

# Proposed Rules

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-370-A8; AMS-FV-06-0213; FV07-930-2]

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

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

**ACTION:** Proposed rule and opportunity to file exceptions.

**SUMMARY:** This recommended decision invites written exceptions to proposed amendments to Marketing Agreement and Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Seven amendments were 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 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) proposed to make any such changes as may be necessary to the order to

conform to any amendment that may result from the hearing.

This decision does not recommend the Board proposal to revise the voting requirements necessary to approve a Board action.

The proposals are designed to provide flexibility in administering the volume control provisions of the order and to update Board nomination, election, and membership requirements. The proposed amendments are intended to improve the operation and administration of the order.

**DATES:** Written exceptions must be filed by July 6, 2010.

**ADDRESSES:** Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1031-S, Washington, DC 20250-9200, Fax: (202) 720-9776 or via the internet at <http://www.regulations.gov>, or to Martin Engeler at the E-mail address provided in the **FOR FURTHER INFORMATION CONTACT** section. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing 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:** Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102-B, Fresno, California 93721; telephone: (559) 487-5110, Fax: (559) 487-5906; or Marc McFetridge, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250-0237; telephone: (202) 720-1509, Fax: (202) 720-8938, or E-mail: [Martin.Engeler@usda.gov](mailto:Martin.Engeler@usda.gov) or [Marc.McFetridge@usda.gov](mailto:Marc.McFetridge@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;

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Telephone: (202) 720-2491, Fax: (202) 720-8938, E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior document in this proceeding; Notice of Hearing issued on February 5, 2007, and published in the February 7, 2007, issue of the **Federal Register** (72 FR 5646).

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

## Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendments to Marketing Order 930 regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Martin Engeler whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), hereinafter referred to as the "Act", and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900).

The proposed amendments are based on the record of public hearings held February 21 and 22, 2007, in Grand Rapids, Michigan and March 1 and 2, 2007, in Provo Utah. Notice of this hearing was published in the **Federal Register** on February 7, 2007 (72 FR 5646). The notice of hearing contained proposals submitted by the Board.

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

The proposed amendments to the order recommended by the Board are summarized below.

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.

*In addition to the proposed amendments to the order, AMS proposes the following:*

8. To make any such changes as may be necessary to the order to conform to any amendments that may result from the hearing.

One amendment proposed by the Board is not being recommended for adoption and is discussed in this decision.

Twenty-one industry witnesses testified at the hearing. These witnesses consisted of tart cherry producers and handlers in the production area, and Board staff. The majority of the witnesses testified in favor of the proposed amendments, while some were opposed to various proposals.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of May 30, 2007, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. Two briefs were filed. One was in support of all the proposed amendments and one was opposed to most of the proposals.

#### Material Issues

*The material issues presented on the record of hearing are as follows:*

(1) Whether to amend the order to authorize changing the primary reserve capacity through informal rulemaking;

(2) Whether to amend 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) Whether to amend the order to establish an age limitation on product placed into reserves;

(4) Whether to amend the order to revise the voting requirements necessary to approve a Board action;

(5) Whether to amend the order to revise the nomination and election process for handler members on the Board;

(6) Whether to amend the order to revise Board membership affiliation requirements; and

(7) Whether to amend order language regarding the nomination and election process in districts with only one Board representative.

#### Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

#### Material Issue Number 1—Authority To Change the Primary Reserve Capacity

The order should be amended to authorize changing the primary reserve capacity through the informal rulemaking process rather than the formal rulemaking process. Such a change could occur no more than once per crop year, and a recommendation from the Board to USDA to make such a change must be made by September 30 of the preceding crop year. Any change made to the reserve capacity would remain in effect until further modified. Prior to making a recommendation to change the reserve capacity, the Board should consider appropriate factors when making such a recommendation.

Section 930.50 of the order specifies procedures concerning establishment of volume control in the form of free and restricted percentages applied to the cherries handlers acquire from growers in a given crop year. Applying the free percentage to the cherries acquired by handlers results in a quantity of free tonnage cherries, and applying the restricted percentage results in a quantity of restricted cherries applicable to regulated handlers. Free tonnage cherries may be disposed of by handlers in any market outlet. Restricted cherries may be released to handlers for market expansion opportunities or to augment supplies in free market outlets. They may also be disposed of in certain outlets not competitive with normal market outlets, according to procedures specified in the order.

Section 930.50(i) provides for the establishment of a primary reserve and a secondary reserve. The first 50-million pounds of reserve established by applying the reserve percentages to the aggregate quantity of cherries acquired by handlers is placed in a primary reserve. Any reserve cherries in excess of the 50-million-pound limitation, or cap, are placed into a secondary reserve. Product from the secondary reserve cannot be released until all cherries in

any primary reserve have been released. Currently, formal rulemaking is required to change the 50-million-pound cap on the primary reserve.

The Board proposed amending the order to authorize changing the 50-million-pound limitation on the primary reserve through the informal rulemaking process rather than through the formal rulemaking process, as is currently required. Under the proposal, a change to the reserve cap could not be made more than once per year, and a recommendation from the Board to make such a change must be made prior to September 30 of the preceding crop year.

Witnesses testified that the proposed amendment is primarily procedural in nature, and would add flexibility to the order. They testified that the current process needed to change the reserve limitation (formal rulemaking) is lengthier than the informal rulemaking process. Witnesses indicated that if this amendment is adopted it would provide a more efficient and timely process for changing the reserve capacity.

Witnesses testified that the cap could be either increased or decreased through this process.

Witnesses testified that the topic of reserves is of great importance and interest to the industry, and it is desirable that a full discussion of the issues occur prior to changing the reserve limitation. They further indicated that the informal rulemaking process would provide ample opportunity for a thorough discussion and analysis of the pertinent issues prior to making a recommendation to the USDA for changing the reserve cap. Witnesses further stated that the order's voting requirements for a "super-majority" to approve a Board action would ensure that a high level of industry agreement is reached before any recommended change could be made. Witnesses also pointed out that the Board itself cannot implement an informal rulemaking change. Such changes are recommended to the USDA, and are only implemented after informal rulemaking by USDA. Witnesses testified that changes to the primary reserve capacity through informal rulemaking should be made no more than one time per year to prevent any market disruption that could occur by changing it more frequently. The proposed requirement that any change must be recommended no later than September 30 of the prior year would allow all industry participants to be fully aware of the regulation well in advance of its implementation.

