

## DEPARTMENT OF AGRICULTURE

## Agricultural Marketing Service

## 7 CFR Part 929

[Docket Nos. AO-341-A6; FV02-929-1A]

**Cranberries Grown in the States of Massachusetts, et al.; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Agreement and Order No. 929**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

**SUMMARY:** This decision proposes 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, and provides growers and processors with the opportunity to vote in a referendum to determine if they favor the changes. The amendments are based on those proposed by the Cranberry Marketing Committee (Committee), which is responsible for local administration of the order and other interested parties representing cranberry growers and handlers. The 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:** The referendum will be conducted from December 13 to December 27, 2004. The representative period for the purpose of the referendum is September 1, 2003, through August 31, 2004.

**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); Final order amending order on partial amendments issued on April 5, 2004, and published in the April 9 issue of the **Federal Register** (69 FR 18803); and Recommended Decision on remainder of amendments issued on April 21, 2004, and published in the April 28 issue of the **Federal Register** (69 FR 23330).

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

**Preliminary Statement**

The proposed amendments were formulated 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. The hearing was held to consider the proposed amendment of Marketing Agreement and Order No. 929, regulating the handling of 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, hereinafter referred to collectively as the "order." The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900). The notice of hearing contained numerous proposals submitted by the Committee, other interested parties and one proposed by the Agricultural Marketing Service (AMS). A final order on 6 of the proposals determined necessary to be expedited was published in the **Federal Register** on April 9, 2004. A recommended decision on the remainder of the proposals was published in the **Federal Register** on April 28, 2004. This action sets forth the Secretary's decision and referendum order on the remaining amendments.

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. Four proposed amendments were not recommended for adoption.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on April 21, 2004, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto by May 28, 2004. On June 2, 2004, the time period for filing written exceptions was extended until June 30, 2004.

Seven exceptions were filed during the period provided. The exceptions

were filed by: The Cranberry Marketing Committee (CMC), Wareham, Massachusetts; Cape Cod Cranberry Growers' Association (CCCGA), East Wareham, Massachusetts; Wisconsin State Cranberry Growers' Association (WSCGA), Wisconsin Rapids, Wisconsin; Clement Pappas and Co., Inc. (Clement Pappas), Seabrook, New Jersey; John C. Decas (John Decas), Wareham, Massachusetts; and two exceptions were filed by Ocean Spray Cranberries, Inc. (OSC), Lakeville/Middleboro, Massachusetts. The exceptions filed by Ocean Spray Cranberries were identical comments but signed by different representatives. This exception will be considered as one. The specifics of the exceptions are discussed in the Findings and Conclusions; Discussion of Exceptions section of this document.

#### *Proposals Being Recommended in This Decision*

The proposal to authorize the Committee to reestablish districts within the production area and reapportion grower membership among the various districts would amend § 929.28.

The proposal to simplify criteria and dates in establishing the Committee's marketing policy would amend § 929.46.

The proposal to revise the formula for calculating sales histories under the producer allotment program and the proposal to allow compensation of sales history for catastrophic events that impact a grower's crop would amend § 929.48.

The proposal to remove dates for information collection for issuing annual allotments, the proposal to clarify the allocation of unused allotment and the proposal to allow growers to not assign their allotment if they do not grow a crop would amend § 929.49.

The proposal to allow growers to transfer allotment would amend § 929.50.

The proposal to authorize the withholding and producer allotment programs in the same year would amend § 929.52.

The proposal to require the Committee to recommend volume regulations by specific dates would amend § 929.51.

The proposal to add authority for exempting fresh and organic cranberries would amend § 929.58.

The proposal to allow more flexibility in establishing other outlets for excess cranberries would amend § 929.61.

The proposal to streamline the withholding provisions would amend § 929.54.

The proposal to modify the buy-back provisions under the withholding program would amend § 929.56.

The proposal to add authority for paid advertising under the research and development provision of the order would amend § 929.45.

The proposal to modify the definition of handle would amend § 929.10.

