

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket Nos. AO-370-A6; FV98-930-2]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Agreement and Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This recommended decision invites written exceptions on proposed amendments to the marketing agreement and order for tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. The amendments were proposed by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. One amendment would clarify the current limitation on the number of Board members that may be from, or affiliated with, a single "sales constituency" by amending the definition of that term. Another would simplify the method used to establish volume regulations for tart cherries. The proposed amendments are intended to improve the operation and functioning of the tart cherry marketing order program.

DATES: Written exceptions must be filed by February 4, 2000.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, room 1081-S, Washington, DC 20250-9200, FAX number (202) 720-9776. Four copies of all written exceptions should be submitted and they should reference the docket numbers and the date and page number of this issue of the **Federal Register**. Exceptions will be made available for public inspection in the Office of the Hearing Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Anne M. Dec, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, Washington, D.C. 20250-0200; telephone: (202) 720-2491, or Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration

Branch, Fruit and Vegetable Programs, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491; Fax (202) 720-5698.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Notice of Hearing issued on November 12, 1998, and published in the November 17, 1998, issue of the **Federal Register** (63 FR 63803).

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

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment of Marketing Agreement and Order No. 930, regulating the handling of tart cherries in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin (hereinafter referred to as the order), and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Anne M. Dec whose address is listed above.

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

The proposed amendment of Marketing Agreement and Order No. 930 is based on the record of a public hearing held in Grand Rapids, Michigan on December 1, 1998, and in Salt Lake City, Utah on December 3, 1998. Notice of this hearing was published in the **Federal Register** on November 17, 1998. The notice of hearing contained proposals submitted by the Board.

The Board proposed two amendments. One would amend the current order provision which defines the term "sales constituency" in order to clarify the intent of the Board membership limitation regarding sales constituency affiliation. The second would simplify the method used to establish volume regulations for tart cherries.

Also, the Fruit and Vegetable Programs of the Agricultural Marketing Service (AMS), proposed to allow such changes as may be necessary to the order, if either or both of the above amendments are adopted, so that all of its provisions conform with the proposed amendment.

Eighteen witnesses testified at the hearing. These witnesses represented

tart cherry growers, processors and marketers in Michigan, Oregon, Washington and Utah. Some witnesses supported the Board's proposed amendments, while others were opposed to the recommended changes.

At the conclusion of the hearing, the Administrative Law Judge fixed February 11, 1999, as the final date for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. That date was later extended to February 26, 1999. Six briefs were filed. Briefs in support of the proposed amendments were filed by the Cherry Industry Administrative Board; Michigan grower Cherry Bay Orchards, Inc.; and CherrCo, Inc. of Ludington, Michigan. Briefs in opposition to one or both of the proposed amendments were filed by Oregon grower Fruithill, Inc.; the Oregon Tart Cherry Association; and Washington grower Washington Tart Cherry.

Material Issues

The material issues of record addressed in this decision are as follows:

- (1) Whether to clarify the current limitation on the number of Board members that may be from, or affiliated with, a single "sales constituency"; and
- (2) Whether to simplify the method used to establish volume regulations for tart cherries.

Findings and Conclusions

The findings and conclusions on the material issues, all of which are based on evidence presented at the hearing and the record thereof, are:

Material Issue Number 1—Definition of Sales Constituency

The current order provision which defines the term "sales constituency" should be amended in order to clarify the intent of the Board membership limitation regarding sales constituency membership or affiliation.

The tart cherry marketing order, which became effective in 1996, covers tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin. The record indicates that while the order covers tart cherries grown in seven States, production is not evenly distributed among those States. To illustrate, the 1998-99 tart cherry crop was about 340 million pounds. Michigan accounted for 76.4 percent of the production, followed by Utah with 9.6 percent, Wisconsin with 4.3 percent, Washington with 4.0 percent, New York with 3.9 percent,

Pennsylvania with 1.2 percent, and Oregon with 0.6 percent.

The record evidence is that there are about 41 tart cherry handlers covered by the program and about 896 growers in the production area. By State, about 72.5 percent of the growers are in Michigan, 9.9 percent in New York, 5.3 percent in Utah, 4.5 percent in Wisconsin, 3.6 percent in Pennsylvania, 2.5 percent in Oregon, and 1.7 percent in Washington.

The program is administered locally by the 18-member Cherry Industry Administrative Board. Among the Board's responsibilities is recommending regulations to implement marketing order authorities. For purposes of Board representation (among other things), the production area is divided into nine districts. Each district is allocated one to four Board members. For those districts with more than one member, only one of those members can be associated with a single "sales constituency." Five of the nine current districts, including all districts subject to volume regulation, are allocated more than one member. Those five districts are Northern Michigan (four members), Central Michigan (three members), Southern Michigan (two members), New York (two members), and Utah (two members). The four districts with one member each are Oregon, Pennsylvania, Washington and Wisconsin. (The eighteenth Board member is selected to represent the general public, and need not be from any specific area.)

