

# Rules and Regulations

Federal Register

Vol. 71, No. 37

Friday, February 24, 2006

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 948

[Docket No. FV05-948-1 FRA]

#### Irish Potatoes Grown in Colorado; Relaxation of Handling Regulation for Area No. 2

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

**ACTION:** Final rule.

**SUMMARY:** This rule relaxes the minimum grade requirement for certain potatoes handled under the Colorado potato marketing order, Area No. 2. The Colorado Potato Administrative Committee, Area No. 2 (Committee), the agency responsible for local administration of the marketing order, recommended this rule. This rule changes the minimum grade from U.S. No. 1 to U.S. Commercial for varieties of long, red-skinned, yellow fleshed potatoes produced in Area No. 2 measuring from 1½-inch minimum diameter to 2¼-inch maximum diameter (size B), and from 1-inch minimum diameter to 1¾-inch maximum diameter. The change is intended to provide potato handlers with more marketing flexibility, growers with increased returns, and consumers with a greater supply of small specialty potatoes.

**EFFECTIVE DATE:** This final rule becomes effective February 27, 2006.

**FOR FURTHER INFORMATION CONTACT:** Teresa Hutchinson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (503) 326-2724, Fax: (503) 326-7440; 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.

Small businesses may request information on complying 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, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This final rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, 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. This rule is not intended to have retroactive effect. 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 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 the date of the entry of the ruling.

This final rule relaxes the minimum grade requirement from U.S. No. 1 to U.S. Commercial for all varieties of long, red-skinned, yellow fleshed potatoes

produced in Colorado Area No. 2 measuring from 1½-inch minimum diameter to 2¼-inch maximum diameter (size B), and from 1-inch minimum diameter to 1¾-inch maximum diameter. This change was recommended by the Committee on October 20, 2005, with 12 members in favor and one opposed. The member voting against the change felt that the minimum grade for all small potatoes should continue to be U.S. No. 1. This member is opposed to having grading exceptions for any variety of potato. The Committee believes that this change will facilitate the marketing of Area No. 2 Colorado potatoes and improve grower returns.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the production area. Section 948.21 further authorizes the modification, suspension, or termination of regulations issued pursuant to § 948.22.

Section 948.40 provides that whenever the handling of potatoes is regulated pursuant to §§ 948.20 through 948.24, such potatoes must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Grade regulations specific to the handling of potatoes grown in Area No. 2 are contained in § 948.386 of the order's handling regulations. Section 948.4 of the order defines the counties included in Area No. 2, which is commonly known as the San Luis Valley. The State of Colorado is divided into three areas for marketing order purposes. Currently, only Area No. 2 and Area No. 3 are active.

The Committee's initial recommendation, made on August 19, 2004, was to relax the minimum grade requirement from U.S. No. 1 to U.S. Commercial for all Colorado Area No. 2 potato varieties measuring from 1½-inch minimum diameter to 2¼-inch maximum diameter (size B), and from 1-inch minimum diameter to 1¾-inch maximum diameter. This change was recommended by the Committee with nine members in favor and four opposed. The members voting against the change believed that the minimum grade for all small potatoes should continue to be U.S. No. 1.

This initial recommendation led to a proposed rule being published in the

**Federal Register** on May 6, 2005 (70 FR 23942), with comments being invited until July 5, 2005. The comment period was reopened until September 12, 2005, in a document published on August 22, 2005 (70 FR 48903), for the purpose of receiving additional input. Five comments were received during the reopened comment period. All of these comments opposed the relaxation of the grade requirement because of the potentially negative impact on the quality of imported round, red-skinned varieties of potatoes. Under section 980.1 of the import regulations, the initially proposed grade change would have applied to all imported round, red-skinned potatoes of the same size categories during the months of October through June. All of the commenters expressed concern that lower quality imported round, red-skinned potatoes would adversely affect the domestic market.

The Committee met on October 20, 2005, to consider the comments received regarding the previously issued proposed rule, as well as other information received from the Colorado potato industry. After much discussion, the Committee recommended that the rule be modified to reflect that the relaxed grade requirement would only apply to long, red-skinned, yellow fleshed potato varieties.

