

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 930****[Docket No. FV01-930-2 FR]****Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2000-2001 Crop Year for Tart Cherries****AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

SUMMARY: This rule establishes final free and restricted percentages for the 2000-2001 crop year. The percentages are 50 percent free and 50 percent restricted and will establish the proportion of cherries from the 2000 crop which may be handled in normal commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions and were recommended by the Cherry Industry Administrative Board (Board), the body which locally administers the marketing order. This action will also authorize the release of reserve pool cherries to replace those purchased for government sales. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

EFFECTIVE DATE: This final rule is effective May 2, 2001 through June 30, 2001.

FOR FURTHER INFORMATION CONTACT: Patricia A. Petrella or Dawana R. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Suite 2A04, Unit 155, 4700 River Road, Riverdale, MD 20737, telephone: (301) 734-5243, or Fax: (301) 734-5275; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, PO Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491, or Fax: (202) 720-5698.

Small businesses may request information on complying with this regulation, or obtain a guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, PO Box 96456, Room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491, Fax: (202) 720-5698, or E-mail: Jay.Guerber@usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under marketing agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, 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 (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This rule will establish final free and restricted percentages for tart cherries for the 2000-2001 crop year, beginning July 1, 2000, through June 30, 2001. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season. The regulations apply to all handlers of tart cherries that are in the regulated districts. Tart cherries in the free percentage category may be shipped immediately to any market, while restricted percentage tart cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with section 930.59 of the order and section 930.159 of the

regulations, or used for exempt purposes (and obtaining diversion credit) under section 930.62 of the order and section 930.162 of the regulations. The regulated Districts for this season are: District one—Northern Michigan; District two—Central Michigan; District three—Southwest Michigan; and District seven—Utah. Districts four, five, six, eight, and nine (New York, Oregon, Pennsylvania, Washington, and Wisconsin, respectively) would not be regulated for the 2000-2001 season.

The order prescribes under section 930.52 that, upon adoption of the order, the districts to be regulated shall be those districts in which the average annual production of cherries over the prior three years has exceeded 15 million pounds. A district not meeting the 15 million-pound requirement shall not be regulated in such crop year. Because this requirement was not met in the districts of New York, Oregon, Pennsylvania, Washington, and Wisconsin, handlers in those districts will not be subject to volume regulation during the 2000-2001 crop year. Production from New York was regulated last year. Production from the other four States was not subject to regulation.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. The supply of tart cherries, by contrast, varies greatly from crop year to crop year. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from crop year to crop year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely balanced. The primary purpose of setting free and restricted percentages is to balance supply with demand and reduce large surpluses that may occur.

Section 930.50(a) of the order describes procedures for computing an optimum supply for each crop year. The Board must meet on or about July 1 of each crop year, to review sales data, inventory data, current crop forecasts and market conditions. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years to which is added a desirable carryout inventory not to exceed 20 million pounds or such other amount as may be established with the approval of the Secretary. The optimum supply represents the desirable volume

of tart cherries that should be available for sale in the coming crop year.

The order also provides that on or about July 1 of each crop year, the Board is required to establish preliminary free and restricted percentages. These percentages are computed by deducting the actual carryin inventory from the optimum supply figure (adjusted to raw product equivalent—the actual weight of cherries handled to process into cherry products) and subtracting that figure from the current year's USDA crop forecast. If the resulting number is positive, this represents the estimated over-production, which would be the restricted percentage tonnage. The restricted percentage tonnage is then divided by the sum of the USDA crop forecast for the regulated districts to obtain percentages for the regulated districts. The Board is required to establish a preliminary restricted percentage equal to the quotient, rounded to the nearest whole number, with the complement being the preliminary free tonnage percentage. If the tonnage requirements for the year

are more than the USDA crop forecast, the Board is required to establish a preliminary free tonnage percentage of 100 percent and a preliminary restricted percentage of zero. The Board is required to announce the preliminary percentages in accordance with paragraph (h) of § 930.50.