The term "sales constituency" is currently defined in § 930.16 of the order to mean a common marketing organization or brokerage firm or individual representing a group of handlers or growers. Section 930.20(f) states that not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board. Record evidence shows that this limitation was designed to prevent any single sales organization from having undue control of Board decision making. Actual control of the sales function was cited as the defining characteristic of a "sales constituency."

The record further indicates that this limitation was designed to prevent the recurrence of a problem that existed under a previous Federal tart cherry marketing order that was in effect from 1971 through 1987. Under the terms of that program, persons affiliated with a single sales organization could fill a majority of Board member seats. This could occur even if that organization accounted for less than a majority of the total volume of tart cherries produced. Under the terms of the previous order,

actions of the Board only required a simple majority vote. This meant that representatives from a single sales organization could pass Board actions without the support of other industry members. Several witnesses testified that the current order requirement that any action be approved by 12 of 18 Board members makes the sales constituency limitation far less critical than it was in the past.

The record shows that the tart cherry industry is comprised of many different types of organizations with varying functions. At one end of the spectrum is a group like Cherry Central, Inc. (Cherry Central). The record indicates that Cherry Central is a federated cooperative with 14 grower cooperative members. Twelve of those cooperatives grow tart cherries. Other commodities marketed by Cherry Central include sweet cherries, blueberries and apples. Cherry Central members grow fruit in Michigan, New York, Utah, Washington, and Wisconsin, as well as in Florida, Georgia and Indiana.

The record indicates that Cherry Central's purpose is to market and sell its members' tart cherries and other products. It acts as the sole sales agent for its members, performing a broad range of sales activities from advertising to quality control. It employs its own sales force that is responsible for soliciting customers, dealing with buyers and negotiating sales. It acts as a single entity in the marketplace, not differentiating among its members' products.

The record indicates that the sales constituency limitation was clearly intended to apply to this type of organization. That was the intent at the time the current order was promulgated when Cherry Central was identified as the type of organization whose Board membership should be limited. No witness offered testimony indicating that such limitation is no longer necessary.

At the other end of the spectrum is an organization known as the Cherry Marketing Institute (CMI). CMI is an organization established under Michigan State law, and its members grow tart cherries in a number of States. CMI's primary function is to conduct generic promotion activities to expand overall sales of tart cherry products. It also conducts research in the areas of processing techniques and product development. CMI activities are funded primarily with tart cherry grower dollars. CMI is not directly involved in the sales of tart cherries.

The record indicates that CMI efforts benefit all tart cherry growers and processors, not only those who

contribute to its operations. At the time the order was promulgated, it was specifically stated that the sales constituency limitation should not apply to CMI. No evidence contrary to this view was presented in the current proceeding.

Another example of an organization that would not constitute a sales constituency under the current order definition is the Michigan Agricultural Cooperative Marketing Association (MACMA). The record indicates that MACMA is another grower organization formed to act on the behalf of tart cherry growers generally. At one time, MACMA was involved in negotiating grower prices, but it no longer performs that function. MACMA's current functions are to collect and disseminate market information to assist growers in making informed decisions. Again, the record contains no evidence which would suggest that MACMA's status under the order should be reconsidered.

Between the two ends of the spectrum is a recently formed federated cooperative named CherrCo, Inc. (CherrCo). The record indicates that this organization was not in existence at the time the order became effective, although preliminary discussions concerning its formation may have been underway. The record contains varying viewpoints as to whether CherrCo should be considered as a single sales constituency for purposes of Board membership under the current order provisions.

The record shows that CherrCo is a federated grower cooperative. It is comprised of 24 member cooperatives. CherrCo's members account for 75–80 percent of Michigan's tart cherry production, and a significant portion of the production in New York, Utah, Washington and Wisconsin. CherrCo currently has no members in Oregon or Pennsylvania. The record indicates that CherrCo members range in size producing from approximately 600,000 pounds of tart cherries per year to more than 50 million pounds of tart cherries per year.

The primary function of CherrCo is to establish minimum prices for tart cherries. Minimum prices are established for various grades and packs of frozen and hot pack tart cherries, but not for pie fill, dried cherries, or other products. All CherrCo's members agree to sell their frozen and hot pack tart cherry products at or above these minimum prices.

Record evidence further indicates that CherrCo is not directly involved in the actual sales of its members' products. Instead, each member individually selects a sales agent. These agents then

work to generate and consummate sales for the individual CherrCo member, not for CherrCo itself. No cherries are sold under the CherrCo name, but rather under that of the CherrCo member or the sales agent. CherrCo members are free to change their sales agents whenever they so choose.