Proponents of the proposal presented testimony indicating that changes in the

industry have occurred which may warrant a change in the primary reserve inventory cap in the future. Handlers are obligated to provide cherry products to meet their reserve obligation, and they currently produce a broader spectrum of products than when the order was formulated in 1996. In the past, the primary product produced and sold was frozen cherries; the product mix is now more diverse with increased amounts of products such as dried cherries, frozen concentrate, and single strength juice being marketed. Because there is now a wider variety of cherry products produced, held in inventory, and sold than in the past, it may be necessary at some point to increase the reserve capacity so the industry can adequately supply buyer's needs with reserve product if and when the reserve is released. Witnesses testified that industry production and sales information is more accurate and more readily available now than in the past, which contributes to the need for the marketing order and its rules and regulations to be responsive to changes in a more timely manner.

Additional testimony suggested that it may be desirable to increase the reserve cap in the future due to an anticipated increase in demand and sales. In 2002, the industry experienced an extremely short crop, and sales in subsequent years decreased as buyers sourced product from different suppliers or used substitute products. It is anticipated that the industry will ultimately regain lost sales and eventually increase demand, especially with the support of a new industry-wide promotion program recently implemented. An increase in demand and annual sales could warrant an increase in the reserve capacity at some point in the future. For example, if annual demand increases, and the industry has a short crop like in 2002, it would be in a better position to adequately supply markets if a larger reserve is in place.

Witnesses opposed to the proposal indicated that the current 50-million-pound cap has worked well for the industry. When the order was promulgated, a 50-million-pound reserve was considered to be an appropriate level, and would help prevent a large inventory buildup. A previous tart cherry marketing order in effect from 1971 to 1987 was not as effective as it could have been because there was no cap on the reserve, which led to the buildup of excessively large inventories. This situation ultimately contributed to the demise of that program, according to testimony.

One witness testified that it is good business practice to carry approximately

25 percent of annual sales in inventory. A 50-million-pound reserve is thus appropriate for the industry because annual industry sales have been in the range of 200 million pounds in recent years. If the industry carries too large a reserve, grower returns could be negatively affected because the demand for tart cherries is relatively inelastic, according to the witness.

Another witness testified that current features of the order allow adequate reserve product to be made available to augment market supplies. There is no need to increase the reserve cap for that purpose, according to the witness.

The witness further testified that the 50-million-pound reserve capacity was a core element of the order when it was promulgated, and its intended use was to manage supplies wisely. According to the witness, no evidence was presented at the hearing that warrants a specific change to the reserve capacity. However, the witness stated that if a change in the reserve capacity is appropriate in the future, any change should be subject to specific, measurable criteria for the Board to consider. As discussed below, such consideration should be part of the Board's analysis and recommendation to USDA.

This proposal would not increase the 50-million-pound primary reserve capacity. The amendment, if adopted, would only change the process by which a future revision in the reserve capacity could be effectuated if conditions warrant.

The record shows that industry and market conditions change over time, and there may be circumstances that would warrant a change in the reserve capacity. Allowing such a change to be made through informal rather than formal rulemaking would add flexibility to the order by providing the industry with an additional tool to respond to industry and market conditions in a more timely and efficient manner.

Hearing testimony indicated that it is desirable to for the Board to conduct a full and thorough analysis when recommending changes to key elements in marketing order programs, such as volume control provisions. This includes the impacts of any proposed change on producers and handlers. Witnesses testified that it is also desirable to attain a high level of agreement among industry members before regulatory changes are implemented.

There can be benefits in allowing changes to be made to program requirements through informal rulemaking rather than formal rulemaking. As with all

recommendations for informal rulemaking, USDA expects the Board to fully consider and analyze pertinent factors when making recommendations to change the reserve capacity.

In consideration of the record, USDA recommends that Section 930.50(i) be revised to authorize changing the reserve capacity from its current 50-million-pound limit through informal rulemaking. Such a change should only occur once per year, and any recommendation for a change should be made by the Board to USDA no later than September 30 of the preceding year. Any change would remain in effect until subsequently modified through informal rulemaking. The requirement to make any such changes no more than one time per year would help to ensure that the industry has sufficient time to plan and respond to the change, and the requirement that any change must be recommended no later than September 30 of the prior year would allow sufficient time to implement the change. In addition, the super-majority voting requirement of the Board will help to ensure that any recommendation for a change to the reserve capacity has a high level of support.

For the above reasons, the proposed amendment to § 930.50(i) is recommended for adoption.

#### **Material Issue Number 2—Authority to Establish a Minimum Inventory Level at Which Reserves Would Be Released**

The order should be amended to add the authority for the Board to establish a minimum inventory level at which cherries held in the primary and secondary reserves would be released and made available to handlers as free tonnage. This change would allow the Board to clear out the primary reserve and subsequently the secondary reserve when a specified inventory level of tart cherries is reached. The specified inventory level would be established by the Secretary through informal rulemaking upon recommendation of the Board.

Section 930.54 of the order specifies different uses and conditions for release of cherries placed in inventory reserve. Reserve cherries may be released from the primary or secondary reserve if demand is greater than supply in commercial outlets, if the Board recommends a portion or the entire reserve inventory be released for sale in designated markets, or the cherries are to be used in certain exempt outlets.

Section 930.55 of the order provides authority and establishes parameters for a primary reserve, including a maximum quantity of product that can be held in primary reserve inventories.

Section 930.57 provides authority and parameters for a secondary reserve. Quantities of product in excess of the maximum amount established in the primary reserve may be placed in the secondary reserve.

