

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Docket No. AO-322-A7; AMS-FV-06-0213; FV07-930-2]

#### Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Hearing on Proposed Amendment of Marketing Agreement and Order No. 930

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

**ACTION:** Notice of hearing on proposed rulemaking.

**SUMMARY:** Notice is hereby given of a public hearing to receive evidence on proposed amendments to Marketing Agreement and Order No. 930 (order), which regulate the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Seven amendments are proposed by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. These proposed amendments would: Authorize changing the primary reserve capacity associated with the volume control provisions of the order; authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage; establish an age limitation on product placed into reserves; revise the voting requirements necessary to approve a Board action; revise the nomination and election process for handler members on the Board; revise Board membership affiliation requirements; and update order language to more accurately reflect grower and handler participation in the nomination and election process in Districts with only one Board representative. In addition, the Agricultural Marketing Service (AMS) proposes to make any such changes as

may be necessary to the order or administrative rules and regulations to conform to any amendment that may result from the hearing. The proposals are intended to provide additional flexibility in administering the volume control provisions of the order, and to update Board nomination, election, and membership requirements. These proposed amendments are intended to improve the operation and administration of the order.

**DATES:** The hearing dates are:

1. February 21, 2007, 9 a.m. to 5 p.m.; and continuing on February 22, 2007, at 9 a.m., if necessary, in Grand Rapids, Michigan.

2. March 1, 2007, 9 a.m. to 5 p.m.; and continuing on March 2, 2007, at 9 a.m., if necessary, in Provo, Utah.

**ADDRESSES:** The hearing locations are:

1. Grand Rapids—U.S. Bankruptcy Court, One Division Ave., N, 3rd Floor Courtroom C, Grand Rapids, MI 49503.

2. Provo—Utah County Administration Building, 100 E. Center Street, Room L900, Provo, Utah 84606.

**FOR FURTHER INFORMATION CONTACT:**

Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Fresno, California 93721; telephone: (559) 487-5110, Fax: (559) 487-5906; or 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, Fax: (202) 720-8938, or E-mail: [Martin.Engeler@usda.gov](mailto:Martin.Engeler@usda.gov) or [Kathy.Finn@usda.gov](mailto:Kathy.Finn@usda.gov).

Small businesses may request information on this proceeding 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 administrative action is instituted pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." This 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.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) seeks to ensure that within the statutory authority of a program, the regulatory and informational requirements are tailored to the size and nature of small businesses. Interested persons are invited to present evidence at the hearing on the possible regulatory and informational impacts of the proposals on small businesses.

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

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. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the 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 hearing is called pursuant to the provisions of the Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments were recommended by the Board and initially submitted to USDA on December 16, 2005. Additional information was submitted in June 2006 at the request of USDA and a determination was subsequently made to schedule this matter for hearing.

The proposed amendments to the order recommended by the Board are summarized as follows:

1. Amend § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume control provisions of the order.

2. Amend § 930.54 of the order to authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage.

3. Amend § 930.55 to establish an age limitation on product placed into reserves.

4. Amend § 930.32 to revise the voting requirements necessary to approve a Board action.

5. Amend § 930.23 to revise the nomination and election process for handler members on the Board.

6. Amend § 930.20 to revise Board membership affiliation requirements.

7. Amend § 930.23 to update order language to more accurately reflect grower and handler participation in the nomination and election process in Districts with only one Board representative.

The Board works with USDA in administering the order. These proposals submitted by the Board have not received the approval of USDA. The Board believes that its proposed changes would provide additional flexibility in administering the volume control provisions of the order, and would update the nomination, election, and membership requirements for the Board. The proposed amendments are intended to improve the operation and administration of the order.

In addition to the proposed amendments to the order, AMS proposes to make any such changes as may be necessary to the order or administrative rules and regulations to conform to any amendment that may result from the hearing.

The public hearing is held for the purpose of: (i) Receiving evidence about the economic and marketing conditions which relate to the proposed amendments of the order; (ii) determining whether there is a need for the proposed amendments to the order; and (iii) determining whether the proposed amendments or appropriate modifications thereof will tend to effectuate the declared policy of the Act.

Testimony is invited at the hearing on all the proposals and recommendations contained in this notice, as well as any appropriate modifications or alternatives.