According to record evidence, competition among CherrCo members is strong, unlike that of members of other organizations such as Cherry Central. Cherry Central, for example, works as a single unit to sell the products of its members, and there is no competition among its members to secure sales. CherrCo members, on the other hand, compete with each other, as well as with non-CherrCo members to secure sales of their products. The record evidence is that while CherrCo members' sales agents agree to meet the minimum prices established by CherrCo, there are many other ways that individual companies compete to obtain sales (that is, other than on the basis of price). These include, for example, the product mix offered by individual companies. Testimony indicates that while some CherrCo members offer an extensive mix of tart cherry and other products, others specialize in a single product (for example, frozen tart cherries). Other ways individual companies that belong to CherrCo differentiate themselves are on their own reputations, on the quality of the products they offer, on any special services they supply to their customers, and on whether or not their processing plants are certified to conform with certain sanitation standards.

The record shows that CherrCo does not perform functions other sales organizations may. CherrCo does not make any processing or sales decisions. It does not direct how much its members should produce, what products they should produce, or for whom. Sales information is treated as proprietary and is not shared with CherrCo's membership. Information such as who is selling to whom and at what price is kept confidential. Witnesses testified that this is unlike the way Cherry Central operates. In that organization, members share information on customers and quantities sold.

The record also shows that, in addition to establishing minimum prices, CherrCo performs other functions for its members. Most of these functions relate directly to ensuring that its members are complying with their agreement to abide by the established minimum prices. The record shows, for example, that CherrCo licenses its sales agents. All CherrCo members agree to

sell only through these licensed sales agents. In order to become licensed, the sales agents agree to conform to CherrCo's pricing structure. The record indicates that CherrCo currently has 10 licensed sales agents, all of which also agree to only market CherrCo members' products.

CherrCo performs other functions as well, such as collecting proceeds from sales and distributing them to its members. The record indicates that subsequent to processing by a CherrCo member, tart cherries are sent to a storage facility (for example, a freezer). At that time, the cherries are consigned to CherrCo. On paper, the cherries belong to CherrCo, although they are not physically in CherrCo's possession. CherrCo is then informed of any sale by the member's sales agent and, if the minimum pricing requirements are met, the cherries are released by CherrCo for movement. CherrCo then bills the buyer, collects the proceeds, and remits those proceeds to the pertinent member after subtracting an administrative charge to cover its expenses.

It was testified that CherrCo employs a staff of four individuals, including its President. None of these individuals are engaged in negotiating sales with current or prospective buyers on behalf of CherrCo members. One employee is responsible for billing, and disbursing sales receipts. Another monitors sales agreements between licensed sales agents and buyers, and releases tart cherries for movement if those agreements conform with CherrCo's minimum pricing requirements. A third employee tracks the inventory consigned to CherrCo. The President oversees the day-to-day operations of the organization and is responsible for member relations. Again, none of these employees is actively engaged in arranging for the sale of tart cherry products.

The Board's recommended amendment would revise the current definition of "sales constituency" to specifically exclude an organization which receives consignments of tart cherries but does not direct where those cherries are sold. This exclusion would mean that entities which perform functions and services such as CherrCo would not be considered sales constituencies, and their representation on the Board would not be subject to the limitation in § 930.20(f) of the order.

Witnesses supporting the Board's proposal agreed with the proponents' intent at the time of the order's promulgation that control of sales should be the criteria for determining whether an organization is considered a sales constituency. They also testified

that CherrCo is more akin to CMI than to Cherry Central because its activities benefit everyone in the tart cherry industry, not just its members. There was testimony to the effect that limiting representation on the Board by CherrCo members could disenfranchise many tart cherry growers. That is, many growers would be deprived of adequate representation on the Board. This is because such a high percentage of growers are affiliated with CherrCo. The record indicates this would be particularly true in certain districts. Several witnesses stated that in District 2—Central Michigan—almost all tart cherry growers and handlers are affiliated with CherrCo. Since District 2 has three positions on the Board, this could result in two vacant seats in a district that produces over 17 percent of the tart cherry crop. A similar situation could exist in Northern Michigan (District 1), the largest growing area with four Board positions. Witnesses estimated that growers and handlers accounting for between 70 and 80 percent of that area's cherries are affiliated with CherrCo. Limiting those growers and handlers to only one of the District's four seats may make it more difficult to fill the remaining positions. The proponents indicated that even if qualified candidates could be found to serve in those Board positions, it would not provide equitable representation for the majority of growers in that district.