Because this final rule is limited to all varieties of long, red-skinned, yellow fleshed potatoes, imported round, red-skinned potato varieties will not be affected. Under § 980.1, imported long type potatoes must meet the grade, size, quality, and maturity requirements of Marketing Order No. 945 (Idaho-Eastern Oregon potatoes) throughout the entire year.

For many years, consumer demand for small fresh market potatoes was relatively soft in comparison to larger sizes. Size B and smaller potatoes were often discarded or fed to livestock. Grade and size regulations were developed to keep lower quality small potatoes out of the fresh market. At that time, the Committee believed that small potatoes, sold at a great discount, eroded the price for large potatoes. By requiring all small potatoes to grade U.S. No. 1 or better, the Committee believed that high quality small potatoes would not have an adverse affect on the market for larger potatoes.

Recently, however, demand has increased for varieties of long, red-skinned, yellow fleshed small potatoes, which often command premium prices compared to larger size A potatoes (1<sup>7</sup>/<sub>8</sub>-inch and larger). With the growing demand for this type of small specialty potato, some growers and handlers are

concerned that they will not be able to supply this market, because only U.S. No. 1 or better grade can be shipped under the order. Growers and handlers have had requests from their customers for long, red-skinned, yellow fleshed varieties of small potatoes that grade U.S. Commercial or better. The Committee believes that this action will help handlers in Area No. 2 meet their buyers' needs.

Committee statistics show that approximately 65 percent of the entire potato crop in Area No. 2 grades U.S. No. 1 or better. However, the percentage of Size B and smaller potatoes meeting U.S. No. 1 grade is only about 50 percent. The reason for the lower percentage of smaller potatoes is because several potato defects are scored based on the percentage of surface area affected on the individual potato. For example, a cut on a large potato may not affect a large enough surface area to be a scorable defect, but the same size cut would be scorable on a smaller potato. Under such circumstances, it would be much harder for a small potato to meet the U.S. No. 1 grade than it would for a large potato. The U.S. Commercial grade allows a slightly higher percentage of total defects than the U.S. No. 1 grade.

By changing the grade requirement to allow long, red-skinned, yellow fleshed potato varieties that are size B and those measuring from 1-inch minimum diameter to 1<sup>3</sup>/<sub>4</sub>-inch maximum diameter to meet U.S. Commercial grade or better, the Committee believes more of this type of small specialty potato would be available to meet increasing demand, and thus help increase returns to growers. Not only would more small long, red-skinned, yellow fleshed potatoes enter the market, these small specialty potatoes typically sell for a premium price in today's marketplace.

The Committee believes that by allowing small long, red-skinned, yellow fleshed potatoes to meet the more relaxed U.S. Commercial grade instead of U.S. No. 1 grade, available volume for sale into the fresh market could increase by about 10 percent.

Although facing an increasing demand, the market for small long, red-skinned, yellow fleshed potatoes is a minor segment of the market served by the Area No. 2 production area. As a consequence, the Committee believes that this type of small specialty potato does not compete directly with the predominant large potatoes produced in this area, and that the relaxation of the grade requirement would not adversely effect the overall Area No. 2 potato market.

### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (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 in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 88 handlers of Colorado Area No. 2 potatoes subject to regulation under the order and approximately 230 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$6,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

During the 2004–2005 marketing year, 17,626,974 hundredweight of Colorado Area No. 2 potatoes were inspected under the order and sold into the fresh market. Based on an estimated average f.o.b. price of \$6.75 per hundredweight, the Committee estimates that 83 Area No. 2 handlers or about 94 percent had annual receipts of less than \$6,000,000.

In addition, based on information provided by the National Agricultural Statistics Service, the average grower price for Colorado fall potatoes for 2004 was \$4.55 per hundredweight. The average annual grower revenue for the 230 Colorado Area No. 2 potato growers is therefore calculated to be approximately \$348,708. In view of the foregoing, the majority of the Colorado Area No. 2 potato growers and handlers may be classified as small entities.

This final rule relaxes the grade requirement implemented under the order from U.S. No. 1 grade to U.S. Commercial grade for all long, red-skinned, yellow fleshed Area No. 2 potato varieties measuring from 1<sup>1</sup>/<sub>2</sub>-inch minimum diameter to 2<sup>1</sup>/<sub>4</sub>-inch maximum diameter (size B) and from 1-inch minimum diameter to 1<sup>3</sup>/<sub>4</sub>-inch maximum diameter.

