each season (growers that have no prior sales history) should also be included in the calculation of the allotment percentage. Section 929.48(a)(5) as proposed would provide that the Committee compute a sales history for a grower who has no history of sales associated with such grower's cranberry acreage during a crop year when a volume regulation has been established, by taking the average of the first year yields as established by the Committee and multiplying it by the number of acres. During the two recent years of volume regulation, new growers' sales histories were included in the calculation of the allotment percentage. The amendment is merely a clarification to ensure that total sales histories are used in this calculation.

The Committee also proposed revising the information required to be submitted by growers to qualify for an annual allotment. Currently, § 929.49(d) provides that the Committee shall require all growers to qualify for allotment by filing with the Committee,

on or before April 15 each crop year, a form wherein growers include the following information: (1) The location of their cranberry producing acreage from which their annual allotment will be produced; (2) the amount of acreage which will be harvested; (3) changes in location, if any, of annual allotment; and (4) such other information, including a copy of any lease agreement, as is necessary for the Committee to administer the order. Such information is gathered by the Committee on a form specified as the AL–1 form.

The proposed amendment would modify the criteria by only requiring pertinent information to be required by growers on the AL–1 form. Record evidence showed that growers are assigned a grower number and the amount of acreage on which cranberries are being produced is maintained. However, the proponents testified that the location of the cranberry producing acreage is not maintained. Therefore, the Committee does not see the need to collect this information on the form. The form also asks about changes in location, if any, of their annual allotment including the lease agreement. Annual allotment is linked to a grower's cranberry producing acreage and, since the acreage cannot be moved from one location to another, information on changes in location is not relevant. Therefore, the Committee has proposed that the information required to be submitted by growers be revised by deleting the information that the Committee does not need to operate a producer allotment program. Other information that is currently requested (including identifying the handler(s) to whom the grower will assign their allotment) would remain unchanged.

The modifications proposed by the Committee add flexibility and clarity to the order and are therefore recommended for adoption.

Material Issue Number 6—Clarify How the Committee Allocates Unused Allotment to Handlers

Section 929.49 should be amended to clarify the method by which the Committee allocates unused allotment to handlers having excess cranberries. Specifically, the Committee would be required to make such a distribution in a way that is proportional to each handler's total allotment.

Currently under the producer allotment volume regulation features of the order, § 929.49(g) provides that handlers who receive more cranberries than the sum of their growers' annual allotments have "excess cranberries" and shall notify the Committee. Handlers who have remaining unused allotment are "deficient" and shall notify the Committee. The Committee is required to equitably distribute unused allotment to all handlers having excess cranberries.

This provision of the order allows handlers to handle additional cranberries by providing them with unused allotment. During years of a producer allotment volume regulation program, handlers cannot handle cranberries unless those berries are covered by an allotment.

The proponents testified that there has been a debate in the industry on the interpretation of what equitable distribution means and how it should be accomplished. To add specificity, the Committee proposed replacing the words "equitably distribute" with "proportional to each handler's total allotment".

The proponents further testified that the distribution of unused allotment would only be to those handlers who have excess fruit and are in need of allotment to cover that fruit. Such handlers would then receive any available allotment in proportion to the amount such handler handles. Record evidence indicated that if handlers had excess fruit and needed allotment from the Committee, they would receive up to the amount they needed to cover that excess fruit. Allotment would only be distributed proportionately to handlers when there are more requests for unused allotment than available unused allotment.

This proposed amendment is supported by record evidence and is recommended for adoption.

Material Issue Number 7—Growers Who Do Not Produce a Crop During a Year of Regulation and Assignment of Their Allotment

Section 929.49 should be amended to eliminate the requirement that growers assign any unused allotment to their handlers under certain circumstances.

As previously discussed, each year a producer allotment regulation is in place, each cranberry grower receives an annual allotment. This allotment represents the volume of that grower's cranberries that can be handled.

Currently, § 929.49(f) requires growers who do not produce cranberries equal to their computed annual allotment to transfer their unused allotment to such growers' handlers. The handlers are then required to equitably allocate the unused allotment to growers who deliver excess cranberries to such handlers. Unused allotments remaining after all such transfers have occurred are then transferred to the Committee.

The proponents testified that one concern of growers was what happens to a grower's annual allotment if the grower decides not to grow a crop during a year of volume regulation. Currently, such growers have no alternative but to transfer their allotments to their contracted handlers. The handlers, in turn, can reallocate those growers' annual allotments among growers delivering excess cranberries to that handler. Growers felt that the annual allotments are based on their sales and that they should have more control over what happens to their unused annual allotment. Further, they believed that their decision not to grow a crop in a year of oversupply should not result in other growers being able to deliver a greater portion of their crops. This dilutes the effectiveness of the allotment regulation.

Concerns were raised at the hearing regarding the contractual arrangements that growers may have with their handlers, and how this amendment could affect those arrangements. The proponents testified that this amendment is not intended to encroach on private contractual arrangements between growers and handlers. Such arrangements fall outside the scope of the order.

One grower testified that if a grower does not want to transfer the allotment to his or her handler, it should be given back to the Committee and the Committee should be accountable for all the allotment that is available. It was supported that growers who do not choose to grow a crop should not be required to transfer such allotment to their handler.

The hearing testimony did not explain what happens to the allotment if a grower does not grow a crop and does not transfer the allotment to such grower's handler. It was suggested that the Committee should have informal rulemaking authority to further define what would happen to such allotment.

The concept of allowing growers to choose whether or not to assign unused allotment to their handlers was not opposed at the hearing. The modification proposed by the Committee is recommended for adoption.

Material Issue Number 8—Transfers of Allotment

Section 929.50 of the order should be amended to allow growers to transfer their allotments during a year of a producer allotment volume regulation, and to provide that a sales history remain with the lessor when there is a total or partial lease of cranberry acreage to another grower.

As previously discussed, in years of a producer allotment volume regulation, an allotment percentage is established and is applied to each grower's sales history to determine that grower's allotment. A grower's allotment represents the amount of cranberries a handler may purchase from or handle for that grower. A complete discussion of how growers' sales histories are calculated is contained in the findings and conclusions regarding Material Issue No. 3.

Currently, § 929.50, Transfers, does not allow the direct transfer of allotment between growers. What it does provide is that in the event cranberry acreage is sold or leased, the sales history associated with that acreage is transferred to the buyer or lessor. Therefore, the only option available to a grower to accomplish a transfer of allotment (aside from purchasing additional acreage) is to complete a lease agreement with another grower. Section 929.50 also provides that growers who lease their acreage must file a lease agreement with the Committee before the Committee recognizes it. The Committee will not recognize such lease agreement until the Committee is in receipt of a completed lease form. Total and partial leases of cranberry acreage require the lessor to transfer the appropriate sales history associated with the acreage being leased.

The Committee manager testified that during 2000 and 2001, when producer allotment volume regulations were implemented, a grower who wanted to obtain more allotment from another grower to cover barrels harvested from his or her acreage had to enter into a short-term lease agreement. Such a legal agreement had to be filed with the Committee. Usually this agreement was just for 30 to 60 days in duration, just to allow growers to transfer sales history (and, indirectly, allotment) to one another.

The Committee manager testified that many of these lease agreements were initiated during the two years of volume regulation and created a burden on the Committee staff as well as on the growers involved. The Committee staff had to process the transfers, keep track of the transfers, and then reverse the transfers within a relatively short period of time. Also, the Committee staff had to recalculate the allotment available to each handler since it may have changed when growers' sales histories and allotments are recalculated under the lease agreement. A problem many growers did not consider at the time these transfers were taking place is that the sales history transferred from one grower to another is combined with that second grower's sales history. The allotment percentage is then applied to that grower's total sales history. This may not result in as much additional allotment as that grower expected. Witnesses testified that this revised process would not affect growers' sales history calculations since allotment would be transferred, not sales histories.

Record evidence showed that this complex transfer process is necessary because there is no method currently available under the order for direct transfers of allotment among growers. The proposed amendment would allow a simple transfer of allotment between growers.

Under this proposed amendment, growers delivering to the same handler could transfer allotments among themselves freely. Growers delivering to different handlers who wish to transfer allotment would have to receive prior consent in writing from the respective handlers, and provide documentation to that effect to the Committee prior to the transfer of allotment. Record evidence shows that the requirement for handler notification and consent is necessary so that handlers know how much allotment they will have available during the crop year.

To ensure that the Committee is aware of allotment transfers, growers would be required to file appropriate forms with the Committee by such date as the Committee may determine. The Committee manager testified that such form would likely include such information as the name of the two growers involved in the transfer, the amount of allotment being transferred, and the handler or handler(s) to whom the growers deliver their crops.

The Committee manager also testified that the Committee should be informed by August 1 of the transfer. This date would be 30 days prior to the beginning of the crop year and would allow the Committee staff to complete the required paperwork on the transferred allotment. One witness testified, however, that growers should be able to transfer allotment through harvest. Growers should be allowed to transfer through harvest because they would not know until harvest how much unused allotment they would have available or how much additional allotment they would need. The witness suggested a modification to change the deadline for transfers from August 1 to December 1.

USDA is modifying the Committee's proposal. The order should provide that the date by which allotment transfers must be completed be established through informal rulemaking. The Committee needs to evaluate whether a later date would be administratively feasible to accomplish and consider the needs of the growers in determining this date. No opposing testimony was presented on this proposed amendment. Therefore, this portion of the proposal is recommended with a modification.

With regard to lease agreements, the Committee manager testified that currently, the lessor and lessee must provide written details regarding the lease to the Committee. The lessee then reports and is credited with the sales from the leased acreage during the lease period. Sales from leased acreage are calculated to determine the lessee's new sales history. At the end of the lease period, barring renewal, the cranberry acreage and all sales history associated with that leased acreage reverts back to the lessor or the owner. The sales history includes all sales history accumulated during the lease period attributable to the leased acreage. The lessee would be required to notify the handler or handlers to whom they are delivering the sales from the leased acreage to be credited to the lessor. It would be the responsibility of the lessor to ensure that the handler receiving the cranberries from the leased acreage is correctly crediting the lessor with the appropriate sales figures.

The manager testified that most leases are a temporary situation, and therefore, most of the grower paperwork is unnecessary because eventually the sales history attributable to the leased acreage would revert back to the lessor or the owner of the acreage. Thus, this proposed amendment provides that in cases where acreage is leased, the sales history associated with that acreage would remain with the landowner. However, the amount of allotment that would be transferred to the lessor could be a part of the lease agreement between the parties involved.

There was no opposition testimony on this proposal. This proposed amendment would simplify the process for transfers of allotment and is recommended for adoption.

Material Issue Number 9—Authorizing Producer Allotment and Withholding Programs in the Same Year

Section 929.52, Issuance of regulations, should be amended to authorize the implementation of the producer allotment and withholding programs in the same year. Currently, that section provides that USDA may regulate the volume of cranberries that may be handled in a crop year by either fixing free and restricted percentages (withholding) or by establishing an allotment percentage (producer allotment).

The record evidence is that that Public Law 107–76, enacted on November 28, 2001, amended the Agricultural Marketing Agreement Act of 1937 by adding the following provision to section 8c(1): ''The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year.''

Therefore, this proposed amendment is intended to bring the marketing order into conformity with the Act. The Committee manager testified that operating both programs during the same year would likely serve as a safety valve. Since the producer allotment program would be implemented early in the year prior to harvest, it could be set too low. A withholding program could therefore be implemented to take additional fruit off the market. The withholding regulation could also be suspended later in the year if it was deemed to be unnecessary.

One witness testified that he was in favor of the amendment but was not clear how both forms of volume regulation would operate in the same year of regulation. The Committee would have to address how these two programs should be used together in a given year. This is an area that could be explored in the economic analysis the Committee would need to submit in support of such a recommendation for regulation, and would assist USDA in its review of that recommendation.

This proposed amendment would bring the order into conformity with the enabling statute. Thus, it is being recommended for adoption.

Material Issue Number 10—Dates for Recommending Volume Regulations

Section 929.51 of the order should be amended to provide deadlines for Committee recommendations for volume regulations. Specifically, if only one type of volume regulation were recommended, a producer allotment regulation would have to be recommended by March 1 each year, and a withholding program would have to be recommended before August 31. However, in the event the Committee determines it desirable to recommend both a producer allotment and withholding regulation, such a recommendation would have to be made by March 1. Currently, § 929.51 does not specify any certain dates by which the Committee must make a recommendation to USDA for volume regulation of the upcoming crop.

As previously discussed, to implement both types of volume regulations during the same year, the Act requires such a Committee recommendation prior to March 1. This deadline is proposed to be added to § 929.51 rather than to § 929.52 as proposed by the Committee. There are no dates specified in the marketing order by which the Committee must recommend a handler withholding or producer allotment regulation when only one type of volume regulation is chosen.

The Committee manager testified that recommending a producer allotment program prior to March 1 would be beneficial to growers. Growers have indicated they need to know as soon as possible whether the Committee is going to recommend a regulation, since a producer allotment program permits handlers to acquire only a portion of their growers' crops. The Committee's decision influences whether growers decide to cut back on purchases of chemicals and fertilizer or to take acreage out of production. The later the decision is made, the greater the chances are that growers will already have started working on preparing their bogs to produce a full crop. Therefore, it is in the best interest of the growers to have a Committee recommendation for a producer allotment program prior to March 1.

The witness further testified that the Committee would hold its regularly scheduled winter meeting in February, at which time the Committee would review the most current information on the upcoming crop.

It was also testified and supported that the March 1 date should be flexible to allow for unforeseen circumstances that could arise that could prevent the Committee from estimating the marketable quantity prior to that date. Proponents testified that the Committee may not be able to reach a consensus by that date and may need more time to review the current situation within the industry. Although the March 1 deadline would apply in most years, USDA is recommending that § 929.51 include a provision that an exception could be made when unforeseen circumstances preclude the Committee from making an informed recommendation that early in the year. This modification is consistent with record testimony and the Committee's brief.

Regarding the handler withholding program, the Committee's original proposal indicated that such a regulation should be made as soon as possible after August 1. The record supports a modification—that free and restricted percentages should be recommended no later than August 31.

The Committee manager testified that the Committee, prior to August 31, should recommend a handler withholding program. This would provide the Committee staff ample time to prepare reports based on handler inventory reports through July 31. The Committee could then meet at its summer meeting (typically held in August) and review the most complete and accurate information available to make a decision on the implementation of such program.

Some concerns were raised at the hearing that establishing a program at the required dates would make the percentages inflexible to crop conditions as they occur. However, any established regulation could be modified, suspended, or terminated pursuant to § 929.53 as crop or market conditions necessitate such action.

Therefore, the Committee's proposal, with appropriate modifications, is recommended for adoption.

Material Issue Number 11—Exemptions From Regulations

Section 929.58 of the order should be amended to add authority to exempt fresh, organic or other types or forms of cranberries from any or all regulatory requirements imposed under the order.

Currently, § 929.58 provides authority for USDA to relieve from any or all requirements under the order, the handling of cranberries in such minimum quantities as the Committee may recommend. In 2000 and 2001, the Committee recommended the implementation of producer allotment volume regulations. In both years, an exemption from the volume regulations was provided for fresh and organic cranberries. It was determined that such fruit comprised a small portion of the crop, did not compete directly with processing fruit cranberries, and did not add materially to the industry surplus of fruit.

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

are grown and harvested accordingly. Only the lower quality fruit from a fresh bog goes to processing outlets. Organic cranberries are a growing niche market and it was believed that regulating them could have had an adverse effect on the production and marketing of this product.

In 2000, the first time a volume regulation was implemented in nearly 35 years, fresh and organic fruit was exempt from that regulation. The industry experienced an increase in fresh fruit production because of the exemption. This was caused by processed fruit growers changing to fresh fruit production. Also, the intent of the fresh fruit exemption in the 2000–01 volume regulation was to only exempt cranberries going to retail outlets as fresh cranberries, and questions arose as to what constituted ''fresh'' under the regulations.

Therefore, the Committee recommended this change to the exemption provision to clarify the current language and provide guidelines for the specific forms and types of cranberries that can be exempted. The Committee manager testified at the hearing that the different forms or types of cranberries might include cranberries sold as packed-out fresh fruit and/or organically grown cranberries sold as fresh or processed fruit.

The witness also testified that extending a minimum exemption to particular forms or types of cranberries during a period when a regulation was in effect would ensure that sufficient fruit would be available to meet current demand, and would encourage the industry to develop new markets. The amendment, however, would not limit the different forms or types of cranberries the Committee could consider in its marketing policy. Such recommendation for exempting cranberries from volume regulations would take place in the Committee's deliberations for volume regulation and could be accomplished through informal rulemaking.

The Committee manager testified that the types of cranberries could be extended to include different varieties of cranberries. For example, the witness testified that the Stevens variety of cranberries could be exempted if circumstances warranted such an exemption.