The Board met on June 22, 2000, and computed, for the 2000–2001 crop year, an optimum supply of 275 million pounds. The Board recommended that the desirable carryout figure be zero pounds. Desirable carryout is the amount of fruit required to be carried into the succeeding crop year and is set by the Board after considering market circumstances and needs. This figure can range from zero to a maximum of 20 million pounds. The Board calculated preliminary free and restricted percentages as follows: The USDA estimate of the crop was 245 million pounds; an 88 million pound carryin added to that estimate results in a total available supply of 333 million pounds. The carryin figure reflects the amount of cherries that handlers actually have in

inventory. Subtracting the optimum supply of 275 million pounds from the total estimated available supply results in a surplus of 58 million pounds of tart cherries. An adjustment for changed economic conditions of 35 million pounds was added to the surplus, pursuant to § 930.50 of the order. This adjustment is discussed later in this document. After the adjustment, the resulting total surplus is 93 million pounds of tart cherries. The surplus was divided by the production in the regulated districts (195 million pounds) and resulted in a restricted percentage of 48 percent for the 2000–2001 crop year. The free percentage was 52 percent (100 percent minus 48 percent). The Board unanimously established these percentages and announced them to the industry as required by the order.

The preliminary percentages were based on the USDA production estimate and the following supply and demand information available at the June meeting for the 2000–2001 year:

Optimum supply formula		Millions of pounds
(1) Average sales of the prior three years		275
(2) Plus desirable carryout		0
(3) Optimum supply calculated by the Board at the June meeting		275
Preliminary Percentages:		
(4) USDA crop estimate		245
(5) Plus carryin held by handlers as of July 1, 2000		88
(6) Total available supply for current crop year		333
(7) Surplus (item 6 minus item 3)		58
(8) Economic adjustment to surplus		35
(9) Adjusted surplus (item 7 plus item 8)		93
(10) USDA crop estimate for regulated districts		195
Percentages		
	Free	Restricted
(11) Preliminary percentages (item 9 divided by item 10 × 100 equals restricted percentage; 100 minus restricted percentage equals free percentage)	52	48

Between July 1 and September 15 of each crop year, the Board may modify the preliminary free and restricted percentages by announcing interim free and restricted percentages to adjust to the actual pack occurring in the industry.

Section 930.50(d) of the order requires the Board to meet no later than September 15 to recommend final free and restricted percentages to the Secretary for approval. The Board met on September 8, 2000, and recommended final free and restricted percentages of 50 percent. The Board recommended that the interim percentages and final percentages be the same. At that time, the Board had available actual production, sales, and carryin inventory amounts to review

and made adjustments to the percentages.

The Secretary establishes final free and restricted percentages through the informal rulemaking process. These percentages will make available the tart cherries necessary to achieve the optimum supply figure calculated by the Board. The difference between any final free percentage designated by the Secretary and 100 percent is the final restricted percentage.

The Board used an updated optimum supply figure in determining the final free and restricted percentages. The revised optimum supply is 277 million pounds, instead of 275 million pounds used in June. The 3-year average sales figure computed in June included an estimate of June 2000 sales because

actual June sales were not yet available. The 3-year average sales figure used in the final calculations reflects actual sales for each month of the 3-year period.

The actual production reported by the Board was 284 million pounds, which is a 39 million pound increase from the USDA crop estimate of 245 million pounds. The increase in production was due to higher yields in the major producing States (Michigan, New York, Utah, Washington, and Wisconsin). For 2000–2001, production in the regulated districts totaled 232 million pounds, 37 million pounds greater than the USDA estimate of 195 million pounds.

An 87 million pound carryin (actual carryin as opposed to the 88 million pounds originally estimated in June)

was added to the Board's reported production of 284 million pounds, yielding a total available supply for the current crop year of 371 million pounds. The optimum supply of 277 million pounds was subtracted from the total available supply which resulted in a 94 million pound surplus. An adjustment of 22 million pounds for changed

economic conditions was added to the surplus, pursuant to § 930.50 of the order. This adjustment is discussed later in this document. After the adjustment, the resulting total surplus is 116 million pounds of tart cherries. The total surplus of 116 million pounds is divided by the 232 million-pound volume of tart cherries produced in the

regulated districts. This results in a 50 percent restricted percentage and a corresponding 50 percent free percentage for the regulated districts.