Industry witnesses supporting the Board's proposed amendment were all affiliated with CherrCo in some way. Three witnesses not affiliated with CherrCo presented opposition testimony. One, a grower/processor in Oregon, suggested that the current Board is improperly constituted. This witness believed that CherrCo is indeed a sales constituency as currently defined under the order. He was opposed to any single interest group being able to control the Board, and believed the Board's proposal would allow just that.

The witness suggested two alternatives. One was to prohibit any sales constituency from having more than half the seats on the Board. The other would prohibit any industry group (rather than just a sales constituency) from having more than one seat per district. His stated objective was to provide the Department with additional methods of allocating Board membership in ways that would ensure that the interests of small, remote, independent growers are protected. In the brief filed by this witness, he recommended that the Board's proposed amendment be rejected, and that this issue be referred back to the Board for reconsideration.

A tart cherry grower/handler from Washington had similar concerns about CherrCo being able to control Board decisions. He suggested that the current sales constituency limitation be applied to industry groups like CherrCo. He also proposed that an additional requirement be added to the order to provide that no sales constituency could have more than a total of eight members on the Board. In his brief, he further proposed that limitations on Board membership should apply to all industry organizations, not only to sales constituencies.

The third witness offering evidence in opposition to the Board's proposal was a tart cherry grower and handler in Utah. He agreed with the statements made earlier in this decision that Cherry Central is an industry group whose membership on the Board should be limited, whereas CMI is not. He disagreed, however, with the proponents' classification of CherrCo. His testimony was that CherrCo does perform important sales functions for its members such as minimum pricing and billing, collecting and disbursing sales receipts. CherrCo's members have common economic and proprietary interests. As such, the marketing order needs to have some provisions to ensure that industry members outside that organization have a voice in Board deliberations.

This witness suggested that one or more "at-large" industry member positions be added to the Board. These members could be from any district in the production area. This proposal would provide growers in districts heavily dominated by CherrCo with an alternative—that is, to vote for representatives other than those supported by CherrCo affiliates.

There are many different ways the Board's membership could be allocated. There are some fundamental issues, however, that the alternative proposals offered on the record fail to address.

The record shows that there are varying interests among tart cherry growers and handlers, dependent in large part on the district in which they are located. One critical difference, of course, is that some of the districts are subject to volume regulation while others are not. Other differences among districts include varying growing and marketing conditions. It is the Department's view that any scheme for Board membership allocation must ensure that growers in each production district have fair representation in program matters. As previously discussed, restrictions on CherrCo's membership on the Board would impact different growing areas differently. For

example, growers in some of the highest volume producing areas could be prevented from having adequate representation on the Board. None of the alternatives proposed adequately address this concern.

Based on record evidence, the Department has determined that the differences between the functions of an organization such as CherrCo and other organizations that qualify as sales constituencies under the current order definition of that term are such that these organizations should not be considered to be "sales constituencies" for the purpose of the order limitation concerning Board membership.

CherrCo members do not act as a single interest group. Rather, the interests of individual members are sufficiently diverse to preclude the need to limit their representation on the Board. Adequate safeguards exist for ensuring the fair consideration of all industry segments in implementing the program. These include the geographic allocation of membership, the super-majority voting requirement for Board actions, the public rulemaking process followed to implement any regulatory actions, and the Department's role in overseeing operation of the program.

For these reasons, the Department is recommending adoption of the Board's proposed amendment to § 930.16 *Sales Constituency*. This section would be amended by adding the following sentence: "An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency."

Material Issue Number 2—Revision of Optimum Supply Formula

The tart cherry marketing order should be amended to simplify the procedures followed to establish volume regulations.

A principal feature of the tart cherry marketing order is supply management through the use of volume regulations. The order provides that production area districts with annual production of less than 15 million pounds of cherries are not subject to volume regulation. Under this provision, volume regulations have not applied to cherries grown in Oregon, Pennsylvania, Washington and Wisconsin.

Volume regulations are implemented through the establishment of free and restricted percentages, that are recommended by the Board and implemented by the Department through the public rulemaking process. These percentages are then applied to each regulated handler's acquisitions in a given season. "Free market tonnage

percentage" cherries may be marketed in any outlet. "Restricted percentage" cherries must be withheld from normal commercial outlets. This can be accomplished by either placing the cherries into handlers' inventories or by diverting them. Cherries may be diverted in the orchard or at the processing plant; placed into a reserve pool; or sold in secondary markets. These secondary markets include exports (except to North America or Japan), and new products. Sales of restricted percentage cherries to these specified exempt markets receive diversion credits which handlers use to fulfill their restricted obligation.

The record indicates that the primary objective of tart cherry volume regulations is to balance supplies with market demand, thereby stabilizing the market and improving grower and processor returns. A second objective is to encourage market growth by allowing restricted percentage cherries to be sold in secondary markets (for example, most export markets). Witnesses attributed much of the improvement in recent cherry market conditions to the use of volume regulations in the 1997/98 and 1998/99 seasons.