Section 930.57(d) of the order states, in part, that "No cherries may be released from the secondary reserve until all cherries in any primary inventory reserve established under § 930.55 have been released." Based on the language in § 930.57(d) handlers cannot access the secondary reserve if any cherries remain in the primary reserve. In addition, the current provisions of the order do not allow the Board to require handlers to release all inventory held in their portion of the primary reserve. The proposed amendment would authorize the Secretary, upon recommendation of the Board to establish a minimum inventory level at which all remaining cherries held in the primary and secondary reserve would be released and made available to handlers as free tonnage.

Witnesses testified that because handlers cannot access the secondary reserve until the primary reserve is completely depleted, minimal amounts left in the primary reserve can create problems for the industry. According to testimony, this may occur when handlers do not take full advantage of opportunities to utilize their portion of the primary reserve and carry minimum inventories in the primary reserve. Therefore, a minimal amount of inventory remaining in the primary reserve of one or a few handlers can prevent the rest of the industry from accessing the secondary reserve. In effect, this can prevent the majority of the industry from clearing out excess reserve inventories.

The record indicates that there should be a way to access the secondary reserve when there is a minimal amount of product remaining in the primary reserve and handlers are not willing or are unable to completely deplete their reserve inventories. The proposed amendment would provide a way to clear out small amounts of primary reserve and provide access to secondary reserve inventories when necessary.

According to the record, implementation of this amendment could also reduce costs associated with administering the reserve program. A significant portion of the Board staff's time is directed at tracking reserve inventory by reviewing reports from handlers and also performing on-site reviews of records and verification of handler inventories. Once the reserve is released, it is no longer necessary for

Board staff to track the reserve inventory.

Similar to the Board staff, handlers also incur costs in maintaining reserves. These costs include the cost of storage and the costs associated with tracking inventory levels. If the storage time is reduced, the cost to handlers will also be reduced.

Witnesses stated that when inventory levels reach a minimal amount, the costs of tracking inventory at the Board and handler level, plus storage costs, outweigh any potential benefit from carrying inventory in the primary reserve.

According to witnesses, the intent of this proposal would be to authorize the Board, through informal rulemaking, to establish the inventory level at which the Board could release reserves when levels are minimal.

The proposed amendment, if implemented, has the potential to positively impact the market by allowing for the sale of more tart cherries than the current order provides.

One witness testified against the proposal. The witness stated that no quantification of the potential cost savings was offered by the proponents. The witness suggested as an alternative that the Board propose or recommend a volume level at which the cost of regulation exceeds the benefit. However, no such proposal was offered at the hearing.

The proposed amendment would not establish a specific quantity at which primary reserves would be released. Witnesses testified that the intent of the proposed amendment is for the Secretary to establish the level through informal rulemaking after discussion and recommendation of the Board. Pertinent factors would be considered and analyzed during that process. No proposal to establish a specific level at which the reserve would be released was presented at the hearing. The Board is made up of a diverse industry group that ensures that all issues will be discussed, and with USDA oversight, the appropriate threshold would be established. Establishing the minimum inventory level through informal rulemaking would ensure broad support due to the two-thirds super majority vote needed for Board approval and recommendation to the Secretary. Once the minimum inventory level is established, the Board staff would administer the reserve release.

According to the record, providing authority to establish a minimum inventory level at which reserves would be released through the informal rulemaking process would provide additional flexibility in administering

the reserve program. If the Board ultimately recommends a minimum level at which reserves would be released, it would help the industry to access secondary reserves in certain situations. It could also help reduce costs associated with the tracking and storing of minimal amounts of reserve product by handlers and Board staff.

Based on the record evidence, USDA recommends amending the order as proposed by the Board by adding § 930.54(d) to authorize the Secretary, upon recommendation of the Board, to establish a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage.

#### **Material Issue Number 3— Establishment of a Minimum Age Limitation on Product Placed Into Reserves**

The order should be amended to establish a minimum age limitation on products placed into reserves. Currently, there is no age limitation on products carried in the reserves. Product carried in storage can deteriorate over time and is more difficult to sell than product stored for a shorter period.

Section 930.55 of the order specifies parameters for cherries placed into reserves. Reserve cherries can be in the form of frozen, canned, dried, or concentrated juice.

According to witness testimony, the marketing order and its inventory reserve provisions were crafted with the idea that market forces would generally define the products carried in the reserve. Handlers are given the option of carrying whatever form and whatever type of product they choose in the reserve. There are no quality standards applied to products placed into reserves, nor is there a limitation regarding the age of products that can be carried in the reserve. This has created a situation where handlers can carry product that is several years old in the reserve inventories. Witnesses testified that because product quality deteriorates over time, poor quality product is often carried in reserve inventory.

According to the record, one of the main rationales for the establishment of the reserve program was the concept that the release of reserve inventories in low production years would support the long-term marketing efforts of the industry. This can only be achieved if the reserve products released are acceptable to the market. Establishing a minimum age limitation on reserve product would prevent product that has deteriorated over time from being held in reserve inventories. This would

ultimately aid the industry in its marketing efforts by having better quality products available when reserves are released to the market.

One witness testified that the marketing order currently has authority to regulate the quality of cherries held in reserves. If the Board wants to regulate the quality of reserve product, it should do so through that authority. The witness further testified that the Board's proposal to limit the age of cherries placed in reserve would not prevent handlers from placing low-grade cherries in reserve, and that such cherries can be challenging to sell.

Other witnesses acknowledged that the order contains authority to regulate the quality of cherries held in reserves, and this can be done through establishing minimum grade, quality, and condition requirements. However, witnesses also testified that the industry has chosen not to implement grade and quality standards with respect to products carried in the reserve. According to witness testimony, establishing and complying with minimum grade and quality standards would be expensive to the industry due to inspection costs, inventory management costs, and added costs associated with monitoring and tracking product grade. Witnesses testified that a more practical solution for the industry is to establish an age limitation on reserve products. Since tart cherry products deteriorate over time and generally have a shelf life of up to three years according to testimony, placing an age limitation of three years on reserve product should help to ensure reserve product is of marketable quality.

Based on the record evidence, USDA recommends amending § 930.55(b) as proposed by the Board to require that products placed into reserve inventory must have been produced in the current or preceding two crop years.