The proposal to streamline and relocate reporting provisions to a more appropriate provision of the order would amend §§ 929.62 and 929.64.

The proposal to delete an obsolete provision would remove § 929.47.

#### *Proposals Not Recommended for Adoption in This Decision*

The proposal to add a new § 929.47 to include a handler marketing pool or buy-back under the producer allotment program is not being recommended for adoption.

The proposal to allow the first 1,000 barrels of each grower's production to be exempt from regulations under the order is not being recommended for adoption.

The proposal to amend § 929.4 to expand the production area to include the States of Maine, Delaware and the entire State of New York is not being recommended for adoption.

The proposal to amend 929.5 to revise the definition of "cranberries" is not being recommended for adoption.

#### **Small Business Considerations**

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

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

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$5,000,000.

Interested persons were invited to present evidence at the hearing on the

probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that these amendments could result in additional regulatory requirements being imposed on some 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 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) 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 acres, 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 sales history formula and add the authority to calculate fresh and processed cranberries separately.

The proposed amendment to the sales history calculations would benefit 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 new acreage 4 years old or less, indicated that the method of calculating sales history 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 a number of approaches for estimating sales history on new acres. 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 simpler and more practical 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 established in crop years when volume regulation is used 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 are calculated so they can be informed and business decisions can be made 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 on or before June 1 of the annual allotment that can be handled for each grower whose crop will be delivered to such handler.

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 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 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 was not 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, section 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 on their cost of production. The later the decision is made by the Committee to regulate, the chances are greater that 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 estimates 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 use 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 meet 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, inspection and certification 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 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 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 the 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

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

The Recommended Decision erroneously indicated that five proposed amendments were not being recommended for adoption. The correct number of proposed amendments not being recommended for adoption is four (as discussed in Material Issues numbered 15, 16, 17 and 19).

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).

#### Conclusion

The proposed amendments would not have a disproportionate economic impact on a substantial number of small entities. Although the proposed amendments may impose some additional costs and requirements on handlers, it is anticipated that the amendments will enhance the

administration and functioning of the cranberry marketing order program. Therefore, any additional costs would be offset by the benefits derived from improved, more effective functioning of the order benefiting handlers and producers alike.

#### Paperwork Reduction Act

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

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 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 at this time. 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.

#### Civil Justice Reform

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or

any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

#### Findings and Conclusions; Discussion of Exceptions

The material issues, findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the April 28 issue of the **Federal Register** (69 FR 23330) are hereby approved and adopted subject to the following additions and modifications.

#### Rulings on Exceptions

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

Based on the exception filed, the findings and conclusions under material issue 1 of the Recommended Decision are revised by adding the following eight paragraphs after the fifteenth paragraph of that section:

WSCGA filed a statement supporting the recommendation and reiterated their position that Wisconsin is underrepresented and New Jersey is overrepresented. Further, the WSCGA is of the view that the committee should directly reallocate membership based upon current production.

CCCGA filed an exception opposing reestablishing districts without a committee recommendation for a hearing on the issue. It reiterated its concerns that Wisconsin representatives would immediately attempt to remove representation from New Jersey and dilute representation in Massachusetts. CCCGA believes that if that happens, Wisconsin representatives would have too much control over the Committee, which would have a negative impact on smaller States. In addition, CCCGA does not believe the cooperative seats on the Committee should decide the fate of the independent seats.

The Committee is composed of 13 grower members and 1 public member. District 3, which includes the State of Wisconsin, is assigned two independent seats. All actions of the Committee

require at least 10 concurring votes if the public member does not vote and 11 concurring votes if the public member votes. The Committee was specifically devised in this manner to ensure that Committee recommendations are supported by a majority of the industry, which includes both cooperative and non-cooperative members. If a motion is made to reapportion the districts, 10 concurring votes are needed.