The Committee would also determine what particular regulations the exemption would apply to. For example, for the 2000 and 2001 seasons, fresh and organic cranberries were exempt only from the volume regulation provisions, but handlers still had to file reports and pay assessments on those cranberries. The Committee could make a recommendation to exempt specific types or forms of cranberries from any or all of the other regulations in effect under the marketing order.

Therefore, this decision recommends that the exemption provision in § 929.58 be modified to clarify the current language and provide that specific forms and types of cranberries can be exempted from any or all regulatory requirements. There was no opposition testimony presented on this issue.

Material Issue Number 12—Outlets for Excess Cranberries

Section 929.61 of the order should be amended to broaden the scope of noncommercial and noncompetitive outlets authorized as outlets for excess cranberries.

Under the order, the producer allotment program provides for limiting the amount of the total crop that can be marketed for normal commercial uses. If a producer allotment program were implemented, USDA would establish an allotment percentage that would equal the marketable quantity divided by the total of all growers' sales histories. The allotment percentage would be applied to each grower's individual sales history to derive each grower's annual allotment. Handlers cannot handle cranberries unless they are covered by a grower's annual allotment.

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

Section 929.59 defines excess cranberries as cranberries withheld by handlers after all unused allotment has been allocated. It also provides for handlers to notify the Committee by January 1 of a written plan to dispose of excess cranberries and to dispose of them by March 1.

There is no need to limit the volume of cranberries that may be marketed in noncommercial and noncompetitive outlets. Section 929.61 of the order designates outlets for handlers to dispose of excess cranberries. Specifically, the provision establishes noncommercial outlets as charitable institutions and research and development projects approved by USDA for the development of foreign and domestic markets, including, but not limited to, dehydration, radiation, freeze drying, or freezing of cranberries. Noncompetitive outlets are established under § 929.61 as any nonhuman food use (animal feed) and foreign markets, except Canada. Canada is excluded because significant sales of cranberries to Canada could result in transshipment back to the United States of the cranberries exported there. This could disrupt the U.S. market, contrary to the intent of the volume regulation.

To ensure that excess cranberries diverted to the specified outlets do not enter normal marketing channels, certain safeguard provisions are established under § 929.61. These provisions require handlers to provide documentation to the Committee to verify that the excess cranberries were actually used in a noncommercial or noncompetitive outlet. This section also provides that the storage and disposition of all excess cranberries withheld from handling shall be subject to the supervision and accounting control of the Committee. In addition, the Committee, with USDA approval, may establish as needed rules and regulation for the implementation and operation of this section.

Under the final rule establishing and implementing the 2000 volume regulation, regulations pertaining to excess cranberries were established under § 929.104. These regulations include all outlets mentioned in § 929.61. The Committee recommended foreign markets be excluded as outlets for excess cranberries because the industry is actively selling cranberries in at least 54 foreign countries today. When foreign markets were listed as potential outlets for excess cranberries, cranberry exports were not as significant to the industry as they are today. However, it was determined that because excess cranberries could not be ''handled'' and fresh cranberries were exempt from the 2000 volume regulation, this recommendation was deemed unnecessary. However, USDA revised § 929.104 to clarify that excess cranberries cannot be processed and sent to foreign markets.

In the 2001 volume regulation, the provisions on outlets for excess cranberries were modified to broaden the scope of research and development projects authorized as outlets for excess cranberries. It was determined by the Committee that the provision from the 2000 volume regulation regarding research and development projects was too restrictive and could exclude some outlets for excess cranberries that could be deemed noncommercial and noncompetitive. The Committee unanimously recommended modifying paragraph (a)(4) of § 929.104 to state that any research and development projects approved by the Committee would be eligible as outlets for excess cranberries. This provided more flexibility in determining if a specific project could

be considered noncompetitive or noncommercial. Research and development projects were not limited to dehydration, radiation, freeze-drying, or freezing of cranberries for the development of foreign markets.

The Committee proposed amending § 929.61 to provide more flexibility in establishing outlets for excess cranberries if volume regulations are recommended and implemented in the future. Testimony revealed that adoption of this proposal would provide the Committee, with USDA's approval, the ability to recognize and authorize the use of additional or new noncommercial and/or noncompetitive outlets for excess cranberries through informal rulemaking.

Mr. Gregory Gitter, representing a Wisconsin cooperative, also proposed amending § 929.61. His proposal recommended that foreign markets only be authorized as outlets for excess cranberries in countries whose total annual consumption is less than the equivalent of 20,000 barrels of cranberries and/or cranberry products. According to his testimony, the purpose of the proposal is to expand noncompetitive outlets for excess cranberries by clearly defining in what countries excess cranberries can be used. In this regard, Mr. Gitter testified that this specific information would allow handlers to better manage their marketing strategies of excess cranberries.

In support of the Committee's proposal, the Committee manager testified that the current provisions did not allow the Committee the ability to recognize and authorize the use of additional or new noncommercial or noncompetitive outlets during the last two volume regulations. During the 2001 regulation, some handlers suggested outlets to dispose of their excess cranberries, which could have been deemed noncommercial or noncompetitive, but were not allowed based on the current provisions.

The provisions regarding noncommercial outlets are currently restricted to only charitable institutions and research and development projects approved by USDA for the development of foreign and domestic markets, including, but not limited to, dehydration, radiation, freeze-drying, or freezing of cranberries. The provisions regarding noncompetitive outlets are restricted to any nonhuman food use and foreign markets, except Canada.

The Committee's proposal would expand the noncommercial outlet provisions by specifying charitable institutions and research and development projects, but not limiting the authority to these outlets. For noncompetitive outlets, the Committee's proposal would expand the provisions by specifying nonhuman food uses and "other outlets established by the Committee with USDA approval.'' The Committee manager testified that there could be new and unforeseen noncommercial and noncompetitive outlets that are not available or even exist today. Testimony indicated that these changes would allow the Committee flexibility in making recommendations for these outlets.

There was no opposition testimony regarding the Committee's proposal to expand the outlets for disposition of excess cranberries. Testimony did relate to the procedures the Committee uses in approving these outlets. For the 2001 volume regulation, the Committee developed guidelines for deciding whether specific research and promotion projects or foreign market development proposals were noncompetitive or noncommercial and therefore, authorized for use for excess cranberries. A review panel was established consisting of Committee staff and USDA personnel. It was determined that Committee members or any other industry member should not be a part of the review panel for confidentiality reasons.

Testimony reflected that the method used in 2001 to review these proposals to determine whether they should be approved as outlets for excess cranberries could be improved. It was testified at the hearing that the intent of the Committee's proposal is to provide latitude to the Committee in developing guidelines and in determining the best method of review. This would be accomplished by informal regulation. If this proposal is adopted, and a producer allotment volume regulation is recommended, the Committee would include in its recommendation for volume regulation, guidelines for reviewing proposals for disposal of excess cranberries.

Different safeguard procedures may be appropriate for different outlets for excess cranberries as some outlets are well defined and documentation is required to verify the excess cranberries were disposed of in such outlets. For example, excess cranberries being given to a charitable organization could be easily documented by the organization receiving the excess cranberries. In addition, cranberries being disposed of as animal feed could be easily documented.

Mr. Gitter stated that his proposal to expand the noncompetitive outlets for excess cranberries would clearly define what countries are open for foreign development by specifying a minimum number of barrels of annual consumption in that country required before an outlet is considered competitive. Mr. Gitter's proposal would base the determination of what constitutes a competitive market on the annual consumption of cranberries in each foreign country. If a country's consumption exceeded 20,000 barrels, it would be considered a competitive market and not authorized as an outlet for excess cranberries. Mr. Gitter testified that 20,000 barrels may be too high a number, but that some specific minimum number should be required.

The Committee manager testified that data relative to annual consumption in foreign countries is not available. The Committee collects information from handlers on the countries where cranberries are shipped and the quantities sold. In some cases, he testified, the cranberries are transshipped to other countries.

The Committee manager testified that the Committee's proposal provides flexibility not available under Mr. Gitter's proposal by authorizing the Committee to develop guidelines for research and development projects for excess cranberries at the time the volume regulation is recommended. The desired results of Mr. Gitter's proposal can be achieved by adopting the Committee's proposal. Mr. Gitter was concerned that allowing the Committee to make this determination does not provide the detail needed prior to the beginning of the season.

Based on record evidence, § 929.61 should be amended to expand the outlets authorized for excess cranberries. There was no testimony provided at the hearing that opening new markets with excess cranberries should not be done. However, defining noncompetitive markets as those markets having an annual consumption of less than 20,000 barrels of cranberries or cranberry products would not be an effective way of determining whether a market is competitive. Information on annual consumption in foreign countries is not currently available.

Additionally, the record revealed that there are many more factors that need to be considered when determining if a market is competitive. The development of new and foreign markets requires significant investment of time and money prior to achieving significant sales. Some foreign markets may never achieve the equivalent of 20,000 barrels of sales. New foreign markets are unfamiliar with cranberries and cranberry products in general, and it takes several years to work with processors and consumers to establish a

foundation on which to build a profitable and sustainable market. A witness testified that allowing sporadic disposal of excess cranberries in years of volume regulation in markets where others have been investing for years would create havoc in those markets, probably permanently damaging those emerging markets.

The record revealed that during volume regulations in recent years, some companies emerged to take possession of growers' excess cranberries with no payment, but with the promise to share profits, if any, from foreign sales. A witness testified that low-cost cranberries offered in overseas markets compete with allotment cranberries for the same markets. Even if the low-cost cranberries are sold in a market devoid of cranberries, transshipment to established markets is possible.

It is not the intent of this proposal to restrict sales to foreign markets. Foreign markets are one area where growth is occurring and demand is increasing. Exports of cranberries have increased from 184,000 barrels in 1988 to 824,000 barrels in 2000. This provision only applies to excess cranberries resulting from a producer allotment volume regulation. Any handler is allowed to compete in any market at any time with allotment cranberries or free market cranberries.

Because competitive markets can change from season to season and new and different research ideas can be devised, the Committee should develop guidelines at the time a producer allotment volume regulation is recommended. Considerable expense can be involved in developing markets and planning research and development projects. Therefore, the Committee should define as specifically as possible noncompetitive and noncommercial outlets eligible for use with excess cranberries.

For the above reasons, § 929.61 should be amended to broaden the scope of activities authorized as outlets for excess cranberries.

Material Issue Number 13—General Withholding Provisions

Section 929.54 of the order, which sets forth the general parameters pertaining to withholding regulations, should be amended to more closely reflect current production and handling practices.

When the cranberry order was promulgated in 1962, volume regulation authority was limited to "withholding" regulations. Under this form of regulation, free and restricted percentages are established, based on market needs and anticipated supplies. The free percentage is applied to handlers' acquisitions of cranberries in a given season. A handler may market free percentage cranberries in any chosen manner, while restricted berries must be withheld from handling.

The withholding provisions of the order were used briefly over three decades ago. The industry has since developed a second method of regulation—producer allotments—designed to overcome the difficulties encountered with the application of withholding regulations. Although the cranberry industry has not used the authority for withholding regulations in quite some time, the record evidence supports maintaining this tool for possible future use. However, substantive changes in industry practices have rendered current withholding provisions in need of revision.

The record shows that at the time the withholding provisions were designed, the cranberry industry was much smaller, producing and handling much lower volumes of fruit than it does now. In 1960, production was about 1.3 million barrels; by 1999, a record 6.3 million barrels were grown. A much higher percentage of the crop was marketed fresh—about 40 percent in the early 1960's versus less than 10 percent in recent years.

Changes in harvesting and handling procedures have been made so the industry is better able to process higher volumes of cranberries. Forty years ago, virtually all cranberries were harvested dry, and water harvesting was in an experimental stage of development. Water harvesting is currently widespread in certain growing regions; cranberries harvested under this method must be handled immediately as they are subject to rapid deterioration.

In the early 1960's, handlers acquired some cranberries that had been "screened" to remove extraneous material that was picked up with the berries as they were being harvested, and "unscreened" berries from which the extraneous material (including culls) had not been removed. The handler cleaned some of the unscreened berries immediately upon receipt, while others were placed in storage and screened just prior to processing.

Paragraph (a) of § 929.54 provides, in part, that when a withholding regulation is implemented, the restricted percentage will be applied to the volume of "screened" berries acquired by handlers. Since the term "screening" is obsolete, the Committee proposed eliminating all references to that term. To accomplish this, the Committee recommended deleting a substantial portion of § 929.54(a). The Committee's proposed revision to this paragraph (as set forth in the Notice of Hearing) failed to indicate, however, how the restricted percentage would be applied.

Testimony indicates that it remains the intent of the industry to apply the withholding regulations to the quantity of marketable cranberries acquired by handlers; culls and other extraneous material that are normally discarded during the handling process should not be used to meet a handler's withholding obligation. However, the record also indicates that cleaning and processing practices differ somewhat among the various handling facilities, and there may not be a single, most efficient means of determining what portion of handlers' receipts constitutes marketable cranberries. It may not be economical, for example, to apply the restricted percentage to cranberries only after a truckload of berries has been dumped and run through the entire processing line. USDA is therefore recommending a modification to § 929.54(a) to provide that any restricted percentage be applied to the volume of marketable cranberries acquired by each handler. The manner in which the marketable volume would be calculated would need to be developed and set forth through the informal rulemaking process. This would entail a Committee recommendation and approval by USDA.

Section 929.54 also currently provides that withheld cranberries must meet such quality standards as recommended by the Committee and established by USDA. That section further provides that the Federal or Federal-State Inspection Service will inspect such cranberries and certify that they meet the prescribed quality standards. The intent of these provisions is, again, to ensure that the withholding regulations reduce the volume of cranberries in the marketplace by not allowing culls to be used to meeting withholding obligations. The inspection and certification process is also meant to assist the Committee in monitoring the proper disposition of restricted cranberries, thereby ensuring handler compliance with any established withholding requirements.

The need for inspection and certification of withheld cranberries, and the agency that would be responsible for those activities, were subject to much debate at the hearing. Several witnesses stated that the inspection and certification of withheld cranberries would be cost prohibitive, particularly since most withheld berries would have to subsequently be dumped,

therefore generating no revenue for growers or handlers. Witnesses also expressed concern that inspection requirements could inordinately slow down handling operations. There was also discussion of potential differential impacts of such requirements because some handling facilities operate in ways that lend themselves to more efficient methods of pulling representative samples (for inspection purposes) than others.

The preponderance of evidence is that the authority for imposing inspection and certification requirements be permissive rather than mandatory. While such requirements may be needed to effectively implement a withholding program, alternative safeguards could be developed by the industry to achieve its objectives at lower costs. Section 929.54 is proposed to be amended accordingly.

Another area of some discussion was designation of the agency that would be conducting any required inspection and certification activities. The Committee had recommended (as proposed in the Notice of Hearing) that its staff be used to perform such functions. It supported this recommendation at the hearing by stating this may be a more cost effective manner of monitoring implementation of a withholding program.

Witnesses at the hearing objected, however, stating the Committee does not currently have sufficient staff with the requisite expertise to provide such services in a timely manner. These witnesses also speculated that it might be more expensive for the industry to hire and train its own personnel to perform this function than to utilize currently available services of the Federal or Federal-State Inspection Service. Finally, witnesses expressed the belief an independent, third party inspection agency would have more credibility than staff hired by the industry.

In its brief, the Committee recommended that the Federal or Federal-State Inspection Service be retained as the agency responsible for any required inspection and certification. USDA is accepting this recommendation.

In its proposal to streamline the provisions of § 929.54, the Committee inadvertently eliminated two items that it did not support at the hearing.

The first of these currently appears in the introductory text of paragraph (a) of § 929.54. The inadvertently deleted text states that the withholding requirements do not apply to any lot of cranberries acquired by a handler for which the withholding obligation had already been met by another handler. The purpose of this provision is to allow transfers of free percentage cranberries among handlers without subjecting those berries to the restricted percentage more than once. The record shows that handler transfers occur quite frequently in the cranberry industry and, thus, this provision is still needed.

The second item appears in paragraph (b) of § 929.54, and provides that the Committee, with approval of USDA, shall prescribe the manner in which handlers must comply with their withholding obligations, and the date or dates by which handlers must comply with those obligations. The record evidence that this provision is also still needed and should be retained.

Material Issue Number 14—Buy-Back Provisions Under the Handler Withholding Program

Section 929.56 of the order, which sets forth provisions for handlers to buy back withheld cranberries under a withholding regulation, should be amended to: (1) Allow direct handler to handler buy-back arrangements; (2) add criteria the Committee needs to consider in establishing buy-back prices; (3) revise the handler payment schedule; and (4) provide that if the Committee cannot purchase free cranberries to replace restricted fruit requested to be released under the buy back provisions, the money deposited by the requesting handler will be refunded to that handler.

As discussed under the previous Material Issue Number 13, one method of volume regulation authorized under the order is referred to as the handler withholding program. Under such regulations, free and restricted percentages are established. These percentages are applied to handlers' acquisitions, with the handlers being required to withhold from handling their restricted cranberries.