The order currently sets forth an "Optimum Supply Formula" (OSF) which the Board must follow in its consideration of annual free and restricted percentages. First, the Board considers the available supply of tart cherries. This is the sum of the annual crop estimate and the carry-in supply from previous crop years. The Board next computes the optimum supply and compares it with the available supply. If the available supply exceeds the optimum supply, then a surplus exists, calling for the use of supply controls. The calculated surplus is then divided by the projected production in the regulated districts to derive the restricted percentage.

The optimum supply is currently defined as 100 percent of the average sales of the prior 3 years, to which is added a desirable carryout inventory not to exceed 20 million pounds (or such other amount as the Board, with the Secretary's approval, may establish). According to the record, using 100 percent of prior years' sales may result in an overstatement of the optimum supply. This is because those total sales include not only sales to the primary market, but sales of restricted percentage cherries to secondary markets as well. Currently, all sales of restricted percentage cherries that receive diversion credits are included in the total sales figure.

The record shows that including the sales of restricted percentage cherries in

the optimum supply may understate the projected surplus which would then result in a higher free percentage than supply and market conditions warrant. Making too many tart cherries available to be sold in the primary market could obviate the objectives of supply management. In the years that tart cherry volume regulations have been used, this issue has been addressed through use of an adjustment in order to achieve an optimum supply of cherries in the marketplace. Once a surplus has been computed (deducting the optimum from the available supply), sales of restricted percentage cherries to secondary markets are added back to the surplus as an economic adjustment. The Board's recommended amendment would revise the order procedures currently used in calculating the optimum supply. Under its proposal, the optimum supply would be equal to the 3-year average sales in primary markets (total sales less sales to markets eligible for diversion credit) plus the target carryout. It is intended that all sales of restricted percentage cherries that receive diversion credits would be deducted from the optimum supply calculation, except as discussed later in this decision.

The record indicates that this change would simplify current procedures and make them easier for tart cherry growers and processors to understand. This would benefit the industry without changing the actual level of regulation.

The following example was presented at the hearing to illustrate the change being proposed. The example uses numbers from the 1997 tart cherry crop. With the exception of the regulated percentages, all numbers are in million pound units.

	With current approach	With proposed approach
U.S. Crop Size ..	285	285
Carryin	+70	+70
Total Available Supply	355	355
Optimum Supply Formula		
3 Year Average Industry Sales	270	270
Adjustment for Diversion Credits	-23
Target Carry-out	+0	+0
Optimum Supply	270	247
Surplus	85	108

	With current approach	With proposed approach
Adjustment for Economic Conditions ..	23
Surplus after Adjustment	108	108
Production in Regulated Districts	240	240
Regulated Percentage	45%	45%

While no evidence was received at the hearing in overall objection to this change, one portion of the proposal did generate some disagreement. The Board's proposed amendment stated that the optimum supply volume shall be calculated as "100 percent of the average sales of the prior three years, reduced by the sales that represent dispositions of restricted cherries qualifying for diversion credit, unless the Board votes to do otherwise * * *". This last phrase, "unless the Board votes to do otherwise," was objectionable to some witnesses.

Evidence shows that this phrase is intended to allow the Board a limited amount of flexibility in recommending free and restricted percentages appropriate for a specific season. The record shows that this provision is intended only to enable the Board to revise the volume of restricted sales it subtracts from total sales in determining the optimum supply, and only if economic and other conditions warrant such a revision. This provision would not allow a wholesale change in the way free and restricted percentages are calculated.

Record evidence indicates that in most years, the Board would be required to use the optimum supply formula set forth in the order (that is, 100 percent of average sales reduced by sales of restricted percentage cherries). Witnesses provided several examples of situations where a revision in the volume subtracted from total sales might be needed.

One example given was that of a freeze in another producing country. Under such a circumstance, reduced supplies from a foreign source would provide additional marketing opportunities for the U.S. tart cherry industry. An increased optimum supply (by reducing the amount of sales of restricted percentage cherries from total sales) would enable the industry to take advantage of these opportunities.

A second example involved export sales. As previously described, sales of restricted percentage cherries in certain secondary (or exempt) markets qualify

for diversion credits. Those secondary, exempt markets are defined through the informal rulemaking process and can change over time. If those exempt markets are redefined, an adjustment in the optimum supply would be needed to reflect that change. For example, sales of restricted percentage cherries to export markets (except North America and Japan) currently qualify for diversion credits. If exports were no longer considered a secondary, exempt market, but part of the primary market, subtracting past years' export sales from total sales would result in an optimum supply that would allow too few cherries available for the newly defined primary market. In this situation, sales of restricted percentage cherries to export markets would not be subtracted from total sales. On the other hand, if a new market were designated as a secondary, exempt market, sales to that new market in previous years might need to be subtracted from total sales in those years. Otherwise, the optimum supply could allow too many cherries to enter the primary market.

