

# 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 923

[Doc. No. AMS-FV-09-0033; FV09-923-1 PR]

#### Sweet Cherries Grown in Designated Counties in Washington; Change in the Handling Regulation

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule invites comments on proposed changes to the handling regulation currently prescribed for cherries under the Washington cherry marketing order. The marketing order regulates the handling of sweet cherries grown in designated counties in Washington and is administered locally by the Washington Cherry Marketing Committee (Committee). This rule would add quality and pack requirements for Rainier cherries and other lightly colored sweet cherry varieties that are designated as "premium" when handled. This change is expected to reduce market confusion regarding the marketing of such cherries; improve producer returns by providing pack differentiation; and benefit producers, handlers, and consumers.

**DATES:** Comments must be received by May 7, 2010.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must 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 Internet: <http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during

regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:**

Robert J. Curry or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, suite 385, Portland, Oregon 97204; Telephone: (503) 326-2724, Fax: (503) 326-7440, or E-mail: [Robert.Curry@ams.usda.gov](mailto:Robert.Curry@ams.usda.gov) or [GaryD.Olson@ams.usda.gov](mailto:GaryD.Olson@ams.usda.gov).

Small businesses may request information on complying with this regulation by contacting Antoinette Carter, 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: [Antoinette.Carter@ams.usda.gov](mailto:Antoinette.Carter@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Order No. 923, both as amended (7 CFR part 923), regulating the handling of cherries grown in designated counties in Washington, 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 proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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 proposal invites comments on proposed changes to the handling regulation currently prescribed for cherries under the order. Specifically, this rule would add minimum requirements for Rainier cherries and other lightly-colored sweet cherry varieties that are designated as "premium" when marketed. Under this proposal, such Rainier cherries or other varieties of lightly colored sweet cherries must be packed so that at least 90 percent, by count, of the cherries in any lot shall measure not less than 64/64-inch (10½-row) in diameter and not more than 5 percent, by count, may be less than 61/64-inch (11-row) in diameter. In addition, 90 percent, by count, of the cherries in any lot must exhibit a pink-to-red surface blush. For any given sample, not more than 20 percent of the cherries shall be absent a pink-to-red surface blush.

This change would help reduce market confusion and improve producer returns by providing pack differentiation and is expected to benefit producers, handlers, and consumers.

Section 923.52 of the order authorizes the establishment of grade, size, quality, maturity, pack and container regulations for any variety or varieties of cherries grown in the production area. Section 923.53 further authorizes the modification, suspension, or termination of regulations issued under § 923.52. Section 923.55 provides that whenever cherries are regulated pursuant to § 923.52 or § 923.53, such cherries must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Section 923.322 of the order's rules and regulations currently provide grade, size, maturity, and pack regulations for Washington grown sweet cherries. Rainier cherries and other lightly-colored sweet cherry varieties have variety-specific minimum size and maturity requirements as well as the same pack requirements as all Washington sweet cherries, but do not

share the minimum grade requirements with dark colored cherries.

As just stated, Rainier cherries and other lightly-colored sweet cherry varieties have certain current mandatory grading requirements, including a minimum maturity requirement of 17 percent soluble solids and a minimum size requirement of 61/64-inch diameter (11-row) as provided in section 923.322(c). However, lightly-colored varieties are not currently required to meet a minimum grade or pack standard. As a consequence, the cherry industry markets several different qualities or packs of lightly colored sweet cherries without the benefit of any clear differentiation between competing products. This lack of differentiation in the marketing of lightly-colored sweet cherries has led to market confusion and downward pricing pressure in recent years.

The worldwide retail trade is currently demanding a consistently large lightly-colored sweet cherry that arrives with a pink to red blush on its external surface. Likewise, the retail trade is willing to pay a premium price for large lightly-colored sweet cherries that consistently exhibit this surface blush. Conversely, the market for lightly-colored sweet cherries without a blush—cherries pure yellow in color—is decreasing and this sub-group of cherries is generally sold at a lower market price. Within the order's existing handling regulation, there is no clear articulation of a "premium" designation within the lightly-colored cherry category and buyers have used the price of the packs containing all-yellow cherries to put downward pricing pressure on cherries that have been produced with the preferred pink-to-red blush.

With this proposed change, industry handlers would be able to differentiate packs of lightly colored cherries and the price point that comes with producing a superior sweet cherry. It is also expected that the change would add further incentive to produce superior quality sweet cherries and strengthen the producer's position in the marketplace.

This rule would require any regulated handler handling cherries with the "premium" designation to adhere to the new requirements as provided in new section 923.322(e). All cherries not so designated would continue to be allowed to be marketed without regard to the new requirements. Notwithstanding, all sweet cherries must continue to meet the other minimum requirements of the order and regulations.

Conforming changes would be made to § 923.322 to reflect the addition of the new requirements. The existing paragraph (e) would be redesignated as paragraph (d), and the introductory sentence of paragraph (g) would be revised to reference the new paragraph (e).

#### Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial 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.

There are approximately 44 handlers of Washington sweet cherries subject to regulation under the marketing order and approximately 1,500 cherry producers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000.

Based on the 2005–2007 three-year average fresh cherry utilization of 121,666 tons and average fresh cherry producer price of \$2,400 per ton as reported by the National Agricultural Statistics Service, USDA, and 1,500 Washington cherry producers, the recent three-year average annual producer revenue was approximately \$194,666. In addition, the Committee reports that none of the 44 handlers have annual receipts of over \$7,000,000. Based on this information, the majority of Washington sweet cherry producers and handlers may be classified as small entities.

Utilizing authority contained in sections 923.52, 923.53, and 923.55, the Committee recommended that a definition for premium packed lightly-colored sweet cherries be added to section 923.322(h) in the order's handling regulation to identify the minimum size and color requirements that a premium packed cherry must meet. In addition, to help stabilize the downwards pricing pressure that varying unmarked grades have on the

market, the Committee recommended adding a new paragraph 923.322(e)(3) to this subpart establishing a requirement that all cherries packed in containers marked "premium" must adhere to the definition.

USDA subsequently determined that, rather than adding a new definition, it would be more appropriate to add minimum requirements for cherries that are designated as "premium" to section 923.322 of the handling regulation.

The Committee reports that cherry size and quality are important to buyers. Consistency and dependability are equally important. In recent seasons, there has not been marketing consistency in the quality and size of lightly-colored cherries. This has resulted in a downwards pricing pressure on all cherries, regardless of the quality, color, and size of the fruit packed.

Cherry size is related to maturity and other quality factors. That is, larger sized cherries tend to be sweeter and of higher overall quality, and thus generally provide higher prices for the producer. Although AMS Market News Service data is not reported for Rainier cherries smaller than 10½-row (1-inch diameter), this correlation is supported by prices received for Bing cherries of various sizes. For example, the Market News Service reported f.o.b. prices for 12-row sized Bing cherries (54/64 inch diameter) of \$24.00 per carton in late June 2007. Concurrently, 10½-row size Bing cherries were selling for \$35.00 to \$36.00 per carton (10½-row Rainier cherries were being quoted by Market News at \$35.00 to \$40.00 per carton in late June 2007). This price relationship generally holds steady throughout each season. Furthermore, market research by the Washington cherry industry shows that larger sizes correlate with higher maturity levels, and that larger sizes are preferred by cherry consumers.

Although research showing a correlation between the flavor of lightly-colored sweet cherry varieties and the degree of reddish blush is lacking, actual market experience has shown the industry that a definite price correlation exists according to remarks made at the recent Committee meeting. This is largely due to consumer preference for lightly colored cherries that exhibit a reddish blush.

The Committee believes that this change would not have a negative impact economically on either small or large handlers or producers. Comments received at the May 14, 2009, meeting indicate that the majority of the Washington sweet cherry industry is already packing to such standards or better. Comments also indicate that it is

relatively easy to produce lightly-colored sweet cherries with a pink to reddish surface blush, since the added color is related to the amount of direct sunlight available to the fruit. Pruning and other common cultural practices can greatly affect the amount of blush on the cherries. Finally, since this change is only required should a handler choose to pack and mark lightly-colored cherries to the "premium" standard, any additional costs can be eliminated by the handler.

The Committee discussed alternatives to the recommended action. The most significant alternative would have been a recommendation that mandated a minimum percentage of reddish color on lightly colored sweet cherries, as well as a mandatory increase in the minimum size (currently 11-row size or 61/64 minimum diameter). There were other various options briefly discussed under this alternative related to sizing and the actual degree of blush. Comments from many of those attending the May 14th meeting indicated that a mandatory change in size and pack requirements would not be well received by the industry at this time, and that the less restrictive recommendation subsequently made should adequately solve the current marketing problem.

This rule would not impose any additional reporting or recordkeeping requirements on either small or large sweet cherry 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. In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Further, the Committee meeting was widely publicized throughout the Washington cherry industry and all interested persons were invited to attend the meeting and participate in the deliberations. Like all Committee meetings, the May 14, 2009, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit comments on this interim final rule, including the regulatory and informational impacts of this action on small businesses.

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/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. Any questions about the compliance guide should be sent to Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments received will be considered before a final determination is made on this matter.

#### List of Subjects in 7 CFR Part 923

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 923 is proposed to be amended as follows:

#### PART 923—SWEET CHERRIES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

1. The authority citation for 7 CFR part 923 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

#### § 923.322 [Amended]

2. In § 923.322, redesignate paragraph (e) as paragraph (d), add a new paragraph (e), and revise the introductory sentence of paragraph (g) to read as follows:

#### § 923.322 Washington cherry handling regulation.

\* \* \* \* \*

(e) *Light sweet cherries marked as premium.* No handler shall handle, except as otherwise provided in this section, any package or container of Rainier cherries or other varieties of lightly colored sweet cherries marked as *premium* except in accordance with the following:

(1) *Quality.* 90 percent, by count, of such cherries in any lot must exhibit a pink-to-red surface blush and, for any given sample, not more than 20 percent of the cherries shall be absent a pink-to-red surface blush.

(2) *Pack.* At least 90 percent, by count, of the cherries in any lot shall measure not less than 64/64-inch (10½-row) in diameter and not more than 5 percent, by count, may be less than 61/64-inch (11-row) in diameter.

\* \* \* \* \*

(g) *Exceptions.* Any individual shipment of cherries which meets each of the following requirements may be

handled without regard to the provisions of paragraphs (a), (b), (c), (d), and (e) of this section, and of §§ 923.41 and 923.55.

\* \* \* \* \*

Dated: February 25, 2010.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2010-4341 Filed 3-5-10; 8:45 am]

**BILLING CODE P**

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 73

[Docket No. PRM-73-14; NRC-2009-0493]

### Nuclear Energy Institute; Denial of Petition for Rulemaking

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for rulemaking; denial.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted by the Nuclear Energy Institute (NEI) (the petitioner). The petitioner requested that the NRC amend the compliance date for specific requirements in the NRC's regulations. The NRC decided to deny PRM-73-14 for the reasons stated in this document.

**ADDRESSES:** You can access publicly available documents related to this petition for rulemaking using the following methods:

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov).

*Federal Rulemaking Web site:* Supporting materials related to this petition for rulemaking can be found at <http://www.regulations.gov> by searching on Docket ID: NRC-2009-0493. Address questions about NRC dockets to Carol