Section 929.56 of the order, entitled "Special provisions relating to withheld (restricted) cranberries,'' sets forth procedures under which handlers may have their restricted cranberries released to them. These provisions are commonly referred to in the industry as the buy-back provisions.

Under the current buy-back provisions, a handler can request the Committee to release all or a portion of his or her restricted cranberries for use as free cranberries. The handler request has to be accompanied by a deposit equal to the fair market value of those cranberries. The Committee then attempts to purchase cranberries in an amount equal to the amount of free cranberries from other handlers. Cranberries so purchased by the Committee are transferred to the restricted percentage and disposed of by the Committee in outlets that are noncompetitive to outlets for free cranberries. The provision that each handler deposit a fair market price with the Committee for each barrel of cranberries released and that the Committee use such funds to purchase an equal amount or as nearly an equal amount as possible of free cranberries is designed to ensure that the percentage of berries withheld from handling remains at the quantity established by the withholding regulation for the crop year.

The Committee has the authority to determine the fair market price for the release of restricted cranberries. The money deposited with the Committee by handlers requesting release of their restricted cranberries is the only money the Committee has available for acquiring free cranberries. Thus, the amount deposited must be equal to the then current market price or the Committee will have insufficient funds to purchase a like quantity of free cranberries.

The Committee is required to release the restricted cranberries within 72 hours of receipt of a proper request (including the deposit of a fair market value). The record shows that this release was made automatic so that handlers would be able to plan their operations, and very little delay would be encountered.

If the Committee is unable to purchase free berries to replace restricted cranberries that are released under these provisions, the funds deposited with the Committee are required to be returned to all handlers in proportion to the volume withheld by each handler.

The withholding provisions of the order have not been used in many years. In recent years, when volume regulations were deemed necessary, the Committee chose to recommend producer allotment regulations rather than withholding regulations. Nevertheless, the evidence supports retaining the withholding provisions of the order in the event they are needed in the future. However, the cranberry industry has identified several portions of the order pertaining to the withholding program, including those relating to buy-back, that need to be updated to meet current industry needs.

The Committee recommended amending § 929.56 to authorize direct buy-back arrangements between handlers. Under this modification, a handler would not have to go through the Committee to have his or her restricted berries released. Instead, that

handler could arrange for the purchase of another handler's free cranberries directly. All terms of the deal, including the price paid, would be between the two parties involved and would not be limited by the Committee. The Committee recommended this change to add flexibility to the order. It could offer a more efficient method of buying back cranberries, since no Committee administrative costs would be incurred. Handlers would have the option of using this method, or they could buy back their berries through the Committee, as is currently provided.

There was no objection to this modification at the hearing, and it is being recommended for adoption.

There are four criteria currently listed in § 929.56 that the Committee needs to consider in establishing a fair market price under the buy-back program. These include prices at which growers are selling their cranberries to handlers; prices at which handlers are selling fresh berries to dealers; prices at which cranberries are being sold to processors; and prices at which the Committee has purchased free berries to replace released restricted berries.

The Committee recommended adding a fifth criterion to the list—the prices at which handlers are selling cranberry concentrate. A Wisconsin grower/handler proposed adding growers' costs of production as an additional criterion. The level of both of these items appear generally known in the industry and appear to be relevant criteria to take into consideration in recommending a fair market value. Thus, it is being proposed that they be added to § 929.56.

Under the current buy-back provisions, handlers are required to deposit with the Committee the full market value of the berries they are asking to be released. The Committee proposed a different payment schedule so that handlers would not have to make a large payment of cash prior to the sale of their restricted cranberries. The Committee proposed that 20 percent of the total amount should be paid at the time of the request, with an additional 10 percent due each month thereafter. There were no objections to this revision expressed at the hearing.

However, in its brief, the Committee modified its proposal to provide that 20 percent of the total amount would be due at the time of the request, with the balance to be due within 60 days. The Committee's brief provided no compelling argument for this change, and there was no opportunity for other parties to express their opinions on this payment schedule. Thus, this decision recommends including in the order the payment plan originally proposed by the Committee. However, this payment plan could be revised through general rulemaking authority contained in § 929.56. Any such revisions would require a Committee recommendation and USDA approval.

As previously discussed, releases by the Committee of withheld berries are currently required to be virtually automatic. In its proposed amendment of the buy-back provisions, the Committee recommended that no release be granted unless the Committee was able to purchase free berries to replace those being bought back. Under this scenario, if the Committee was unable to purchase the free berries, it would refund the money received from the requesting handler, and the request would be denied.

The Committee manager testified that this change is necessary to maintain an appropriate volume of cranberries in the marketplace. If withheld berries are released for handling, and no free berries are purchased to replace them, more cranberries would be available than the Committee deemed appropriate. This would obviate the effectiveness of the volume regulation and result in lower grower returns.

Several handlers objected to this portion of the Committee's proposal. They indicated that it would unduly limit handlers' abilities to fill their customers' needs.

It would also unduly delay any decisions on handlers' requests for releases of their restricted berries.

Those opposed to this change also testified that there should be free cranberries available for purchase. This is because handlers with inventories (which are free from regulation) would have an economic incentive to use those inventories to fill current orders, and sell current year's cranberries to the Committee for its disposal. It was also pointed out that if the Committee were not able to purchase unrestricted fruit, that would be an indication that either the market had improved or that the original free percentage determination was incorrect. Handlers with additional sales opportunities should not be placed at a disadvantage because of these situations.

USDA concurs that the Committee's recommendation could unduly restrict handlers' opportunities for buying back their restricted fruit. As such, this change is not being recommended for adoption.

One additional proposal to amend § 929.56 was received. Stephen L. Lacey, on behalf of two cranberry handlers, proposed changing the refund provisions in the buy-back program. If the Committee is unable to purchase free berries under the buy-back system, it is currently required to refund the money to all handlers proportional to the amount each handler withheld under regulation. Mr. Lacey recommended that the money be returned to the handler who deposited it to be distributed to the growers whose fruit was sold. He stated it would be unfair to penalize growers whose fruit was sold by handlers not being able to pay them for that fruit because that money went to other handlers' growers.

USDA believes that Mr. Lacey's arguments have merit. Additionally, this change could provide an incentive for handlers to make available free cranberries for purchase to replace restricted cranberries that are released under the buy-back provisions. For these reasons, USDA is recommending adoption of this proposal.

Section 929.56 is being recommended for amendment as described above.

Material Issue Number 15—Handler Marketing Pool and Buy-Back Under the Producer Allotment Program

The order should not be amended to include the establishment of a handler marketing pool or buy-back under the producer allotment provisions of the order.

Stephen L. Lacey, on behalf of Clement Pappas and Company, Inc., and Cliffstar Corporation, proposed adding a new § 929.47 to the order establishing a handler marketing pool as part of the marketable quantity in any crop year in which a producer allotment regulation is effectuated. As a modification of this proposal, a Massachusetts handler recommended adding buy-back provisions to the producer allotment program as well.

Under Mr. Lacey's proposal, in any crop year in which a producer allotment regulation were recommended, a Handler Marketing Pool would be established. Handlers determined to be in surplus would have to contribute fruit to the pool, and handlers determined to be deficit would have access to those cranberries in the pool. The Committee would determine which handlers are in surplus and which handlers are in deficit based on a formula that would appear in the order. The order would also contain provisions relating to pool pricing and payment terms.

In support of the proposal, Mr. Lacey testified that during the 2000 and 2001 volume regulations, concerns were raised about the effects volume controls could have on handlers that do not maintain inventories of cranberries. He testified that the surplus that necessitated volume regulations was

held by two entities, and the regulations put the remaining, non-surplus handlers at a significant competitive disadvantage because they experienced difficulty in securing product from the surplus handlers to fill their customers' needs.

With one exception, Mr. Lacey's proposal is identical to the language that was drafted by the amendment subcommittee, which attempted to develop a recommendation for a handler marketing pool. The difference is the section on pricing. Mr. Lacey's proposal would allow non-surplus handlers to purchase pool cranberries at a price equal to the price that handler is paying its growers for the current crop.

In volume regulation discussions over the last 2 years, concerns were raised that the current producer allotment provisions place handlers who do not have inventories at a disadvantage. Because some handlers do not maintain inventories, the restricted percentage does not provide enough fruit for them to meet their market demands and maintain market share. Although handler-to-handler purchases are a normal business practice (with or without a volume regulation), a producer allotment restriction increases the need for handlers to purchase from handlers with inventories to maintain market share. Some handlers believe this places them in a vulnerable position, needing more fruit than normal from their competitors.

The purpose of the handler marketing pool would be to provide cranberries to those handlers who do not have a surplus in years of volume regulation. Some witnesses suggested the existence of such a mechanism would help to build industry consensus for volume regulation and for the appropriate marketable quantity which would help facilitate the use of volume regulation when needed. As proposed, the volume of cranberries in the pool would be included within the marketable quantity, not be in addition to the marketable quantity. If the pool cranberries were in addition to the marketable quantity, the effectiveness of the volume regulation would be decreased.

Regarding payment terms, the proposal would require handlers acquiring cranberries from the pool to deposit an initial payment of $5.00 per barrel with the Committee within 30 days of receipt of product. Subsequent payments would be made every 60 days in the amount specified by the Committee based on handler payments to growers. Full payment would be made by August 31 of the following year. The Committee would make immediate payments to the surplus handlers.

The proposed amendment would allow the Committee to collect information necessary to verify prices. Mr. Lacey testified that the pricing mechanism would ensure that non-surplus handlers would not be competitively harmed by a volume regulation, and would help maintain the prices paid to growers that deliver to these handlers. In addition, this pricing mechanism would establish a fair price to handlers purchasing cranberries and the growers that produced the cranberries.

Mr. Lacey discussed activities of the amendment subcommittee, which began discussions on ways to improve the volume regulations in February 2001. Discussed were the concepts of adding buy-back provisions to the producer allotment program (similar to those currently existing under the withholding provisions) or establishing a handler marketing pool. In additional subcommittee meetings in 2001, consensus was reached for the subcommittee to focus its efforts on establishing a fruit-based handler marketing pool within the marketable quantity. At an August 2001 teleconference meeting, concerns were raised about the pricing mechanism and whether it would afford handlers access to cranberries at below market rates.

As a result of these concerns, the subcommittee did not forward the amendment proposal for consideration by the full Committee. Nevertheless, the full Committee did consider a motion to include the handler marketing pool with the Committee's proposed amendments at an August 27, 2001, meeting, which motion was rejected.

According to Mr. Lacey, there is overwhelming support from handlers, growers and the public member for the concept of a handler marketing pool. In addition, he testified that the information necessary to administer the program is already collected by the Committee in connection with its marketing policy report.

Mr. Lacey testified that the proposal would not raise costs to producers, handlers or USDA. It would require the Committee to undertake additional efforts to administer the marketing pool, and any costs associated with this effort would be paid from assessment funds. Mr. Lacey further testified that the proposal would, over time, improve producer returns by ensuring stability in the industry and help prevent further consolidation at the handler level.

A Massachusetts independent handler testified in support of the handler marketing pool. He also proposed adding a buy-back provision under the producer allotment program similar to the provisions under the handler withholding program. He testified that he would support adopting one or the other or both of these provisions, as long as the cranberries he has cleaned, frozen and put in the freezer are made available to him.

In support of the handler marketing pool, this handler testified that this proposal is essential to make any allotment volume regulation a fair and reasonable regulation. Some handlers are smaller than others and some have inventories while others do not. He testified that these differences among handlers must be recognized and without this provision, the allotment option, as opposed to the withholding option, would remain as it presently exists, the lesser of two evils. He further testified that a handler marketing pool with a fair pricing formula would dramatically alter the existing environment where consensus in unachievable. According to his testimony, this proposal would alleviate the many difficulties experienced in garnering support for a volume regulation.

This handler testified that if the handler marketing pool concept is rejected, the entire amendment process would have failed to address the real issues that keep the industry polarized. He recommended a modification to the proposal's pricing provisions. He suggesting adding to the paragraph on pool pricing that the handlers purchasing from the pool would pay the price that they are paying their growers, or the average price that all handlers purchasing from the pool are paying their growers, whichever is higher. He believed adding this language would avoid the possibility of handlers manipulating their pool price by not paying their growers a reasonable price.

Regarding this handler's proposal to add a buy-back provision under the producer allotment program, he testified that this would further improve the allotment option and do so in a way that would generate industry-wide support. The proposed provision would allow handlers to buy back excess cranberries delivered by their growers. The proposed buy-back mechanics of the producer allotment program would be identical to the provisions under the withholding (as previously discussed under Material Issue Number 14). The same pricing formula would apply to purchases of cranberries as is set forth in the handler marketing pool proposal.

This handler stated that there would not be an incentive for growers to deliver fruit over their allotment

because they would not be paid for any deliveries over their allotment. Growers' only incentive to exceed their allotment would be to help their handler maintain its market share. He further stated that it is in the growers' best interests to allow non-surplus handlers to buy cranberries back even though the growers are not compensated. It was unclear under this proposal who would be responsible for cleaning, processing and storage charges for excess cranberry deliveries. This handler believed that because growers would not be compensated for any excess cranberry deliveries, there would only be a minimal amount of excess cranberries to buy back.

As an example of how the producer allotment program negatively impacted his business, the handler testified that during the last volume regulation, his company lost a large customer to a Canadian handler because his company was no longer able to be a reliable supplier. Although the relationship continued, sales to the customer went from 200,000 gallons of concentrate to 50,000 gallons. He does not believe the volume regulation should drive customers out of the country. He also testified that the smaller handlers, although not small businesses under the SBA definition, are at a distinct disadvantage when competing with the larger volume handlers.

Regarding this handler's proposal to add buy-back provisions under the producer allotment program, he testified that to be consistent, similar provisions should be in place under both the withholding and the producer allotment programs.

A Massachusetts grower testified that although he was not opposed to a buy-back provision or a handler marketing pool, he believed that there should also be a provision guaranteeing the grower reasonable returns. He testified that during the last two volume regulations, the focus has been on handlers fighting for market share, and little attention was given to growers. He further testified that if there is going to be a pool for handlers to be able to have access to cranberries to compete with one another, the growers should be guaranteed the cost of production.

A Wisconsin handler in opposition had two main objections to the handler marketing pool as proposed. He testified that the definition of a handler's ''needs'' should be based on purchases from growers of domestic cranberries rather than basing the needs on a percentage of prior years' sales. He believes this definition favors handlers that do not purchase all their cranberries from growers.

As an example, he discussed a handler that would purchase 50,000 barrels of cranberries from growers and 200,000 barrels from other handlers. This handler's needs would be defined as 250,000 barrels. If a volume regulation were implemented, only the 50,000 barrels would be subject to the allotment, and that handler would be considered in deficit and authorized to purchase a minimum of 200,000 barrels from the marketing pool.

This would encourage handlers to not purchase directly from growers because their needs would be better met with purchases from the marketing pool. This handler testified that the proposal is clearly an attempt to limit a handler's risk of entering contracts with growers, and to reward the handler for not entering contracts with growers. This proposal, as written, would have the potential to seriously reduce the competitive marketplace for grower fruit, thus depressing prices paid to growers. It would also discourage normal handler-to-handler purchases, because the deficit handler would wait and buy cranberries from the pool at a lower price.

The handler testified that the proposal is especially troublesome in light of the fact that the industry clearly acknowledges that the international supply of fruit is expected to exceed annual sales for the next few years. The proposal would devastate individual growers because it would insulate any handler from having to directly compete for grower fruit by offering better prices or terms because they would be protected by the marketing pool. This handler would support the proposal if the calculation of need used a maximum need number as the number of barrels directly purchased from growers in the production area. As in the example provided, the handler who purchases 50,000 barrels from growers and 200,000 from handlers would have its need limited to 50,000 barrels.

In addition, he believed that the pricing mechanism should be linked to the market price for cranberries during the year of volume regulation rather than what handlers are paying their growers. He did not believe it was equitable to allow a handler to purchase cranberries from the marketing pool at a price that could be lower than what the surplus handler paid its growers. As an example, he testified that his company can sell cranberries to Tropicana Company for $20 per barrel, but could have to sell to a competitor handler for $17, if that is what that handler paid its growers.

This handler further testified that the handler marketing pool concept is potentially highly detrimental to growers and highly beneficial to handlers that choose to contract directly from growers for less fruit than their needs. He believes that if this proposal were adopted, handlers would be encouraged to make fewer contracts with growers and buy their cranberries directly from the pool. Also, buyers (or second handlers) would be encouraged to purchase a minimal amount of fruit from growers, so they can become a handler and have access to the pool.

Based on record evidence, the order should not be amended to include a handler marketing pool. Conceptually, the handler marketing pool showed promise in addressing the concerns of some handlers. However, an effective means of establishing a pool under the producer allotment program has not been presented.

Opponents of this proposal discussed relevant flaws in how this pool would be implemented in an effective manner. The pricing mechanism of the pool is a major concern. In addition, the methodology used to determine a handler's status, whether surplus or deficit, is problematic.

