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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97-930-6 PR]

Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 1997-98 Crop Year for Tart Cherries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposal invites comments on the establishment of final free and restricted percentages for the 1997-98 crop year. The percentages are 55 percent free and 45 percent restricted. These percentages would establish the proportion of cherries from the 1997 crop which may be handled in normal commercial outlets and are intended to stabilize supplies and prices, and strengthen market conditions. This proposed rule would also establish the date by which restricted percentage obligations must be satisfied and a 30-day grace period. This rule was recommended by the Cherry Industry Administrative Board (Board), which locally administers the marketing order. The free and restricted percentages in this proposal would not apply to handlers in the districts of Southwest Michigan, Oregon, Pennsylvania, Washington and Wisconsin.

DATES: Comments must be received by February 5, 1998.

ADDRESSES: Interested persons are invited to submit written comments concerning this action. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 720-5698. All comments should reference the docket 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.

FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-2491. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525-S, Washington, DC 20090-6456; telephone: (202) 720-2491; Fax: (202) 720-5698.

SUPPLEMENTARY INFORMATION: This proposal is issued under marketing agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This rule establishes final free and restricted percentages for tart cherries for the 1997-98 crop year, July 1, 1997, through June 30, 1998. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempt therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the

hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season. Regulations setting free and restricted percentages apply to all handlers of tart cherries that are in the regulated districts. Tart cherries in the free percentage category may be marketed, while restricted percentage cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with section 930.59. The regulated Districts for this season are: District one—Northern Michigan; District two—Central Michigan; District four—New York; and District seven—Utah. Districts three, five, six, eight and nine (Southwest Michigan, Oregon, Pennsylvania, Washington, and Wisconsin, respectively) would not be regulated for the 1997-98 season.

The order prescribes under section 930.52 that the districts to be regulated shall be those districts in which the average annual production of cherries over the prior three years has exceeded 15 million pounds. Districts not meeting the 15 million pound requirement would not be regulated. Therefore, for this season, handlers in the districts of Oregon, Pennsylvania, Washington, and Wisconsin would not be subject to volume regulation. In addition, Southwest Michigan handlers would not be subject to volume regulation this season because their estimated production fell below 50 percent of the average annual processed production in that district in the previous five years. Section 930.52(d) of the order provides that when this occurs that district would be exempt from any volume regulation if, in that year, a restricted percentage is established. Southwest Michigan's tart cherry production was subjected to a freeze during early bud development that reduced its crop yield for the 1997 season.

Section 930.50(a) describes procedures for computing an optimum

supply for each crop year. The Board must meet on or about July 1 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 is calculated as 100 percent of the average sales of the prior three years 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. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year. This optimum supply volume shall be announced by the Board in accordance with section 930.50(h).

The order also provides that on or about July 1 of each crop year, the Board should establish a preliminary free market tonnage percentage based on the optimum supply formula. To calculate such percentage the Board should deduct the carryin inventory to determine the tonnage requirements (adjusted to raw product equivalent—the actual weight of cherries handled to process into cherry products) for the current crop year which will be

subtracted by the current year USDA crop forecast. If the resulting number is positive, this would represent the estimated over-production which would need to be the restricted percentage tonnage. This restricted percentage tonnage would then be divided by the sum of the USDA crop forecast for the regulated districts to obtain the percentages for the regulated districts. If the resulting quotient is 100 percent or more, the Board should establish a preliminary free market tonnage percentage of 100 percent. If the quotient is less than 100 percent, the Board should establish a preliminary restricted tonnage percentage equivalent to the quotient, rounded to the nearest whole number, with the compliment being the preliminary free tonnage percentage.

The Board met on June 26–27, 1997, and computed, for the 1997–98 crop year, an optimum supply of 247 million pounds. This number was calculated by using 270 million pounds for the average three year sales figure and subtracting 23 million pounds for exports that could have received diversion credit. The Board recommended that the carryout figure

be zero pounds. The Board calculated preliminary free and restricted percentages as follows: The optimum supply was 247 million pounds; a 70 million pound carryin subtracted from that yielded a tonnage requirement for the current crop year of 177 million pounds. The tonnage requirement for the current crop year was subtracted from the USDA crop estimate of 242 million pounds, resulting in an estimated restricted percentage tonnage of 65 million pounds of tart cherries. The estimated restricted percentage tonnage was divided by the USDA crop estimate for the regulated districts of 192 million pounds which resulted in 66 percent free and 34 percent restricted for the 1997–98 season. The Board recommended these percentages by a 17 to 1 vote. No reason was provided for the one dissenting vote. The Board recommended the percentages and announced them to the industry as required by the order.