Authority for this action is contained in §§ 948.21, 948.22, 948.40, and 948.386.

Regarding the impact of this rule on affected entities, this relaxation of the

grade requirement for small long, red-skinned, yellow fleshed varieties of potatoes is expected to benefit handlers and growers. Through this relaxation of the minimum grade requirement for this type of small specialty potato, a potentially greater quantity of potatoes will meet the order's handling regulations. This could translate into an increased market for small long, red-skinned, yellow fleshed potatoes and greater returns for handlers and growers.

As small long, red-skinned, yellow fleshed varieties of potatoes have grown in popularity with consumers, the market demand has outpaced the quantity of these small, high quality potatoes available from Area No. 2. The Committee believes that this relaxation in the grade requirement will increase the available supply of small, long, red-skinned, yellow fleshed varieties of potatoes. These small specialty potatoes are a minor segment of the potato market served by the Area No. 2 production area. As such, the Committee believes that these small long, red-skinned, yellow fleshed potato varieties do not compete directly with most of the potatoes produced in this area and that the relaxation of the grade requirement will not adversely effect the overall Area No. 2 potato market.

Based on Committee records, about half the handlers ship all of the size B and smaller potatoes grown in Area No. 2. Committee records also indicate that during the 2004–2005 fiscal period, approximately 165,000 hundredweight (less than 1 percent) of size B and smaller were inspected and shipped. The Committee estimates that the marketable supply of size B and smaller long, red-skinned, yellow fleshed potato varieties will increase approximately 10 percent and add about 16,500 hundredweight to the marketable supply. The Committee anticipates that the greater quantity of small long, red-skinned, yellow fleshed varieties of potatoes will expand Area No. 2's market share, increase the supply of potatoes available for consumers, and increase grower returns.

After discussing possible alternatives to this rule and reviewing the comments received in regards to the first proposed rule (70 FR 23942, May 6, 2005; and 70 FR 48903, August 22, 2005), the Committee determined that a relaxation in the grade requirement to U.S. Commercial grade for small long, red-skinned, yellow fleshed potatoes will sufficiently meet the industry's current needs. The relaxation in the grade requirement for this type of small specialty potato will provide the greatest benefit to the industry by augmenting the developing market for

these potatoes and thereby increase grower returns.

The first proposal would have allowed all varieties of small potatoes produced in Area No. 2 to meet U.S. Commercial grade, including round, red-skinned potato varieties. Under the import regulations, round, red-skinned potatoes are required to meet the grade, size, quality, and maturity requirements of the Area No. 2 Colorado potato marketing order from October through June. Thus, under the first proposal, all imported round, red-skinned potatoes would have been allowed into the U.S. as U.S. Commercial grade during this period. Commenters expressed concern that such a relaxation of the grade requirement for small round, red-skinned potatoes could potentially have a negative impact on the quality of imported round, red-skinned potatoes. They were concerned that lower quality imported round, red-skinned potatoes would adversely affect the domestic market. However, this final rule will only relax the grade requirement for long, red-skinned, yellow fleshed potato varieties and, therefore, will not change the grade requirement for round, red-skinned potatoes or for any imported round, red-skinned potatoes during the months of October through June.

This action will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. 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.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

In addition, the Committee's meetings were widely publicized throughout the Colorado potato industry and all interested persons were invited to attend the meetings and participate in Committee deliberations. Like all Committee meetings, the August 19, 2004, and the October 20, 2005, meetings were public meetings and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning the Committee's amended action was published in the **Federal Register** on December 22, 2005 (70 FR 75981). Copies of the rule were mailed or sent via facsimile to all Committee members. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending January 6, 2005, was provided to allow interested

persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping potatoes from the 2005–2006 crop and handlers want to take advantage of the relaxation as soon as possible. Further, handlers are aware of this rule, which was recommended at a public meeting. In addition, this rule replaces a previously proposed rule. Affected entities were allowed to provide input during the previous comment periods and all comments were considered in the preparation of this rule. Finally, an additional 15-day comment period was provided for in the second proposed rule and no comments were received.