As previously indicated, one handler suggested that a handler buy-back provision be added to the producer allotment program in order to be consistent with the handler withholding program. However, including a buy-back provision under the producer allotment program would be counterproductive.

The withholding method of volume regulation is applied at the handler level. Growers deliver to their handler everything they grow. Free and restricted percentages are applied to each handler's acquisitions of cranberries. Because handlers apply the percentage after delivery, the restricted cranberries are in the possession of the handlers and available to be sold.

The intent under the producer allotment program is to discourage production at the grower level so that less fruit is delivered to handlers. Establishing a buy-back under a producer allotment program is problematic for that reason. If growers believed that some of their excess fruit would eventually be bought back, increased production could be encouraged, defeating the purpose of the program. Even if the growers were not paid for any deliveries in excess of their allotment, handlers could encourage them to deliver excess cranberries.

If buy-back provisions were added to the producer allotment program, handlers and growers whose deliveries exceed their allotment are rewarded, and the handlers who comply with the

allotment are at a detriment. Although the Massachusetts handler testified that only a minimal amount of cranberries would be excess, it would set the stage for growers to be encouraged to deliver in excess of their allotment, defeating the purpose of the program. Encouraging growers to deliver excess cranberries with no compensation to assist their handler in maintaining market share is contrary to the objectives of a producer allotment volume regulation.

Therefore, the proposal to add buy back provisions under the producer allotment program is not being accepted.

During the discussions at the subcommittee level, there was never industry consensus on the pricing mechanism for cranberry purchases from the pool. Some handlers believed the price should be set at the same price they pay their growers. Some growers believed this price would give handlers an incentive to pay them less as testified by one grower. Growers believe the price should be set to reflect the cost of production. Some believed the price should be set at fair market value at the time of purchase, including recovery costs for cleaning, shipping, storage, etc. Without resolution of this issue and cohesiveness from all segments of the industry, the handler marketing pool concept would not work.

The volume regulation authority of the order is intended to address industry oversupply problems and enhance grower returns on an industry-wide basis.

Regarding foreign cranberry production, volume regulation can only be imposed on cranberries grown in the production area. The impact of foreign competition is also an item that may be taken into consideration prior to recommending volume regulation.

For the above reasons, record evidence does not support adding a handler marketing pool or buy-back provisions under the producer allotment program.

Material Issue Number 16—Grower Exemption

The order should not be amended to allow the first 1,000 barrels of each grower's production to be exempt from regulations issued under the order.

A Massachusetts grower proposed an amendment to the order to authorize an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower. This proposal appeared in the Notice of Hearing, although it was subsequently withdrawn by the grower who submitted it. Nevertheless, two witnesses testified on the proposed amendment at the hearing.

One witness testified in favor of the proposal. He believed it would offer relief to small cranberry growers who are facing difficult economic circumstances.

The Committee manager testified in opposition to the proposal. Based on his review of the 1999 crop, which was the last crop not regulated, if the exemption was in place 510 farm units out of a total of 1,124 farm units would have been totally exempted from the volume regulation. The witness testified that these farm units represented 203,778 barrels of cranberries that would have been exempt from the producer allotment volume regulation.

The Committee manager also testified that within the Ocean Spray cooperative, 35 percent of its members are growers that produce less than 1,000 barrels. In Massachusetts alone, the number is 50 percent, and in Wisconsin, 90 percent of the cooperative's growers produce less than 1,000 barrels. The witness also testified that handlers that handle a large number of small growers' cranberries would receive more relief from such an exemption than handlers that handle the fruit of larger growers. A particular handler would not be regulated at all if all the growers delivered less than 1,000 barrels of their production from their individual farm units. The witness also was concerned that growers could split their farm units into units that produce 1,000 barrels or less so that all of their production would be exempt. For example, if a grower produces 2,000 barrels, such grower could split his or her farm unit and have two farms that produce 1,000 barrels each to take advantage of the exemption.

Record evidence does not support the amendment as proposed. This exemption could result in such a magnitude of fruit being unregulated that any volume control program would be rendered ineffective. This proposal could have the effect of requiring growers that produce more than 1,000 barrels—roughly half of the grower population—to hold back more of their fruit to meet the increased allotment percentage that would be required as a result of the exemption. Additionally, the proposal could provide an incentive for growers to reorganize their businesses so that all of their production would be exempt.

For the above reasons, USDA recommends that the proposed amendment to exempt the first 1,000 barrels of each grower's production should not be adopted.

Material Issue Number 17—Expansion of Production Area

The production area should not be expanded to include the States of Maine, Delaware and the entire State of New York.

The marketing order and its rules and regulations apply only to cranberries grown in the production area, as defined in § 929.4 of the order. Currently, the production area is defined to include the States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York.

The marketing order was promulgated in 1962. The order's primary regulatory authority is volume regulation, but it also provides for research and promotion activities to promote the consumption of cranberries and increase demand. The order also provides the authority to collect and disseminate information on industry statistics to benefit the entire industry.

Currently, cranberries are produced in 12 States, but the vast majority of farms and production are concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Massachusetts was the number one producing State until 1990, when Wisconsin took over the lead. Since 1995, Wisconsin has been the top producing State. Together, both States account for over 80 percent of cranberry production. Average farm size for cranberry production is very small. The average across all producing States is about 33 acres. Wisconsin's average is twice the U.S. average, at 66.5 acres, and New Jersey averages 83 acres. Average farm size is below the U.S. average for Massachusetts (25 acres), Oregon (17 acres) and Washington (14 acres).

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

Evidence produced at the hearing indicated that there are 39 growers in Maine and approximately 265 producing acres. Testimony indicated that one producer in Maine produces 75 percent of Maine's production on 111 acres. The remaining 38 growers thus have combined acreage of 154 acres, or

an average of 4 acres apiece. This is substantially below the average of the major producing States of Wisconsin (66.5 acres) and Massachusetts (25 acres). The range of acreage for the remaining Maine growers is from 1 to 5 acres bogs, averaging about 110 barrels per farm.

In 2000, 9,000 barrels were harvested in Maine compared with 18,000 barrels in 2001. This represents a very small proportion of total U.S. production of 5.6 million barrels in 2000 (0.2 percent) and of 5.4 million barrels in 2001 (0.3 percent).

There are 2 growers in New York and 1 grower in Delaware commercially producing cranberries. Combined, these two States have less acreage and production than the totals in Maine, and are thus of less consequence in the scheme of the total domestic industry.

According to testimony received at the hearing, most Maine cranberries were utilized in the processed markets until 1999. There is no juice market for Maine cranberries, and most processed cranberries are used in the ingredient market. At the time of the hearing, it was estimated that about 20 percent of Maine production was used in the fresh market, primarily in Maine and New Hampshire. Maine handlers source additional cranberries from Canadian rather than U.S. growers due to transportation costs, the value of the dollar, and trade-off agreements with blueberry handlers in Canada.

For many years, the cranberry industry enjoyed increasing demand for cranberry products, primarily due to the success of cranberry juice-based drinks. This situation encouraged additional production. While production capacity increased dramatically, demand leveled off. This has resulted in supplies outpacing demand, high levels of inventories, and dramatic drops in grower prices. Grower prices rose from $8.83 per barrel in 1960 to a peak level of $65.90 per barrel in 1996. By 1998, grower prices had decreased to $36.60 per barrel, and returns for the 2000 crop year were only $19.60 per barrel, well below the cost of production, which ranges from $15 to $45 per barrel. This situation led to the Committee recommending, and USDA establishing, volume regulations for the 2000 and the 2001 crops.

The record indicates that domestic growers, including those in Maine, benefited from the volume controls under the order. Grower returns in Maine were estimated at $12 in 2000 and $23 in 2001. A grower testified that the increase in grower returns was directly related to the volume regulation under the order in 2001.

Proponents testified that all cranberries produced in the U.S. are connected and compete for markets. It was expressed by proponents that cranberry growers share a common bond relative to the decline in prices and increasing returns to growers will take a concentrated effort by the entire industry. It was further testified that production from unregulated areas flows freely into the marketplace, which counteracts the Committee's ability to establish and maintain equilibrium. Proponents also expressed the opinion that all growers benefit from the operation of the marketing order and, thus, all should share the burden of regulation necessary to restore economic health to the industry.

Opponents testified that States with insignificant production should be exempt from the marketing order. One opponent recommended having a State threshold of 500 acres or 50,000 barrels of production before inclusion under the marketing order. If there were several non-regulated States producing 50,000 barrels of cranberries annually, this could have a significant negative impact on the regulated States.

Maine is a relatively new cranberry growing State. Testimony indicated that the maximum number of years producers have been growing cranberries is 10 years, with many growers just beginning to grow cranberries in the last 3 years. The average yield per acre in Maine is only 60 barrels. This compares with average yields in the major producing States of 186 barrels in Wisconsin and 133 barrels in Massachusetts.

Testimony indicated that Maine has the potential to increase its acreage from the current 265 acres to 2,000 acres. At 2,000 acres, Maine would represent about 13 percent of the total U.S. acreage of 15,100 acres. However, with current yields, Maine production would still be less than one-half of one percent of the U.S. total.

Although Maine's current production represents 0.3 percent of total domestic production, proponents of expanding the production area claimed that the potential for increased production and more efficient yields exists. It was further testified that growers and handlers in the regulated States would have an incentive to develop acreage in Maine if it is not included under the order.

Opponents testified that given the state of the industry, new cranberry acreage in Maine is not likely. In addition, opponents testified that strict environmental regulations and associated costs would deter development of any additional acreage. Anyone wanting to develop new bogs would elect to develop them in Canada before Maine because of the environmental restrictions and climate. It was further testified that yields would not increase dramatically because of the climatic conditions in Maine.

Certain aspects of growing cranberries in Maine are restrictive and the climatic conditions may not be ideal for growing cranberries. It would be risky financially to develop and plant new bogs in any great degree given the current oversupply situation.

To help stabilize market supply and demand conditions, volume regulation was introduced under the order in 2000, marking the first time in over 30 years that such regulation was implemented. Volume regulation was again implemented in 2001. No volume regulations were recommended in 2002. Proponents of expanding the production area testified that production in non-regulated areas diminishes the effectiveness of volume regulation. It was testified that growers in non-regulated areas benefit from the sacrifice of those in the regulated area. In addition, recommending volume regulations is very controversial for regulated producers and handlers, partly because of non-regulated production. If all U.S. growers were regulated, it was testified that there would be more grower support for a volume regulation.

If Maine was included in the production area, the allotment percentage established under a producer allotment volume regulation would not change because that State produces such small volumes of cranberries. Thus, there would be no benefit to regulated growers to including production of Maine growers at the current time.

Additionally, Maine growers testified that any volume regulation would have a negative impact on Maine growers because they are mostly newer acres not in full production. These growers believed that they would be at a disadvantage in the allocation of sales histories. Proponents testified that many acres were planted in the production area at the same time Maine was planting, and the current order provides adjustments in sales histories for growers with newer acreage and growers with no sales histories.

Opponents testified that Maine cranberries are superior, and premium prices are received for cranberries grown in Maine. One grower cited a study that showed Maine cranberries have a higher sugar content than other cranberries. Another grower testified that testing on Maine cranberries demonstrates it is a superior product,

probably due to the younger bogs and less pollution in Maine. A Committee witness countered by testifying that if Maine shipped their cranberries to the Massachusetts wholesale market, they would not receive a premium price. Growers testified that Maine's economy would be further damaged if Maine cranberries were included under the marketing order. Washington County—accounting for most of Maine's production—has the lowest income and highest unemployment in Maine. Testimony revealed that Washington County is designated a Federal HUB zone or depressed area.

Proponents testified that Maine benefits from the domestic and foreign generic promotion sponsored by the Committee and should contribute to those promotions. The additional revenue generated from assessing Maine handlers would allow for increased promotion funds. However, the additional revenue to be expected from regulating Maine cranberries would be minimal (18,000 barrels times the assessment rate of 18 cents a barrel would yield assessment income of only $3,240).

Additionally, opponents testified that Maine does not benefit from promotion of juice and/or concentrate since no Maine production is used for juice and/or concentrate. Testimony indicated that Maine does not want to fund out-of-State companies in the juice market. Further, growers testified that generic promotion could actually harm the Maine industry because much has been done to establish Maine products as unique. A grower testified that a generic promotion would put the Maine branding program in jeopardy as funds used to promote "the Maine mystique'' would be diminished. The Maine Growers Association collects a voluntary assessment of $.20 per barrel. These funds are used for promoting Maine products, including cranberries.

Proponents also testified that the Committee would have access to more information on cranberry imports, acquisitions, and dispositions if the production area were expanded. This would enable the Committee to more accurately establish its marketing policy.

Currently, the Committee has no access to data on foreign cranberry imports into Maine and New York, and it has had no success in requesting this information voluntarily. In October 1999, authority was granted to USDA to collect information from processors and handlers outside the production area. It also allows collection of information on cranberry imports. However, to implement this authority, the order need not be amended for this reason. Additionally, opponents testified that Maine growers would continue to provide production information to the National Agricultural Statistics Services.

The Act requires that a marketing order be limited in its application to the smallest regional production area practicable. USDA finds that expanding the production area under the cranberry marketing order would be contrary to the Act at this time. Production in the areas proposed to be added to the current production area is so minimal that their inclusion under the order would have no impact on the level of volume regulation that may need to be imposed to reduce oversupply situations. Additionally, little additional assessment revenue would be generated for generic promotion purposes, and information collection needs could be accomplished through other means.

For the above reasons, USDA concludes that the definition of production area should not be revised to include the States of Maine, Delaware and New York.

Material Issue Number 18—Adding Authority for Paid Advertising

Section 929.45 of the order, Research and development, should be amended to add authority for the Committee to fund paid advertising.

Currently, § 929.45 authorizes the Committee, with the approval of USDA, to participate in production research, marketing research, and market development projects designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cranberries. There is no specific authority for the Committee to fund paid advertising.

The Act lists specific commodities for which paid advertising may be conducted under marketing order programs. Until recently, the Act did not include cranberries in that list. The record shows that authority to allow paid advertising for cranberries was added to the Act by Public Law 106–78, Agricultural Appropriation Bill, signed on October 22, 1999.

As previously discussed in this decision, the domestic cranberry industry has recently been experiencing an oversupply situation. Increases in cranberry production have exceeded growth in demand for cranberries and cranberry products. One marketing order tool the industry has used to help cope with the current situation is volume control through producer allotment regulations.

The Committee has also engaged in promotion activities designed to increase demand for cranberries. For example, in recent years the Committee has participated in USDA's Foreign Agricultural Service's Market Access Program (MAP). Under this program, industry funds are augmented by USDA funds to promote the use of domestic products in overseas markets. The record shows that the Committee's export promotion program has resulted in increased foreign sales.

Additionally, at the time of the hearing, the Committee was in the process of developing a domestic promotion program. The Committee believes that expanding demand will benefit growers and handlers in the industry.

The Committee proposed adding paid advertising authority to the order to provide it with another tool to promote the consumption of cranberries in its export and domestic programs. Currently, paid advertising of cranberries is limited to branded advertising by individual handlers or processors in the industry. The Committee would like to use assessments or other available funding sources (such as MAP funds) for paid advertising as a component of its promotion programs to meet its stated objectives of increasing demand and consumption of cranberries and cranberry products. There may be opportunities, for example, to use paid advertising as a means of providing consumers with relevant information on the health-related benefits of cranberries.

There was no opposition expressed to this Committee proposal. For the above reasons, it is recommended that § 929.45 be amended by adding authority for paid advertising.

Material Issue Number 19—Definition of Cranberries

Section 929.5 of the order should not be amended to revise the definition of "cranberries.''

The order's provisions, including volume regulations, assessments, and reporting requirements, apply to all cranberries grown in the production area. Currently, § 929.5 defines cranberries to mean all varieties of the fruit *Vaccinium macrocarpon,* known as cranberries, grown in the production area.

The Committee proposed that the genus and species *Vaccinium oxycoccus* be added to the definition of cranberries. *Vaccinium oxycoccus,* also known as European cranberry, grows wild in Europe, Canada, and some parts of the United States. The record evidence established that it is not commercially produced in the United States. During shortfalls in domestic

production, the industry has imported *Vaccinium oxycoccus* to use in cranberry products.

The Committee recommended adding *Vaccinium oxycoccus* to the definition of cranberries so that the Committee could obtain information on the quantity of that species handlers acquire. This would enable the Committee to make better marketing decisions in recommending such things as volume regulations, and keep data separate from the regulated species of cranberry during years of volume regulation. The record shows that there is no intent to subject this species to marketing order requirements (such as volume controls) other than those relating to reporting.

