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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 930**

**[Doc. No. AMS-FV-13-0030; FV13-930-2 IR]**

**Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Revising Handler Reporting and Grower Diversion Requirements**

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This rule invites comments on changes to handler reporting and grower diversion requirements prescribed under the marketing order for tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin (order). The Cherry Industry Administrative Board (Board) locally administers the order. This rule changes the deadline for submitting the handler reserve plan from November 1 to October 1 and extends the deadline for redeeming or transferring grower diversion certificates from November 1 to June 30 of a given crop year. A crop year is the 12-month period beginning on July 1 of any crop year and ending on June 30 of the following year. These changes will provide the industry with a more

complete and timely picture of the available supply earlier in the season and give handlers more time and flexibility in meeting their obligations under volume regulation.

**DATES:** Effective [INSERT DATE 1 DAY AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]; comments received by [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or Internet: <http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Jennie M. Varela, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 325-8793, or E-mail: Jennie.Varela@ams.usda.gov or Christian.Nissen@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Jeffrey Smutny, Marketing Order and Agreement Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Jeffrey.Smutny@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order and Agreement No. 930, as amended (7 CFR part 930), regulating the handling of tart cherries grown 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 (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This rule changes the deadline for submitting the handler reserve plan from November 1 to October 1 and extends the deadline for redeeming or transferring grower diversion certificates issued by the Board from November 1 to June 30 of a given crop year. These changes will

provide the industry with a more complete and timely picture of the available supply earlier in the season and will provide handlers more time and flexibility in meeting their obligations under volume regulation. The Board unanimously approved these changes at its March 21, 2013, meeting.

Sections 930.58 and 930.59 of the order provide authority for grower and handler diversion, respectively. In particular, §930.59(c) requires that handlers notify the Board of their intent to divert cherries. These sections also provide authority for the Board to establish rules and regulations to administer these provisions, with the approval of the Secretary.

Section 930.159 of the rules and regulations establishes requirements for handler diversion. This section currently states, in part, that handlers intending to divert cherries or cherry products under a volume regulation must notify the Board and submit their plan for complying with that season's restriction obligation by November 1.

Section 930.158 of the order's rules and regulations establishes requirements for using grower diversion certificates. This section currently provides that

handlers redeem grower diversion certificates with the Board by November 1 of the crop year, as the certificates will not be valid after that date.

Section 930.58 of the order was recently amended to exempt cherries diverted in the orchard (grower diversion) from inclusion in a handler's total volume calculation. When a volume regulation is issued, handlers are obligated to keep a percentage of their total volume in reserve or account for the restricted volume with diversion certificates. These certificates can be earned through export sales, new market or new product sales, or through grower diversion. Before the amendment, the volume of cherries represented by a grower diversion certificate was added to the handler's total volume. Following the amendment, handlers can redeem grower diversion certificates without adding tonnage to their total volume.

Amendments to an order often require conforming changes or adjustments to the administrative rules and regulations. The Board created a committee to review the order's diversion and reporting regulations and present any recommended changes to the Board. This rule implements the two recommended changes: changing the due date for the handler reserve plan to October 1, and allowing the

transfer and redemption of grower diversion certificates through the end of the crop year, June 30.

Separating grower diversion certificates from a handler's total volume simplified the completion of the reserve plan. Consequently, the Board believes handlers will be able to complete their reserve plan for restricted tart cherries at an earlier date. As a result, the Board recommended that the deadline for submitting handler reserve plans be changed from November 1 to October 1 of each season. The reserve plan is submitted in combination with a handler's final pack report. The Board consolidates this data and uses it to issue reports on the final volume processed and available inventory. This date change will provide the industry a more complete and timely picture of the available supply earlier in the season. This information is important to the industry, especially when considering the release of additional reserves when a volume regulation is in effect.

Originally, the deadline to redeem grower diversion certificates was tied to the handler reserve plan as handlers needed to account for grower diversion when calculating their total volume. As such, current regulations establish a due date of November 1 for grower

diversion certificates, while other diversion certificates can be transferred throughout the season. With the amendment to the order, grower diversion certificates no longer need to be linked to when the handler reserve plan is due. To bring consistency to the use of diversion certificates, the Board recommended allowing handlers to transfer and redeem grower diversion certificates through the end of the season, June 30. This change also provides handlers additional time and flexibility in meeting restriction obligations.