The decision to increase the Committee to its current level was part of the same hearing. That portion of the proposed amendments was expedited and the Secretary's Decision and Referendum Order was published in the **Federal Register** on December 12, 2003. In that decision, USDA concluded that providing an additional seat for District 3 at the exclusion of membership from Districts 2 or 4 was not desirable. It was determined important to take into account the significance of the smaller growing regions, while recognizing that the potential scale of the impact increases with the volume of cranberries produced and regulated.

Having 2 members from the districts that represent Wisconsin and Massachusetts reasonably recognized the fact that those districts have a greater economic interest at stake when more significant actions, such as volume regulation, are considered by the Committee. Allowing the smaller volume districts to have 1 member recognizes their significance to the industry. Using volume alone as a means of determining Committee membership does not take into consideration smaller growing regions. USDA further concluded that opportunities must be provided for input by all segments of the industry.

As stated previously, notice and comment rulemaking would be necessary to implement any modifications in district representation. All growers and handlers would be provided the opportunity to comment and all comments would be considered before issuing a final rule.

Also addressed previously is that this authority provides the Committee the flexibility to address industry changes in a timely manner. This flexibility is deemed beneficial to the Committee and the industry.

Accordingly, the exception on this material issue filed by CCCGA is denied.

##### *Material Issue Number 2—Development of Marketing Policy*

Based on two comments filed in support of this proposed amendment, the findings and conclusions under material issue 2 of the Recommended

Decision are revised by adding the following one paragraph after the eleventh paragraph of that section.

CCCGA and Clement Pappas, in their exceptions filed to the Recommended Decision, supported USDA's recommendation to delete the decision making dates from this section and modify the criteria to be considered in recommending the marketing policy.

#### *Material Issue Number 3—Revision of Sales History*

Based on the exceptions filed, the findings and conclusions under material issue 3 of the Recommended Decision are revised by adding the following twelve paragraphs after the twenty-seventh paragraph of the subsection in material issue 3 entitled *Sales History Formula*:

Clement Pappas, in its exception to the Recommended Decision, supported USDA's recommendation to amend the sales history formula.

The Committee's exception suggested this section be modified to better reflect the Committee's intent.

The Committee stated that the intent of modifying the sales history calculations was to provide additional sales histories to newer acres "in years of volume regulation." The way the language is currently proposed, the Committee would calculate sales histories annually, which would include accommodating newer acres with additional sales histories each year. Providing additional sales history to newer acres is referred to throughout the industry as "ramp-up." The Committee stated that ramp-up should only occur during periods when a producer allotment regulation is established.

Paragraph (b) of § 929.48 states that "a new sales history shall be calculated for each grower after each crop year (emphasis added) 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."

The Committee believes paragraph (b) should be modified to state "a new sales history shall be calculated for each grower during periods when a producer allotment regulation has been established prior to the beginning of the next 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."

The intent of the ramp-up formula is to provide growers "in years of volume regulation" with additional sales histories to account for expected increases in yields on newer acres in order to provide growers of these acres with a sales history more reflective of their actual sales potential at the time of a volume regulation. To require the Committee to provide the adjustment each year regardless of whether a volume regulation is in effect would be unnecessary.

The impact of a sales history assigned to new acreage would only affect growers when a volume regulation is implemented. For example, if the next volume regulation were

implemented in 2008, growers who planted new acres in 2003 would have a sales history reflective of actual production in 2008 and would not need an adjustment on those acres. However, if new acres were planted in 2007, the ramp-up provisions should be applied to the new acres to provide this grower an adjustment for those acres that are not at full production at the time of the volume regulation.

It is concluded that the language in § 929.48 should be modified to clarify that adjustments for new acres is only applied during years of volume regulation. It is intended that the Committee would still compute sales histories annually for growers so any modification to this provision should ensure that new sales histories are calculated for growers each year. The Committee's suggested modification would not require any sales histories to be calculated until a volume regulation is implemented. Based on the record, the Committee needs to maintain an annual sales history for each grower based on their average production. To only compute sales histories in years of volume regulation would deprive the industry of critical information necessary to the mission of the Committee. The Committee uses this information annually in development of its marketing policy. Growers and handlers need to know this information to plan their growing and marketing strategies. It is important that the Committee continue to calculate sales histories annually. The language is being modified to express that adjustments for newer acres would only be authorized in years prior to any producer allotment volume regulation.