#### **Material Issue Number 4—Revise Voting Requirements Necessary to Approve a Board Action**

The order should not be amended to revise the number of votes necessary to approve a Board action.

Section 930.32 establishes the quorum requirements for Board meetings and the voting requirements necessary to approve Board actions. This section specifies that two-thirds of the members of the Board, including alternates acting for absent members, shall constitute a quorum. It further specifies that for any action of the Board to pass, two-thirds of the entire Board must vote in favor of such action.

The Board proposed amending the voting requirement in § 930.32 to

specify that for any action of the Board to pass, at least two-thirds of those present at the meeting must vote in support of such action. The quorum requirement would not change under the proposal.

Witnesses in favor of this proposal believe the current voting requirement can give members who are not in attendance at meetings an undue influence on the outcome of votable issues. Witnesses believed that because the current requirement for passing a Board action is based on a favorable vote of at least two-thirds of the entire Board membership, any vacant Board position at a meeting results in the equivalent of a "no" vote on all votable issues. Witnesses further testified that the current requirement may encourage members to not attend a meeting if they do not want to discuss the merits of an issue, and that their non-attendance has an impact on the outcome of any vote taken at the meeting. The proposed amendment, according to proponents, would encourage members to attend meetings because they would no longer have an impact on the outcome of Board actions by virtue of their absence. If the proposal is implemented, members would have more incentive to attend meetings in order to discuss, vote, and have an impact on Board actions, according to witnesses. Witnesses also testified that improved meeting attendance would lead to increased interaction and discussion of industry issues among Board members.

Witnesses asserted that the current voting requirements are unnecessarily restrictive. The current requirements could allow a small minority of Board members to effectively block an action that may be favored by the majority of the Board. For example, with an 18 or 19-member Board, six members could block an action favored by 13 members. An example cited at the hearing referenced a specific Board meeting where 15 of 19 members were present. The required number of votes to pass a Board action was 13. It was testified that a small minority of three members were not supportive of an issue that the majority of Board members favored, which prevented the Board from taking an action it may have otherwise taken.

Witnesses opposed to this proposed change testified that the proposed change to the voting requirements could create a situation where a minority number of Board members could approve an action. For example, if the Board consisted of 19 members and there were 13 members present at a meeting, an action could be passed by an affirmative vote of nine members.

Nine members would represent only 47 percent of the 19 Board members.

Witnesses opposed to the proposal also testified that the proposed change could increase the possibility that members affiliated with a common sales constituency or region could dominate the Board and Board actions. This effect could be amplified if the proposed amendment to § 930.20 (see material issue #6) is adopted. That particular proposal could result in an increase in the number of Board members affiliated with a common sales constituency under certain circumstances.

Witness testimony also contended that there is no evidence that the current voting requirements are ineffective. Lacking any evidence to the contrary, the arguments used in implementing the current voting requirements are as valid now as when they were originally implemented, according to one witness.

The contention that a vacant Board position at a meeting automatically results in a "no" vote on all votable issues is not correct. If a Board seat is vacant at a meeting, the vacant seat would not be recorded in vote counts. In contrast however, under the order, voting requirements do not change based on the number of members present at the meeting. It takes a fixed number of votes to pass a Board action, regardless of the number of members in attendance at a meeting. Thus, if a member was absent from a meeting, that member's absence would have the same impact on a vote as if the member was present and voted "no".

According to statistics presented at the hearing regarding attendance at past Board meetings, there was non-attendance of members in 20 of the past 40 Board meetings. Of the 20 meetings with members not in attendance, 17 of those meetings had one member absent, two meetings had two absent members, and one meeting had four absences. These statistics indicate that lack of attendance of Board members has not been an overriding problem at Board meetings. In fact, only 3.4% of the available Board seats have been unrepresented in the 40 meetings for which statistics were provided. Further, the statistics do not indicate there is an attendance problem from any particular region or district. Given the size of the Board (18 or 19 members, depending on production levels in the districts), and the geographic disbursement of members and travel involved to attend meetings, the meeting attendance record is very high. On a percentage basis, nearly 97 percent of available Board seats were filled in the 40 meetings for which statistics were provided.

Record testimony indicated that the Board tries to reach consensus on issues coming before it. Most actions taken by the Board are unanimous or very close to unanimous, indicating a high degree of support for Board actions.

The current super-majority voting requirements were intentionally incorporated into the order when it was promulgated and subsequently amended. The requirements were designed to help ensure a high degree of support for issues at the Board level. According to the order's promulgation record, the current voting requirements were incorporated into the order to ensure that the industry majority supports actions of the Board, and that minority interests are addressed. Further, the requirements were intended in part to ensure that a single sales constituency would not have a controlling interest on the Board. The record evidence does not refute that these same issues are valid today. Further, the evidence does not show that the current voting requirements are having an undue impact on Board actions or functions or that lack of attendance has caused an undue influence on the outcome of Board actions.

The record evidence does not support changing the voting requirements under the order. For the reasons discussed herein, USDA recommends that proposed amendment to § 930.32(a) not be adopted.

#### **Material Issue Number 5—Revise Nomination and Election Process for Handler Members on the Board**

The order should be amended to require a handler to receive support from handler(s) that handled at least five percent of the average production of tart cherries handled in the applicable district in order to be eligible to participate as a candidate in an election for Board membership. The order should also be amended to require a handler to receive support from handler(s) that handled at least five percent of the average production of tart cherries handled in the applicable district in order to be elected by the industry and recommended to the Secretary for Board membership.

Section 930.23 specifies procedures and criteria for growers and handlers to be nominated as candidates for Board membership. It also specifies procedures and criteria for candidates to be elected by the industry for recommendation to the Secretary for Board membership.

To be nominated as a Board candidate, a handler must be nominated by one or more handlers, other than the

nominee, from the applicable district. If there are fewer than two handlers in the district, a handler can nominate him or herself. To be elected by the industry for recommendation to the Secretary, the successful handler candidate is the candidate receiving the most votes. Each eligible handler is entitled to one vote, and there is no weight given to the individual votes based on the volume of cherries handled.

