

Etiwanda Creek; then southeast along East Etiwanda Creek to Wilson Avenue; then east on Wilson Avenue to Summit Avenue; then east on Summit Avenue to Cherry Avenue; then south on Cherry Avenue to U.S. Interstate 15; then southwest on U.S. Interstate 15 to East Avenue; then south on East Avenue to State Highway 66; then east on State Highway 66 to Cherry Avenue; then south on Cherry Avenue to Slover Avenue; then west on Slover Avenue to South Mulberry Avenue; then south on South Mulberry Avenue to Jurupa Avenue; then southwest on Jurupa Avenue to North Etiwanda Avenue; then south on North Etiwanda Avenue to Philadelphia Street; then west on Philadelphia Street to South Milliken Avenue; then south on South Milliken Avenue to East Riverside Drive; then west on East Riverside Drive to South Haven Avenue; then south on South Haven Avenue to East Edison Avenue; then west on East Edison Avenue to Edison Avenue; then west on Edison Avenue to Cucamonga Creek; then south on Cucamonga Creek to Eucalyptus Avenue; then northwest on Eucalyptus Avenue to San Antonio Avenue; then north on San Antonio Avenue to Edison Avenue; then west on Edison Avenue to Grand Avenue; then northwest on Grand Avenue to South Grand Avenue; then north on South Grand Avenue to East Badillo Street; then northeast on East Badillo Street to Badillo Street; then northeast on Badillo Street to West Covina Street; then east on West Covina Street to State Highway 57; then north on State Highway 57 to State Highway 210; then east on State Highway 210 to North Towne Avenue; then north on North Towne Avenue to its intersection with the shoreline of Thompson Creek; then east along an imaginary line from the intersection of North Towne Avenue and the shoreline of Thompson Creek to its intersection with Miller Ranch Road and the eastern border of Marshall Canyon County Park; then northeast along the eastern border of Marshall Canyon County Park to the southern border of the Angeles National Forest; then east along the southern border of the Angeles National Forest to the point of beginning.

*Santa Clara County.* San Jose area: That portion of the county bounded by a line drawn as follows: Beginning at the intersection of Camden Avenue and Hillside Avenue; then northeast on Hillside Avenue to Meridian Avenue; the northwest on Meridian Avenue to Dry Creek Road; then northeast on Dry Creek Road to Hicks Avenue; then northwest on Hicks Avenue to Robsheal Drive; then northeast on Robsheal Drive

to Simpson Way; then southeast on Simpson Way to Clark Way; then northeast on Clark Way to Lincoln Avenue; then northwest on Lincoln Avenue to Byerley Street; then northeast on Byerley Street to Byerley Avenue; then northeast on Byerley Avenue to Bird Avenue; then southeast on Bird Avenue to Malone Road; then northeast on Malone Road to Almaden Road; then northeast on Almaden Road to San Jose Avenue; then northeast on San Jose Avenue to Monterey Highway; then southeast on Monterey Highway to Tully Road; then northeast on Tully Road to South King Road; then southeast on South King Road to Aborn Road; then northeast on Aborn Road to San Felipe Road; then southeast on San Felipe Road to Silver Creek Road; then south along an imaginary line from the intersection of San Felipe Road and Silver Creek Road to the intersection of U.S. Highway 101 and Metcalf Road; then southwest on Metcalf Road to Monterey Highway; then southeast on Monterey Highway to Bailey Avenue; then southwest on Bailey Avenue to McKean Road; then southwest along an imaginary line from the intersection of Bailey Avenue and McKean Road to the intersection of Mine Hill Road and Alamitos Road; then southwest on Alamitos Road to Hicks Road; then northwest and northeast on Hicks Road to Camden Avenue; then northwest on Camden Avenue to the point of beginning.