Paragraphs (a)(3), (4) and (6) are being modified. Paragraph (a)(3) will state that 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 *in a year prior to a year of a producer allotment volume regulation*, shall be adjusted as provided in paragraph (a)(6) of this section.

Paragraph (a)(4) will state that for a grower with 4 years or less of sales history, the sales history will be computed by dividing the total sales from that acreage by 4 and *in a year prior to a year of a producer allotment volume regulation*, shall be adjusted as provided in paragraph (a)(6) of this section.

Paragraph (a)(6) will specify that the adjustments will only be applied in a year prior to a producer allotment volume regulation. Paragraph (b) will not be modified.

The Committee's exception on this material issue is being accepted. These changes will more accurately reflect the intent of the industry and are supported by the record.

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

Based on the exceptions filed, the findings and conclusions under material issue 4 of the Recommended Decision are revised by adding the following five paragraphs after the sixteenth paragraph of that section:

WSCGA and Clement Pappas, in their exceptions filed to the Recommended Decision, supported the flexibility provided by USDA's recommendation to amend this provision.

CCCGA also supported the flexibility that this provision provides but was concerned that using the word "catastrophic" would be too stringent of a test to meet in order to qualify for an adjustment. As an example, CCCGA discussed a situation that impacted a Massachusetts grower in 2003. The grower experienced pesticide resistance with a severe insect pest called the cranberry weevil. This situation caused this grower to experience a crop loss in excess of 50 percent. CCCGA believed that this situation should be one where a grower would be authorized an adjustment in their sales history but was concerned that this type of event may not be classified as catastrophic.

The record supported that the Committee deliberated on this provision at length and agreed that the word catastrophic was the terminology that was preferred. They believed that allowances should be made for serious events that impact growers' crops, and should not be allowed for less serious events, such as a long rainy spell. In addition, the computation of sales histories allows a "bad" year not to be included in the computation if the acreage has 5 or more years of sales history. Only 4 of the highest years are used to calculate the sales history.

The record supported allowing the Committee to recommend, through informal rulemaking, more specific determinations of what would constitute a catastrophic event. Using the informal rulemaking authority provides the Committee the flexibility to thoroughly discuss the issue at Committee meetings and make recommendations.

Accordingly, no changes are being made to this provision. The exception on this issue is denied.

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

Based on the exceptions filed, the findings and conclusions under material issue 7 of the Recommended Decision are revised by adding the following eleven paragraphs after the eighth paragraph of that section:

Two exceptions addressed this material issue. Clement Pappas requested that specificity be added to § 929.49(f) to clarify that this provision would not supercede contractual arrangements. Although the hearing record disclosed that the amendment is

not intended to obviate contractual arrangements, the commenter believes that the order language should specify such to ensure that there is no confusion on this issue. The amendment specifies that growers who do not grow a crop may choose not to assign their allotment to a handler. The commenter believes that if many growers of one handler opt to not assign their allotment, a handler's marketing and sales program could be ruined.

Clement Pappas suggested adding a paragraph (k) to § 929.49 stating "With the exception of issuance of annual allotments, nothing in this section shall be construed as superseding contractual agreements between growers and handlers." As stated previously, contractual arrangements between growers and handlers fall outside the scope of the order.

Because contractual relationships between growers and handlers are outside the scope of the order, the language requested to be included by this commenter is not being added to this provision. Therefore, this exception is denied.

The Committee's exception suggested adding the following sentence at the end of paragraph (f) of § 929.49: "If a grower does not specify how their annual allotment is to be apportioned among the handlers, the committee will apportion such annual allotment equally among those handlers they are delivering their crop to." The Committee states that this addition was suggested at the hearing and there was no opposition to its inclusion. In testimony, the Committee representative stated that in the last two volume regulations, some growers who delivered to more than one handler did not specify the breakdown of the allotment. The Committee exception stated that this situation resulted in delays in apportionment and caused disagreements among handlers. This clarification has merit.