The record supports allowing the Board some discretion in determining the amount of sales of restricted percentage cherries it subtracts from total sales to derive the optimum supply. As shown in the examples above, that amount could be greater or less than actual sales of restricted cherries in the defined previous period (three years).

Witnesses objecting to the Board's proposed amendment believed that this phrase would give the Board too much discretion in establishing volume regulations. For example, they believed that the Board could choose to use an equation to compute free and restricted percentages that was totally different from that contained in the order. Additionally, it was believed that the Board could use a different procedure in establishing its preliminary percentages (done on or about July 1) than in establishing its final percentages (done by September 15, adjusted for actual production). It was testified that significant changes in procedures from one season to another, and particularly within a single season, would be extremely disadvantageous to growers and processors. This is because industry members make decisions based on their expectations of what program requirements will be. Constantly changing these requirements would therefore create chaos rather than stability in the tart cherry industry.

Based on record testimony, it is clear that this provision is intended to provide only limited discretion to the Board. The Board should, with adequate

justification and the Secretary's approval, have the discretion to adjust the volume of sales of restricted percentage cherries it subtracts from total sales to derive its annual optimum supply, if such an adjustment is needed to promote orderly marketing conditions. Barring an emergency, a major change in economic conditions, or other like circumstances, the amount subtracted cannot later be changed within a given season, except as may be necessary to replace any estimates of sales used at the time preliminary percentages are recommended with actual figures known at the time final percentages are established.

Further, the fact that any such adjustment would require the vote of 12 of the 18 Board members and that such an adjustment would require the Secretary's approval through the public rulemaking process should serve as sufficient safeguards to ensure the judicious use of this discretion.

The proposed amendment to § 930.50(a) of the order which appeared in the notice of hearing has been changed by the Department to clarify (for the reasons discussed above) that the discretion provided by this phrase only pertains to the volume of sales of restricted percentage cherries that is subtracted from total sales to derive the optimum supply.

In addition, witnesses proposed one clarifying change in the language contained in the notice of hearing. As previously indicated, the optimum supply volume is calculated as 100 percent of the average sales of the prior three years. The Board's amendment, as set forth in the notice of hearing, proposed that this total be reduced by sales of restricted cherries qualifying for diversion credit. However, no time period was specified for the sales of restricted cherries that were to be subtracted from the total sales. The record indicates that the same 3-year average should be used for both total sales and the sales of restricted cherries qualifying for diversion credits. Such language has been added to § 930.50(a) to clarify this point.

One other change is being made in the language in § 930.50(a) by the Department. The language in the notice of hearing referred to sales of "restricted cherries." This phrase has been changed to "restricted percentage cherries" since that phrase is defined in § 930.15 of the order and is a more accurate phrase to use.

For the above reasons, the Department is recommending that § 930.50(a) be amended to provide that sales of restricted percentage cherries qualifying for diversion credits be subtracted from

total industry sales in deriving the optimum supply of tart cherries.

The Agricultural Marketing Service proposed to make such changes as may be necessary to the order to conform with any amendment that may result from the hearing. No necessary conforming changes have been identified by the Department.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.601) as those having annual receipts of less than \$500,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$5,000,000.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments on small businesses. The record indicates that growers and handlers would not be burdened by any additional regulatory requirements, including those pertaining to reporting and recordkeeping, as a result of these proposed amendments.

The record indicates that during the 1998–99 crop year, approximately 41 handlers were regulated under Marketing Order No. 930. In addition, there were about 896 producers of tart cherries in the production area. 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. Thus, both the RFA and the Act are compatible with respect to small entities.

The 1998–99 tart cherry crop was about 340 million pounds. The record indicates that of the 41 tart cherry handlers, 12 had processed tonnage of more than 10 million pounds (or 29 percent of all handlers); 4 had between 5 and 10 million pounds (10 percent); 15 had between 1 and 5 million pounds (37 percent); and the remaining 10 had less than 1 million pounds of processed tonnage (24 percent). Handlers accounting for 10 million pounds or more would be classified as large businesses. Thus, a majority of tart

cherry handlers could be classified as small entities. The majority of tart cherry processors are located in Michigan. Many handle cherries grown in more than one district. Michigan accounted for 76.4 percent of the production, followed by Utah with 9.6 percent, Wisconsin with 4.3 percent, Washington with 4.0 percent, New York with 3.9 percent, Pennsylvania with 1.2 percent, and Oregon with 0.6 percent. By State, about 72.5 percent of the growers are in Michigan, 9.9 percent in New York, 5.3 percent in Utah, 4.5 percent in Wisconsin, 3.6 percent in Pennsylvania, 2.5 percent in Oregon, and 1.7 percent in Washington.