The amendment proposed by the Board would provide additional criteria for being nominated as a handler candidate and being elected by the industry for recommendation for a handler position on the Board. The proposed additional criteria for a person to be nominated as a handler candidate would require the prospective candidate to attain support from another handler or handlers whose combined tonnage handled represents at least five percent of the average production handled in the applicable district. If a handler attained this five percent support, he or she could then be a candidate in the election. A successful candidate would then be required to similarly receive support (through the balloting process) from another handler or handlers whose combined tonnage represented no less than five percent of the average production handled in the applicable district. Of the candidates who received support from handlers representing at least five percent of the average production in the district, the candidate with the most votes would be recommended to the Secretary for Board membership.

Witnesses testified that handler members on the Board should at least have support of a minimum amount of tonnage handled in the applicable district to help ensure they represent the interests of handlers in the district. Obtaining support from handlers representing at least five percent of the volume in the district was considered to be reasonable, and would not be an overly burdensome amount of support to obtain. Witnesses also testified that under the order's current provisions, handlers representing a small amount of volume could attain and potentially control the handler seats on the Board. Witnesses indicated that it would not be equitable to the handlers representing the vast majority of production if this situation was to occur.

Testimony was also provided at the hearing regarding application of this proposed amendment in conjunction with the proposed amendment to § 930.20(g) addressed in material issue number six. It was discussed that if a potential handler candidate for Board membership could not achieve support

from handlers handling five percent of the average production in a district, that should not prevent him or her from serving on the Board if it would prevent a sales constituency conflict from occurring as provided in § 930.20(g). (A sales constituency conflict is considered to exist if two persons from the same district are affiliated with the same sales constituency.)

Record testimony supports requiring a minimum level of support for a handler to be elected to the Board. A provision to require members to have support from their peers representing at least five percent of the volume in the district would help to ensure that commercial handler interests in the applicable district are being represented. Such a provision would not preclude a small handler from serving on the Board. It would only require a handler to garner a minimum level of support from industry peers in order to serve on the Board. The provision would establish a minimum threshold of support in terms of volume handled to represent the constituents in the district.

However, testimony also was provided at the hearing regarding application of the proposed amendment in conjunction with the proposed amendment to § 930.20(g) addressed in material issue number six. As discussed in material issue number six, USDA agrees with testimony indicating that if a potential handler candidate for Board membership could not achieve support from handlers handling five percent of the average production in a district, that should not prevent him or her from serving on the Board if it would prevent a sales constituency conflict from occurring as provided in § 930.20(g). (A sales constituency conflict is considered to exist if two persons from the same district are affiliated with the same sales constituency.)

Record evidence supports adopting the Board's proposal by amending § 930.23(b)(2) and § 930.23(c)(3)(ii) of the order to require handler candidates seeking nomination to the Board to receive support from handler(s) that handled at least five percent of the average production of tart cherries handled in the district in which he or she is seeking the position. Record evidence also supports adding provisions to § 930.23(b)(2) and § 930.23(c)(3)(ii) that would conform this section to the proposed amendments to § 930.20(g) regarding sales constituency affiliation. USDA recommends adoption of this amendment as proposed, with changes as noted.

### **Material Issue Number 6—Revise Board Membership Affiliation Requirements**

The order should be amended to revise Board membership affiliation requirements to allow more than one Board member per district from being affiliated with the same sales constituency if it cannot be avoided.

Section 930.20(g) of the order currently provides that no more than one Board member may be from, or affiliated with, a single sales constituency in those districts with more than one seat on the Board. A sales constituency is defined in § 930.16 as “\* \* \* a common marketing organization or brokerage firm or individual representing a group of handlers or growers \* \* \*.” The purpose of this provision is to achieve a fair and balanced representation on the Board and to prevent any one sales constituency from gaining control of the Board.

The proposed amendment would add a proviso to the prohibition limiting the number of Board members from a sales constituency in districts with more than one member. The proviso states that the sales constituency prohibition shall not apply in a district where such a conflict cannot be avoided.

Witnesses supporting this proposed amendment testified that the current order provisions recently prevented District 7, the State of Utah, from attaining its full complement of positions on the Board. Section 930.20(b) provides that districts with greater than 10 million pounds of production and less than 40 million pounds are entitled to two seats on the Board. Based on this provision, the State of Utah is entitled to two positions on the Board. However, a situation occurred in recent years where there were no eligible persons willing to serve on the Board from Utah who were affiliated with a different sales constituency than the existing Board member, as required by Section 930.30(g). Witnesses testified that despite extensive outreach efforts, they were only able to locate one eligible candidate from a different sales constituency, but that person had no interest in serving on the Board. Because of this situation, there was one vacant Utah seat on the Board. Utah was unable to achieve its full complement of positions on the Board pursuant to § 930.20(b) of the order. Witnesses believed that a fair and equitable process was not being well served in this situation, and that a conflict exists between sections 930.20(b), which allocates Utah two positions on the

Board, and 930.20(g), which prevents two members from the same sales constituency in the same district from serving on the Board.

The proposed amendment is intended to prevent this type of situation from occurring. Witnesses testified that a district's right to representation on the Board is more important than the requirement that Board members from the same District not be affiliated with the same sales constituency.

One witness expressed reservations about the proposed amendment. He indicated that a potential increase in the number of Board members affiliated with the same sales constituency may not promote diversity of views on the Board. The witness also stated that this proposal would not be desirable if the proposed change to the voting requirements is adopted. The witness suggested an alternative idea would be to divide the State of Utah into two districts for Board representation purposes. However, the witness did not present a specific alternative proposal or any information or analysis demonstrating how this would address the problem.

The record indicates that the Board's proposal would address the issue of ensuring that the various districts under the order would be able to maintain their share of representation on the Board.