■ 3. In § 301.78–10, paragraph (d) is revised to read as follows:

**§ 301.78–10 Treatments.**

\* \* \* \* \*

(d) *Premises.* A field, grove, or area that is located within the quarantined area but outside the infested core area, and that produces regulated articles, must receive regular treatments with either malathion or spinosad bait spray. These treatments must take place at 6 to 10-day intervals, starting a sufficient time before harvest (but not less than 30 days before harvest) to allow for completion of egg and larvae development of the Mediterranean fruit fly. Determination of the time period must be based on day degrees. Once treatment has begun, it must continue through the harvest period. The malathion bait spray treatment must be applied at a rate of 1.2 fluid ounces of technical grade malathion (1.4 ounces by weight) and 10.8 fluid ounces of protein hydrolysate (13.2 ounces by weight) per acre, for a total of 12 fluid ounces per acre. The spinosad bait spray treatment must be applied by aircraft or ground equipment at a rate of 0.01 oz of a USDA-approved spinosad formulation

and 48 oz of protein hydrolysate per acre. For ground applications, the mixture may be diluted with water to improve coverage.

\* \* \* \* \*

Done in Washington, DC, this 7th day of February 2006 .

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 06–1302 Filed 2–10–06; 8:45 am]

**BILLING CODE 3410–34–P**

**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 993**

[Docket No. FV02–993–610 REVIEW]

**Dried Prunes Produced in California; Section 610 Review**

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

**ACTION:** Confirmation of regulations.

**SUMMARY:** This action summarizes the results under the criteria contained in section 610 of the Regulatory Flexibility Act (RFA), of an Agricultural Marketing Service (AMS) review of Marketing Order No. 993, regulating the handling of dried prunes produced in California.

**ADDRESSES:** Interested persons may obtain a copy of the review. Requests for copies should be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or E-mail: [moab.docketclerk@usda.gov](mailto:moab.docketclerk@usda.gov).

**FOR FURTHER INFORMATION CONTACT:** Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; Telephone: (559) 487–5902; Fax: (559) 487–5906; E-mail: [Terry.Vawter@usda.gov](mailto:Terry.Vawter@usda.gov); 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; Fax: (202) 720–8938; E-mail: [George.Kelhart@usda.gov](mailto:George.Kelhart@usda.gov).

**SUPPLEMENTARY INFORMATION:** Marketing Order No. 993, as amended (7 CFR Part 993), regulates the handling of dried prunes produced in California. The marketing 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 marketing order establishes the Prune Marketing Committee (Committee), consisting of 22 members and their respective alternates. Fourteen members represent producers, 7 represent handlers, and one member represents the public. Of the 14 producer members, 7 represent the cooperative marketing association and 7 are independent. Of the 7 handler members, 3 represent the cooperative marketing association, and 4 represent independents. Members and alternates serve two-year terms of office ending May 31 of even numbered years. Independent producers are nominated to the Committee through a mail balloting process. Independent producers represent 7 production districts. Independent handlers represent large, medium, and small-sized handlers, and nominees are submitted by each of these respective groups. The cooperative marketing association submits its nominees for members and alternate members for appointment through its board of directors.

Currently, there are approximately 1,100 producers and 22 handlers of California dried prunes. Marketing Order No. 993, originally established in 1949, authorizes grade, size, pack, market allocation, reserve pool, as well as inspection requirements. The order also authorizes the Committee, with the approval of the Secretary, to establish projects including marketing research and development projects, designed to assist, improve, or promote the marketing, distribution, and consumption of dried prunes.

AMS published in the **Federal Register** (63 FR 8014; February 18, 1999), its plan to review certain regulations, including Marketing Order No. 993, under criteria contained in section 610 of the Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612). An updated plan was published in the **Federal Register** on January 4, 2002 (67 FR 525) and August 14, 2003 (68 FR 48574). Accordingly, AMS published a notice of review and request for written comments on the California dried prune marketing order in the July 15, 2002, issue of the **Federal Register** (67 FR 46423). The period for comments ended September 13, 2002. During the comment period, two written comments were received. Both comments were submitted by prune handlers who expressed their opinions in opposition to the use of reserve pooling under the order.

