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## 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.; Order Amending Marketing Agreement and Order No. 929

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the marketing agreement and order for cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York. The amendments 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 will: 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 amendments are intended to improve the operation and functioning of the cranberry marketing order program.

**DATES:** *Effective Date:* February 16, 2005.

**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); 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); and Secretary's decision on remainder amendments issued on November 30, 2004, and published in the December 1 issue of the *Federal Register* (69 FR 69995).

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

#### Preliminary Statement

This final rule was formulated based on the record of a public hearing held in 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). This action adopts the remaining portion of proposed amendments listed in the Notice of Hearing that were not expedited in a previous proceeding.

The amendments included in this decision will: 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; 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 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.

Upon the basis of evidence introduced at the hearing, a Secretary's decision was issued on December 1, 2004, directing that a referendum be conducted during the period December 13 to December 27, 2004, among growers and processors of cranberries to determine whether they favored the proposed amendments to the order. In the referendum, all amendments were favored by more than two-thirds of the growers voting in the referendum by number or by volume. Processors representing more than 50 percent of the crop also approved the amendments.

The amended marketing agreement was mailed to all cranberry handlers in the production area for their approval. The marketing agreement was approved by handlers representing more than 50 percent of the volume of cranberries handled by all handlers during the representative period of September 1, 2003, through August 31, 2004.

#### **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 will not result in additional regulatory requirements being imposed on some cranberry growers and handlers.

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. 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, these amendments will 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 action amends the order to:

- 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; 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.

#### *Reestablishment of Districts and Reapportionment of Grower Membership Among the Districts*

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

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

#### *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. The amendment will remove the 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. This amendment will remove both dates.

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 amendment to modify the method for calculating sales histories will 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 amendment will also allow more flexibility in recommending changes to the formula and add the authority to calculate fresh and processed cranberries separately.

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

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

The Committee determined that something needed to be done to address the concerns associated in the 2000 crop year with growers with newer acreage. The Committee discussed 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 will 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 amendment represents a generic version of the formula that was used in 2001.

This amendment will not impose any immediate regulations on large or small growers and handlers. It will only modify the formula for calculating sales histories in the event volume regulations are implemented in the future. This amendment will 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. Growers and handlers will know specifically how sales histories are calculated so they can be informed and business decisions can be made ahead of the future season.

The amendment also includes that sales histories, starting with the crop year following adoption of this amendment, will 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 amendment makes 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 amendment will be favorable to both large and small entities.

#### *Catastrophic Events That Impact Growers' Sales Histories*

The amendment will 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 amendment will 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 will recommend procedures and guidelines to be followed in each year a volume regulation is implemented. The amendment will have a positive impact on both large and small growers as the Committee would be in a position to compensate more growers who experienced losses due to catastrophic events than the current order provides.

#### *Remove Specified Dates Relating To Issuing Annual Allotments*

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

Experience during the 2000 and 2001 crop years has proven that maintaining a specified date by which growers are to file a form to qualify for their allotment and for the Committee to notify handlers of their growers' annual allotments has been difficult. This amendment will delete the specified

dates and allow the Committee to determine, with the approval of USDA, more appropriate dates by which growers are to file forms and the Committee is to notify handlers of their growers' annual allotments. The Committee would like to have established dates that the industry can realistically meet each season when a volume regulation is implemented.

Because volume regulation was not recommended until the end of March during 2000 and 2001, growers had difficulty in submitting the required reports in a timely manner. Additionally, the rulemaking process to establish the allotment percentage was not completed by June 1. Therefore, the Committee was unable to notify handlers of their growers' allotment by the specified deadline. With this 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.

This amendment will also clarify 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" include the sales histories calculated for new growers. This rule adds 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 revises 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 amendment will 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 revised 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) will 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 amendment will 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 amendment will replace the words "equitably distribute" with "proportional to each handler's total allotment".

The proponents testified that the distribution of unused allotment will 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 will then receive the allotment in proportion to the volume of cranberries they handle.

This amendment will 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 amendment to authorize growers who choose not to produce a crop in years of volume regulation to not assign their allotment to their handler will 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 will benefit growers who choose not to grow a crop by providing them with input into the allocation of that allotment. This amendment should be favorable to both large and small growers.

#### *Transfers of Allotment During Years of Volume Regulation*

The amendment will 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 amendment will 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 amendment will 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 amendment 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 amendment should be favorable to both large and small entities.

#### *Dates for Recommending Volume Regulation*

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

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

Another amendment will 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 amendment will 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 amendment providing that specific authority be added to exempt fresh, organic or other forms of cranberries from order provisions will 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 amendment will 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 amendment should be beneficial to large and small entities.

#### *Expand Outlets for Excess Cranberries*

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

Because competitive markets can change from season to season and new and different research ideas can be devised, the Committee will develop guidelines each year a volume regulation is recommended that would be used in determining appropriate outlets for excess cranberries. This will benefit growers and handlers by providing flexibility in determining outlets. This amendment will 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 amendment.

#### *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 amendment updates and streamlines those provisions.

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

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

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

The order currently provides that when a withholding regulation is

implemented, the restricted percentage will be applied to the volume of "screened" berries acquired by handlers. Since the term "screening" is obsolete, all references to that term are being deleted.

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

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

Removing the requirements for mandatory inspection and certification requirements will 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 amendment provides flexibility by allowing the Committee to consider other, less costly alternatives.

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

#### *Buy-Back Provisions Under the Handler Withholding Program*

Section 929.56 of the order, entitled "Special provisions relating to withheld (restricted) cranberries," sets forth procedures under which handlers may

have their restricted cranberries released to them. These provisions are commonly referred to in the industry as the buy-back provisions.

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

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

The Committee is required to release the restricted cranberries within 72 hours of receipt of a proper request (including the deposit of a fair market value). This release was made automatic so that handlers will 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 amendment authorizes direct buy-back between handlers. With this option, a handler will 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 will 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 will 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 adds 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 will 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 will 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 modified that provision to 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 amendment to add authority for paid advertising under the research and development provisions of the order will provide the Committee the flexibility to use paid advertising to assist, improve, or promote the marketing, distribution, and consumption of cranberries in either its export or domestic programs. The authority for authorizing paid advertising under the cranberry marketing order was added to the Act in October, 1999.

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

### *Definition of Handle*

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

The amendment will 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 will benefit large and small handlers by allowing temporary storage of withheld cranberries, which could be critical during a withholding volume regulation.

### *Reporting Requirements*

The amendment to modify the reporting requirements will relocate a

paragraph on a grower reporting requirement to the section on Reports for ease of referencing and is only administrative in nature.

The amendment will also add more specific information under the grower reporting provisions to incorporate additional information necessary from growers regarding sales history and transfer of allotment. 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 amendment will 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 amendment will also simplify and clarify the provision on verification of reports. The amendment should be favorable to large and small growers.

### *Obsolete Provision*

The amendment to delete an obsolete provision relating to preliminary regulation is administrative in nature. There would be no impact on growers or handlers.

### *Amendments Not Recommended for Adoption*

Four proposed amendments were not recommended for adoption. Therefore, there would be no economic impact resulting from such proposals.

All of these changes are designed to enhance the administration and functioning of the marketing agreement and order to the benefit of the industry. Accordingly, it is determined that the benefits of implementing these amendments will outweigh any associated costs. Costs are not anticipated to be significant.

### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980 (44 FR 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).

The collection of information under the marketing order would not be affected by these amendments to the marketing order. Current information collection requirements for part 929 are approved under OMB No. 0581-0189, Generic OMB Fruit Crops.

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

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

Committee meetings to consider order amendments 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.

### **Civil Justice Reform**

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

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



**Order Amending the Order Regulating the Handling of Cranberries Grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York**

*Findings and Determinations*

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

(a) *Findings and determinations upon the basis of the hearing record.*

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon the proposed amendments to the Marketing Agreement and Order No. 929 (7 CFR part 929), regulating the handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York.

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

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

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

(4) The marketing agreement and order, as amended and as hereby further amended, prescribe, insofar as

practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of cranberries grown in the production area; and

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

(b) *Additional findings.*

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

A later effective date would unnecessarily delay implementation of the amendments modifying the Committee's marketing policy and sales histories which will soon be under consideration for the upcoming season by the Committee. Therefore, making the effective date one day after publication in the **Federal Register** will allow the amendments, which are expected to be beneficial to the industry, to be implemented as soon as possible.