The provisions of the proposed amendment would allow two Board members from a district to be affiliated with the same sales constituency if it cannot be avoided. An example given at the hearing regarding when a sales constituency conflict could not be avoided was if there were no other persons willing and able to serve on the Board from a particular district from a different sales constituency. Witnesses were questioned about the possible implementation of this proposed amendment and the proposed amendment under material issue number five that would require a handler Board member candidate to achieve support from handlers representing at least five percent of the production in the District in order to run for a position and be elected to the Board. Some witnesses testified that if the only qualified candidate in a particular district that was not affiliated with the same sales constituency as the other Board member from that district could not achieve the five percent support, then that person should be able to serve on the Board to avoid having two members from the same district affiliated with the same sales constituency. Other witnesses testified that if such a situation occurred, the

candidate should not be allowed to serve on the Board, and if another qualified candidate from the same sales constituency as the existing member was available and met the five percent criterion, that candidate should be able to serve.

The record is clear that if there are no willing and eligible candidates available to serve on the Board from a different sales constituency than the existing member(s), then it should be permissible to allow two members from the same sales constituency to serve so that each district achieves its share of representation. In order to appropriately address the issue that generated this proposal while avoiding two members on the Board from the same sales constituency, USDA concludes that it is reasonable to not apply the five percent requirements discussed in material issue number five in these circumstances. Accordingly, as provided in material issue number five, language is added to conform and clarify the two sections of the order.

Record evidence supports amending § 930.20(g) to revise Board membership affiliation requirements to allow more than one Board member per district from being affiliated with the same sales constituency if such a conflict cannot be avoided. USDA recommends adoption of this amendment as proposed.

### **Material Issue Number 7—Update Order Language**

Section 930.23 of the order should be revised 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. Section 930.20 establishes the calculations for the number of representatives on the Board to which each district is entitled. Based on the calculations established in § 930.20, the number of Board representatives can vary from year to year due to shifts in production levels in various districts.

Sections 930.23(b)(5) and (c)(4) specifically reference Districts 5, 6, 8 and 9 in regard to the nomination and election process. Those were the districts entitled to one Board seat when the order was initially promulgated. However, districts that are entitled to one Board seat have changed over time due to shifts in production. Amending § 930.23(b)(5) and (c)(4) by removing the specific references to Districts 5, 6, 8 and 9 and replacing it with generic language to cover any district that is entitled to only one Board representative based on the representation calculation established in § 930.20 would update order language to

accommodate changes in production patterns in the tart cherry industry. This amendment is intended to simply update language rather than alter the meaning of order provisions in any way. Witnesses supported this proposed amendment at the hearing and there was no opposition expressed.

The record evidence supports amending § 930.23(b)(5) and (c)(4) as proposed.

#### Conforming Changes

The Agricultural Marketing Service also proposed to make such changes as may be necessary to the order to conform to any amendment that may result from the hearing. Except as previously discussed, the Department has identified no additional conforming changes.

#### Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$6,500,000.

There are approximately 40 handlers of tart cherries subject to regulation under the order and approximately 900 producers of tart cherries in the regulated area. A majority of the producers and handlers are considered small entities according to the SBA's definition.

The geographic region regulated under the order covers the states of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According to data presented at the hearing, bearing acreage in 1987–88 totaled 50,050 acres; by 2006–2007 it had declined to 37,200 acres. Michigan accounts for 74 percent of total U.S. bearing acreage with 27,700 bearing acres. Utah is second, with a

reported 2,800 acres, or approximately eight percent of the total. The remaining states' acreage ranges from 700 to 2,000 acres.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supplies presents a marketing challenge for the tart cherry industry because demand for the product is relatively static. In addition, the demand for tart cherries is inelastic, which means a change in the supply has a proportionately larger change in the price level.

Authorities under the order include volume regulation, promotion and research, and grade and quality standards. Volume regulation is used under the order to augment supplies during short supply years with product placed in reserves during large supply years. This practice is intended to reduce the annual fluctuations in supplies and corresponding fluctuations in prices.

The Board is comprised of representatives from all producing areas based on the volume of cherries produced in those areas. The Board consists of a mix of handler and grower members, and a member that represents the public. Board meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Board deliberations, and each Board member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Board appointed a subcommittee to consider amendments to the marketing order. The subcommittee met several times for this purpose, and ultimately recommended several amendments to the order. The Board subsequently requested that USDA conduct a hearing to consider the proposed amendments. The views of all participants were considered throughout this process.

In addition, the hearing to receive evidence on the proposed amendments was open to the public and all interested parties were invited and encouraged to participate and express their views.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to update Board nomination, election, and membership requirements. The amendments are intended to improve

the operation and administration of the order. Record evidence indicates the proposals are intended to benefit all producers and handlers under the order, regardless of size.

#### Proposal 1—Adding the Authority to Change the Primary Reserve Capacity

The proposal described in Material Issue No. 1 of this recommended decision would amend § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume provisions of the order through informal rulemaking. Changing the reserve capacity currently requires amendment of the order through the formal rulemaking process.

The order establishes a fixed quantity of 50-million pounds of tart cherries and tart cherry products that can be held in the primary reserve. Any reserve product in excess of the 50-million-pound limitation must be placed in the secondary reserve.

Free tonnage product can be sold to any market outlet, but most shipments are sold domestically, which is considered the primary market. Reserve product can be used only in specific outlets which are considered secondary markets. These secondary markets include development of export markets, new product development, new markets, and government purchases.

When the order was promulgated, a 50-million-pound limitation was placed on the capacity of the primary reserve. Proponents of the current order proposed a limitation on the quantity of product that could be placed into the primary reserve. That limitation was incorporated into the order, and can only be changed through the formal rulemaking process.

Economic data presented when the order was promulgated indicated that a reserve program could benefit the industry by managing fluctuating supplies. Witnesses at the February and March 2007 hearing indicated the order has been successful in this regard. However, the record indicated that the order could be more flexible in allowing modifications to the 50-million-pound limitation should conditions warrant such a change in the future.

If the reserve capacity was changed, costs associated with storing product in reserves could also change. In addition, to the extent such a change could affect supplies in the marketplace; returns to both growers and handlers could also be affected.

Any Board recommendation to change the reserve capacity would be required to be implemented through the informal rulemaking process. As part of the informal rulemaking process, USDA

expects that any Board recommendation would include an analysis of the pertinent factors and issues, including the impact of a proposed regulation on producers and handlers. Any change to the reserve capacity would be implemented only with analysis of the expected economic impact on the affected entities.