The review was undertaken to determine whether the California dried

prune marketing order should be continued without change, amended, or rescinded to minimize the impacts on small entities. In conducting this review, AMS considered the following factors: (1) The continued need for the marketing order; (2) the nature of complaints or comments received from the public concerning the marketing order; (3) the complexity of the marketing order; (4) the extent to which the marketing order overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and (5) the length of time since the marketing order has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the marketing order.

The marketing order has been used effectively in the areas of quality control and marketing research and development. The establishment of a quality control program that includes minimum grades and standards and mandatory inspections, and container pack requirements has helped improve the quality of product moving from the farm to market. These order requirements have helped ensure that only quality product reaches the consumer. This has helped increase and maintain demand for prunes from this marketing order area over the years. The compilation and dissemination of statistical information has helped producers and handlers make production and marketing decisions.

More recently, the industry was considering changes to the order. However, in 2003, the prune reserve and the voluntary producer prune plum diversion provisions in the order and related volume control regulations were suspended for a five-year period and the outgoing prune inspection and quality provisions of the order and regulations also were suspended for a three-year period. Further, as published in the **Federal Register** on May 27, 2005 (70 FR 30610), all handling and reporting requirements under the marketing order were suspended indefinitely. The suspension action also extended indefinitely the temporary suspension of the outgoing inspection and quality provisions of the order and regulations as well as the prune reserve and the voluntary producer plum diversion provisions in the order and related volume control regulations. The suspension action allows producers and handlers time to consider which provisions in the marketing order would continue to meet their future needs.

Based on the potential benefits of the marketing order to producers, handlers,

and consumers, AMS has determined that the order should continue without change, while the industry continues to evaluate the provisions of the order and regulations currently under suspension.

In regard to complaints or comments received from the public regarding the marketing order, during this review, USDA received two comments from prune handlers in opposition to the use of reserve pooling under the order.

One handler expressed the belief that reserve pooling by the California prune industry would place the industry at a competitive disadvantage with other producing countries. Costs of reserve pooling would be incurred by the California prune industry, while other producing countries would not experience such costs. In addition, the handler claimed that reserve maintenance costs such as storage bins, etc. would be unfair to smaller handlers who would not normally incur such costs in the absence of a reserve.

Another handler commented that reserve pooling would be unfair to grower/packers as opposed to packers who do not produce prunes but purchase only the supply they need from growers. This handler also expressed the belief that prune supplies should come more into line with demand as a result of the tree-pull program implemented during the 2001–2002 crop year. (This was a government-funded program that essentially paid prune producers to pull trees out of production to reduce burdensome supplies.)

USDA believes that supply control programs such as reserve pooling can be a valuable tool for an industry for the orderly marketing of its commodity. Such orderly marketing benefits the industry and consumers. The Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601–674) authorizes a number of supply control programs, including reserve pooling to achieve orderly marketing of a commodity. Such programs are authorized under a number of marketing orders and have been utilized successfully to the benefit of the respective commodity industries. Costs of such programs and impacts on industry members both small and large are taken into account.

The reserve pool provisions of the prune marketing order have not been used for a number of years. These provisions are currently under suspension for an indefinite period while the industry continues to evaluate the provisions of the order and regulations. The program concerns such as the commenters raised can be addressed in the continuing dialogue

concerning the suspended order and regulation provisions.

Further, marketing order issues and programs are discussed at public meetings, and all interested persons are allowed to express their views. All comments are considered in the decision-making process by the Committee and USDA before programs are implemented.

In considering the order's complexity, AMS has determined that the marketing order is not unduly complex.

During the review, the order was also checked for duplication and overlap with other regulations. AMS did not identify any relevant Federal rules, or State and local regulations that duplicate, overlap, or conflict with the marketing order for dried prunes produced in California.

As stated previously, the order was established in 1949. During this time, AMS and the California dried prune industry have continuously monitored marketing operations. Changes in regulations are implemented to reflect current industry operating practices, and to solve marketing problems as they occur. The goal of these evaluations is to assure that the marketing order and the regulations implemented under it fit the needs of the industry and are consistent with the Act.