The preliminary percentages were based on the USDA production estimate and the following supply and demand information for the 1997–98 crop year:

	Millions of pounds
Optimum Supply Formula	
(1) Average sales of the prior three years	270
(2) Plus carryout	0
(3) Less amount for exports that would have received diversion credit	23
(4) Optimum Supply calculated by the Board at the June meeting	247
Preliminary Percentages	
(5) Less carryin as of July 1, 1997	70
(6) Tonnage requirement for current crop year	177
(7) USDA crop estimate	242
(8) Estimated restricted percentage tonnage (item 7 minus item 6)	65
(9) USDA crop estimate for regulated districts	192
Percentages	
	Free Restricted
(10) Preliminary percentages (item 8 divided by item 9)×100	66 34

The Board may adjust the estimated crop production as the actual pack is realized and interim percentages may be announced between July 1 and September 15 of the crop year.

Section 930.50(d) of the order requires the Board to meet no later than September 15 to recommend final free and restricted percentages to the Secretary. The Board met on September 11–12, 1997, and recommended final free and restricted percentages of 55 and 45, respectively. At that time, the Board had available actual production amounts to review and made the necessary adjustments to the percentages. The Board used a revised

optimum supply figure of 270 million pounds for its final percentage calculations because it was determined that exports of 23 million pounds should not have been deducted from the average sales figure.

A 70 million pound carryin was subtracted from the optimum supply, which yields a tonnage requirement for the current crop year of 200 million pounds. The actual production reported by the Board was 284 pounds, a 42 million pound increase from the USDA crop estimate. The increase in the crop was due to very favorable growing conditions in portions of the State of Michigan this season. Subtracted from

the Board reported production is the tonnage required for the current crop year (200 million pounds) which results in an 84 million pound surplus. An adjustment for changed economic conditions of 23 million pounds was added to the surplus, pursuant to section 930.50(f). This adjustment is discussed later in this document. This yielded a total surplus of 107 million pounds of tart cherries. The free and restricted percentages would only apply to those handlers in regulated districts. Therefore, the percentages would be calculated by dividing the restricted tonnage volume by the regulated districts' production. The total surplus

of 107 million pounds is divided by the 239 million pound volume of tart cherries produced in the regulated districts. This results in a 45 percent restricted percentage and a corresponding 55 percent free percentage for those districts that would be regulated.

Section 930.51(d) provides that the Board, with the approval of the Secretary, shall develop rules and regulations which shall provide

guidelines for handlers in complying with any restricted tonnage requirements, including but not limited to, a grace period of at least 30 days to segregate and appropriately document any tonnage they wish to place in the inventory reserve and to assemble any applicable diversion certificates. A previous rulemaking action published in the **Federal Register** on January 6, 1998, [63 FR 399], provided such guidelines. However, that action did not

establish a date by which restricted tonnage requirements must be satisfied or a 30-day grace period. This rule proposes to require that restricted tonnage obligations must be met when this proposed rule becomes final with a 30-day grace period added to that date.

The final percentages are based on the Board's reported production figures and the following supply and demand information for the 1997-98 crop year:

		Millions of pounds
Optimum Supply Formula		
(1) Average sales of the prior three years		270
(2) Plus carryout		0
(3) Optimum Supply calculated by the Board at the September meeting		270
Final Percentages		
(4) Less carryin as of July 1, 1997		70
(5) Tonnage required current crop year		200
(6) Board reported production		284
(7) Surplus (item 6 minus item 5)		84
Modification to Marketing Policy		
(8) Economic adjustment to surplus		23
(9) Adjusted surplus (item 7 plus item 8)		107
(10) Production in regulated districts		239
Percentages		
	Free	Restricted
(11) Final Percentages (item 9 divided by item 10)×100	55	45

As previously mentioned, the Board had made an earlier recommendation to modify the optimum supply formula by defining average sales to not include exports that were granted diversion credit. However, it was determined that exports should not have been subtracted from the average sales figure. The Board thus recommended at its September meeting that the marketing policy be modified by 23 million pounds due to changes in economic conditions as provided under section 930.50(e)(5) and (7) and (f).