**Proposal 2—Adding the Authority To Establish a Minimum Inventory Level at Which Reserves Would Be Released**

The proposal described in Material Issue No. 2 would amend § 930.54 of the order to provide the Board with the authority to establish a minimum inventory level at which reserves would be released and made available to handlers as free tonnage. If implemented, the proposed amendment would allow the Board to clear out the primary reserve and subsequently the secondary reserve when a specified minimum inventory level of tart cherries is reached. The specified minimum level would be established through the informal rulemaking process.

Under current order provisions, handlers cannot access the secondary reserve until the primary reserve is empty. Based on current language of the order, one handler who has not completely disposed of or otherwise fulfilled its reserve obligation can prevent access to the secondary reserve.

The proposed amendment would allow the Board to clear out the primary reserve when inventory levels are at a minimum level in order to provide the industry access to secondary reserve inventories.

If the amendment were implemented, costs to both handlers and the Board could be reduced. Handlers incur costs in maintaining reserves. According to the record, these costs include the cost of storage, which can be in the range of \$.01 per pound per month. Handlers also incur costs associated with tracking their own inventory levels. Witnesses stated that when inventory levels reach a minimal amount the costs of tracking inventory outweighs the benefit from carrying inventory in the primary reserve.

A significant portion of the Board staff's time is directed at tracking reserve inventory maintained at handlers' facilities. Hearing witnesses testified that while it is difficult to quantify the exact value of the Board staff's time to conduct these activities, the time could be better spent on other industry issues, and it is unnecessary to track minimal levels of inventory.

The proposed amendment, if implemented, could have a positive

impact on the market. As inventories are released from the reserves, products could be sold, generating revenue for the industry. This proposed amendment, if implemented, is expected to reduce costs to handlers and the Board, thus having a positive economic impact.

**Proposal 3—Establishing an Age Limitation on Products Placed Into Reserves**

The proposal described in Material Issue No. 3 would amend § 930.55 to require that products placed in reserves must have been produced in the current or immediately preceding two crop years. If implemented, this proposed amendment would allow the Board to place an age limit on products carried in the reserve. The purpose of the amendment would be to help ensure that products of saleable quality are maintained in reserve inventories.

Witness supported the proposed amendment by stating that it would add credibility to product quality for all products carried in the reserve. Currently, handlers can carry products they have no intention of selling just to meet their reserve obligation. This amendment would require handlers to rotate product in their reserve inventory, thus preventing them from maintaining the same product in the reserve year after year. Product held in inventory tends to deteriorate over time. When reserve product is ultimately released for sale to meet market demand, this proposed amendment would help ensure the reserve product available is in saleable condition and can satisfy the market's needs. Assuring product is available to satisfy the market helps to foster long term market stability.

In terms of costs, handlers may experience some minimal costs associated with periodically rotating product through their reserve inventory. It would be difficult to estimate such costs because they would vary depending upon each handler's operation. To the extent costs would be increased, they would be proportionate to each handler's share of the entire industry's reserve inventory. Each handler's reserve inventory obligation is based on the handler's share of the total crop handled. Thus, small handlers would not be disproportionately burdened.

It is anticipated that the benefits of providing a good quality product in reserves to ultimately supply markets when needed would outweigh any costs associated with implementation of this amendment.

**Proposal 4—Revision of Voting Requirements To Approve Board Actions**

The proposal submitted by the Board in Material Issue No. 4 would revise voting requirements under § 930.32 of the order. Current requirements provide that any action of the Board requires a two-thirds vote of the entire Board. The proposal would allow passage of a Board action with a two-thirds vote of those present at a meeting. USDA denied this proposal and will not change the voting requirements for reasons specified earlier in this recommended decision.

**Proposal 5—Revision of Nomination and Election Process for Handler Members on the Board**

The proposal submitted by the Board in Material Issue No. 5 relates to nomination and election of Board members under § 930.23 of the order. It would require a handler to receive support from handlers that handled at least five percent of the average production of tart cherries in the applicable district in order to be a candidate and to be elected by the industry and recommended to the Secretary for Board membership.

Under the current order, there is no accounting for handler volume in the nomination and balloting process. Each handler is entitled to one equal vote. This proposal would continue to allow each handler to have one vote, but would also require handler candidates to be supported by handlers representing at least five percent of the average production in the applicable district to be eligible to run for a Board position and to be elected by the industry for recommendation to the Secretary. This would help to ensure that handler members on the Board represent the interests of handlers in their district that account for at least a minimal percentage of the volume in the district.

This proposed amendment is not anticipated to have a significant economic impact on small businesses. It only affects the nomination and election criteria for membership on the Board by adding volume as an element of support to help ensure that Board membership reflects the interests of its constituency. All handlers, regardless of size, will continue to be able to participate in the nomination and election process. The process would continue to allow for both small and large handlers to be represented on the Board.

### **Proposal 6—Revision of Board Membership Affiliation Requirements**

The Board's proposal discussed in Material Issue No. 6 would amend § 930.20 to allow more than one Board member to be affiliated with the same sales constituency from the same district, if such a conflict cannot be avoided.

Currently, § 930.20 does not allow more than one Board member to be affiliated with the same sales constituency from the same district under any circumstances. The purpose of this provision is to prevent any one sales constituency from having a controlling influence on Board issues and actions. However, a situation occurred in District 7, Utah, where this particular provision of the order did not allow the district from having two representatives on the Board, as it was entitled to under section 930.20 (b) of the order. In that situation, the only candidates willing to serve on the Board from Utah were affiliated with the same sales constituency. Thus Utah was only able, under the marketing order rules, to seat one of the two Board representatives it was entitled to.

The proposed amendment is designed to prevent this problem from occurring in the future by allowing more than one Board member affiliated with the same sales constituency to represent a district, if such a sales constituency conflict cannot be avoided. The hearing record is clear that the sales constituency provision should not prevent a district from having its allocated number of seats on the board if there are eligible candidates willing to serve on the Board.

This amendment is not expected to have an economic impact on growers or handlers. It relates to representation on the Board, and is intended to help ensure each area covered under the order has the opportunity to achieve its allocated representation on the Board.