Accordingly, AMS has determined that the marketing order should be continued without further change, as the industry continues to evaluate the provisions of the order and regulations currently under suspension. AMS will continue to work with the California dried prune industry in maintaining an effective marketing order program.

Dated: February 7, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

### **Section 610 Review of the Marketing Order for Dried Prunes Produced in California Marketing Order No. 993**

#### *Introduction and Background*

This review is being conducted under section 610 of the Regulatory Flexibility Act (RFA). 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 agreements and orders (orders) issued under the Agricultural Marketing Agreement Act of 1937 (Act) are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both the RFA and the Act have small entity orientation and compatibility. Small agricultural service firms, which

include handlers and shippers of the commodity, are defined by the Small Business Administration (13 CFR 121.201) as those whose annual receipts are less than \$5,000,000. Small agricultural producers are defined as those having annual receipts of less than \$750,000.

In January of 1997, Fruit and Vegetable Programs (FV) of the Agricultural Marketing Service (AMS), U.S. Department of Agriculture (USDA) made a policy decision to include initial and final RFA analyses in all of its informal and formal rulemaking documents. Prior to that, FV had been certifying that the specific rulemaking actions did not have a significant economic impact on a substantial number of small entities. The decision to include these analyses was made to ensure that the impact of regulations on small entities was more thoroughly reviewed, especially because FV orders have small entity orientation. Most rulemaking decision makers and drafters have found the RFA analysis tools useful in ensuring that all reasonable alternatives are considered in minimizing the economic burden or increasing the benefits for small entities, and for assessing the overall impact on industries, while achieving the objectives of the Act.

Consistent with this policy decision, AMS published in the **Federal Register** on February 18, 1999, a plan to review all regulations that warrant periodic review. An updated plan was published in the **Federal Register** on January 4, 2002, and again on August 14, 2003. The reviews are being conducted over the next 10 years under section 610 of the RFA. Of the program reviews being conducted, approximately 17 are FV orders. These FV orders are being reviewed for the purpose of determining whether they should be continued without change, or should be amended, rescinded, or terminated (consistent with the objectives of applicable statutes) to minimize the impacts on small entities.

In reviewing each of its orders, FV is considering the following factors:

- (1) The continued need for the order;
- (2) The nature of complaints or comments from the public concerning the order;
- (3) The complexity of the order;
- (4) The extent to which the rules of the order overlap, duplicate, or conflict with other Federal rules and, to the extent feasible, with state and local regulations; and
- (5) The length of time since the order has been evaluated or the degree to which technology, economic conditions,

or other factors have changed in the area affected by the order.

USDA is required to terminate an order if it finds that the provisions no longer tend to effectuate the declared policy of the Act. Termination is also required whenever it is favored by a majority of producers who during a crop year have been engaged in the production of prunes for market, and that such majority produced for market more than 50 percent of the volume of prunes produced during that crop year.

#### *Review of Marketing Order No. 993 for Dried Prunes Produced In California*

Marketing Order No. 993 (order) regulates the handling of dried prunes produced in the State of California. The order authorizes grade and size regulation, including mandatory inspection, container pack requirements, volume control, reporting requirements, and marketing research and development. The order was initially promulgated in 1949, with surplus control and grade and size (quality) regulation being its primary function. It has been amended eight times to include additional authorities and make changes to existing authorities to meet the changing needs of the industry. The most recent amendments occurred in 1980. More recently, the industry was considering additional changes to the order. However, in 2003, the prune reserve and voluntary producer prune plum diversion provisions in the order and related volume control regulations were suspended for a five-year period, and the outgoing prune inspection and quality provisions in the order and regulations were suspended for a three-year period. Further, as published in the **Federal Register** on May 27, 2005, (70 FR 30610), all handling and reporting requirements under the marketing order were suspended indefinitely. The suspension action also extended indefinitely the temporary suspension of the outgoing inspection and quality provisions of the order and regulations as well as the prune reserve and the voluntary producer plum diversion provisions in the order and related volume control regulations. The suspension action allows producers and handlers time to consider which provisions in the marketing order would continue to meet their future needs.