Dividing total production by the number of growers, the average grower produces about 380,000 pounds of cherries annually. With grower returns of about 20 cents per pound, average revenues would be \$76,000. Thus, it is reasonable to conclude that most tart cherry growers are small entities.

At 20 cents per pound, a grower would have to produce 2.5 million pounds of cherries to reach the \$500,000 receipt threshold to qualify as a large producing entity under the SBA's definition. No record evidence was provided to indicate how many tart cherry growers produce 2.5 million pounds or more. One witness testified, however, that an estimated 150 growers (about 17 percent of the total number of growers) produce in excess of 1 million pounds, with the remainder producing less than that. With a majority of growers producing less than 1 million pounds, it follows that a majority of growers produce less than 2.5 million pounds. This supports the conclusion that the majority of tart cherry growers are small businesses. By State, however, average grower size varies considerably. The average grower in Washington accounts for roughly 910,000 pounds of cherries. Next in size is Utah with 680,000 pounds, followed by Michigan (400,000 pounds), Wisconsin (370,000 pounds), New York (150,000 pounds), Pennsylvania (130,000 pounds), and Oregon (100,000 pounds).

This decision recommends two amendments to the tart cherry marketing order. One would clarify the current limitation on the number of Board members that may represent a single "sales constituency." The second would simplify the method used to establish volume regulations for tart cherries.

Definition of Sales Constituency

Section 930.20 of the tart cherry marketing order provides for an 18-member Cherry Industry Administrative Board to assist the Department in

administering the program. That section also divides the production area into nine districts for purposes of representation on the Board and allocates membership among those districts. Five of the nine current districts, including all districts subject to volume regulation, are allocated more than one member. Those five districts are Northern Michigan (four members), Central Michigan (three members), Southern Michigan (two members), New York (two members), and Utah (two members). The four districts with one member each are Oregon, Pennsylvania, Washington and Wisconsin. (The eighteenth Board member is selected to represent the general public, and need not be from any specific area.)

Section 930.20 further provides that for those districts allocated more than one member, only one of those members can be affiliated with a single sales constituency. Section 930.16 currently defines a sales constituency to mean a common marketing organization or brokerage firm or individual representing a group of handlers or growers.

The proposed amendment to § 930.16 would provide that an organization that receives consignments of cherries but does not direct where those cherries are sold would not be considered a sales constituency. The growers and handlers affiliated with such an organization would not be limited in their representation on the Board.

The record shows that one of the Board's primary responsibilities is to recommend regulations to implement the marketing order's authorities relating to supply management, or volume regulation. Volume regulations benefit all industry members, both large and small, by matching demand in primary markets with available supplies of tart cherries. These regulations also serve to expand sales in secondary markets. The result is improved grower and processor returns.

The record shows that approximately 11 of the current 18 members of the Board are affiliated in some way with CherrCo, the organization which raised the question of the intended meaning of the term sales constituency. Applying the current order limitation on the number of members representing a single sales constituency to CherrCo would result in five of the current Board members being declared ineligible to serve on the Board. All of these members represent regulated districts—four in Michigan and one in New York.

The record shows that CherrCo is a federated grower cooperative. It is comprised of 24 member cooperatives. CherrCo's members account for 75–80

percent of Michigan's tart cherry production, and a significant portion of the production in New York, Utah, Washington and Wisconsin. CherrCo currently has no members in Oregon or Pennsylvania. The record indicates that the primary function of CherrCo is to establish minimum prices for certain tart cherry products. The record indicates that CherrCo is not directly involved in the actual sales of its members' products. There is intense competition among its members (as well as between its members and non-members) to sell tart cherries. The competition for sales is on the basis of individual handlers' reputations, on the quality and mix of the products they offer, on any special services they supply to their customers, and on whether or not their processing plants are certified to conform with certain sanitation standards.

Opponents of the Board's proposal believe that not limiting CherrCo's representation would result in the elimination of certain safeguards incorporated in the order to preserve the varying interests of tart cherry growers and processors, especially those outside the major producing area of Michigan. These safeguards include the requirement that Board actions be passed by a super-majority (12 of 18 members), that Board representation be allocated among districts, and that districts accounting for less than 15 million pounds of production be exempt from volume regulations.

None of these program requirements could be changed by Board action alone. All would require an order amendment through the formal rulemaking process, including public hearings and the Department's analysis of impacts of costs and benefits to small and large growers and processors. Additionally, record evidence shows that individual CherrCo members have sufficiently diverse interests to preclude them from voting alike on all issues before the Board.