Paragraph (f) of § 929.49 is being modified to include the authority for the Committee to apportion the allotment among handlers if the grower fails to advise the Committee. This portion of the Committee's exception is being accepted.

The Committee also took exception to language in § 929.49 and believed that the language in paragraph (g) is in conflict with paragraph (i) of the same section and paragraph (b) of § 929.50.

The Committee explained that paragraph (g) of § 929.49 states that growers who do not produce cranberries equal to their computed annual allotment *shall* transfer their unused allotment to such grower's handlers. In

§ 929.50(b) stated that a grower *may* transfer all or part of his/her allotment to another grower. The Committee states these provisions are in conflict with each other. The Committee suggested changing the *shall* in § 929.49(g) to *may* to correct the issue and because of that, paragraph (i) covering growers who do not produce a crop is not needed.

While it is agreed that there is a conflict between paragraph (g) of § 929.49 and paragraph (b) of § 929.50, the Committee's suggested change would not address the concern. If the word *may* were substituted for *shall* in § 929.49(g), growers would not be required to account for 100 percent of their unused allotment. Record evidence supports that for effective administration of the program, growers should account for all of their unused allotment. If growers have the option to deliver unused allotment to their handler or transfer unused allotment to other growers, they could choose not to transfer all their unused allotment. In that situation, it would be unclear what would happen to the remainder of their allotment. Therefore, the language is being modified to specify that growers *shall* transfer their unused allotment to their handler *unless it is transferred to another grower in accordance with § 929.50(b)*. In this way, any unused allotment not transferred to other growers must be transferred to their handlers.

The Committee's exception also states that there is no need for paragraph (i) where growers who choose not to grow a crop may choose not to assign their allotment. This situation is not in conflict with the provisions on transfers. This was included in the proposed order to allow growers who choose not to grow a crop some flexibility in assigning their allotment.

However, this option should also be included under paragraph (g) as an option for transferring unused allotment to handlers. Therefore, paragraph (g) of § 929.49 is being further modified to state that growers must transfer their unused allotment to their handler unless it is transferred to another grower or if it is not assigned in accordance with paragraph (i) of § 929.49.

The Committee's exception is being accepted in part and denied in part. Specifically, § 929.49(f) and (g) are being modified to address the points of the exception. The exception to remove paragraph (i) of § 929.49 is denied.

#### *Material Issue Number 10—Dates for Recommending Volume Regulations*

Based on the exception filed, the findings and conclusions under material issue 10 of the Recommended Decision

are revised by adding the following two paragraphs after the ninth paragraph of that section:

Clement Pappas filed an exception expressing concern with authorizing a later date than March 1 for recommending a producer allotment program. The order language states that an allotment percentage must be recommended by no later than March 1, unless unforeseen circumstances deem a later date.

The commenter states that after March 1, growers have already incurred significant costs to maintain their bogs and prepare for the upcoming growing season. Record testimony supported that the March 1 date be flexible enough to allow an exception in the event of unforeseen circumstances. Therefore, this exception is denied.

#### *Material Issue Number 11—Exemptions From Regulations*

Based on the exceptions filed, the findings and conclusions under material issue 11 of the Recommended Decision are revised by adding the following four paragraphs after the ninth paragraph of that section:

WSCGA supports this amendment. However, it suggests that the description of how cranberries for fresh use are harvested be corrected. The recommended decision stated that fresh cranberries are dry harvested. WSCGA stated that in some growing areas in the eastern U.S., cranberries for fresh use are dry harvested. However, in Wisconsin, cranberries for fresh use are wet harvested. This exception is being accepted to clarify the different ways cranberries for fresh use are harvested.

Clement Pappas filed an exception stating that the language for exempting varieties and types of cranberries from regulations is too broad. The exception states that exemptions should be limited to niche markets and not varieties. The commenter further stated that allowing specific varieties to be exempted from order regulations creates a loophole for abuse.

The language specifies that forms or types of cranberries can be exempted from the regulations. Testimony did indicate that types of cranberries could be extended to include varieties. The intent of this amendment is to clarify that cranberries such as organic and fresh cranberries can be exempted from order provisions if recommended by the Committee and approved by USDA. In addition, other unforeseen markets could develop and the Committee wanted the language broad enough to cover these unforeseen situations. It is possible that an experimental variety could be developed that the Committee

believed would benefit from being exempt.

This exception is being denied. The language should remain flexible enough to allow for unforeseen markets that may develop that an exemption from order requirements would benefit.

*Material Issue Number 13—General Withholding Provisions*

Based on the exception filed, the findings and conclusions under material issue 13 of the Recommended Decision are revised by adding the following two paragraphs after the seventeenth paragraph of that section:

Clement Pappas filed an exception expressing general disapproval for the withholding method of volume regulation. The commenter stated that except for its use in withholding very small quantities of cranberries, the withholding provisions are a poor method of volume regulation in comparison to the producer allotment method of volume regulation.

The record supports maintaining this method of volume regulation as an additional tool for the industry in considering ways to minimize oversupply of cranberries. Any withholding regulation would have to be recommended by the Committee and approved by USDA. Accordingly, this exception is denied.

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

Based on the exception filed, the findings and conclusions under material issue 14 of the Recommended Decision are revised by adding the following six paragraphs after the twenty-third paragraph of that section:

The Committee filed an exception pertaining to the distribution of funds collected under the buy-back provisions of the withholding program.

The order currently provides for situations in which the funds deposited with the committee by handlers to purchase unrestricted cranberries are in excess of the funds used by the committee for this purpose. In such situations, the excess funds are to be proportionately refunded to the handlers on the basis of the volume of cranberries withheld by each handler.

The recommended decision (and the notice of hearing) contained two provisions related to expended funds under the buy-back program. Paragraph (e) of § 929.56 proposed amending this provision to provide that any excess funds received by the committee accrue to the committee's general fund. Paragraph (f) of that same section provides that any unexpended funds be

refunded to the handler that deposited the funds. Proposed paragraph (f) also stated that the handler would then equitably distribute the refund among the growers delivering cranberries to that handler.

In its exception, the committee recommended that § 929.56(e) be changed to provide that any excess funds received by the committee *would accrue to the handler who deposited the funds for the release of withheld cranberries to be distributed proportionately to the handlers' growers affected by the volume regulation* (the committee's suggested revision in italics).

After further review of the record evidence, USDA finds that the committee's exception has merit. The order should be consistent in its provisions relative to excess funds received under the buy-back program. Further, it is reasonable that such funds be refunded to those persons from whom they were collected.

Thus, the committee's exception is being accepted. However, the text of paragraph (e) has been slightly modified from the committee's suggested text. Paragraph (e) of § 929.56 has been modified accordingly.

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

Based on the exceptions filed, the findings and conclusions under material issue 15 of the Recommended Decision are revised by adding the following four paragraphs after the thirty-seventh paragraph of that section:

Ocean Spray, in its exception filed to the Recommended Decision, supported USDA's recommendation to not include a handler marketing pool to the order.

Clement Pappas believes the handler marketing pool should be added to the order. In its exception, the commenter stated that the proposed amendment had broad industry support and was innovative. The commenter stated that the recommended decision states that without resolution on price and cohesiveness from all segments of the industry, the handler marketing pool would not work. According to the commenter, these standards are inappropriate for evaluating the handler marketing pool because they are impossible to meet. If this standard were applied to all amendments, none would pass. Finally, the commenter stated that adequate justification was not provided and this amendment should be allowed to be voted on in a referendum.

As stated previously in the Recommended Decision, this concept was innovative and showed the

potential to address concerns of handlers. This issue was considered at the subcommittee level and agreement on the pricing issue could not be achieved. There were wide-ranging options put forth on how the pricing mechanism could work, each benefiting one segment of the industry over another. Because of the subcommittee's inability to gain consensus on this issue, a recommendation was not made to the full committee. In addition, nothing additional was presented on the hearing record to demonstrate how the handler marketing pool could work effectively, particularly in view of the outstanding pricing issue options.