Witnesses testified that this change would make the marketing order definition consistent with the Food and Drug Administration's (FDA) definition of cranberry, which includes *Vaccinium macrocarpon* and *Vaccinium oxycoccus*. Witnesses however, do not agree with the FDA definition because the two varieties are distinctly different in flavor, appearance and acid content. Some witnesses testified that the industry should work with FDA to change its definition rather than change the marketing order definition. Further, concerns were raised that inclusion of the term in the definition would legitimize *Vaccinium oxycoccus* fruit as ''true'' cranberries, which is not the Committee's or the domestic industry's intent.

Currently, § 929.105 of the rules and regulations in effect under the order requires handlers to report to the Committee the total quantity of cranberries and *Vaccinium oxycoccus* cranberries the handlers acquire and the amount they have in inventory. This information is required to be submitted to the Committee on a quarterly basis. Witnesses acknowledged through testimony that the needed information regarding *Vaccinium oxycoccus* is and can be obtained through these reports.

The evidence supported that the Committee is able to obtain the information intended under this proposal through current provisions. With the regulations already in place requiring handlers to report all receipts and dispositions of *Vaccinium oxycoccus*, and the lack of the need to regulate such variety, the definition of cranberries should remain as it is.

Record evidence does not support amending the marketing order to change the definition of ''cranberries,'' and the proposed amendment is not being recommended for adoption.

Material Issue Number 20—Clarification of the Definition of Handle

The order should be amended to clarify the definition of handle that appears in § 929.10. This definition serves to identify those activities that are subject to regulation under the order.

Currently, the definition of handle specifies, in part, that handle means to sell, consign, deliver, or transport fresh cranberries or in any other way to place fresh cranberries in the current of commerce within the production area or between the production area and any point outside thereof in the United States or Canada.

The Committee proposed modifying this language to clarify that the transporting of fresh cranberries to foreign markets other than Canada is also considered handling. According to testimony, the current language could be confusing as it could be construed that handling of fresh cranberries is only applicable to movement within the production area, the United States and Canada. However, the Committee manager testified that fresh cranberries are exported to many foreign countries including the United Kingdom, Germany and Japan. Placing fresh cranberries into the current of commerce within these and other foreign countries would constitute handling. The Committee proposal merely clarifies this language to avoid any confusion in the definition of handle. There was no opposition testimony on this proposed change.

In addition, the definition of handle currently excludes from handling, the cold storage or freezing of excess cranberries for the purpose of temporary storage during periods when an annual allotment percentage is in effect prior to their disposal. Section 929.10 does not currently exclude the temporary cold storage or freezing of withheld cranberries when a withholding provision is in effect.

The Committee proposed including the cold storage or freezing of withheld cranberries as an exemption from handling for the purpose of temporary storage during periods when withholding provisions are in effect prior to their disposal. The Committee manager testified that handlers should be allowed to temporarily use cold storage or freezing of restricted cranberries when a handler withholding regulation is in effect just as the authority exists for excess cranberries under a producer allotment. The period in which handlers could temporarily use cold storage or freezing storage of either excess and/or restricted cranberries could not exceed the date set by the Committee (with USDA approval) for the disposition of excess and/or withheld cranberries. There was no opposition testimony to this proposal.

Record evidence supports modifying the definition of handle to clarify that handling includes the placing fresh cranberries within the stream of commerce to markets within the United States, as well as to all foreign countries. In addition, record evidence supports adding an exemption from handling for the temporary freezing or cold storage of restricted cranberries under a handler withholding program.

USDA is recommending that § 929.10 be amended as proposed by the Committee.

Material Issue Number 21—Reporting Requirements

Currently under the order, there is a reference to a reporting requirement for growers under § 929.48, Sales History. The reporting requirement specifies that growers shall file a report with the Committee by January 15 of each crop year, indicating the total acreage harvested, the total commercial cranberry sales in barrels from such acreage, and the amount of any new or renovated acreage planted, and to allow the committee to compute a sales history for each grower.

Section 929.62 currently includes reporting requirements for handlers. The requirements include reports relating to handler inventories, receipts, amount of cranberries handled, withheld and other reports deemed necessary.

Section 929.64 sets forth that the Committee shall have access to handler records for the purpose of assuring compliance and checking and verifying records and reports filed by handlers.

The Committee proposed moving the grower reporting requirements to § 929.62, Reports, in order to maintain all reporting functions of growers and handlers in one section of the order for ease of referencing. In addition, the Committee proposed adding more specific requirements under the grower reporting provisions. The Committee proposed modifying grower reporting requirements by: Having the grower specify whether their acreage is owned or leased; Having the grower specify the amount of acreage either in production, but not harvested or taken out of production and the reason(s) why; Changing the word renovated acreage to replanted acreage; Having the grower specify the name of the handler(s) to whom commercial cranberry sales were made; and Having the grower supply

such other information as may be needed for implementation and operation of this section.

Under the handler reporting requirements, the Committee recommended changing the word "handler'' to "person'' under the inventory reporting requirement. The reason for this was because of legislation enabling USDA to require persons engaged in the handling or importation of cranberries or cranberry products to provide information on acquisitions, inventories, and dispositions of cranberries and cranberry products. The Committee's intent was to broaden the scope of the entities required to report certain information.

The Committee also recommended deleting a paragraph relating to handlers reporting of withheld cranberries when a withholding volume regulation is in effect. The reason specified for this deletion was that the paragraph requiring handlers to file reports on the quantity of cranberries handled would cover the reporting of withheld cranberries as well as excess cranberries under a producer allotment program.

The Committee's proposed changes to § 929.64, Verification of Reports, are to simplify and clarify the language as to the Committee's authority to have access to any handler's premises where records are maintained for the purpose of assuring compliance and checking and verification of records and reports filed by handlers. The Committee believed this proposal to be administrative in nature as no changes are being proposed to the current regulations or requirements contained in the marketing order regarding the checking and verifying of handle records.

There was no opposition testimony on the changes to the reporting requirements as proposed by the Committee. However, USDA is modifying some of the proposals.

The grower reporting requirements should be moved to the section of the order relative to reports. This will allow them to be located easily. Expanding the requirements to include additional information would ensure that the Committee staff is provided with appropriate information to accomplish its mission. In addition, because of the changes being recommended in how sales histories are computed and in authorizing growers to transfer their sales histories to other growers, more information from growers is necessary, such as planting dates and whether the acreage is leased or owned. This will assist the Committee in assembling the most accurate information as possible. The addition of language requiring such other information as may be needed for implementation and operation of this section will allow additional reporting requirements to be recommended if any unforeseen need arises.

Orders with producer allotment programs are unique in that specific information is needed from growers in order to implement a program. Under the cranberry order, growers benefit from reporting the information by being provided accurate and timely sales histories that reflect their production and allow equitable allotments to be determined on their acreage during years of volume regulation. The failure of growers to file these reports could be detrimental to them in the event volume regulations are implemented.

Therefore, record evidence supports relocating the grower reporting requirements to the reporting requirements section of the order and expanding the information needed from growers. This proposal is recommended for adoption.

The Committee's proposal to change the word "handler'' to "person'' is not being recommended. The reason the Committee proposed the change was due to legislation expanding the data collection requirements for cranberries and cranberry products. Regulations regarding this legislation are being developed apart from the order. Any regulations adopted from this legislation would include appropriate reporting requirements for those impacted by the regulations. This proposed change is, therefore, unnecessary and is not being recommended for adoption.

The Committee proposal to delete the paragraph relating to handlers' reporting of cranberries withheld under a withholding volume regulation is not being recommended. However, a modification is being recommended. The Committee's reason for deleting this paragraph was that the handler requirement for reporting quantities of cranberries handled would cover this instance. Withheld cranberries under a withholding provision as well as excess cranberries under a producer allotment program are not allowed to be handled. Therefore, there should be specific requirements for handlers to report these quantities. The current language in that section, however, only relates to withheld cranberries and should also include excess cranberries. Therefore, USDA is recommending retaining that paragraph in this section but modifying it to include that handlers are required to report information on the quantities of excess cranberries as well as withheld cranberries. Record evidence supports this modification.

The Committee also proposed adding a paragraph under this provision authorizing that the committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section. This paragraph is being recommended to allow the Committee to develop and recommend rules and regulations needed to implement these provisions.

Any additional reporting requirements resulting from adoption of this proposed amendment would be submitted to the Office of Management and Budget prior to implementation.

The Committee proposal to simplify and clarify the language relating to verification of reports is being recommended. This is an administrative change and should be made.

Material Issue Number 22—Deletion of Obsolete Provision

The order should be amended to delete § 929.47, as it is obsolete.

Section 929.47, entitled Preliminary Regulation, refers to base quantity, which is a term that is no longer used under the marketing order. The order was amended in 1992 to improve the producer allotment program to base annual allotments on sales histories rather than base quantities. This section is obsolete, serves no purpose, and therefore should be removed from the order.

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 initial 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 cranberry growers and handlers. Overall benefits are expected to exceed costs.

The record indicates that there are about 20 handlers currently regulated under Marketing Order No. 929. In addition, the record indicates that there are about 1,250 producers of cranberries in the current production area.

Based on recent years' price and sales levels, AMS finds that nearly all of the cranberry producers and some of the handlers are considered small under the SBA definition. In 2001, a total of 34,300 acres were harvested with an average U.S. yield per acre of 156.2 barrels. Grower prices in 2001 averaged $22.90 per barrel. Using these figures, average total annual grower receipts for 2001 are estimated at $153,375 per grower. However, there are some growers whose estimated sales would exceed the $750,000 threshold. Thus, the consequences of this decision would apply almost exclusively to small entities.

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

This decision proposes that the order be amended: (1) To authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts; (2) to simplify criteria considered and set forth more appropriate dates in establishing the Committee's marketing policy; (3) to revise the formula for calculating sales histories under the producer allotment program in § 929.48, which includes providing additional sales history to compensate growers for expected production on younger acres. This proposed changed to § 929.48 would also allow for more flexibility in recommending changes to the formula and add authority for segregating fresh and processed sales; (4) to allow compensation of sales history for catastrophic events that impact a grower's crop; (5) to remove specified dates relating to when information is required to be filed by growers/handlers in order to issue annual allotments; (6) to clarify how the Committee allocates unused allotment to handlers; (7) to allow growers to decide whether to assign allotment if no crop is produced; (8) to allow growers to transfer allotment during a year of volume regulation; (9) to authorize the implementation of the producer allotment and withholding programs in the same year; (10) to set dates by which volume regulations must be recommended; (11) to add specific authority to exempt fresh, organic or other forms of cranberries from order provisions; (12) to allow for greater flexibility in establishing other outlets for excess cranberries; (13) to update and streamline the withholding volume control provisions; (14) to modify the withholding volume regulations by allowing growers to be compensated under the buy-back provisions if any funds are returned to the handler by the Committee; (15) to add authority for paid advertising under the research and development provision of the order; (16) to modify the definition of handle to clarify that transporting fresh cranberries to foreign countries is considered handling and include the temporary cold storage or freezing of withheld cranberries as an exemption from handling; (17) to relocate some reporting provisions to a more suitable provision and streamline the language relating to verification of reports and records; and (18) to delete an obsolete provision from the order relating to preliminary regulation.

This decision does not recommend for adoption the following proposed amendments: (1) To incorporate a handler marketing pool or buy-back provisions under the producer allotment program; (2) to authorize an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower; (3) to add Maine, Delaware and the entire State of New York to the production area; (4) to add the species *Vaccinium oxycoccus* to the definition of cranberry.

Historical Trends and Near Term Outlook

The cranberry industry has operated under a Federal marketing order since 1962. For many years, the industry enjoyed increasing demand for cranberry products, primarily due to the success of cranberry juice-based drinks. This situation encouraged additional production. Between 1960 and 1999, production increased from 1.34 million barrels (one barrel equals 100 pounds of cranberries) to a record 6.3 million barrels. This represents a 370 percent increase from 1960 and a 17-percent gain from the 1998 crop year. Production in the 2000 crop year declined to 5.6 million barrels and to 5.4 million barrels in 2001, due to the use of volume control by the industry and a decrease in yields in some production areas due to adverse weather conditions during the growing season.

Production increased for each of the five major producing States from 1960 to 2001. In 1995, Wisconsin surpassed Massachusetts to become the largest producing State. Production in all States is highly variable. This variation in production is mainly due to the variation in yields, which is influenced by weather in each of the producing States. The variation in production is one of the primary reasons the industry likes to carry out a reasonable volume of inventory into the next crop year to insure against a short crop.

Cranberries are produced in at least 10 States, but the vast majority of farms and production are concentrated in Massachusetts, New Jersey, Oregon, Washington, and Wisconsin. Area harvested for the U.S. has increased from 21,140 acres in 1960 to 34,300 acres in 2001. Most of this increase has come from Wisconsin, where area harvested has increased from 4,200 acres in 1960 to 15,100 acres in 2001. Currently, Wisconsin has the highest amount of area harvested at 15,100 acres, followed by Massachusetts with 12,200, New Jersey with 3,100 acres, Oregon with 2,300 acres, and Washington with 1,600 acres. Total U.S. area harvested has declined from a peak of 37,500 in 1999 to 34,300 acres in 2001. This decline is likely due to the surplus situation the industry has experienced over the last several crop years. Massachusetts has traditionally had the largest area harvested. However, in 1998, Wisconsin became the State with the largest area harvested. Since 1998, Wisconsin area harvested has continued to increase, while Massachusetts area harvested has declined. Together, both States account for over 80 percent of cranberry production.

Average farm size for cranberry production is very small. The average across all producing States is about 27 acres. Wisconsin's average is twice the U.S. average, at 56 acres, and New Jersey averages 66 acres. Average farm size is below the U.S. average for Massachusetts (20 acres), Oregon (13 acres) and Washington (11 acres).

Yields are highly variable from year to year and yields have been increasing over time. For the U.S., yields have more than doubled from the 1960's to the 2000's. Increasing yields suggest that cranberry growers have become more productive. Over the last five crop years (1997–2001), Wisconsin has had the highest yield at 185.9 barrels per acre,

followed by New Jersey with an average yield of 154.0 barrels per acre, then Oregon with an average yield of 151.2 barrels per acre, then Massachusetts with an average yield of 133.2 barrels per acre, and then Washington with an average yield of 104.1 barrels per acre.

While production capacity continues to rise, demand has leveled off. Per capita consumption of fresh cranberries has remained stable ranging from 0.07 to 0.10 pounds per person. The per capita consumption of processed cranberries increased to 1.70 pounds per person in 1994. In 1994, total domestic production was 4,682,000 barrels, while total sales increased to 4,692,507 barrels. This increase in sales and per capita consumption, accompanied by increasing grower prices provided further incentives for growers to increase plantings and productivity. However, after 1994, sales of processed cranberries began to stagnate. Stagnant sales of processed cranberry products continued until 2000. In the 2000 crop year, per capita consumption of processed cranberries increased to 1.87 pounds and sales of processed cranberries increased to over 5 million barrels for the first time.

About 92 percent of the cranberry crop is processed, with the remainder sold as fresh fruit. In the 1950's and early 1960's, fresh production was considerably higher than it is today, and in many years, constituted as much as 25 to 50 percent of total production. Fresh production began to decline in the 1980's, while processed utilization and output soared as cranberry juice products became popular. Today, fresh fruit claims only about 8 percent of total production. Three of the top five States produce cranberries for fresh sales. New Jersey and Oregon produce fruit for processed products only. There has been tremendous growth in processed cranberries, while the fresh market has remained relatively stable.

When supply is greater than demand, inventories are carried over into the next crop year. Carryin inventories are reported by the Committee. In many agricultural industries, modest levels of inventories are believed to be desirable in situations of a late harvest or a disastrous production year. From 1987 through 1997, annual carryin inventories were relatively stable, averaging 1.1 million barrels. Beginning with the 1998 crop, carryin inventories exceeded 2 million barrels. For the 2000 crop year, carryin inventories exceeded 4 million barrels. Large and increasing inventories provide an indication of how far supply is outpacing demand. Larger inventories, beginning in 1997, have resulted in prices paid to growers dropping dramatically.

From 1974 through 1996, prices trended up. Prices increased from $11.00 per barrel in 1974 to $65.90 per barrel in 1996. Since 1996, prices have decreased. Prices reached a recent low of $17.20 per barrel in 1999. In 2001, prices are reported at $22.90 per barrel. The period of increasing prices provided an incentive for producers to expand planted acres and to increase yields. The price decline over the past several crop years is due to the surplus situation which resulted from the increase in planted acreage and yields and the lack of significant sales increases to keep pace with increased production.

Grower prices do not vary greatly among the five major producing States. This provides an indication that domestic market forces similarly impact all U.S. cranberry growers. Further evidence that prices for the five producing States follow very similar movements is provided by computing the correlation coefficient for the five producing States from 1960 to 2001. Correlation is a statistical measure, which shows how variables are related and a figure of 1.0 would mean perfect correlation. The price correlation among the five States is greater than 0.97.