The final percentages are based on the Board's reported production figures and the following supply and demand information available in September for the 2000–2001 crop year:

Optimum supply formula		Millions of pounds
(1) Average sales of the prior three years		277
(2) Plus desirable carryout		0
(3) Optimum supply calculated by the Board at the September meeting		277
Final Percentages:		
(4) Board reported production		284
(5) Plus carryin held by handlers as of July 1, 2000		87
(6) Tonnage available for current crop year		371
(7) Surplus (item 6 minus item 3)		94
(8) Economic adjustment to surplus		22
(9) Adjusted surplus (item 7 plus item 8)		116
(10) Production in regulated districts		232
Percentages		
	Free	Restricted
(11) Final Percentages (item 9 divided by item 10 × 100 equals restricted percentage; 100 minus restricted percentage equals free percentage)	50	50

As previously mentioned, the Board recommended an economic adjustment in computing both the preliminary and final percentages for the 2000–2001 crop year. This is authorized under § 930.50. These provisions provide that in its deliberations of volume regulation recommendations, the Board consider, among other things, the expected demand conditions for cherries in different market segments and an analysis of economic factors having a bearing on the marketing of cherries. Based on these considerations, the Board may modify its marketing policy calculations to reflect changes in economic conditions.

The order provides that the 3-year average of all sales be used in determining the optimum supply of cherries. The industry wants to export diversion cherries to foreign markets, excluding Canada and Mexico. Exports are used by handlers to meet their diversion requirements. Including this volume of sales in the optimum supply formula, however, results in an overestimate of the volume of tart cherries that can be profitably marketed in unrestricted markets. Thus, the Board recommended adjusting its estimate of surplus cherries by adding exempt export sales (all exports except those going to Canada and Mexico).

This season the Board also recommended that the adjustment reflect the impact that USDA purchases for school lunch and other purposes might have on the sales component of

the optimum supply formula. Purchases by USDA are part of the average sales history for the industry. In recent years, USDA has purchased about 17 million pounds of tart cherry products and this has been factored into the optimum supply formula. During the 2000–2001 crop year, USDA expects to purchase about 10 million pounds of frozen and hot pack cherries, and 20 million pounds of dried cherries. The Board determined that the difference between the expected purchases (30 million pounds) during the 2000–2001 crop year and the average purchases of 17 million pounds should not be included in the optimum supply figure.

Therefore, the Board adjusted the expected surplus to 22 million pounds (35 million pounds of exports minus 13 million pounds of USDA purchases). Without this adjustment, the surplus for the 2000–2001 crop year would have been 129 million pounds. Dividing this figure by the Board reported production in the regulated districts (232 million pounds) would have resulted in a 56 percent restricted percentage. Hence, this adjustment resulted in a reduction in the restricted percentage from 56 percent to 50 percent. The 50 percent restricted percentage will allow growers to deliver more of their crop to handlers. This reduction should provide some benefits to growers in Michigan and Utah which are the only States restricted for the 2000–2001 crop year.

By recommending this marketing policy modification, the Board believes

that it will provide stability to the marketplace and the industry will be in a better situation in future years. This modification is intended to further facilitate and encourage market expansion. Board members were of the opinion that, if this adjustment is not made, growers could be paid less than their production costs, because handlers would suffer financial losses that will probably be passed on to the growers. In addition, the value of cherries already in inventory could be depressed due to the overabundant supply of available cherries, a result inconsistent with the intent of the order and the Act.

The supplementary information section of the proposed rule stated that the Board also recommended that a like quantity of cherries be released from the reserve to replace cherries that the USDA and other governmental agencies offer to purchase for surplus removal purposes. Based on a comment filed on behalf of the Board, purchases by other government agencies will also be included. The comment, discussed in full later, clarifies that the Board intended that such releases only be made for surplus removal type purchases, and that all government purchases, not only USDA purchases for such purposes should trigger releases.

Simply put, the procurement process consists of three stages. The offer to buy stage, the invitation to bid stage, and the awarding of contracts stage. Such releases will be based on USDA and other government agency announced

offers to purchase tart cherries for surplus removal. The quantities purchased are sometimes less than the quantities mentioned in the announced offers. Actual purchases depend on the prices and quantities offered as well as possible adjustments in user requirements.