Accordingly, this exception is denied.

*Material Issue Number 17—Expansion of Production Area*

Based on the exceptions filed, the findings and conclusions under material issue 17 of the Recommended Decision are revised by adding the following eleven paragraphs after the twenty-eighth paragraph of that section:

There were six exceptions filed regarding the decision not to expand the production area.

The comments included discussions that the entire industry benefits from the operation of the marketing order, especially the promotion activities. Thus, all growing areas should contribute to these efforts, as well as participate in any volume regulation.

Two commenters stated that there are other States currently included in the marketing order that produce minimal amounts of cranberries. One commenter stated that most Massachusetts producers have minimal acreage and low yields and for this reason, Massachusetts growers should be exempt.

Two commenters stated that all growers compete for the same markets. As an example, a commenter stated that Maine's involvement in the ingredients market impacts all of the Northeast States that compete in that market.

One commenter believed that USDA's analysis of future yields of Maine cranberries is flawed, and there is the potential for Maine to produce large volumes of cranberries in the future.

Three commenters did not believe that there is any differentiation in the quality of Maine cranberries compared to those grown in other States.

Two commenters discussed the importance of receiving data from all producing States. The best way to ensure complete information is to collect it under marketing order reporting requirements.

One commenter stated that USDA misinterpreted the Act's requirement

that a marketing order be limited in its application to the smallest regional production area practicable.

One commenter stated that it is a rare occasion when consensus is reached in the cranberry industry and that there is consensus that the production area should be expanded. The commenter believes that USDA should not deny such a strongly supported position by the industry. Another commenter added that growers should be allowed to vote on this issue in referendum.

The concerns raised in the exceptions have been thoroughly considered. Many segments of the industry throughout this proceeding, both within and outside the production area, have expressed opinions on the expansion of the production area.

After consideration of the record, including the exceptions filed on this material issue, USDA concludes that the production area should not be expanded at this time as proposed by the Committee. The record includes many factors concerning the determination of the appropriate production area. These include production levels, the number of growers in each State, the markets and the future potential of the industry. It is determined that expanding the production area at this time is not necessary for the effective operation of the marketing order and thus would not be consistent with the Act.

Accordingly, the six exceptions filed on this material issue are denied.

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

#### **Order Amending the Marketing Agreement and Order**

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of 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." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

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

#### **Referendum Order**

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

The representative period for the conduct of such referendum is hereby determined to be September 1, 2003, through August 31, 2004.

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

#### **List of Subjects in 7 CFR Part 929**

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

Dated: November 24, 2004.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

#### **Order Amending the Order Regulating the Handling of 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<sup>1</sup>**

##### *Findings and Determinations*

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

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

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

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and Order No. 929 (7 CFR part 929), regulating the handling of 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.

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

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

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

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

(4) The marketing agreement and order, as amended and as hereby 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.

#### **Order Relative to Handling**

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

The provisions of the proposed marketing agreement and the order amending the order will be and are the terms and provisions of this order amending the order and are set forth in full herein.

**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 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.

(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 in a year prior to a year of a producer allotment volume regulation shall be adjusted as provided in paragraph (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 in a year prior to a year of a producer allotment volume regulation shall be adjusted as provided in paragraph (a)(6) of this section.

(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 a year prior to a year of a producer allotment volume regulation, 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. If a grower does not specify how their annual allotment is to be apportioned among the handlers, the Committee will apportion such annual allotment equally among those handlers they are delivering their crop to.

(g) Growers who do not produce cranberries equal to their computed annual allotment shall transfer their unused allotment to such growers' handlers unless it is transferred to another grower in accordance with § 929.50(b) or if it is not assigned in accordance with paragraph (i) of this section. 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 may 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 requesting 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 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, would accrue to the handler who deposited those funds to be distributed to that handler's growers.

(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.

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