The order establishes the Prune Marketing Committee (Committee) as the administrative body charged with overseeing program operations. Staff is hired to conduct the daily administration of the program. The Committee consists of 22 members and 22 alternate members. Fourteen

members represent producers, seven represent handlers, and one represents the public. Currently, three of the handler members represent cooperative marketing associations and four members represent independents (those not affiliated with a cooperative). Producer membership is divided evenly between independents and cooperatives with seven members each. Each member and alternate serves a two-year term of office ending on May 31 of even numbered years. Independent producers nominate independent producer members, while independent handlers, through a mail balloting process, nominate independent handler members. Cooperative representatives are nominated by the cooperative marketing organizations.

Currently, there are approximately 1,100 producers and 22 handlers of California dried prunes. The majority of these producers and handlers may be classified as small entities. The regulations implemented under the order are applied uniformly to small and large entities, are designed to benefit all industry entities regardless of size, and do not have differential impacts based on size.

The Committee's activities include administering a quality control program that includes minimum grades and standards and mandatory inspections, container pack requirements, and compiling and disseminating statistical information to the industry. Portions of the quality control program are now under suspension. Two forms of volume control exist under the order, an undersized regulation and a reserve pool, which are under suspension. Although reserves have been used in the past, this form of volume control has not been implemented since 1971. In recent seasons, volume control has been implemented through elimination of the smallest undersized prunes from the market. One of the primary reasons for the use of this form of volume control is that the industry has had large inventories, consisting mainly of small-sized prunes. This form of volume control has reduced the marketable production by about 2 percent, and was proposed to be implemented for the 2004–05 season. However, dried prune production during that season was the smallest since the early 1900's and the proposal was withdrawn. While the order contains authority for marketing research and development, the research, marketing and advertising activities are conducted under a companion State program. The Committee is also responsible for recommending needed regulatory actions to USDA and recommending changes to the marketing

order and its rules and regulations. USDA must approve activities undertaken by the Committee before they can be implemented. Activities of the Committee are funded with assessment monies collected from handlers.

A notice of review and request for comments regarding the California prune marketing order was published in the **Federal Register** on July 15, 2002. During the comment period that ended on September 13, 2002, two written comments were received. Both comments were submitted by prune handlers who expressed their opinions in opposition to the use of reserve pooling under the order.

#### *The Continued Need for the Marketing Order*

The order was established in 1949 to help the California dried prune industry work with USDA to solve marketing problems that were characterized by an oversupply situation and relatively low producer returns. During the pre-World War II period from 1934–38, California prune production averaged 235,300 tons, according to a Recommended Decision published by USDA in the **Federal Register** on July 1, 1949. Sales to commercial domestic markets averaged 102,000 tons, 20,000 tons were utilized in relief programs, and exports (primarily to Europe) averaged 97,400 tons, for a total of 220,015 tons. After World War II, the situation changed dramatically. During the 1947–48 season, domestic sales were 93,000 tons and exports were reduced to 16,100 tons. Based on data available at the time and the prevailing growing conditions, it was expected that annual production would average around 185,000 tons in the subsequent seasons. Producer prices during the 1947–48 season averaged \$148.00 per ton, which was 62 percent of the parity price at that time. In addition, the Commodity Credit Corporation purchased 123,000 tons of California prunes during that season; thus, producer prices would have undoubtedly been even lower absent those purchases. In order to address this situation, the California prune marketing order was promulgated. Its primary feature at that time was a supply control program, which helped the industry manage the oversupply situation.

USDA routinely monitors the operations of this order, as does the industry and Committee, to ensure that the regulations issued address current market and industry conditions, and that the regulations and administrative procedures are appropriate for current practices within the industry. This

helps ensure the marketing of a high quality product. Prior to its suspension, the prune import regulation required imported dried prunes to meet quality and size requirements comparable to those applied to California dried prunes.