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

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

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping cranberries covered by the order as hereby amended) who, during the period September 1, 2003, through August 31, 2004, handled 50 percent or more of the volume of such cranberries covered by said order, as hereby amended, have signed an amended marketing agreement; and

(2) The issuance of this amendatory order is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period September 1, 2003, through August 31, 2004 (which has been deemed to be a representative period), have been engaged within the production area in the production of such cranberries, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

(3) The issuance of this amendatory order is favored or approved by

processors who, during the period September 1, 2003, through August 31, 2004 (which has been deemed to be a representative period), have engaged in canning or freezing cranberries for market and have frozen or canned more than 50 percent of the total volume of cranberries regulated which were canned or frozen within the production area.

**Order Relative to Handling**

*It is therefore ordered*, that on and after the effective date hereof, all handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed marketing agreement and order further amending the order contained in the Secretary's Decision issued by the Administrator on November 30, 2004, and published in the **Federal Register** on December 1, 2004, shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

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

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 929 is amended as follows:

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

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

**Authority:** 7 U.S.C. 601-674.

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

**§ 929.10 Handle.**

(a) \* \* \*

(2) To sell, consign, deliver, or transport (except as a common or contract carrier of cranberries owned by another person) fresh cranberries or 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. Amend § 929.45 by revising paragraph (a) 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.

\* \* \* \* \*

■ 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 (a)(6) of this section.

(4) For a grower with 4 years or less of sales history, the sales history shall be computed by dividing the total sales from that acreage by 4 and 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 (a)(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

requested and shall be accompanied by a deposit (a cashier's or certified check made payable to the Cranberry Marketing Committee) in an amount equal to the twenty percent of the amount determined by multiplying the number of barrels stated in the request by the then effective amount per barrel as determined in paragraph (c).

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

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

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

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

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

among the growers delivering to such handler.

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

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

■ 14. Revise § 929.58 to read as follows:

**§ 929.58 Exemptions.**

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

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

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

■ 15. Revise § 929.61 to read as follows:

**§ 929.61 Outlets for excess cranberries.**

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

- (1) Charitable institutions; and
- (2) Research and development projects.

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

- (1) Any nonhuman food use; and

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

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

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

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

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

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

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

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

■ 16. Revise § 929.62 to read as follows:

**§ 929.62 Reports.**

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

- (1) Total acreage harvested and whether owned or leased.
- (2) Total commercial cranberry sales in barrels from such acreage.
- (3) Amount of acreage either in production, but not harvested or taken out of production and the reason(s) why.
- (4) Amount of new or replanted acreage coming into production.
- (5) Name of the handler(s) to whom commercial cranberry sales were made.
- (6) Such other information as may be needed for implementation and operation of this section.

(b) *Inventory.* Each handler engaged in the handling of cranberries or cranberry products shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to any cranberries

and cranberry products which were held by them on such date as the committee may designate.

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

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

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

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

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

■ 17. Revise § 929.64 to read as follows:

**§ 929.64 Verification of reports and records.**

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

Dated: February 8, 2005.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 930**

[Docket No. FV04-930-2 FR]

**Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2004-2005 Crop Year**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes final free and restricted percentages for the 2004-2005 crop year. The percentages are 72 percent free and 28 percent restricted and would establish the proportion of tart cherries from the 2004 crop which may be handled in commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions. The percentages were recommended by the Cherry Industry Administrative Board, the body that locally administers the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Oregon, Utah, Washington, and Wisconsin.

**DATES:** *Effective Date:* February 16, 2005. This final rule applies to all 2004-2005 crop year restricted cherries until they are properly disposed of in accordance with marketing order requirements.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 6C02, Unit 155, 4700 River Road, Riverdale, MD 20737; Telephone: (301) 734-5243 or Fax: (301) 734-5275; or George Kelhart, Technical Advisor, 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 complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

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

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

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This rule will establish final free and restricted percentages for tart cherries for the 2004-2005 crop year, beginning July 1, 2004, through June 30, 2005.

This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with 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 exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the USDA would rule on the petition.

The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season. Handlers handling tart cherries produced in the regulated districts are subject to these regulations. Tart cherries in the free percentage category may be shipped immediately to any market, while restricted percentage tart cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with § 930.59 of