Based on the evidence in the record, it is the Department's conclusion that an organization such as CherrCo should not be considered a sales constituency. Limiting Board representation by members of organizations such as CherrCo would be inconsistent with the proper functioning of the order and would be contrary to the original intent of the limitation on Board representation. This proposed amendment should be favorable to both large and small entities.

Revision of the Optimum Supply Formula

A principal feature of the tart cherry marketing order is supply management through the use of volume regulations. Authority for such regulations appears in § 930.51 of the marketing order.

Volume regulations are implemented through the establishment of free and restricted percentages. Such percentages are recommended by the Board in accordance with § 930.50 of the order, and, if deemed appropriate, implemented by the Department through the public rulemaking process. These percentages are then applied to each regulated handler's acquisitions in a given season. "Free market tonnage percentage" cherries may be marketed in any outlet. "Restricted percentage" cherries must be withheld from the primary market. They may be diverted in the orchard or at the processing plant; placed into a reserve pool; or sold in secondary markets. These secondary markets include exports (except to North America or Japan), and new products. Sales of restricted percentage cherries to these specified exempt markets receive diversion credits which handlers use to fulfill their restricted obligation.

The record indicates that the primary objective of tart cherry volume regulations is to balance supplies with market demand, thereby stabilizing the market and improving grower and processor returns. A second objective is to encourage market growth by allowing restricted cherries to be sold in secondary markets (for example, most export markets). Witnesses attributed much of the improvement in recent cherry market conditions to the use of regulation in the 1997/98 and 1998/99 seasons.

The order currently sets forth, in § 930.50, an "Optimum Supply Formula" (OSF) which the Board must follow in its consideration of annual free and restricted percentages. The optimum supply is currently defined as 100 percent of the average sales of the prior 3 years, to which is added a desirable carryout inventory.

The record indicates that using 100 percent of prior years' sales results in an overstatement of the optimum supply. The record shows that including the sales of restricted cherries in the optimum supply understates the projected surplus and results in a higher free percentage than supply and market conditions warrant. This is because those total sales include not only sales to the primary market, but to secondary markets as well.

In the years that tart cherry volume regulations have been used, this issue has been addressed through use of an adjustment in order to achieve an optimum supply of cherries in the marketplace. Once a surplus has been computed (deducting the optimum from the available supply), the sales to secondary markets are added back to the surplus as an economic adjustment. The Board's recommended amendment would revise the procedures currently used in calculating the optimum supply. Under its proposal, the optimum supply would be equal to the 3-year average sales in primary markets (total sales less sales to markets eligible for diversion credit) plus the target carryout. This would simplify the method of arriving at an optimum supply figure and would be easier for tart cherry growers and processors to understand. Therefore, any regulatory impact on growers or handlers would be minimal or non-existent.

The record evidence supports the conclusion that this amendment would result in no extra costs to growers or processors in that any resulting level of volume regulation would be similar to what is currently in effect and its economic effect on the industry would be similarly analyzed in each instance. It would benefit industry members both large and small, however, because the process relating to the establishment of volume regulations would be less confusing and more readily understood by industry members. This process is used by growers and handlers in making seasonal decisions (including those relating to harvesting cherries). To the extent that this process is more readily understood, all in the industry should benefit.

The collection of information under the marketing order would not be affected by these amendments to the marketing order. Current information collection requirements for Part 930 are approved by OMB under OMB number 0581-0177.

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.

The Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

Board meetings regarding these proposals as well as the hearing dates were widely publicized throughout the tart cherry industry, and all interested

persons were invited to attend the meetings and the hearing and participate in Board deliberations on all issues. All Board meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that this rulemaking may be completed prior to the upcoming season. All written exceptions timely received will be considered and a grower referendum will be conducted before these proposals are implemented.

Civil Justice Reform

The amendments proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the amendments.

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 exempted therefrom. A 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 to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

Rulings on Briefs of Interested Persons

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

General Findings

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

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

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

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

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

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

Recommended Amendment of the Marketing Agreement and Order

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

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. In part 930, § 930.16 is revised to read as follows:

§ 930.16 Sales Constituency.

Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

3. In § 930.50, paragraph (a) is revised to read as follows:

§ 930.50 Marketing policy.

(a) *Optimum supply*. On or about July 1 of each crop year, the Board shall hold

a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years, reduced by the average sales that represent dispositions of restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is necessary to recommend otherwise with respect to sales of restricted percentage cherries, to which shall be

added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

* * * * *

Dated: December 29, 1999.

Kathleen A. Merrigan,

Administrator, Agricultural Marketing Service.

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