Real prices are derived by deflating the actual (nominal) prices by a price index (Prices Received by Farmers All Farm Products Index 1990–92=100). Real prices have the effects of inflation removed. Real prices show whether there has been any change in a commodity's price behavior absent the effects of inflation. Real cranberry prices reached a peak in 1997. Currently, real prices have fallen to levels similar to the mid 1970's.

The value of production increased dramatically from 1960, reaching a peak of $350 million in 1997. In 2000, the value of production fell below $100 million for the first time since 1980. Between 1997 and 2001, growers lost 69 percent of the value of production due to the surplus situation. The value of production has declined in all of the major producing States.

With most agricultural commodities, there is a pronounced inverse relationship between production and prices. When production is high, prices are generally low and when production is low, prices are generally high. From 1960 through 1996, prices and production are positively correlated (the correlation coefficient is 0.93). However, beginning in 1997, as production continued to increase, prices started to decline and continued to decline as production increased in crop years 1998 and 1999. Starting in 1996, supply began to outpace demand, ultimately resulting in declining prices.

To help stabilize market supply and demand conditions, volume regulation was introduced in 2000 and again in 2001, marking the first time in 30 years that such regulations were implemented. Crop sizes in 2000 and 2001 have been reduced by the use of the producer allotment program, which limits the amount of product that a producer can deliver to a handler. Reduced crop sizes for these two crop years, combined with increased sales and USDA purchases, have resulted in a reduction of inventories.

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

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

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

Reestablishment of Districts and Reapportionment of Grower Membership Among the Districts

The proposed amendment to authorize the Committee to reestablish and/or reapportion districts would give the Committee greater flexibility in responding to changes in grower demographics and district significance in the future. This authority would allow the Committee to recommend changes through informal rulemaking rather than through an order amendment. The proposal includes specific criteria to be considered prior to making any recommendations.

This proposed authority does not change the districts. It only authorizes the Committee to recommend changes more efficiently. No additional administrative costs are anticipated

with this proposed amendment. This proposal should be favorable to both large and small entities.

Development of Marketing Policy

Section 929.46 of the order requires the Committee to develop a marketing policy each year as soon as practicable after August 1. In its marketing policy, the Committee projects expected supply and market conditions for the upcoming season. The marketing policy should be adopted before any recommendation for regulation, as it serves to inform USDA and the industry, in advance of the marketing of the crop, of the Committee's plans for regulation and the bases therefore. Handlers and growers can then plan their operations in accordance with the marketing policy.

The Committee is currently required to consider nine criteria in developing its marketing policy. The criteria include such items as expected production, expected demand conditions, and inventory levels. This rule recommends removing criteria not considered to be relevant in making a decision on the need for volume regulation.

The marketing order section of the order also states that the Committee must estimate the marketable quantity necessary to establish a producer allotment program by May 1, and must submit its marketing policy to USDA after August 1. These dates are inconsistent with the dates by which the Committee must recommend a volume regulation (if one or both are deemed necessary) for the upcoming crop. USDA is recommending that both dates be removed.

These changes are non-substantive in nature. They remove unnecessary criteria and obsolete dates from the order. As such, they will have no economic impact on growers or handlers.

Sales History Calculations Under the Producer Allotment Program

The proposed amendment to modify the method for calculating sales histories would provide growers with additional sales histories to compensate them for expected increases in yields on newer acres during a year of volume regulation, which would result in sales histories more reflective of actual sales. This proposed amendment would also allow more flexibility in recommending changes to the formula and add the authority to calculate fresh and processed cranberries separately.

The proposed amendment to the sales history calculations would benefit a majority of growers, especially growers who planted some or all of their acreage within the previous 5 years. The proposal would also help ensure that growers with mature acres who also have newer acreage and growers with only newer acres are treated equitably.

During the 2000 volume regulation, many growers, particularly those with acreage 4 years old or less, indicated that the method of sales history calculation placed them at a disadvantage because they realized more production on their acreage than their sales history indicated. With the volume of new acres within the industry, this would affect many growers.

The Committee determined that something needed to be done to address the concerns associated in the 2000 crop year with growers with newer acreage. The Committee discussed other alternatives to this method. One suggestion was to allow growers with newer acreage to add a percentage of the State average yield to their sales history each year up to the fourth year. The example presented was that acreage being harvested for the second time during a year of volume regulation would receive a sales history that was 25 percent of the State average yield, a third year harvest would receive 50 percent of State average yield, and a fourth year harvest would receive 75 percent of State average yield. Although this method would address some of the problems experienced in 2000, it was determined that the method established by this action would be a simpler and more practical method for growers to obtain the most realistic sales history.

This action addresses grower concerns regarding determination of their sales histories. The method provides additional sales history for growers with newer acres to account for increased yields for each growing year up to the fifth year by factoring in appropriate adjustments to reflect rapidly increasing production during initial harvests. The adjustments are in the form of additional sales histories based on the year of planting.

An appeals process would be in place for growers to request a redetermination of their sales histories. For the 2000–2001 volume regulation, over 250 appeals were received by the appeals subcommittee (the first level of review for appeals). In 2001–2002, a total of 49 appeals were filed. The decrease in appeals filed was a direct result of the formula for calculating sales histories that was implemented in 2001. This proposed amendment represents a generic version of the formula that was used in 2001.

This proposal, if adopted, would not impose any immediate regulations on large or small growers and handlers. It would only modify the formula for calculating sales histories in the event volume regulations are implemented in the future. Adopting this proposal would benefit small businesses by allowing them more flexibility in receiving a more equitable sales history if volume regulations are recommended and implemented in future years. If this proposal is adopted, growers and handlers would know specifically how sales histories would be calculated so that they can be informed and make business decisions well ahead of the future season.

The proposal also includes that sales histories, starting with the crop year following adoption of this amendment, would be calculated separately for fresh and processed cranberries. Fresh and organic fruit were exempt from the 2000 and 2001 volume regulations because it was determined that they did not contribute to the surplus. In both years, fresh fruit sales were deducted from sales histories and each grower's sales history represented processed sales only. To have sales histories more reflective of sales, the Committee proposed calculating separate sales histories for fresh and processed cranberries. Also, in future years, fresh cranberry sales could contribute to the surplus. This proposed change would make sales history calculations more equitable.

These changes will have a positive effect on all growers and handlers because they will result in a more equitable allocation of the marketable quantity among growers. The proposal would be favorable to both large and small entities.

Catastrophic Events That Impact Growers' Sales Histories

The proposed amendment would provide more flexibility in the provision under the sales history calculations that compensates growers with additional sales histories for losses on acreage due to forces beyond the grower's control.

The current provisions require that if a grower has no commercial sales from acreage for 3 consecutive crop years due to forces beyond the grower's control, the Committee shall compute a level of commercial sales for the fourth year for that acreage using an estimated production. The record revealed that this provision was too stringent as evidenced by only one grower meeting these criteria in two years of volume regulation.

The proposal would authorize the Committee to recommend rules and

regulations to allow for adjustments of a grower's sales history to compensate for catastrophic events that impact a grower's crop. The Committee would recommend procedures and guidelines to be followed in each year a volume regulation is implemented. The proposed amendment would have a positive impact on both large and small growers as the Committee would be in a position to compensate more growers who experienced losses due to catastrophic events than the current order provides.

Remove Specified Dates Relating to Issuing Annual Allotments

The order currently provides that when a producer allotment regulation is implemented, USDA establishes an allotment percentage equal to the marketable quantity divided by the total of all growers' sales histories. The allotment percentage is then applied to each grower's sales history to determine that individual's annual allotment. All growers must file an AL–1 form with the Committee on or before April 15 of each year in order to receive their annual allotments. The Committee is required to notify each handler of the annual allotment that can be handled for each grower whose crop will be delivered to such handler on or before June 1.

Experience during the 2000 and 2001 crop years has proven that maintaining a specified date by which growers are to file a form to qualify for their allotment and for the Committee to notify handlers of their growers' annual allotments has been difficult. This proposed change would delete the specified dates and allow the Committee to determine, with the approval of USDA, more appropriate dates by which growers are to file forms and the Committee is to notify handlers of their growers' annual allotments. The Committee would like to have established dates that the industry can realistically meet each season when a volume regulation is implemented.

Because volume regulation was not recommended until the end of March during 2000 and 2001, growers had difficulty in submitting the required reports in a timely manner. Additionally, the rulemaking process to establish the allotment percentage had not been completed by June 1. Therefore, the Committee was unable to notify handlers of their growers' allotment by the specified deadline. With this proposed amendment, dates could be established in line with the timing of the recommendation and establishment of volume regulation. Allowing the Committee to set dates that can realistically be met by the industry would better serve the purposes of the marketing order. Thus, this modification should benefit the entire industry, both large and small entities.

The Committee also recommended clarifying the explanation of how an allotment percentage is calculated. Currently, § 929.49(b) states that such allotment percentage shall equal the marketable quantity divided by the total of all growers' sales histories. It does not specify that ''all growers' sales histories'' includes the sales histories calculated for new growers. This rule proposes a clarification to ensure that total sales histories (including those of new growers) are used in this calculation. To the extent this clarification makes the terms of the order easier to understand, it should benefit cranberry growers and handlers.

This rule also proposes revising the information to be submitted by growers to qualify for an annual allotment. Currently, all growers must qualify for allotment by filing with the Committee a form including the following information: (1) The location of their cranberry producing acreage from which their annual allotment will be produced; (2) the amount of acreage which will be harvested; (3) changes in location, if any, of annual allotment; and (4) such other information, including a copy of any lease agreement, as is necessary for the Committee to administer the order. Such information is gathered by the Committee on a form specified as the AL–1 form.

The proposed amendment would modify these criteria by not including information that is not pertinent. Currently, growers are assigned a grower number and the amount of acreage on which cranberries are being produced is maintained. The location of the cranberry producing acreage is not maintained. Therefore, there is no need to specify this information on the form. It is also unnecessary to include changes in location, if any, of growers' annual allotment including the lease agreement. Annual allotment is linked to a grower's cranberry producing acreage and, since the acreage cannot be moved from one location to another, information on changes in location is not relevant.

Therefore, the information to be submitted by growers is being recommended for revision by removing the information that the Committee does not need to operate a producer allotment program. Other information that is currently requested (including identifying the handler(s) to whom the grower will assign his or her allotment) would remain unchanged.

The AL–1 form was modified (and approved by OMB) prior to the 2001 volume regulation. At that time, the Committee did not include this information on the form. Therefore, there is no reporting burden change as a result of this amendment. This change removes the unnecessary information from the order language.

Clarify How the Committee Allocates Unused Allotment to Handlers

The proposed amendment would change the method by which the Committee allocates unused allotment to handlers having excess cranberries to proportional distribution of each handler's total allotment.

Currently under the producer allotment volume regulation features of the order, section 929.49(h) provides that handlers who receive cranberries more than the sum of their growers' annual allotments have ''excess cranberries'' and shall notify the Committee. Handlers who have remaining unused allotment are ''deficient'' and shall notify the Committee. The Committee shall equitably distribute unused allotment to all handlers having excess cranberries.

The proponents testified that there has been a debate in the industry on the interpretation of what equitable distribution means and how it should be accomplished. To add specificity, the Committee proposed replacing the words ''equitably distribute'' with ''proportional to each handler's total allotment''.

The proponents testified that the distribution of unused allotment would only be given to those handlers who have excess fruit and are in need of allotment to cover that fruit. Allotment is only distributed proportionately to handlers when there are more requests for unused allotment than available unused allotment. In this situation, handlers would then receive the allotment in proportion to the volume of cranberries they handle.

This amendment would have a positive impact on large and small handlers since handlers may be able to acquire the additional allotment they need for their excess berries than they would have under the current provisions.

Growers' Assignment of Allotment if No Crop Is Produced

The proposed amendment to authorize growers who choose not to produce a crop in years of volume regulation to not assign their allotment to their handler would provide growers with flexibility to decide what happens with their unused allotment. Currently,

the order requires the allotment to go to the handlers.

Prior to implementing this provision, the Committee would consider what would happen to the unused allotment and recommend, with USDA approval, implementing regulations. This amendment would benefit growers who choose not to grow a crop by providing them with input into the allocation of that allotment. This proposal should be favorable to both large and small growers.

Transfers of Allotment During Years of Volume Regulation

The proposed amendment would allow growers to transfer allotment during a year of volume regulation and allow the sales history to remain with the lessor when there is a total or partial lease of cranberry acreage to another grower. Currently, growers are not allowed to transfer allotment to other growers. The only option available to growers to accomplish a transfer of allotment is to complete a lease agreement between the two growers. This involves filing paperwork, including signed leases and only transferring the sales history, not the allotment. Many of the lease agreements were initiated during the two years of volume regulation and created a burden on Committee staff. It also made recalculations of growers sales histories difficult.

This proposal would simplify the process for growers by authorizing growers to transfer all or part of his or her allotment to another grower. Safeguards are in place to ensure that the transferred allotment remains with the same handler unless consent is provided by both handlers. In addition, the Committee may establish dates by which transfers may take place.

This proposal would be beneficial to both large and small growers as it provides flexibility in transferring allotment.

Implementing Both Forms of Volume Regulation in the Same Year

The proposal to require authorizing both forms of volume regulation in the same year was proposed in accordance with an amendment to the Act in November 2001. The amendment specified that USDA is authorized to implement a producer allotment program and a handler withholding program in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Committee. If such recommendation is made by the Committee, it must be made no later than March 1 of each year. The amendment would provide additional flexibility to the Committee when considering its marketing policy each year.

This proposal should be favorable to both large and small entities.

Dates for Recommending Volume Regulation

The proposal to require the Committee to recommend a producer allotment program by March 1 each year would allow growers to alter their cultural practices in an efficient manner in the event that a producer allotment is implemented. Growers have indicated that they need to know as soon as possible whether the Committee is going to recommend a regulation since a producer allotment program requires growers to only deliver a portion of their crop. The Committee's decision influences whether growers can cut back on purchases of chemicals, fertilizer or possibly take acreage out of production. This can result in growers' savings. The later the decision is made, the chances are growers will have already invested these costs on their acreage.

The proposal to require the Committee to recommend a handler withholding program by August 31 each year would provide the Committee staff with ample time to prepare reports based on handler inventory reports and crop projection data received from the National Agricultural Statistics Service (NASS). Because the withholding program does not impact grower deliveries, this date is more appropriate for making an informed decision on whether to recommend this type of program.

Another proposal would authorize both forms of volume regulation to be implemented each year in accordance with an amendment to the Act authorizing such proposal. The amendment states that if both forms of volume regulation are recommended, it should be done by March 1. Therefore, this proposed amendment would require that if both forms of regulation are recommended in the same year that it be recommended by March 1. The same reasoning for recommending a producer allotment alone would apply to this proposed requirement. Growers need to know as soon as possible if production costs can be mitigated if a producer allotment is recommended. All growers, both large and small, should benefit from this change.

Exemptions From Order Provisions

The proposed amendment recommending that specific authority be added to exempt fresh, organic or other forms of cranberries from order provisions would clarify the current language and provide guidelines for the specific forms or types of cranberries that could be exempted.

Fresh and organic cranberries were exempted from the 2000 and 2001 volume regulations under the minimum quantity exemption authority of the order. This proposal would merely clarify that authority in the order to ensure that fresh and organic and other forms of cranberries could be exempted if warranted in the future. This proposal should be beneficial to large and small entities.

Expand Outlets for Excess Cranberries

The proposed amendment to the outlets for excess cranberries provisions would broaden the scope of noncommercial and noncompetitive outlets for excess cranberries. Adoption of this proposal would provide the Committee, with USDA's approval, the ability to recognize and authorize the used of additional or new noncommercial and/or noncompetitive outlets for excess cranberries through informal rulemaking.

Because competitive markets can change from season to season and new and different research ideas can be devised, the Committee would develop guidelines each year a volume regulation is recommended that would be used in determining appropriate outlets for excess cranberries. This would benefit growers and handlers by providing flexibility in determining outlets. This proposal would be particularly useful in determining which foreign markets can be used as outlets for excess cranberries. Foreign markets are one area where growth is occurring and demand is increasing. Exports of cranberries have increased from 184,000 barrels in 1988 to 824,000 barrels in 2000. Both large and small entities should benefit from this proposal.

General Withholding Provisions

Section 929.54 of the order sets forth the general parameters pertaining to withholding regulations. Under this form of regulation, free and restricted percentages are established, based on market needs and anticipated supplies. The free percentage is applied to handlers' acquisitions of cranberries in a given season. A handler may market free percentage cranberries in any chosen manner, while restricted berries must be withheld from handling.

The withholding provisions of the order were used briefly over three decades ago. Although the cranberry industry has not used the authority for

withholding regulations in quite some time, the record evidence supports maintaining this tool for possible future use. However, substantive changes in industry practices have rendered current withholding provisions in need of revision. Thus, this decision recommends updating and streamlining those provisions.

The record shows that at the time the withholding provisions were designed, the cranberry industry was much smaller, producing and handling much lower volumes of fruit than it does now. In 1960, production was about 1.3 million barrels; by 1999, a record 6.3 million barrels were grown. A much higher percentage of the crop was marketed fresh—about 40 percent in the early 1960's versus less than 10 percent in recent years.