Because of the potential difference between the offer and the actual quantity purchased, and the timing of the offer and the invitation to bid and awarding of contracts by the government agency, the Board indicated, in its comment, that the quantity of reserve tonnage released on the basis of surplus removal offers should not be considered as carryover at the first stage of the procurement process. If at the second stage, the quantity for which bids are invited is less than the initial quantity offered, the difference between the two amounts will be considered carryover tonnage. If at the third stage the quantity for which contracts have been awarded and the quantity initially offered to be purchased is less, the difference between the two amounts will be considered carryover for the purpose of computing marketing percentages.

According to the Board, releasing a like quantity of tart cherries from the reserve to replace cherries that are offered to be purchased by USDA and other government agencies for surplus removal, together with the previously mentioned carryover adjustments, will remove the variability and irregularity of such purchases and thereby make the computation of volume regulation percentages more stable and predictable. The Board believes that such releases will equitably spread the benefit of these planned purchases throughout the industry because all handlers regulated under the order, and not just those handlers who successfully bid and sold product to USDA and other government agencies, will benefit from the surplus removal tart cherry purchases.

The Department's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This goal will be met by the establishment of a preliminary percentage which releases 100 percent of the optimum supply and the additional release of tart cherries provided under § 930.50(g). This release of tonnage, equal to 10 percent of the average sales of the prior three years sales, is made available to handlers each season. The Board recommended that such release should be made available to handlers the first week of December

and the first week of May. Handlers can decide how much of the 10 percent release they would like to receive during the December and May release dates. Once released, such cherries are released for free use by such handler. Approximately 27 million pounds will be made available to handlers this season in accordance with Department Guidelines. This release will be made available to every handler and released to such handler in proportion to its percentage of the total regulated crop handled. If a handler does not take his/her proportionate amount, such amount shall remain in the inventory reserve.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this final regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) will allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opts for such certification, but rather performs regulatory flexibility analyses for any rulemaking that will generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic or regulatory impacts.

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 rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 900 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000.

Board and subcommittee meetings are widely publicized in advance and are

held in a location central to the production area. The meetings are open to all industry members (including small business entities) and other interested persons who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations can be considered to represent the interests of small business entities in the industry.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 1995/96 through 1999/00, approximately 91 percent of the U.S. tart cherry crop, or 280.5 million pounds, was processed annually. Of the 280.5 million pounds of tart cherries processed, 62 percent was frozen, 29 percent was canned, and 9 percent was utilized for juice.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. In the ten-year period, 1987/88 through 1997/98, the tart cherry area decreased from 50,050 acres, to less than 40,000 acres. In 1999/00, approximately 90 percent of domestic tart cherry acreage was located in four States: Michigan, New York, Utah and Wisconsin.

Michigan leads the nation in tart cherry acreage with 70 percent of the total. Michigan produces about 75 percent of the U.S. tart cherry crop each year. In 1999/00, tart cherry acreage in Michigan decreased to 28,100 acres from 28,400 acres the previous year.

In crop years' 1987/88 through 1999/00, tart cherry production ranged from a high of 359.0 million pounds in 1987/88 to a low of 189.9 million pounds in 1991/92. The price per pound received by tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuations in the tart cherry industry are national in scope and impact. Growers testified during the order promulgation process that the prices they received often did not come close to covering the costs of production.

They also testified that production costs for most growers range between 20 and 22 cents per pound, which is well above average prices received during the 1993–1995 seasons.

The industry demonstrated a need for an order during the promulgation process of the marketing order because large variations in annual tart cherry supplies tend to lead to fluctuations in prices and disorderly marketing. As a result of these fluctuations in supply

and price, growers realize less income. The industry chose a volume control marketing order to even out these wide variations in supply and improve returns to growers. During the promulgation process, proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because many such growers and handlers had been going out of business due to low tart cherry prices.

They also testified that, since an order would help increase grower returns, this should increase the buffer between business success and failure because small growers and handlers tend to be less capitalized than larger growers and handlers.

Aggregate demand for tart cherries and tart cherry products tends to be relatively stable from year-to-year. Similarly, prices at the retail level show minimal variation. Consumer prices in grocery stores, and particularly in food service markets, largely do not reflect fluctuations in cherry supplies. Retail demand is assumed to be highly inelastic which indicates that price reductions do not result in large increases in the quantity demanded. Most tart cherries are sold to food service outlets and to consumers as pie filling; frozen cherries are sold as an ingredient to manufacturers of pies and cherry desserts. Juice and dried cherries are expanding market outlets for tart cherries.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. In general, the farm-level demand for a commodity consists of the demand at retail or food service outlets minus per-unit processing and distribution costs incurred in transforming the raw farm commodity into a product available to consumers. These costs comprise what is known as the "marketing margin."

The supply of tart cherries, by contrast, varies greatly. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from year-to-year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely in equilibrium. As a result, grower prices fluctuate widely, reflecting the large swings in annual supplies.

In an effort to stabilize prices, the tart cherry industry uses the volume control mechanisms under the authority of the Federal marketing order. This authority allows the industry to set free and

restricted percentages. These restricted percentages are only applied to States or districts with a 3-year average of production greater than 15 million pounds. Currently, only the three districts in Michigan and Utah are subject to restricted percentages.

The primary purpose of setting restricted percentages is an attempt to bring supply and demand into balance. If the primary market is over-supplied with cherries, grower prices decline substantially. The tart cherry sector uses an industry-wide storage program as a supplemental coordinating mechanism under the Federal marketing order. The primary purpose of the storage program is to warehouse supplies in large crop years in order to supplement supplies in short crop years. The storage approach is feasible because the increase in price—when moving from a large crop to a short crop year—more than offsets the cost for storage, interest, and handling of the stored cherries.

The price that growers' receive for their crop is largely determined by the total production volume and carryin inventories. The Federal marketing order permits the industry to exercise supply control provisions, which allow for the establishment of free and restricted percentages for the primary market, and a storage program. The establishment of restricted percentages impacts the production to be marketed in the primary market, while the storage program has an impact on the volume of unsold inventories.

The volume control mechanism used by the cherry industry results in decreased shipments to primary markets. Without volume control the primary markets (domestic) would likely be over-supplied, resulting in low grower prices.

To assess the impact that volume control has on the prices growers receive for their product, an econometric model has been estimated. The estimated model provides a way to see what impacts volume control may have on grower prices. The three districts in Michigan and Utah are the only restricted areas for this crop year and their combined total production is 232 million pounds. A 50 percent restriction means 116 million pounds is available to be shipped to primary markets from these two States. Production levels of 17 million pounds for New York, 4 million pounds for Oregon, 5 million pounds for Pennsylvania, 17 million pounds for Washington, and 10 million pounds for Wisconsin results in an additional 53 million pounds available for primary market shipments.

In addition, USDA requires a 10% release from reserves as a market growth factor. This results in an additional 28 million pounds being available for the primary market. The 116 million pounds from Michigan and Utah, the 53 million pounds from the other producing states, and the 28 million pound release gives a total of 197 million pounds being available for the primary markets. This results in 88 million pounds being restricted and an effective restricted percent of 30.8 percent.

The econometric model is used to estimate grower prices with and without regulation. Without the volume controls, the estimated grower price would be approximately \$0.12 per pound. With volume controls, the estimated grower price would increase to approximately \$0.20 per pound.

The use of volume controls is estimated to have a positive impact on growers' total revenues. Without regulation, growers' total revenues from processed cherries are estimated to be \$34.2 million in 2000–2001. In this scenario, production is 284 million pounds and price, without regulation, is estimated to be \$0.12 per pound. With regulation, growers' revenues from processed cherries are estimated to be \$43.8 million. In this scenario, 197 million pounds are available for the primary markets with an estimated price of \$0.20 per pound. Over the past several seasons, growers received approximately \$0.05 per pound for restricted (diverted) cherries.

The results of econometric analysis are subject to some level of uncertainty. As long as the resulting grower prices are \$0.15 per pound or greater, then growers' are better off with the regulation. If price with regulation is \$0.15 per pound or less, the estimated revenues under no regulation would be similar to the revenues with a 50 percent regulation.

It is concluded that the 50 percent volume control would not unduly burden producers, particularly smaller growers. The 50 percent restriction is only applied to the growers in Michigan and Utah. The growers in the other 5 regulated States will benefit from this restriction. Michigan and Utah produced over 80 percent of the tart cherry crop during the 2000/01 crop year.

Recent grower prices have been as high as \$0.20 per pound. At current production levels, the cost of production is reported to be \$0.20 to \$0.22 per pound. Thus, the estimated \$0.20 per pound received by growers with regulation is close to the cost of production. The use of volume controls

is believed to have little or no effect on consumer prices and will not result in fewer retail sales or sales to food service outlets.

Without the use of volume controls, the industry could be expected to continue to build large amounts of unwanted inventories. These inventories have a depressing effect on grower prices. The econometric model shows for every 1 million-pound increase in carryin inventories, a decrease in grower prices of \$0.0033 per pound occurs. The use of volume controls allows the industry to supply the primary markets while avoiding the disastrous results of over-supplying these markets. In addition, through volume control, the industry has an additional supply of cherries that can be used to develop secondary markets such as exports and the development of new products.

In discussing the possibility of marketing percentages for the 2000–2001 crop year, the Board considered the following factors contained in the marketing policy: (1) The estimated total production of tart cherries; (2) the estimated size of the crop to be handled; (3) the expected general quality of such cherry production; (4) the expected carryover as of July 1 of canned and frozen cherries and other cherry products; (5) the expected demand conditions for cherries in different market segments; (6) supplies of competing commodities; (7) an analysis of economic factors having a bearing on the marketing of cherries; (8) the estimated tonnage held by handlers in primary or secondary inventory reserves; and (9) any estimated release of primary or secondary inventory reserve cherries during the crop year.

The Board's review of the factors resulted in the computation and announcement in September 2000 of the free and restricted percentages in this rule (50 percent free and 50 percent restricted).

A positive factor for the cherry industry this year is the unusually large USDA purchases of cherries during this crop year. These USDA sales include a significant amount of frozen cherries and large quantities of dried cherries. It also appears likely that the USDA will offer to buy more cherries later this year using Congressionally appropriated funds designated for purchases of specified commodities, including tart cherries.

A number of industry leaders have suggested that the Board should consider alternative approaches for dealing with this challenging situation which has developed with this year's crop because of (a) the considerably

larger actual crop size, (b) the resulting high regulation percentage, and the prospect of a significant secondary reserve, (c) the unusually large USDA purchases, and (d) other factors.

The Board discussed two alternatives. The first alternative was an economic adjustment component for the large USDA purchases. The Board added a separate component for the economic adjustment in the supply regulation calculations for the large USDA purchases.

The average of USDA purchases during the last three years has been 17 million pounds. This year USDA has purchased 10 million pounds of frozen cherries to be delivered during the 2000 crop-marketing year. USDA has also currently offered to buy another approximately 20 million pounds as dried cherries. If all of this is successfully awarded after the bids, this will be a total of 30 million pounds to be delivered this year. This is 13 million pounds more than USDA tart cherry purchases in recent years. Those who support this type of economic adjustment for the USDA demand agree that the additional 17 million pounds over the average could be used as a partial balance to the 35 million pounds of the economic adjustment for the expected export diversion credit volume.

The second alternative is that no change be made in the economic adjustment (with a reserve release if needed). The Board might decide to make no changes in the economic adjustment with the expectation that, if cherries are needed from the reserve to meet the unusually large USDA purchases, a reserve release will be made by the Board when needed during the coming marketing year. Some in the industry stated that even though the crop turned out to be considerably larger than expected in June, and despite the large USDA purchases, it is best to keep the economic adjustment factor at 35 million pounds. With the larger crop size, this would result in a regulation of 57 percent in the regulated districts. With this alternative, if more open market cherries are needed because of the large USDA purchases to date (and/or an expected additional purchase later this year), some of the reserve can be used to replace the free tonnage tart cherries.

As mentioned earlier, the Department's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The

quantity available under this rule is 110 percent of the quantity shipped in the prior three years.

The free and restricted percentages established by this rule release the optimum supply and apply uniformly to all regulated handlers in the industry, regardless of size. There are no known additional costs incurred by small handlers that are not incurred by large handlers. The stabilizing effects of the percentages impact all handlers positively by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all producers by allowing them to better anticipate the revenues their tart cherries will generate.

The Department has not identified any relevant Federal rules that duplicate, overlap, or conflict with this regulation.

While the benefits resulting from this rulemaking are difficult to quantify, the stabilizing effects of the volume regulations impact both small and large handlers positively by helping them maintain markets even though tart cherry supplies fluctuate widely from season to season.

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the information collection and recordkeeping requirements have been previously approved by OMB and assigned OMB Number 0581–0177.

There are some reporting, recordkeeping, and other compliance requirements under the marketing order. The reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This rule does not change those requirements.

A proposed rule concerning this action was published in the **Federal Register** on January 10, 2001 (66 FR 1909). Copies of the rule were mailed or sent via facsimile to all Board members and handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register. A 15-day comment period ending on January 25, 2001, was provided to allow

interested persons to respond to the proposal.

Two comments were received during the comment period in response to the proposal. One comment was received from a Michigan grower-handler who supported the Board's recommendation. A second comment was received on behalf of the Board, and recommended several clarifications to the proposal. The commenter stated that the Board intended that reserve releases should be made for USDA and other government intended purchases, not only USDA purchases. The commenter also stated that the intent of the Board was that reserve releases involving intended government purchases should be triggered only by bonus purchases (non-entitlement purchases) of surplus tart cherries; i.e., purchase offers intended to remove surplus supplies from the marketplace. The Board believes that the benefits of purchases to remove surpluses should be shared by each handler in proportion to the quantities of reserve cherries held by the handlers. Purchases by government agencies for other purposes (referred to as entitlement purchases) should continue to be supplied with free tonnage, not reserve tonnage.

The commenter also stated that any reserve inventory released based on surplus removal purchase offers should not adversely impact the Optimum Supply Formula and volume regulation percentages in the subsequent marketing season. If an offer to make a surplus removal purchase results in a reserve release in one crop year and an invitation to submit bids and an awarding of contracts the following year, the tonnage released during the previous year would be considered as carryover tonnage. This would increase the total available supply of cherries for the succeeding year even though most if not all of them will probably be purchased by the government agency, and make the volume regulation for the succeeding year more restrictive than needed. To prevent this from occurring, the commenter recommended various methods of handling the carryover during the procurement steps. If the tonnage offered and released is the same as the quantity purchased, none of the

released tonnage should be considered as carryover. The same would be true if the offer had been made but the invitations to bid and the awarding of contracts had not been issued. If the offer to purchase and the amount released is more than the quantity for which contracts were awarded, the difference between the two amounts would not be considered as carryover tonnage. If the offer to purchase and the amount of tonnage released is more than the amount in the invitation to bid or the contracts awarded, the difference in the amounts would be considered carryover tonnage. This reflects how this aspect of the computation of volume regulations will be accomplished. They will help the Board properly administer the inventory releases and the volume control provisions of the marketing order. Supply management is a critical feature of the tart cherry marketing order and it is important that the percentages not be more restrictive than needed.

In summary, it was the Board's intent to limit the types of purchases that would trigger inventory reserve releases to bonus (non-entitlement) surplus removal purchases. Also, the Board did not intend to limit reserve releases to surplus removal purchases made by the USDA. It wanted all government purchases for such purposes to trigger releases of reserve cherries. These requested changes are made in the applicable provisions.

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

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

It is further found that good cause exists for not postponing the effective

date of this rule until 30 days after publication in the **Federal Register** because handlers have already received 2000–2001 crop tart cherries from growers. Further, handlers are aware of this rule which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule, and the comments received have been addressed.

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 amended to read 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. Section 930.154 is added to read as follows:

§ 930.154 Reserve release.

If USDA or any other governmental agency initiates an invitation to purchase product as a non-entitlement purchase, the Board shall release a like quantity of cherries from the reserve pool to each handler who has a proportionate share in the reserve.

3. Section 930.252 is added to read as follows:

§ 930.252 Final free and restricted percentages for the 2000–2001 crop year.

The final percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2000, which shall be free and restricted, respectively, are designated as follows: Free percentage, 50 percent and restricted percentage, 50 percent.

Dated: April 24, 2001.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

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