Although modified numerous times since its inception, the order still maintains authority for volume control. There are two methods of volume control authorized under the order. One involves a reserve program which is currently under suspension. Under this program, if USDA established a reserve recommended by the Committee based on oversupply conditions, handlers would be required to withhold from selling a certain percentage of product in normal market outlets. This "reserve" product could be disposed of into normal domestic or export market outlets, or into other noncompetitive outlets. Also, if a reserve were in effect, the order authorizes a diversion program whereby producers may divert prune plum production, and each handler's reserve obligations would be reduced according to the quantity of prune plums diverted from production. The industry used these volume control programs, or a variation of the programs, periodically from the 1950's into the 1970's to manage supplies in large crop years. However, salable and reserve volume control programs have not been implemented in more than 30 years in the California prune industry. Supplies were in relative balance with demand until the late 1990's. As mentioned previously, the authority for this program is under suspension.

Another form of volume control under the order involves eliminating the smallest, most undesirable sizes of prunes from human consumption channels. The "undersize regulation" recently has been used for five seasons beginning with the 1998–99 prune crop through the 2002–03 prune crop. This tool is effective in making relatively small adjustments to the supply rather than large adjustments. An "undersize regulation" for the 2004–05 season was recommended by the Committee and proposed by USDA. However, the production turned out to be the smallest since the early 1900's and the proposed rule was withdrawn. This provision also is under suspension for an indefinite period.

Due to a long-run surplus situation realized in recent seasons, the Committee recommended establishing a reserve program for the 2001–02 season. However, the program was not implemented. There was a smaller crop than initially estimated. In addition, the USDA implemented a program (67 FR 11384; March 14, 2002) pursuant to

Section 32 of the Act of August 24, 1935, as amended, to allow prune producers to remove trees from production.

Authority for grade and size regulations has also been included in the order since its inception in 1949. When the order was promulgated, it was determined that producer prices and total returns to producers could be augmented by making available in trade channels only the better sizes and qualities of fruit (Recommended Decision, July 1, 1949). Over the years, the industry has found that providing higher quality and more desirable sizes of prunes to the marketplace has increased consumer satisfaction and resulted in more repeat purchases of the product. Keeping the lower priced, lower quality and less desirable sizes off the market has helped to prevent such product from depressing overall price levels, thus improving grower returns and fostering orderly marketing conditions. However, in 2003, taking into account cost considerations, the Committee recommended suspension of the outgoing inspection and outgoing prune quality requirements. The Committee also recommended relaxation of the disposition and verification requirements on undersized prunes. The USDA implemented these recommendations in 2003.

In 1960, the order was amended to include authority for marketing research and development projects. However, this authority has been used in a limited fashion. Since July 1980, production research, market research, market development, and promotion, including paid advertising, have been conducted under a State marketing order. In a Giannini Foundation March 1998 report, the California Dried Plum Board's (CDPB; formerly known as the California Prune Board) promotion program was evaluated. The report was paid for with CDPB assessment funds, and concluded that the promotion of California prunes by the CDPB has increased the demand for prunes and returns to producers of prunes. Over the four-year period analyzed in the monthly model, spending by prune growers for promotion yielded marginal returns of at least \$2.65 for every dollar spent. Moreover, marginal benefit-cost ratios of 2.7 to 1 and greater indicate that the industry could have profitably invested even more in promotion this period.

Also in 1960, the order was amended to include authority to establish size categories, size nomenclature designations, and labeling requirements for natural condition and processed whole prunes. These authorities were

implemented through rulemaking during 1961, 1981, and 1984. This was an important feature in informing buyers of the type and size of whole prunes marketed.

Prior to the most recent suspension action, the Committee collected statistical information from handlers on a routine basis. The Committee staff compiled aggregate statistical reports that were distributed to the industry and used in planting, harvesting, and sales decisions. This information was also used by the industry in making marketing policy decisions, including whether to implement volume control and/or undersize volume control. It was also used in recommending changes to the marketing order pertaining to grade and size.