All persons wishing to submit written material as evidence at the hearing should be prepared to submit four copies of such material at the hearing and should have prepared testimony available for presentation at the hearing.

From the time the notice of hearing is issued and until the issuance of a final decision in this proceeding, USDA employees involved in the decisional

process are prohibited from discussing the merits of the hearing issues on an *ex parte* basis with any person having an interest in the proceeding. The prohibition applies to employees in the following organizational units: Office of the Secretary of Agriculture; Office of the Administrator, AMS; Office of the General Counsel, except any designated employee of the General Counsel assigned to represent the Board in this proceeding; and the Fruit and Vegetable Programs, AMS.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

#### List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

#### PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

2. Testimony is invited on the following proposals or appropriate alternatives or modifications to such proposals.

Proposals submitted by the Cherry Industry Administrative Board:

#### Proposal Number 1

3. Revise paragraph (i) of § 930.50 to read as follows:

#### § 930.50 Marketing policy.

(i) *Restricted Percentages.* Restricted percentage requirements established under paragraphs (b), (c), or (d) of this section may be fulfilled by handlers by either establishing an inventory reserve in accordance with § 930.55 or § 930.57 or by diversion of product in accordance with § 930.59. In years where required, the Board shall establish a maximum percentage of the restricted quantity which may be established as a primary inventory reserve such that the total primary inventory reserve does not exceed 50 million pounds; *Provided*, That such 50 million pound quantity may be changed upon recommendation of the Board and approval of the Secretary. Any such change shall be recommended by the Board on or before September 30 of any crop year to become effective for the following crop year, and the quantity may be changed no more than one time per crop year. Handlers will be permitted to divert (at plant or with grower diversion

certificates) as much of the restricted percentage requirement as they deem appropriate, but may not establish a primary inventory reserve in excess of the percentage established by the Board for restricted cherries. In the event handlers wish to establish inventory reserve in excess of this amount, they may do so, in which case it may be classified as a secondary inventory reserve and will be regulated accordingly.

\* \* \* \* \*

#### Proposal Number 2

4. Add a new paragraph (d) to § 930.54 to read as follows:

#### § 930.54 Prohibition on the use or disposition of inventory reserve cherries.

\* \* \* \* \*

(d) Should the volume of cherries held in the primary inventory reserves and, subsequently, the secondary inventory reserves reach a minimum amount, which level will be established by the Secretary upon recommendation from the Board, the products held in the respective reserves shall be released from the reserves and made available to the handlers as free tonnage.

#### Proposal Number 3

5. Revise paragraph (b) of § 930.55 to read as follows:

#### § 930.55 Primary inventory reserves.

\* \* \* \* \*

(b) The form of the cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. The product(s) placed by the handler in the primary inventory reserve must have been produced in either the current or the preceding two crop years. Except as may be limited by § 930.50(i) or as may be permitted pursuant to §§ 930.59 and 930.62, such inventory reserve portion shall be equal to the sum of the products obtained by multiplying the weight or volume of the cherries in each lot of cherries acquired during the fiscal period by the then effective restricted percentage fixed by the Secretary; *Provided*, That in converting cherries in each lot to the form chosen by the handler, the inventory reserve obligations shall be adjusted in accordance with uniform rules adopted by the Board in terms of raw fruit equivalent.

\* \* \* \* \*

#### Proposal Number 4

6. Revise paragraph (a) of § 930.32 to read as follows:

**§ 930.32 Procedure.**

(a) Two-thirds (2/3) of the members of the Board, including alternates acting for absent members, shall constitute a quorum. For any action of the Board to pass, at least two-thirds (2/3) of those present at the meeting must vote in support of such action.

\* \* \* \* \*

**Proposal Number 5**

7. Revise paragraph (b)(2), redesignate paragraph (c)(3) as paragraph (c)(3)(i) and add a new paragraph (c)(3)(ii) to § 930.23 to read as follows:

**§ 930.23 Nomination and election.**

\* \* \* \* \*

(b) \* \* \*

(2) In order for the name of a handler nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which contains the signature of one or more handler(s), other than the nominee, from the nominee's district who is or are eligible to vote in the election and that handle(s) a combined total of no less than five percent (5%) of the average production, as that term is used in § 930.20, handled in the district. The requirement that the petition form be signed by a handler other than the nominee shall not apply in any district where fewer than two handlers are eligible to vote.