#### List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

#### PART 948—IRISH POTATOES GROWN IN COLORADO

■ 1. The authority citation for 7 CFR part 948 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. In § 948.386, paragraphs (a)(3) and (a)(4) are revised to read as follows:

#### § 948.386 Handling regulation.

\* \* \* \* \*

(a) \* \* \*

(3) *All varieties.* Size B, if U.S. No. 1 or better grade: *Provided*, That varieties of long, red-skinned, yellow fleshed potatoes shall grade U.S. Commercial or better.

(4) *All varieties.* 1-inch minimum diameter to 1¾-inch maximum diameter, if U.S. No. 1 or better grade: *Provided*, That varieties of long, red-

skinned, yellow fleshed potatoes shall grade U.S. Commercial or better.

\* \* \* \* \*

Dated: February 17, 2006.

**Lloyd C. Day,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 06-1717 Filed 2-23-06; 8:45 am]

BILLING CODE 3410-02-P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 1124 and 1131

[Docket No. AO-368-A32, AO-271-A37; DA-03-04B]

#### Milk in the Pacific Northwest and Arizona-Las Vegas Marketing Areas; Order Amending the Orders

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends provisions of the producer-handler definitions of the Pacific Northwest and Arizona-Las Vegas orders as contained in the Final Decision published in the *Federal Register* on December 14, 2005. More than the required number of producers for the Arizona-Las Vegas and Pacific Northwest marketing areas approved the issuance of the orders as amended.

**DATES:** *Effective Date:* April 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Jack Rower, Marketing Specialist or Gino Tosi, Associate Deputy Administrator for Order Formulation and Enforcement, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, STOP 0231-Room 2971, 1400 Independence Avenue SW., Washington, DC 20250-0231, (202) 720-2357 or (202) 690-1366, e-mail addresses: [jack.rower@usda.gov](mailto:jack.rower@usda.gov) or [gino.tosi@usda.gov](mailto:gino.tosi@usda.gov).

**SUPPLEMENTARY INFORMATION:** This document amends the producer-handler and related provisions of the Pacific Northwest and Arizona-Las Vegas Federal milk orders. Specifically, this final rule permanently adopts a provision that will eliminate the exemption from pooling and pricing provisions of the orders for producer-handlers with in-area route disposition in excess of 3-million pounds per month.

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.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), 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 request modification or exemption from such order by filing 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 the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this final decision will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a milk marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500 employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Producer-handlers are defined as dairy farmers that process only their

own milk production. These entities must be dairy farmers as a pre-condition to operating processing plants as producer-handlers. The size of the dairy farm determines the production level of the operation and is the controlling factor in the capacity of the processing plant and possible sales volume associated with the producer-handler entity. Determining whether a producer-handler is considered a small or large business must depend on its capacity as a dairy farm where a producer-handler with annual gross revenue in excess of \$750,000 is considered a large business.

The amendments will place entities currently considered to be producer-handlers under the Pacific Northwest or the Arizona-Las Vegas orders on the same terms as all other fully regulated handlers provided they meet the criteria for being subject to the pooling and pricing provisions of the two orders. Entities currently defined as producer-handlers under the terms of these orders will be subject to the pooling and pricing provisions of the orders if their route disposition of fluid milk products is more than 3 million pounds per month.

Producer-handlers with route disposition of less than 3 million pounds during the month will not be subject to the pooling and pricing provisions of the orders. To the extent that current producer-handlers for each order have route disposition of fluid milk products outside of the marketing areas, such route disposition will be subject to an order's pooling and pricing provisions if total in-area route disposition causes them to become fully regulated.

Assuming that some current producer-handlers will have route disposition of fluid milk products of more than 3 million pounds during the month, such producer-handlers will be regulated subject to the pooling and pricing provisions of the orders like other handlers. Such producer-handlers will account to the pool for their uses of milk at the applicable minimum class prices and pay the difference between their use-value and the blend price of the order to the order's producer-settlement fund.

While this may cause an economic impact on those entities with more than 3 million pounds of route sales who currently are considered producer-handlers by the two orders, the impact is offset by the benefit to other small businesses. With respect to dairy farmers whose milk is pooled on the two marketing orders, such dairy farmers who have not heretofore shared in the additional revenue that accrues from the marketwide pooling of Class I