By recommending the 23 million pound modification, the Board believes that it will provide stability to the marketplace and the industry will be in a better situation for future years since new markets will have been developed. Board members discussed at that meeting that, if this adjustment is not made, growers, due to an abundant supply of available tart cherries, could be paid less than their production costs, because handlers could suffer financial losses. Handlers might have to default or renegotiate contracts with buyers due to additional cherries being available on the domestic market, which could have a depressing impact on prices received for all tart cherries. These costs would likely be passed on to growers. In addition, the value of cherries already in

inventory could be depressed by 20 to 50 percent due to a 23 million pound increase to an already abundant supply of available cherries, a result inconsistent with the intent of the order.

The changes in economic conditions that caused the Board to modify its marketing policy are as follows: (1) the determination that export sales could not be subtracted from the optimum supply formula calculation was made late in the season; (2) handlers had made marketing plans, sales and sales commitments (including exports) based on the Board's recommendations made in March and June; and (3) prices received for tart cherries and tart cherry products would be severely impacted by an additional large volume of cherries being made available to the market when there is already an abundant supply of cherries.

USDA's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" provide that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. This goal would be met by the establishment of a final percentage which releases 100 percent of the optimum supply and the additional release of tart cherries provided under section 930.50(g). This

release of tonnage, equal to 10 percent of the average sales of the prior three years sales, is made available to handlers each season. The Board will make such cherries available to handlers for one or more weeks during the crop year. Handlers can decide how much of the 10 percent release they would like to receive during such releases. Once released, such cherries are released for free use by such handler. Approximately 27 million pounds should be made available to handlers this season in accordance with USDA Guidelines. This release would be made available to every handler and released to such handler in proportion to its percentage of the total regulated crop handled. If such handler does not take such handler's proportionate amount, such amount shall remain in the inventory reserve.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this initial regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) would allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities.

However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic or regulatory impacts.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 1,220 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$5,000,000, and small agricultural producers are defined as those having annual receipts of less than \$500,000.

Marketing order board and subcommittee meetings are widely publicized in advance and are held in a location central to the production area. The meetings are open to all industry members and entities (including small business entities) and other interested persons—who are encouraged to participate in the deliberations and voice their opinions on topics under discussion. Thus, Board recommendations usually represent the interests of both small and large business entities in the industry.

The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced and pureed. During the period 1993/94 through 1996/97, approximately 94 percent of the U.S. tart cherry crop, or 285.7 million pounds, was processed annually. Of the 285.7 million pounds of tart cherries processed, 63 percent was frozen, 32 percent canned and 3 percent utilized for juice. The remaining 2 percent was dried or assembled into juice packs.

Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry

production has been trending downward since the 1991/92 season. In the ten-year period, 1986/87 through 1996/97, tart cherry area decreased from 48,180 acres, to less than 42,000 acres. Approximately 78 percent of domestic tart cherry acreage is located in four States: Michigan, New York, Utah and Wisconsin. Michigan leads the nation in tart cherry acreage with 65 percent of the total. Michigan produces about 72 percent of the U.S. tart cherry crop each year. In 1996/97, tart cherry acreage in Michigan was down 2,700 acres, to 27,300.

In crop years 1986 through 1993, tart cherry production ranged from a high of 359 million pounds in 1987 to a low of 189.9 million pounds in 1991. The price per pound to tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuation in the tart cherry industry are national in scope and impact. Growers testified during the order promulgation process that the average prices of 12 to 17 cents per pound which they received during this period did not come close to covering the costs of production for the vast majority of tart cherry growers. They also testified that production costs for most growers range between 20 and 22 cents per pound, which is well above average prices received.

As previously stated, this is the first year of operation for this marketing order. The industry demonstrated a need for such order during the order promulgation process based on the argument that large variations in annual tart cherry supplies and prices tend to lead to disorderly marketing. As a result of these fluctuations in supplies and prices, growers realize a smaller return for their crop. Therefore, the industry elected the establishment of a volume control marketing order to even out the wide variations in supply and thereby improve returns to growers. During the promulgation process, proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because many such growers and handlers have been going out of business over most of the last eight years due to low tart cherry prices. They also testified that, since an order would help increase grower returns, this should increase the buffer between business success and failure because small growers and handlers tend to be less capitalized than larger growers and handlers.