\* \* \* \* \*

(c) \* \* \*

(3)(i) \* \* \*

(ii) To be seated as a handler representative in any district, the successful candidate must receive the support of handler(s) that handled a combined total of no less than five percent (5%), of the average production, as that term is used in § 930.20, handled in the district.

\* \* \* \* \*

**Proposal Number 6**

8. Revise paragraph (g) of § 930.20 to read as follows:

**§ 930.20 Establishment and membership.**

\* \* \* \* \*

(g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is, however, no prohibition on the number of Board members from differing districts that

may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

\* \* \* \* \*

**Proposal Number 7**

9. Revise paragraphs (b)(5) and (c)(4) of § 930.23 to read as follows:

**§ 930.23 Nomination and election.**

\* \* \* \* \*

(b) \* \* \*

(5) In districts entitled to only one Board member, both growers and handlers may be nominated for the district's Board seat. Grower and handler nominations must follow the petition procedures outlined in paragraphs (b)(1) and (b)(2) of this section.

\* \* \* \* \*

(c) \* \* \*

(4) In districts entitled to only one Board member, growers and handlers may vote for either the grower or handler nominee(s) for the single seat allocated to those districts.

\* \* \* \* \*

Proposal submitted by USDA:

**Proposal Number 8**

Make such changes as may be necessary to the order to conform with any amendment thereto that may result from the hearing.

Dated: February 5, 2007.

**Lloyd C. Day,**  
*Administrator, Agricultural Marketing Service.*

[FR Doc. 07-549 Filed 2-5-07; 10:43 am]

**BILLING CODE 3410-02-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration, National Marine Fisheries Service**

**50 CFR Part 223**

**[Docket No. [070123015-7015-01; I.D. 052104F]**

**RIN 0648-AV18**

**Endangered and Threatened Species: Proposed Protective Regulations**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments; notice of availability of a draft environmental assessment.

**SUMMARY:** We, NMFS, are proposing to issue protective regulations under section 4(d) of the Endangered Species Act (ESA) for a distinct population segment (DPS) of steelhead in Puget Sound, Washington, presently proposed for listing as a threatened species. The 4(d) regulations prohibit the take of listed species, unless a "limit" applies for specified categories of activities determined to be adequately protective of listed salmonids. In addition, we are announcing the availability of an environmental assessment (EA) that analyzes the impacts of promulgating these 4(d) regulations. We are furnishing this notification to allow other agencies and the public an opportunity to review and comment on the draft EA. All comments received will become part of the public record and will be available for review.

**DATES:** Comments on this proposed rule and the draft EA must be received by no later than 5 p.m. P.S.T. on March 9, 2007. (See **ADDRESSES**).

**ADDRESSES:** Comments may be submitted by mail to Chief, Protected Resources Division, NMFS, 1201 NE Lloyd Blvd - Suite 1100, Portland, OR 97232-1274. Comments may be submitted by e-mail to [salmon.nwr@noaa.gov](mailto:salmon.nwr@noaa.gov). Include in the subject line of the e-mail the following document identifier: [070123015-7015-01]. Comments may also be submitted via facsimile (fax) to 503-230-5441, or via the Internet through the Federal e-Rulemaking portal at <http://www.regulations.gov>. The draft EA and other information regarding Pacific salmon and steelhead can be found at <http://www.nwr.noaa.gov/ESA-Salmon-Regulations-Permits/4d-Rules/>.

**FOR FURTHER INFORMATION CONTACT:** For further information regarding this proposed rule contact Steve Stone, NMFS, Northwest Region, (503) 231-2317; or Marta Nammack, NMFS, Office of Protected Resources, (301) 713-1401.

**SUPPLEMENTARY INFORMATION:**

**Background**

*Regulatory Authority*

NMFS is responsible for determining whether species, subspecies, or distinct population segments (DPSs) of most marine and anadromous species warrant listing as threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). For species listed as endangered, section 9(a) of the ESA prohibits activities that result in take. Under the ESA the term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Activities that may harm