In addition to adjusting the deadline for submitting the handler reserve plan and extending the deadline for redeeming grower diversion certificates, this rule also makes a minor wording change to § 930.158 to facilitate the change in date.

#### **Initial Regulatory Flexibility Analysis**

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

The purpose of the RFA is to fit regulatory actions to the scale of businesses 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.

There are approximately 600 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$750,000 and small agricultural service firms have been defined as those having annual receipts of less than \$7,000,000 (13 CFR 121.201).

According to data from the National Agricultural Statistics Service and the Board, the average annual grower price for tart cherries during the 2012-13 season was \$0.54 per pound, and total shipments were around 85 million pounds. Therefore, average receipts for tart cherry producers were around \$76,200, well below the SBA threshold for small producers. In 2013, The Food Institute estimated an f.o.b. price of \$0.84 per pound for frozen tart cherries, which make up the majority of processed tart cherries. Using this data, average annual handler receipts

were about \$1.8 million, also below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This rule modifies § 930.159, changing the deadline for submitting the handler reserve plan from November 1 to October 1. This rule also modifies § 930.158 to extend the deadline for redeeming or transferring grower diversion certificates issued by the Board from November 1 to June 30 of a given crop year. These changes are authorized under §§ 930.59 and 930.58, respectively. These changes will provide the industry with a more complete and timely picture of the available supply earlier in the season. In addition, the new deadline for transferring grower diversion certificates will allow handlers more time and flexibility in meeting their obligations under volume regulation.

It is not anticipated that this rule will generate any additional costs for growers or handlers. This action is intended to adjust regulations to reflect recent amendments to the order and to allow the order to function more efficiently. These changes are expected to benefit the industry by providing a clear picture of available supply

earlier in the season, and by allowing handlers more time to utilize grower diversion certificates to meet their restriction under volume regulation. These changes should impact all entities positively, regardless of size.

Regarding alternatives to this action, the Board considered not making any changes to the regulations regarding the handler reserve plan or grower diversion certificates. However, the Board unanimously supported an earlier date for the handler reserve plan as all handlers are aware of the restriction well in advance and it would provide timely information regarding the season. Additionally, the Board determined that changing the deadline for redeeming grower diversion certificates was in line with the industry's objective to have consistency among the application of diversion credits. As such, these alternatives were rejected.

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 as a

result of this action are necessary. Should any changes become necessary, they would be submitted to OMB for approval.

This rule will require changes to Cherry Industry Administrative Board Form 4, "Handler Reserve Plan and Final Pack Report". However, these changes are minor and the currently approved burden for the form remains the same. The revised form has been submitted to OMB for approval.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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.

In addition, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Board's meeting was widely publicized throughout the tart cherry industry and all interested persons were invited to attend the videoconference meeting at regional locations or call in to participate in the Board's deliberations. Like all Board meetings, the March 21, 2013, meeting was a public meeting and all entities, both large and small, were able to express their views on these issues. Finally, interested persons are invited to submit comments on this interim rule, including the regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at:  
[www.ams.usda.gov/MarketingOrdersSmallBusinessGuide](http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide). Any questions about the compliance guide should be sent to Jeffrey Smutny at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

This rule invites comments on changes to handler reporting and grower diversion requirements prescribed under the order. Any comments received will be considered prior to finalization of this rule.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this interim rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The order amendments prompting these changes were implemented on June 7, 2012; (2) the Board unanimously recommended these changes at a public meeting and interested parties had an opportunity to provide input; (3) this change relaxes the date for utilizing grower diversion certificates; (4) handlers begin to make plans regarding diversion requirements in July; and (5) this rule provides a 60-day comment period and any comments received will be considered prior to finalization of this rule.

**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 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.

§ 930.158 [Amended]

2. In § 930.158, paragraph (a) is amended by removing the words "November 1" and adding in their place "June 30" everywhere they appear.

§ 930.159 [Amended]

3. In § 930.159, paragraph (b) is amended by removing the word "November" and adding in its place "October" in the first sentence, and removing the words "certificates redeemed" and adding in their place "certificates to be redeemed" in the fourth sentence.

Dated: July 25, 2013

Rex A. Barnes  
Associate Administrator  
Agricultural Marketing Service

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