In discussing the possibility of marketing percentages for the 1997–98 crop year, the Board considered: (1) The estimated and actual total production of

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

The Board's review of these factors resulted in the computation and announcement in July 1997 of preliminary free and restricted percentages, and subsequent recommendation of interim and final percentages at its September meeting. At its September 1997 meeting, the Board recommended that the interim percentages and final percentages (55 percent free and 45 percent restricted) be the same percentages.

The Board considered the fact that the demand for tart cherries is inelastic at high and low levels of production. At the extremes, various factors become operational. The promulgation record stated that when crops are very low there is limited but sufficient exclusive demand for cherries that can cause processor prices to double and grower prices to triple. In the event of large crops, there seems to be no price low enough to expand tart cherry sales in the marketplace sufficient to market the crops. This year the crop has been a large one.

The Board discussed alternatives to the volume recommendation including not having volume regulation this season. Board members stated that no volume regulation would be detrimental to the tart cherry industry. Returns to growers would not even cover their production costs for this season causing some to go out of business.

The Board also discussed not granting exemptions, and diversion credit for such exemptions, for exports to eligible countries (including juice and juice concentrate), other exempt uses, and charitable donations. However, the Board felt this would not be in the best interest of the industry or the public. The Board expressed that not allowing the export and other exemptions would have a detrimental effect on the market this season if free and restricted percentages are imposed. Without such exemptions and diversion credits for export sales, new market development and other specified uses, about 50

million pounds of cherries would not be removed from the domestic market this season, depressing grower returns for all cherries. The marketing order was designed to increase grower returns by stabilizing supplies with demand as well as stabilizing prices and creating a more orderly and predictable marketing environment. Expanding markets and developing new products is key to meeting this marketing order's goals.

Not granting exemptions and diversion credit for exports to countries other than Canada, Mexico, and Japan was also discussed at Board meetings. However, the Board expressed that this recommendation is very important to creating stable conditions in the export marketplace this season and would encourage future market growth. The Board further stated that such action will improve returns to growers because of the tremendous growth in the export market this season. Exemptions and diversion credit have been addressed in other rulemaking actions.

As mentioned earlier, USDA's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity available under this rule is 110 percent of the quantity shipped in the prior three years.

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

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

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

Interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

Paperwork Reduction

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

There are some reporting, recordkeeping and other compliance requirements under the marketing order. The reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms related to handler diversion and handlers meeting restricted percentage obligations (*i.e.*, Inventory Reserve Summary, Cherries Acquired From Producers, Handler Reserve Plan and Final Pack Report, and Inventory Location Report) have received approval by OMB. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. It was anticipated that as many as 45 handlers might be regulated if volume regulations are established. Many reports are submitted a single time each season, while some are submitted more frequently. In addition, the bulk of the information handlers must report is obtained during the normal course of their business operations. It would take handlers approximately 15 minutes per report to complete for a total of 60 minutes per handler and approximately 2,700 minutes annually for the estimated 45 handlers. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This proposed rule does not change those requirements.

A 15-day comment period is provided to allow interested persons to respond to this proposal. Fifteen days is deemed appropriate because this rule needs to be in place as soon as possible since handlers are currently marketing 1997-98 crop tart cherries and this action should be taken promptly to achieve the intended purpose of making the optimum supply quantity computed by the Board available to handlers. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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

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

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

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

2. A new Subpart—Supplementary Regulations consisting of § 930.250 is added to read as follows:

Note: This subpart will consist of handling regulations which will not appear in the annual Code of Federal Regulations.

Subpart—Supplementary Regulations

§ 930.250 Final free and restricted percentages for the 1997-98 crop year.

The final percentages for tart cherries handled by handlers in volume regulated districts during the crop year beginning on July 1, 1997, which shall be free and restricted, respectively, are designated as follows: Free percentage, 55 percent and restricted percentage, 45 percent. Restricted percentage obligations must be satisfied on or before the effective date of this rule. A grace period of 30 days will be allowed for handlers to segregate and appropriately document any tonnage they wish to place in the inventory reserve and to assemble any applicable diversion certificates.

Dated: January 15, 1998.

Robert C. Keeney,
Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 98-1429 Filed 1-20-98; 8:45 am]

BILLING CODE 3410-02-P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[Docket No. PRM-50-63A]

Peter G. Crane; Receipt of an Amended Petition for Rulemaking, Extension of Comment Period

AGENCY: Nuclear Regulatory Commission.

ACTION: Amended petition for rulemaking; extension of comment period.