The industry has changed marketing practices over the years and now pitted prunes dominate the market. In 1986, 61 percent of the prunes were marketed as whole prunes. In earlier years, this percentage was even higher. During the 2003–04 crop year, only 35 percent of the crop was marketed as whole prunes.

The industry has conducted studies to determine if the marketing order grade and size regulations can be improved. One such study was initiated to see if the industry could tighten its pit fragment tolerance. One of the most frequent consumer complaints has been a pit or pit fragment(s) in prunes. The industry enlisted the services of the Dried Fruit Association of California to conduct the pit fragment study. The results of the study showed that the industry could tighten the prune pit and pit fragment tolerance standard. The industry decided to improve its product by tightening the pit and pit fragment tolerance standard effective November 30, 1992, from a U.S Food and Drug Administration requirement that allowed no more than 2 percent, by count, of prunes with whole pits and/or pit fragments 2 mm or longer to a marketing order tolerance not to exceed an average of 0.5 percent, by count, of prunes with whole pits and/or pit fragments 2 mm or longer; and four of ten sub samples examined having no more than 0.5 percent, by count, of prunes with whole pits and/or pit fragments 2 mm or longer. Over the past 12 years, this change has helped reduce the incidence of pit and/or pit fragments in pitted prunes. Currently, the industry is conducting a study to determine whether the 0.5 percent pit/pit tolerance can be reduced to 0.25 percent.

USDA reviews industry recommendations and programs for consistency with the regulatory authorities provided in the order, the prevailing and prospective market

situation, and the impact upon small businesses. An assessment is also made as to whether regulatory recommendations or programs are practical for those who would be regulated, and whether the recommendations are consistent with USDA policy.

The California prune marketing order has proven to be an effective tool used by the industry for more than 50 years in managing and marketing its crop. The order should help the industry to face the challenges of the future. Based on the potential benefits of the marketing order to producers, handlers, and consumers, AMS has determined that the order should be continued without further change as the industry continues to evaluate the provisions of the order and regulations currently under suspension.

#### *The Nature of Complaints or Comments From the Public Concerning the Marketing Order*

As previously mentioned, USDA received two comments regarding the order or the regulations issued under the order in response to the published notice of review. Both comments expressed opposition to reserve pooling under the order. No comments from non-industry entities were received.

One handler expressed the belief that reserve pooling by the California prune industry would place the California industry at a competitive disadvantage with other producing countries. Costs of reserve pooling would be incurred by the California prune industry, while other producing countries would not experience such costs. In addition, the handler claimed that reserve maintenance costs for storage bins would be unfair to smaller handlers who would not normally incur such costs in the absence of a reserve.

Another handler commented that reserve pooling would be unfair to grower/packers as opposed to packers who do not produce prunes but purchase only the supply they need from growers. This handler also expressed the belief that prune supplies should come more into line with demand as a result of the tree-pull program implemented during the 2001–02 crop year. This was a government-funded program that allowed prune producers to pull trees out of production to reduce burdensome long-run supplies.

USDA believes that supply control programs such as reserve pooling can be a valuable tool for an industry for the orderly marketing of its commodity. Such orderly marketing benefits the industry and consumers. The

Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601–674) authorizes a number of supply control programs, including reserve pooling to achieve orderly marketing of a commodity. Such programs are authorized under a number of marketing orders and have been utilized successfully to the benefit of the respective commodity industries. Costs of such programs and impacts on industry members both small and large are taken into account.

The reserve pool provisions of the prune marketing order have not been used for a number of years. These provisions are currently under suspension for an indefinite period while the industry continues to evaluate the provisions of the order and regulations. The program concerns raised by the commenters can be addressed in the continuing dialogue concerning the suspended order and regulation provisions.

Further, marketing order issues and programs are discussed at public meetings, and all interested persons are allowed to express their views. All comments are considered in the decision making process by the Committee and USDA before recommendations and programs are implemented.