Changes in harvesting and handling procedures have been made so the industry is better able to process higher volumes of cranberries. Forty years ago, virtually all cranberries were harvested dry, and water harvesting was in an experimental stage of development. Water harvesting is currently widespread in certain growing regions; cranberries harvested under this method must be handled immediately as they are subject to rapid deterioration.

In the early 1960's, handlers acquired some cranberries that had been "screened'' to remove extraneous material that was picked up with the berries as they were being harvested, and "unscreened'' berries from which the extraneous material (including culls) had not been removed. The handler cleaned some of the unscreened berries immediately upon receipt, while others were placed in storage and screened just prior to processing.

The order currently provides that when a withholding regulation is implemented, the restricted percentage will be applied to the volume of "screened'' berries acquired by handlers. Since the term "screening'' is obsolete, all references to that term are being deleted.

The order also currently provides that withheld cranberries must meet such quality standards as recommended by the Committee and established by USDA. The Federal or Federal-State Inspection Service must inspect such cranberries and certify that they meet the prescribed quality standards. The intent of these provisions is, again, to ensure that the withholding regulations reduce the volume of cranberries in the marketplace by not allowing culls to be used to meeting withholding obligations. The inspection and certification process is also meant to assist the Committee in monitoring the proper disposition of restricted cranberries, thereby ensuring handler compliance with any established withholding requirements.

The need for inspection and certification of withheld cranberries is not as great today as in the past. Additionally, it could be costly, particularly since most withheld berries would subsequently be dumped, generating no revenue for growers or handlers. The inspection process could also inordinately slow down handling operations, and there could be differential impacts of such requirements because some handling facilities operate in ways that lend themselves to more efficient methods of pulling representative samples (for inspection purposes) than others.

Removing the requirements for mandatory inspection and certification requirements would allow the industry to develop alternative safeguards to achieve its objectives at lower cost. While the inspection process may be deemed the best method by the Committee, this proposal provides flexibility by allowing the Committee to consider other, less costly alternatives.

Eliminating the mandatory inspection under the withholding program and deleting obsolete terminology would make the program more flexible for the industry and allow the Committee to operate more efficiently. As such, this amendment should benefit cranberry growers and handlers by providing an additional tool they could use in times of cumbersome oversupply.

Buy-Back Provisions Under the Handler Withholding Program

Section 929.56 of the order, entitled "Special provisions relating to withheld (restricted) cranberries,'' sets forth procedures under which handlers may have their restricted cranberries released to them. These provisions are commonly referred to in the industry as the buy-back provisions.

Under the current buy-back provisions, a handler can request the Committee to release all or a portion of his or her restricted cranberries for use as free cranberries. The handler request has to be accompanied by a deposit equal to the fair market value of those cranberries. The Committee then attempts to purchase as nearly an equal amount of free cranberries from other handlers. Cranberries so purchased by the Committee are transferred to the restricted percentage and disposed of by the Committee in outlets that are noncompetitive to outlets for free cranberries. The provision that each handler deposit a fair market price with the Committee for each barrel of cranberries released and that the Committee use such funds to purchase an equal amount or as nearly an equal amount as possible of free cranberries is designed to ensure that the percentage of berries withheld from handling remains at the quantity established by the withholding regulation for the crop year.

The Committee has the authority to establish a fair market price for the release of restricted cranberries under the buy-back program. The money deposited with the Committee by handlers requesting release of their restricted cranberries is the only money the Committee has available for acquiring free cranberries. Thus, the amount deposited must be equal to the then current market price or the Committee will have insufficient funds to purchase a like quantity of free cranberries.

The Committee is required to release the restricted cranberries within 72 hours of receipt of a proper request (including the deposit of a fair market value). This release was made automatic so that handlers would be able to plan their operations, and very little delay would be encountered.

If the Committee is unable to purchase free berries to replace restricted cranberries that are released under these provisions, the funds deposited with the Committee are required to be returned to all handlers in proportion to the volume withheld by each handler.

This rule proposes authorizing direct buy-back between handlers. With this option, a handler would not have to go through the Committee to have his or her restricted berries released. Instead, that handler could arrange for the purchase of another handler's free cranberries directly. All terms, including the price paid, would be between the two parties involved and would not be prescribed by the Committee. This change would add flexibility to the order and could offer a more efficient method of buying back cranberries. Also, no Committee administrative costs would be incurred. Handlers would have the option of using this method, or they could buy back their berries through the Committee, as is currently provided.

There are four criteria the Committee needs to consider in establishing a fair market price under the buy-back program for purchasing restricted cranberries. These include prices at which growers are selling their cranberries to handlers; prices at which handlers are selling fresh berries to dealers; prices at which cranberries are being sold to processors; and prices at

which the Committee has purchased free berries to replace released restricted berries.

This action proposes adding two criteria to the list—the prices at which handlers are selling cranberry concentrate and growers' costs of production. Both of these items are relevant to consider in determining a fair market value. Consideration of these criteria by the Committee would benefit handlers.

Under the current buy-back provisions, handlers are required to deposit with the Committee the full market value of the berries they are asking to be released. This decision proposes a different payment schedule so that handlers would not have to make a large cash payment prior to the sale of their restricted cranberries. Twenty percent of the total amount would be due at the time of the request, with an additional 10 percent due each month thereafter. This change would facilitate handlers buying back their restricted berries by reducing the costs of such a venture. Thus, handlers should benefit.

If the Committee is unable to purchase free berries under the buy-back system, it is currently required to refund the money back to all handlers proportionate to the amount each handler withheld under regulation. USDA is proposing a modification that would provide that the money be returned to the handler who deposited it for distribution to the growers whose fruit was sold. This should benefit growers whose fruit was sold. Additionally, this change could provide an incentive for handlers to make available free cranberries for purchase to replace restricted cranberries that are released under the buy-back provisions. For these reasons, this change should benefit the cranberry industry.

Paid Advertising

The proposal to add authority for paid advertising under the research and development provisions of the order would provide the Committee the flexibility to use paid advertising to assist, improve, or promote the marketing, distribution, and consumption of cranberries in either its export or domestic programs. The authority for authorizing paid advertising under the cranberry marketing order was added to the Act in October, 1999.

If a paid advertising program is recommended by the Committee, it could entail an increase in assessments to administer the program, which would have an impact on handlers. According to testimony, it is the Committee's intent to use paid advertising sparingly as a means to provide consumers with relevant information to the health-related benefits of cranberries. Paid advertising authority is viewed as an additional tool available to the Committee to meet its objectives of increasing demand and consumption of cranberries and cranberry products. It is anticipated that any additional costs incurred to all handlers, both large and small, would be outweighed by the benefits of increasing demand for cranberries. Any paid advertising program and increase of assessment must proceed through notice and comment rulemaking before it is implemented.

Definition of Handle

The proposal to modify the definition of handle under the order would clarify that the transporting of fresh cranberries to foreign markets other than Canada is also considered handling. This proposed change would merely clarify language.

The proposal would also modify the definition by including the cold storage or freezing of withheld cranberries as an exemption from handling for the purpose of temporary cold storage during periods when withholding provisions are in effect prior to their disposal. The provision already applies this exemption to excess cranberries under the producer allotment program and it was determined that handlers could benefit from this provision under a withholding program as well. This would benefit large and small handlers by allowing temporary storage of withheld cranberries, which could be critical during a withholding volume regulation.

Reporting Requirements

The proposal to modify the reporting requirements would relocate a paragraph on a grower reporting requirement to the section on Reports for ease of referencing and is only administrative in nature.

The proposal would also add more specific information under the grower reporting provisions to incorporate additional information necessary from growers if the sales history and transfer of allotment proposals are adopted. This will assist the Committee in assembling the most accurate and effective information as possible. Orders with producer allotment programs are unique in that specific information is needed from growers in order to implement a program. Both large and small growers benefit from reporting the information by being provided accurate and timely sales histories that reflect their production and allow equitable allotments to be determined on their acreage during years of volume regulation. The failure of growers to file these reports could be detrimental to them in the event volume regulations are implemented. Any additional reporting requirements resulting from adoption of this proposed amendment would be submitted to the Office of Management and Budget prior to implementation.

The proposal would also include that handlers report on the quantities of excess cranberries as well as withheld cranberries. This is a clarification and administrative in nature. The proposal would also simplify and clarify the provision on verification of reports. The proposal should be favorable to large and small growers.

Obsolete Provision

The proposal to delete an obsolete provision relating to preliminary regulation is administrative in nature and is being recommending for adoption. There would be no impact on growers or handlers.

Proposed Amendments Not Recommended For Adoption in This Decision

Five proposed amendments are not being recommended for adoption. Therefore, there would be no economic impact resulting from these proposals.

The proposed amendments not recommended would have: (1) Incorporated a handler marketing pool and/or buy-back provisions to the producer allotment program (Material Issue 15); (2) authorized an exemption from order provisions for the first 1,000 barrels of cranberries produced by each grower (Material Issue 16); (3) expanded the production area to include the States of Maine and Delaware and the entire State of New York (Material Issue 17); and (4) modified the definition of cranberry by adding the species *Vaccinium oxycoccus* to the definition (Material Issue 19).

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 35), the reporting and recordkeeping provisions that would be generated by the proposed amendments would be submitted to the Office of Management and Budget (OMB).

None of the changes, if implemented, would generate any reporting burden to growers or handlers.

Many of the changes have no reporting ramifications if they are established. As examples, adding the authority for redistricting and reapportionment of the Committee,

changing the deadlines for filing volume regulations, or adding the authority for paid advertising would not create any additional reporting requirements.

Some of the proposed amendments would not generate any reporting burdens by amendment of the order alone. If these authorities were added to the order, reporting burdens would occur at the time regulations were established to activate the order authority. Examples of these amendments are those that impact the two forms of volume regulations. If a producer allotment volume regulation were implemented, regulations would be needed to set forth any forms of cranberries exempt from the volume regulation or what outlets (and appropriate safeguards) would be established for excess cranberries. Also, at the time of recommendation, the process for making adjustments for catastrophic events would need to be recommended by the Committee. In these instances, the reporting burdens, if any, would not exist until the volume regulation was in place. In addition, if a handler withholding volume regulation is established, additional reporting burdens may be necessary to cover the handler-to-handler buy-back program.

Reporting burdens that would be immediately generated by these amendments are the grower reporting requirements. However, prior to the 2001 volume regulation, the Committee modified the AL–1 form to accommodate needed requirements for implementing the producer allotment volume regulation.

Specifically, the way growers' sales histories were calculated that is being recommended to be added to the order was used in the 2001 volume regulation. The AL–1 form was modified at that time (and approved by OMB) to include the additional information required, such as year of planting and year of first harvest.

Likewise, growers are already reporting fresh and processed sales separately on form GSAR–1. This information was included on the form prior to the 2001 volume regulation to accommodate the regulations.

The amendment to remove dates regarding issuance of annual allotments does not require a modification of the form as no dates are specified on the form.

Therefore, there would be no modification to reporting and recordkeeping burdens generated from these proposed amendments. Current information collection requirements for part 929 are approved by OMB under OMB number 0581–0189.

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.

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

Committee meetings regarding these proposals as well as the hearing dates were widely publicized throughout the cranberry industry, and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the 2005–2006 season. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

Civil Justice Reform

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

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

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all 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.

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

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of cranberries grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in their 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 proposed to be 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 cranberries grown in the production area; and

(5) All handling of cranberries grown in the production area as defined in the

marketing agreement and order, as amended, and as hereby proposed to be further amended, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

Recommended Amendment of the Marketing Agreement and Order

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

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

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

Authority: 7 U.S.C. 601–674.

2. Amend § 929.10 by revising paragraphs (a)(2) and (b)(4) to read as follows:

§ 929.10 Handle.

(a) * * *

(2) To sell, consign, deliver, or transport (except as a common or contract carrier of cranberries owned by another person) fresh cranberries or any other way to place fresh cranberries in the current of commerce within the production area or between the production area and any point outside thereof.

(b) * * *

(4) The cold storage or freezing of excess or restricted cranberries for the purpose of temporary storage during periods when an annual allotment percentage and/or a handler withholding program is in effect prior to their disposal, pursuant to §§ 929.54 or 929.59.

3. Add a new § 929.28 to read as follows:

§ 929.28 Redistricting and reapportionment.

(a) The committee, with the approval of the Secretary, may reestablish districts within the production area and reapportion membership among the districts. In recommending such changes, the committee shall give consideration to:

(1) The relative volume of cranberries produced within each district.

(2) The relative number of cranberry producers within each district.

(3) Cranberry acreage within each district.

(4) Other relevant factors.

(b) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

4. Revise § 929.45 to read as follows:

§ 929.45 Research and development.

(a) The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and market development projects, including paid advertising, designed to assist, improve, or promote the marketing, distribution, consumption, or efficient production of cranberries. The expense of such projects shall be paid from funds collected pursuant to § 929.41, or from such other funds as approved by the Secretary.

(b) The committee may, with the approval of the Secretary, establish rules and regulations as necessary for the implementation and operation of this section.

5. Revise § 929.46 to read as follows:

§ 929.46 Marketing policy.

Each season prior to making any recommendation pursuant to § 929.51, the committee shall submit to the Secretary a report setting forth its marketing policy for the crop year. Such marketing policy shall contain the following information for the current crop year:

(a) The estimated total production of cranberries;

(b) The expected general quality of such cranberry production;

(c) The estimated carryover, as of September 1, of frozen cranberries and other cranberry products;

(d) The expected demand conditions for cranberries in different market outlets;

(e) The recommended desirable total marketable quantity of cranberries including a recommended adequate carryover into the following crop year of frozen cranberries and other cranberry products;

(f) Other factors having a bearing on the marketing of cranberries.

§ 929.47 [Removed]

6. Remove § 929.47.

7. Revise § 929.48 to read as follows:

§ 929.48 Sales history.

(a) A sales history for each grower shall be computed by the committee in the following manner:

(1) For growers with acreage with 6 or more years of sales history, the sales history shall be computed using an average of the highest four of the most recent six years of sales.

(2) For growers with 5 years of sales history from acreage planted or replanted 2 years prior to the first harvest on that acreage, the sales history is computed by averaging the highest 4 of the 5 years.

(3) For growers with 5 years of sales history from acreage planted or replanted 1 year prior to the first harvest on that acreage, the sales history is computed by averaging the highest 4 of the 5 years and shall be adjusted as provided in paragraph (a)(6) of this section.

(4) For a grower with 4 years or less of sales history, the sales history shall be computed by dividing the total sales from that acreage by 4 and shall be adjusted as provided in paragraph (a)(6).

(5) For growers with acreage having no sales history, or for the first harvest of replanted acres, the sales history will be the average first year yields (depending on whether first harvested 1 or 2 years after planting or replanting) as established by the committee and multiplied by the number of acres.

(6) In addition to the sales history computed in accordance with paragraphs (a)(3) and (4) of this section, additional sales history shall be assigned to growers using the formula x=(a–b)c. The letter "x'' constitutes the additional number of barrels to be added to the grower's sales history. The value "a'' is the expected yield for the forthcoming year harvested acreage as established by the committee. The value "b'' is the total sales from that acreage as established by the committee divided by four. The value "c'' is the number of acres planted or replanted in the specified year. For acreage with five years of sales history: a = the expected yield for the forthcoming sixth year harvested acreage (as established by the committee); b = an average of the most recent 4 years of expected yields (as established by the committee); and c = the number of acres with 5 years of sales history.

(b) A new sales history shall be calculated for each grower after each crop year, using the formulas established in paragraph (a) of this section, or such other formula(s) as determined by the committee, with the approval of the Secretary.

(c) The committee, with the approval of the Secretary, may adopt regulations to change the number and identity of years to be used in computing sales histories, including the number of years to be used in computing the average. The committee may establish, with the approval of the Secretary, rules and

regulations necessary for the implementation and operation of this section.

(d) Sales histories, starting with the crop year following adoption of this part, shall be calculated separately for fresh and processed cranberries. The amount of fresh fruit sales history may be calculated based on either the delivered weight of the barrels paid for by the handler (excluding trash and unusable fruit) or on the weight of the fruit paid for by the handler after cleaning and sorting for the retail market. Handlers using the former calculation shall allocate delivered fresh fruit subsequently used for processing to growers' processing sales. Fresh fruit sales history, in whole or in part, may be added to process fruit sales history with the approval of the committee in the event that the grower's fruit does not qualify as fresh fruit at delivery.

(e) The committee may recommend rules and regulations, with the approval of the Secretary, to adjust a grower's sales history to compensate for catastrophic events that impact the grower's crop.

8. Revise § 929.49 to read as follows:

§ 929.49 Marketable quantity, allotment percentage, and annual allotment.