### **Proposal 7—Update Order Language to Accurately Reflect Grower and Handler Participation in the Nomination and Election Process in Districts With Only One Board Representative**

The proposal described in Material Issue No. 7 would amend § 930.23 to revise 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.

Sections 930.23(b)(5) and (c)(4) specifically reference Districts 5, 6, 8 and 9 in regard to the nomination and election process. Those were the districts entitled to one Board seat when

the order was initially promulgated. However, districts that are entitled to one Board seat have changed over time due to shifts in production. Amending § 930.23(b)(5) and (c)(4) by removing the specific references to Districts 5, 6, 8 and 9 and replacing it with generic language to cover any district that is entitled to only one Board representative based on the representative calculation established in § 930.20 would update order language to better reflect the constantly changing tart cherry industry.

This amendment updates order language to remove incorrect references to district representation in the event production shifts occur. It has no economic impact on handlers, growers, or any other entities.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impacts of the proposed amendments to the order on small entities. The record evidence is that some of the proposed amendments may result in some minimal cost increases while others will result in cost decreases. To the extent there are any cost increases, the benefits of the proposed changes are expected to outweigh the costs. In addition, changes in costs as a result of these amendments would be proportional to the size of businesses involved and would not unduly or disproportionately impact small entities. The informational impact of proposed amendments is addressed in the Paperwork Reduction Act discussion that follows.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are intended to improve the operation and administration of the order to the benefit of the industry.

Board meetings regarding these proposals as well as the hearing date and location were widely publicized throughout the tart cherry industry, and all interested persons were invited to attend the meetings and the hearing, and to participate in Board deliberations on all issues. All Board meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because these proposed changes have been widely publicized and the Board and industry would like to avail themselves of the opportunity to implement the changes as soon as

possible. All written exceptions timely received will be considered and a grower referendum will be conducted before any of these proposals are implemented.

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.

### **Paperwork Reduction Act**

Information collection requirements for Part 930 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581-0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Implementation of these proposed amendments would not trigger any changes to those requirements. It is possible that a change to the reporting requirements may occur in the future if the Board believes it would be necessary to assist in program compliance efforts. Should any such changes become necessary in the future, they would be submitted to OMB for approval.

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.

### **Civil Justice Reform**

The amendments to Marketing Order 930 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 this proposal.

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

no later than 20 days after the date of the entry of the ruling.

#### Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

#### General Findings

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

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

(2) The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of tart cherries grown in the production area (the States of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin) in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

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

(4) The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of tart cherries grown in the production area; and

(5) All handling of tart cherries grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because these proposed changes have been widely publicized and implementation of the changes, if adopted, would be desirable to benefit the industry as soon as possible. All written exceptions timely received will be considered and a grower referendum will be conducted before any of these proposals are implemented.

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

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR Part 930 is proposed to be amended as follows:

#### 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. 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 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.

\* \* \* \* \*

3. Revise paragraphs (b)(2) and (b)(5), redesignate paragraph (c)(3) as paragraph (c)(3)(i), add a new paragraph (c)(3)(ii), and revise paragraph (c)(4) of § 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 § 930.20, handled in the district. *Provided*, that this requirement shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g). 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.

\* \* \* \* \*

(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) \* \* \*

(3) \* \* \*

(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; *Provided*, that this paragraph shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g).

(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.

\* \* \* \* \*

4. 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 will be classified as a secondary inventory reserve and will be regulated accordingly.

\* \* \* \* \*

5. 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.

6. 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.

\* \* \* \* \*

Dated: May 27, 2010.

**Rayne Pegg**

*Administrator, Agriculture Marketing Service.*

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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1215**

**[Document Number AMS-FV-10-0010]**

**Popcorn Promotion, Research, and Consumer Information Order; Reapportionment**

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

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to reduce the Popcorn Board (Board) membership from nine to five members to reflect the consolidation of the popcorn industry and therefore, fewer popcorn processors in the industry. In accordance with the Popcorn Promotion, Research and Consumer Information Order (Order) which is authorized by the Popcorn Promotion, Research and Consumer Information Act (Act), the number of members on the Board may be changed by regulation; provided, that the Board consist of not fewer than four members and not more than nine members. In addition, the Order states that for purposes of nominating and appointing processors to the Board, the Secretary may take into account the geographical distribution of popcorn processors.

**DATES:** Comments must be received by July 6, 2010.

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at: <http://www.regulations.gov> or to the Research and Promotion Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, (Department) Room 0632-S, Stop 0244, 1400 Independence Avenue, SW., Washington, DC 20250-0244; *facsimile*: (202) 205-2800. 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 above office during regular business hours or it can be viewed at <http://www.regulations.gov>. All comments

received will be posted without change, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:**

Deborah Simmons, Marketing Specialist, Research and Promotion Branch, Fruit and Vegetable Programs, AMS, U.S. Department of Agriculture, Stop 0244, 1400 Independence Avenue, SW., Room 0632-S, Washington, DC 20250-0244; *telephone*: (888) 720-9917; *facsimile*: (202) 205-2800; or electronic mail: [deborah.simmons@ams.usda.gov](mailto:deborah.simmons@ams.usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under the Popcorn Promotion, Research, and Consumer Information Order [7 CFR part 1215]. The Order is authorized under the Popcorn Promotion, Research and Consumer Information Act [7 U.S.C. 7481-7491].

**Executive Order 12866**

The Office of Management and Budget (OMB) has waived the review process required by Executive Order 12866 for this action.

**Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect and will not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

The Act provides that any person subject to an order may file a written petition with the Department if they believe that the order, any provision of the order, or any obligation imposed in connection with the order, is not established in accordance with law. In any petition, the person may request a modification of the order or an exemption from the order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the petitioner resides or conducts business shall have the jurisdiction to review the Department's ruling on the petition, provided a complaint is filed not later than 20 days after the date of the entry of the ruling.

**Initial Regulatory Flexibility Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act (RFA) [5 U.S.C. 601-612], AMS has considered the economic impact of this action on the processors that would be affected by this rule. The purpose of the RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened.