



DEPARTMENT OF AGRICULTURE

3410-02P

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AO-370-A9; 11-0093; AMS-FV-10-0087; FV10-930-5]

Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes amendments to Marketing Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and provides growers and processors with the opportunity to vote in a referendum to determine if they favor the changes. These amendments were proposed by the Cherry Industry Administrative Board (CIAB), which is responsible for local administration of the order. These amendments would revise: Section 930.10, the definition of "Handle"; Section 930.50, "Marketing Policy" and Section 930.58, "Grower Diversion Privilege." The amendments are intended to improve the operation and administration of the order.

DATES: The referendum will be conducted from March 19, 2012 to March 30, 2012. The representative period for the purpose of the referendum is July 1, 2010 through June 30, 2011.

FOR FURTHER INFORMATION CONTACT: Parisa Salehi, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington DC 20250-0237; Telephone: (202) 270-9918, Fax: (202) 720-8938, or E-mail: Parisa.Salehi@ams.usda.gov; or Martin Engeler, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 2202 Monterey Street, Fresno, California, 93721; Telephone: (559) 487-5110 , Fax: (559) 487-5110, or E-mail: Martin.Engeler@ams.usda.gov.

Small businesses may request information on this proceeding by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 205-2830, Fax: (202) 720-8938, E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on March 4, 2011, and published in the March 14, 2011, issue of the **Federal Register** (76 FR 13528). The Recommended Decision was

issued on November 3, 2011 and published in the November 9, 2011, issue of the **Federal Register** (76 FR 69673).

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

The proposed amendments are based on the record of a public hearing held April 20 and 21, 2011, in Grand Rapids, Michigan, and a second public hearing held April 26, 2011, in Provo, Utah. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), 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). Notice of this hearing was published in the **Federal Register** on March 14, 2011 (76 FR 13528). The notice of hearing contained the proposal submitted by CIAB and one proposal by the Agricultural Marketing Service (AMS). This action is a decision addressing the amendments listed in the notice of hearing.

The proposed amendments were recommended by CIAB and submitted to USDA on September 22, 2010.

The proposed amendments recommended by the CIAB are summarized below.

1. Amendment 1 would revise the term "handle" within the order. This proposal would revise existing section 930.10, Handle, to exclude handler acquisition of grower diversion certificates from definition of handle.

2. Amendment 2 would revise the "marketing policy" provisions in section 930.50 of the order so that grower-diverted cherries are not counted as production in the volume control formula.

3. Amendment 3 would revise the existing section 930.58, so grower-diverted cherries are not treated as actual harvested cherries.

In addition to the proposed amendments to the order, AMS proposed to making any additional changes to the order as may be necessary to conform to any amendment that may result from the hearings.

Upon the basis of evidence introduced at the hearings and the record thereof, the Administrator of AMS issued a Recommended Decision published in the **Federal Register** on November 9, 2011 (76 FR 69673). An opportunity to file written exceptions was provided through November 25, 2011. Two comments were received during that period. A comment was received on behalf of the Cherry Industry

Administrative Board. The second comment was from a grower/handler in Michigan. Both supported the proposed amendments. Therefore, no changes were adopted by AMS based on the received comments.

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 final 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.

There are approximately 40 handlers of tart cherries subject to regulation under the order and approximately 600 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as

those having annual receipts of less than \$750,000. A majority of the tart cherry producers and handlers are considered small entities under the SBA standards.

The geographic region regulated by the order includes 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 hearings, bearing acreage in 1987-88 totaled 50,050 acres; by 2010-11 it had declined to 35,650 acres. Michigan accounts for 73 percent of total U.S. bearing acreage with 26,200 bearing acres. Utah is second, with a reported 3,300 acres, or approximately nine percent of the total. The remaining states' acreage ranges from 600 to 1,800 acres. The order includes authority for (1) volume regulation, (2) promotion and research, and (3) grade and quality standards. Volume regulation is used under the order to augment supplies during low supply years, with product placed in reserves during large supply years.

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 supply presents a marketing challenge for the tart cherry industry because demand for the product is relatively inelastic; meaning a change in supply has a proportionately larger change in price.

According to data presented at the hearing, production has ranged from a low of 62.5 million pounds in 2002-03 to a high of 395.6 million pounds in 1995-96. For 2010-11, Michigan accounted for 71 percent of total U.S. production with 135 million pounds. Utah is second, with a reported 23 million pounds, or approximately twelve percent of the total. The remaining states produce between 15.4 and 1.2 million pounds.

During the hearings, multiple witnesses testified that they did not believe that the proposed amendments would have any adverse impacts on small agricultural service firms or small agricultural producers as defined by the SBA. According to the record, the proposed amendments would help agricultural businesses and growers by encouraging growers to divert some of their tart cherries in the orchard during years of extremely large supply. The proposed amendments would result in higher grower returns during years of extremely large supply. Furthermore, the growers who divert their crop do not incur harvest and transportation costs. The proposed amendments would result

in a lower possibility of market saturation. Overall the supply of tart cherries in extremely large supply years would result in higher returns for growers.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to improve its operation and administration. Record evidence indicates that the proposed amendments are intended to benefit all producers and handlers under the order, regardless of size.

There are three proposed amendments. Amendment one would amend Section 930.10 of the order to change the definition of "handle," so that handler acquisition of grower diversion certificates is not considered handling. Amendment two would amend the "marketing policy" provisions in Section 930.50 of the order so that grower-diverted cherries are not counted as production in the OSF. Amendment three would amend section 930.58 of the order so that grower-diverted cherries are not treated as actual harvested cherries. The proposed amendments would modify how grower diversions are accounted for under the order.

Evidence presented when the order was promulgated indicated that a grower diversion program could benefit the industry by managing fluctuating supply. Witnesses indicated that the order has been successful in this

regard. However, the record indicated that the order should be more flexible in addressing how grower diversions are utilized under the order.

The most efficient method to deal with a surplus is at the lowest level of the production and processing chain. The industry wastes the least amount of resources if it diverts cherries in the orchard. Once they are harvested, chilled, washed, de-stemmed, sorted, pitted, and packed, significantly higher costs are incurred and there is a greater risk of waste. Diverting surplus cherries in the orchard is the most cost effective method of dealing with a surplus situation and provides the largest benefit to growers through lower costs.

The order establishes an opportunity for growers to undertake in-orchard diversions of cherries (section 930.58). These diversions are done during harvest in accordance with procedures defined under the order and are overseen by the CIAB. The CIAB issues grower diversion certificates to the growers that represent the pounds of cherries that were left in the orchard.

Growers redeem the diversion certificates with handlers, who use them as one of their compliance alternatives to meet their reserve or restricted obligation. However, under the current order definition of

"handle," handlers must include the pounds of cherries represented by the certificates as part of the total cherries that have been delivered and processed.

Consequently, grower in-orchard diversions effectively increase the supply of restricted cherries even though none of those cherries were delivered for processing. Grower diversion certificates are considered to be part of the total quantity of cherries that a handler receives and processes, and contribute to the total supply of restricted cherries in the OSF. This creates confusion in accounting for the cherries in years when cherries are restricted for both the growers and processors.

The OSF is the mechanism specified in the order and used by CIAB to determine the relationship between the demand and supply of tart cherries in a given year. When the supply of tart cherries exceeds the average demand, volume regulation is implemented.

In an effort to stabilize supply and prices, the tart cherry industry uses volume regulation which allows the industry to set free and restricted percentages. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage cherries are placed in a reserve inventory. The primary purpose of setting

restricted percentages and placing cherries in a reserve inventory is to attempt to balance supply with demand.

A related component of the OSF under the order involves growers diverting cherries by leaving them unharvested in the orchard. Handlers can coordinate with their growers in large crop years by encouraging them to divert cherries from production. Handlers can then acquire the diversion certificates issued to growers and use them as credit toward their restriction or reserve obligations.

The interaction of sections 930.10 and 930.50 of the order establishes that grower in-orchard diversion is subject to the restriction percentage calculated for the year. Because of this, grower diversion certificates have less value when growers redeem them with handlers. Therefore, when a handler utilizes the grower diversion certificates received from growers, the certificates have a reduced value as a compliance tool in meeting the restricted obligation. Because the certificates have a reduced value growers will deliver most of their crop to handlers instead of diverting cherries in the orchard in large crop years.

The intent of these amendments is to remove the grower disincentive for in-orchard diversion. If the way grower diversions are accounted for is changed, the grower

diversion program is expected to help mitigate the negative effects of oversupply, by increasing the amount of cherries diverted from production.

This action is expected to have a positive impact on growers. The value of the grower diversion certificates is expected to increase. As the value of the certificates increases, grower diversion of cherries in large crop years is expected to increase. Increased grower diversion activity will help to reduce excess supplies, which in turn is expected to have a positive impact on grower returns. In addition, grower costs associated with harvesting and transporting cherries to handlers will be reduced as more cherries are diverted.

This action is also expected to have a positive impact on handlers. As more fruit is diverted in the orchard, handlers will avoid the processing and storage costs that they would otherwise incur if growers harvested and delivered the fruit. Reducing the available supply of cherries is expected to mitigate the price depressing effects that oversupply typically has on the market, resulting in a positive effect for both growers and handlers.

Testimony at the hearing suggested that the amendments, which would encourage grower diversions, would

not have a negative impact on small growers or handlers. The hearing record suggests that these amendments would benefit small growers by providing better opportunities to divert cherries in the orchard in large crop years. Small handlers are not always able to ship to export markets or have as much new product activity as larger handlers. Small handlers would benefit from these amendments by providing diversion credits as a way to meet their restrictions.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581-0177, (Tart cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin). No changes in those requirements is necessary a result of this action. Should any change become necessary, it 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. USDA has not identified any relevant Federal

rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

The implementation of these requirements is not expected to have any additional costs on handlers. In fact, these proposed changes are expected to reduce costs for both growers and handlers.

In addition, the meetings regarding these proposals as well as the hearing dates were widely publicized throughout the existing tart cherry production area and all interested persons were invited to attend the meetings and the hearings and participate in CIAB deliberations on all issues. All CIAB meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The CIAB itself is composed of members representing handlers, producers and the public. Finally, interested persons were invited to present evidence at the hearing on the regulatory and informational impacts of this action on small businesses.

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.

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.

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 the 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.

Findings and Conclusions

The findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the November 9, 2011 (76 FR 69673) issue of the **Federal Register** are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled "Order Amending the Order Regulating the Handling of Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin." This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered, that this entire decision be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400-407) to determine whether the annexed order amending the order regulating the handling of Tart cherries is approved or favored by growers and processors, as defined under the terms of the order, who during the representative period were engaged in the production or processing of tart cherries in the production area.

The representative period for the conduct of such referendum is hereby determined to be July 1, 2010, through, June 30, 2011.

The agents of the Secretary to conduct such referendum are hereby designated to be Christian Nissen, or Jennie Varela, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA; Telephone: (863)324-3375, Fax (863)325-8793, or E-mail: Christian.Nissen@ams.usda.gov or Jennie.Varela@ams.usda.gov, respectively.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

Dated: February 28, 2012

Robert C. Keeney
Acting Administrator
Agricultural Marketing Service

**Order Amending the Order Regulating the Handling of Tart
Cherries Grown in Michigan, New York, Pennsylvania, Oregon,
Utah, Washington, And Wisconsin¹**

Findings and Determinations:

The findings and determinations hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing 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.

(a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, (7 USC 601-612), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon proposed further amendment of Marketing Agreement and Order No. 930, regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Upon the basis of the evidence

¹ This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

introduced at such hearing and the record thereof, it is found that:

1. The marketing 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 order, as amended, and as hereby proposed to be further amended, regulates the handling of tart cherries grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

3. The marketing order, as amended, and as hereby proposed to be further amended, is limited in its 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 order, as amended, and as hereby proposed to be further amended, prescribes, 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 order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin shall be in conformity to, and in compliance with the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the order contained in the Recommended Decision issued on November 3, 2011 and published on November 9, 2011 (76 FR 69673) will be and are the terms and provisions of this order amending the order and are set forth in full below.

For the reasons stated in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR Part 930 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 the introductory paragraph in § 930.10 to read as follows:

§ 930.10 Handle.

Handle means the process to brine, can, concentrate, freeze, dehydrate, pit, press or puree cherries, or in any other way convert cherries commercially into a processed product, or divert cherries pursuant to § 930.59, or to otherwise place cherries into the current of commerce within the production area or from the area to points outside thereof: *Provided*, That the term handle shall not include:

* * * * *

3. Revise paragraphs (d) and (e) of § 930.50 to read as follows:

§ 930.50 Marketing Policy.

* * * * *

(d) Final percentages. No later than September 15 of each crop year, the Board shall review the most current

information available including, but not limited to, processed production and grower diversions of cherries during the current crop year. The Board shall make such adjustments as are necessary between free and restricted tonnage to achieve the optimum supply and recommend such final free market tonnage and restricted percentages to the Secretary and announce them in accordance with paragraph (h) of this section. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent shall be the final restricted percentage. With its recommendation, the Board shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Board shall give consideration to the following factors:

- (1) The estimated total production of 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;
- (9) Any estimated release of primary or secondary inventory reserve cherries during the crop year; and
- (10) The quantity of grower-diverted cherries during the crop year.

* * * * *

4. Revise paragraph (a) of §930.58 to read as follows:

§ 930.58 Grower Diversion privilege.

(a) In general. Any grower may voluntarily elect to divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler. Any grower diversions completed in accordance with this section, but which are undertaken in districts

subsequently exempted by the Board from volume regulation under § 930.52(d), shall qualify for diversion credit.

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