#### *The Complexity of the Marketing Order*

The prune marketing order itself is not unduly complex. The implementing rules and regulations under the order have a degree of complexity; however, efforts are undertaken to ensure that the regulations are no more complex than necessary to achieve the desired objectives. The Committee and its subcommittees review the regulations periodically and make recommendations for change. Their goal is to keep the regulations as easy to understand as possible. In addition, USDA reviews the recommendations to help assure this goal. Finally, Committee staff provides materials to growers and handlers explaining the programs and regulations, and periodically conducts educational workshops to help growers and handlers better understand the programs and regulations.

#### *The Extent to Which the Marketing Order Overlaps, Duplicates, or Conflicts With Other Federal Rules, and to the Extent Feasible, With State and Local Regulations*

USDA has not identified any relevant Federal rules, or State and local regulations that duplicate, overlap, or conflict with this order's requirements. However, there is a companion California State marketing order that

also applies to the prune industry. This program works cooperatively with the Federal marketing order to ensure there is no duplication of efforts. The programs share staff and office space, and many of the Federal marketing order committee members are also members of the State marketing order committee. This arrangement helps assure that the programs complement each other rather than conflict, duplicate efforts, or overlap. Activities under the Federal marketing order were discussed in detail in an earlier section of this review. The State marketing order engages in those activities not undertaken under the Federal order including production research, marketing research, and market promotion. Both programs operate in concert with each other to benefit the prune industry.

#### *The Length of Time Since the Marketing Order Has Been Evaluated or the Degree to Which Technology, Economic Conditions, or Other Factors Have Changed in the Area Affected by the Marketing Order*

The USDA and the California prune industry monitor the production and marketing of prunes on a continuing basis. Changes in regulations are implemented to reflect current industry operating practices, and to solve marketing problems. The goal of these evaluations is to assure that the order and the regulations issued under it fit the needs of the industry and are consistent with the Act and USDA policies.

The USDA routinely monitors the operations of this order, as does the industry, to ensure that the regulations issued address current market and industry conditions, and that the regulations and administrative procedures are appropriate for current practices within the industry. The producers and handlers of California prunes support activities that help ensure the marketing of a high quality product, and believe that this order has been effectively used for that purpose.

Since its inception in 1949, Marketing Order 993 has gone through numerous changes. These changes were made, in part, because of changing technological and economic conditions affecting the production, handling, and marketing of prunes. This industry is continuing to evaluate the provisions of the order and regulations currently under suspension in determining which provisions in the marketing order would continue to meet its future needs.

Records indicate that the order has been formally amended eight times since its promulgation. Amendments

have varied in their nature and scope, ranging from procedural issues such as changing voting requirements to adding entirely new regulatory authorities to the order. For example, Committee membership and voting requirements were revised in a 1954 amendment proceeding (January 1, 1954, **Federal Register**). In 1957, authority for consumer pack regulations was added to the order (August 15, 1957, **Federal Register**), and in 1960 authority for market research and development was added to the order (November 29, 1960, **Federal Register**). The order was most recently amended in 1981. Those amendments included changing the Committee name, adding a public member and alternate member to the Committee, changing the quorum requirements, and establishing a continuous undersize regulation (September 28, 1981, **Federal Register**).

The Committee decided to review the order for needed changes and formed an Amendment Subcommittee during the middle of 2001 to review the order and put together amendment proposals for the Committee to review and ultimately forward to USDA with a request for an amendment hearing. The order's rules and regulations also have been modified numerous times over the years to ensure they meet the needs of the industry. While several amendment proposals were considered, the Committee, in 2005, ultimately decided to recommend an indefinite suspension of the order's handling, reporting, quality, inspection, and volume control provisions. The industry is continuing its dialogue concerning its future needs. Ultimately, the Committee will decide whether the provisions should be modified, terminated, or remain unchanged.

The numerous formal order amendments, the many changes to the rules and regulations over the years, and the Committee's continuing review and adjustments to its programs, show that the order is constantly changing to meet industry needs. The USDA will continue to work with the California prune industry in maintaining an effective program.

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