(a) Marketable quantity and allotment percentage. If the Secretary finds, from the recommendation of the committee or from other available information, that limiting the quantity of cranberries purchased from or handled on behalf of growers during a crop year would tend to effectuate the declared policy of the Act, the Secretary shall determine and establish a marketable quantity for that crop year.

(b) The marketable quantity shall be apportioned among growers by applying the allotment percentage to each grower's sales history, established pursuant to " 929.48. Such allotment percentage shall be established by the Secretary and shall equal the marketable quantity divided by the total of all growers' sales histories including the estimated total sales history for new growers. Except as provided in paragraph (g) of this section, no handler shall purchase or handle on behalf of any grower cranberries not within such grower's annual allotment.

(c) In any crop year in which the production of cranberries is estimated by the committee to be equal to or less than its recommended marketable quantity, the committee may recommend that the Secretary increase or suspend the allotment percentage applicable to that year. In the event it is found that market demand is greater than the marketable quantity previously set, the committee may recommend that the Secretary increase such quantity.

(d) *Issuance of annual allotments.* The committee shall require all growers to qualify for such allotment by filing with the committee a form wherein growers include the following information:

(1) The amount of acreage which will be harvested;

(2) A copy of any lease agreement covering cranberry acreage;

(3) The name of the handler(s) to whom their annual allotment will be delivered;

(4) Such other information as may be necessary for the implementation and operation of this section.

(e) On or before such date as determined by the committee, with the approval of the Secretary, the committee shall issue to each grower an annual allotment determined by applying the allotment percentage established pursuant to paragraph (b) of this section to the grower's sales history.

(f) On or before such date as determined by the committee, with the approval of the Secretary, in which an allotment percentage is established by the Secretary, the committee shall notify each handler of the annual allotment that can be handled for each grower whose total crop will be delivered to that handler. In cases where a grower delivers a crop to more than one handler, the grower must specify how the annual allotment will be apportioned among the handlers.

(g) Growers who do not produce cranberries equal to their computed annual allotment shall transfer their unused allotment to such growers' handlers. The handler shall equitably allocate the unused annual allotment to growers with excess cranberries who deliver to such handler. Unused annual allotment remaining after all such transfers have occurred shall be reported and transferred to the committee by such date as established by the committee with the approval of the Secretary.

(h) Handlers who receive cranberries more than the sum of their growers' annual allotments have "excess cranberries," pursuant to § 929.59, and shall so notify the committee. Handlers who have remaining unused allotment pursuant to paragraph (g) of this section are "deficient" and shall so notify the committee. The committee shall allocate unused allotment to all handlers having excess cranberries, proportional to each handler's total allotment.

(i) Growers who decide not to grow a crop, during any crop year in which a volume regulation is in effect, may choose not to assign their allotment to a handler.

(j) The committee may establish, with the approval of the Secretary, rules and regulations necessary for the implementation and operation of this section.

9. Revise § 929.50 to read as follows:

§ 929.50 Transfers of sales histories and annual allotments.

(a) Leases and sales of cranberry acreage.

(1) *Total or partial lease of cranberry acreage.* When total or partial lease of cranberry acreage occurs, sales history attributable to the acreage being leased shall remain with the lessor.

(2) *Total sale of cranberry acreage.* When there is a sale of a grower's total cranberry producing acreage, the committee shall transfer all owned acreage and all associated sales history to such acreage to the buyer. The seller and buyer shall file a sales transfer form providing the committee with such information as may be requested so that the buyer will have immediate access to the sales history computation process.

(3) *Partial sale of cranberry acreage.* When less than the total cranberry producing acreage is sold, sales history associated with that portion of the acreage being sold shall be transferred with the acreage. The seller shall provide the committee with a sales transfer form containing, but not limited to the distribution of acreage and the percentage of sales history, as defined in § 929.48(a)(1), attributable to the acreage being sold.

(4) No sale of cranberry acreage shall be recognized unless the committee is notified in writing.

(b) *Allotment transfers.* During a year of volume regulation, a grower may transfer all or part of his/her allotment to another grower. If a lease is in effect the lessee shall receive allotment from lessor attributable to the acreage leased. *Provided,* That the transferred allotment shall remain assigned to the same handler and that the transfer shall take place prior to a date to be recommended by the Committee and approved by the Secretary. Transfers of allotment between growers having different handlers may occur with the consent of both handlers.

(c) The committee may establish, with the approval of the Secretary, rules and regulations, as needed, for the implementation and operation of this section.

10. Revise § 929.51 to read as follows:

§ 929.51 Recommendations for regulation.

(a) Except as otherwise provided in paragraph (b) of this section, if the

committee deems it advisable to regulate the handling of cranberries in the manner provided in § 929.52, it shall so recommend to the Secretary by the following appropriate dates:

(1) An allotment percentage regulation must be recommended by no later than March 1;

(2) A handler withholding program must be recommended by not later than August 31. Such recommendation shall include the free and restricted percentages for the crop year;

(3) If both programs are recommended in the same year, the Committee shall submit with its recommendation an economic analysis to the USDA prior to March 1 of the year in which the programs are recommended.

(b) An exception to the requirement in paragraph (a)(1) of this section may be made in a crop year in which, due to unforeseen circumstances, a producer allotment regulation is deemed necessary subsequent to the March 1 deadline.

(c) In arriving at its recommendations for regulation pursuant to paragraph (a) of this section, the committee shall give consideration to current information with respect to the factors affecting the supply of and demand for cranberries during the period when it is proposed that such regulation should be imposed. With each such recommendation for regulation, the committee shall submit to the Secretary the data and information on which such recommendation is based and any other information the Secretary may request.

11. Revise § 929.52 to read as follows:

§ 929.52 Issuance of regulations.

(a) The Secretary shall regulate, in the manner specified in this section, the handling of cranberries whenever the Secretary finds, from the recommendations and information submitted by the committee, or from other available information, that such regulation will tend to effectuate the declared policy of the Act. Such regulation shall limit the total quantity of cranberries which may be handled during any fiscal period by fixing the free and restricted percentages, applied to cranberries acquired by handlers in accordance with § 929.54, and/or by establishing an allotment percentage in accordance with § 929.49.

(b) The committee shall be informed immediately of any such regulation issued by the Secretary, and the committee shall promptly give notice thereof to handlers.

12. Revise § 929.54 to read as follows:

§ 929.54 Withholding.

(a) Whenever the Secretary has fixed the free and restricted percentages for any fiscal period, as provided for in § 929.52(a), each handler shall withhold from handling a portion of the cranberries acquired during such period. The withheld portion shall be equal to the restricted percentage multiplied by the volume of marketable cranberries acquired. Such withholding requirements shall not apply to any lot of cranberries for which such withholding requirement previously has been met by another handler in accordance with § 929.55.

(b) The committee, with the approval of the Secretary, shall prescribe the manner in which, and date or dates during the fiscal period by which, handlers shall have complied with the withholding requirements specified in paragraph (a) of this section.

(c) Withheld cranberries may meet such standards of grade, size, quality, or condition as the committee, with the approval of the Secretary, may prescribe. The Federal or Federal-State Inspection Service shall inspect all such cranberries. A certificate of such inspection shall be issued which shall include the name and address of the handler, the number and type of containers in the lot, the location where the lot is stored, identification marks (including lot stamp, if used), and the quantity of cranberries in such lot that meet the prescribed standards. Promptly after inspection and certification, each such handler shall submit to the committee a copy of the certificate of inspection issued with respect to such cranberries.

(d) Any handler who withholds from handling a quantity of cranberries in excess of that required pursuant to paragraph (a) of this section shall have such excess quantity credited toward the next fiscal year's withholding obligation, if any—provided that such credit shall be applicable only if the restricted percentage established pursuant to § 929.52 was modified pursuant to § 929.53; to the extent such excess was disposed of prior to such modification; and after such handler furnishes the committee with such information as it prescribes regarding such withholding and disposition.

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

13. Revise § 929.56 to read as follows:

§ 929.56 Special provisions relating to withheld (restricted) cranberries.

(a) A handler shall make a written request to the committee for the release of all or part of the cranberries that the handler is withholding from handling pursuant to § 929.54(a). Each request shall state the quantity of cranberries for which release is requested and shall provide such additional information as the committee may require. Handlers may replace the quantity of withheld cranberries requested for release as provided under either paragraph (b) or (c) of this section.

(b) The handler may contract with another handler for an amount of free cranberries to be converted to restricted cranberries that is equal to the volume of cranberries that the handler wishes to have converted from his own restricted cranberries to free cranberries.

(1) The handlers involved in such an agreement shall provide the committee with such information as may be requested prior to the release of any restricted cranberries.

(2) The committee shall establish guidelines to ensure that all necessary documentation is provided to the committee, including but not limited to, the amount of cranberries being converted and the identities of the handlers assuming the responsibility for withholding and disposing of the free cranberries being converted to restricted cranberries.

(3) Cranberries converted to replace released cranberries may be required to be inspected and meet such standards as may be prescribed for withheld cranberries prior to disposal.

(4) Transactions and agreements negotiated between handlers shall include all costs associated with such transactions including the purchase of the free cranberries to be converted to restricted cranberries and all costs associated with inspection (if applicable) and disposal of such restricted cranberries. No costs shall be incurred by the committee other than for the normal activities associated with the implementation and operation of a volume regulation program.

(5) Free cranberries belonging to one handler and converted to restricted cranberries on the behalf of another handler shall be reported to the committee in such manner as prescribed by the committee.

(c) Except as otherwise directed by the Secretary, as near as practicable to the beginning of the marketing season of each fiscal period with respect to which the marketing policy proposes regulation pursuant to § 929.52(a), the committee shall determine the amount per barrel each handler shall deposit with the committee for it to release to him, in accordance with this section, all or part of the cranberries he is withholding; and the committee shall

give notice of such amount of deposit to handlers. Such notice shall state the period during which such amount of deposit shall be in effect. Whenever the committee determines that, by reason of changed conditions or other factors, a different amount should therefore be deposited for the release of withheld cranberries, it shall give notice to handlers of the new amount and the effective period thereof. Each determination as to the amount of deposit shall be on the basis of the committee's evaluation of the following factors:

(1) The prices at which growers are selling cranberries to handlers,

(2) The prices at which handlers are selling fresh market cranberries to dealers,

(3) The prices at which cranberries are being sold for processing in products,

(4) The prices at which handlers are selling cranberry concentrate,

(5) The prices the committee has paid to purchase cranberries to replace released cranberries in accordance with this section, and

(6) The costs incurred by growers in producing cranberries.

(7) Each request for release of withheld cranberries shall include, in addition to all other information as may be prescribed by the committee, the quantity of cranberries the release is requested and shall be accompanied by a deposit (a cashier's or certified check made payable to the Cranberry Marketing Committee) in an amount equal to the twenty percent of the amount determined by multiplying the number of barrels stated in the request by the then effective amount per barrel as determined in this paragraph (c).

(8) Subsequent deposits equal to, but not less than, the ten percent of the remaining outstanding balance shall be payable to the committee on a monthly basis commencing on January 1, and concluding by no later than August 31 of the fiscal period.

(9) If the committee determines such a release request is properly filled out, is accompanied by the required deposit, and contains a certification that the handler is withholding such cranberries, it shall release to such handler the quantity of cranberries specified in his request.

(d) Funds deposited for the release of withheld cranberries, pursuant to paragraph (c) of this section, shall be used by the committee to purchase from handlers unrestricted (free percentage) cranberries in an aggregate amount as nearly equal to, but not in excess of, the total quantity of the released cranberries as it is possible to purchase to replace the released cranberries.

(e) All handlers shall be given an equal opportunity to participate in such purchase of unrestricted (free percentage) cranberries. If a larger quantity is offered than can be purchased, the purchases shall be made at the lowest price possible. If two or more handlers offer unrestricted (free percentage) cranberries at the same price, purchases from such handlers shall be in proportion to the quantity of their respective offerings insofar as such division is practicable. The committee shall dispose of cranberries purchased as restricted cranberries in accordance with § 929.57. Any funds received by the committee for cranberries so disposed of, which are in excess of the costs incurred by the committee in making such disposition, will accrue to the committee's general fund.

(f) In the event any portion of the funds deposited with the committee pursuant to paragraph (c) of this section cannot, for reasons beyond the committee's control, be expended to purchase unrestricted (free percentage) cranberries to replace those withheld cranberries requested to be released, such unexpended funds shall, after deducting expenses incurred by the committee, be refunded to the handler who deposited the funds. The handler shall equitably distribute such refund among the growers delivering to such handler.

(g) Inspection for restricted (withheld) cranberries released to a handler is not required.

(h) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation of this section. Such rules and regulations may include, but are not limited to, revisions in the payment schedule specified in paragraphs (c)(7) and (c)(8) of this section.

14. Revise § 929.58 to read as follows:

§ 929.58 Exemptions.

(a) Upon the basis of the recommendation and information submitted by the committee, or from other available information, the Secretary may relieve from any or all requirements pursuant to this part the handling of cranberries in such minimum quantities as the committee, with the approval of the Secretary, may prescribe.

(b) Upon the basis of the recommendation and information submitted by the committee, or from other available information, the Secretary may relieve from any or all requirements pursuant to this part the handling of such forms or types of cranberries as the committee, with the approval of the Secretary, may prescribe. Forms of cranberries could include cranberries intended for fresh sales or organically grown cranberries.

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

15. Revise § 929.61 to read as follows:

§ 929.61 Outlets for excess cranberries.

(a) *Noncommercial outlets.* Excess cranberries may be disposed of in noncommercial outlets that the committee finds, with the approval of the Secretary, meet the requirements outlined in paragraph (c) of this section. Noncommercial outlets include, but are not limited to:

(1) Charitable institutions; and

(2) Research and development projects.

(b) *Noncompetitive outlets.* Excess cranberries may be sold in outlets that the committee finds, with the approval of the Secretary, are noncompetitive with established markets for regulated cranberries and meet the requirements outlined in paragraph (c) of this section. Noncompetitive outlets include but are not limited to:

(1) Any nonhuman food use; and

(2) Other outlets established by the committee with the approval of the Secretary.

(c) *Requirements.* The handler disposing of or selling excess cranberries into noncompetitive or noncommercial outlets shall meet the following requirements, as applicable:

(1) *Charitable institutions.* A statement from the charitable institution shall be submitted to the committee showing the quantity of cranberries received and certifying that the institution will consume the cranberries;

(2) *Research and development projects.* A report shall be given to the committee describing the project, quantity of cranberries contributed, and date of disposition;

(3) *Nonhuman food use.* Notification shall be given to the committee at least 48 hours prior to such disposition;

(4) *Other outlets established by the committee with the approval of the Secretary.* A report shall be given to the committee describing the project, quantity of cranberries contributed, and date of disposition.

(d) The storage and disposition of all excess cranberries withheld from handling shall be subject to the supervision and accounting control of the committee.

(e) The committee, with the approval of the Secretary, may establish rules and

regulations for the implementation and operation of this section.

16. Revise § 929.62 to read as follows:

§ 929.62 Reports.

(a) *Grower report.* Each grower shall file a report with the committee by January 15 of each crop year, or such other date as determined by the committee, with the approval of the Secretary, indicating the following:

(1) Total acreage harvested and whether owned or leased.

(2) Total commercial cranberry sales in barrels from such acreage.

(3) Amount of acreage either in production, but not harvested or taken out of production and the reason(s) why.

(4) Amount of new or replanted acreage coming into production.

(5) Name of the handler(s) to whom commercial cranberry sales were made.

(6) Such other information as may be needed for implementation and operation of this section.

(b) *Inventory.* Each handler engaged in the handling of cranberries or cranberry products shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to any cranberries and cranberry products which were held by them on such date as the committee may designate.

(c) *Receipts.* Each handler shall, upon request of the committee, file promptly with the committee a certified report as to each quantity of cranberries acquired during such period as may be specified, and the place of production.

(d) *Handling reports.* Each handler shall, upon request of the committee, file promptly with the committee a certified report as to the quantity of cranberries handled during any designated period or periods.

(e) *Withheld and excess cranberries.* Each handler shall, upon request of the committee, file promptly with the committee a certified report showing, for such period as the committee may specify, the total quantity of cranberries withheld from handling or held in excess, in accordance with §§ 929.49 and 929.54, the portion of such withheld or excess cranberries on hand, and the quantity and manner of disposition of any such withheld or excess cranberries disposed of.

(f) *Other reports.* Upon the request of the committee, with the approval of the Secretary, each handler shall furnish to the committee such other information with respect to the cranberries and cranberry products acquired and disposed of by such person as may be necessary to enable the committee to exercise its powers and perform its duties under this part.

(g) The committee may establish, with the approval of the Secretary, rules and regulations for the implementation and operation of this section.

17. Revise § 929.64 to read as follows:

§ 929.64 Verification of reports and records.

The committee, through its duly authorized agents, during reasonable business hours, shall have access to any handler's premises where applicable records are maintained for the purpose of assuring compliance and checking and verifying records and reports filed by such handler.

Dated: April 21, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

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