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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AMS-FV-11-0047; FV11-930-1 FR]

Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Suspension of Order Regulations Regarding Random Row Diversion

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule changes the grower diversion regulations prescribed under the marketing order for tart cherries (order). The order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and is administered locally by the Cherry Industry Administrative Board (Board). This rule suspends indefinitely the regulations establishing random row as a method of grower diversion. With growers consistently choosing other diversion methods which offer more flexibility and fewer potential problems, the Board recommended this suspension to bring grower diversion requirements in line with current industry practices.

DATES: *Effective Date:* October 22, 2011.

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

Small businesses may request information on complying with this regulation by contacting Laurel May,

Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries grown in 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 final 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 not later than 20 days after the date of the entry of the ruling.

This final rule changes the grower diversion regulations prescribed under the order. This rule suspends indefinitely the regulations establishing random row as a method of grower diversion. With growers consistently choosing other diversion methods which offer more flexibility and fewer potential problems, the Board recommended this suspension to bring grower diversion requirements in line with current industry practices. The

Board unanimously recommended this action at a meeting on March 24, 2011.

Section 930.58 of the order provides authority for voluntary grower diversion. Under volume regulation, growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would be subject to regulation. Section 930.158 prescribes the rules and regulations for grower diversion, including the procedures and deadline dates for applying for diversion and the types of diversion available to growers. Currently, there are four types of grower diversion: Random row, whole block, partial block, and in-orchard tank. This rule suspends the portions of § 930.158 that provide random row as an option under grower diversion.

The order contains volume control provisions that allow the industry to address fluctuations in production from season to season, helping to stabilize supplies and prices. When volume control is in effect, free and restricted percentages are established. Handlers can meet their restricted percentage obligation by placing cherries in inventory reserve, diverting cherries themselves, or redeeming grower diversion certificates.

Under voluntary grower diversion, growers can divert cherries from production in exchange for Board issued grower diversion certificates stating the quantity diverted. Growers can then present these certificates to handlers who may redeem them as a method of complying with their restricted percentage obligation under volume regulation. By diverting cherries from production, growers can avoid the costs of harvesting and transporting fruit, reduce the supply, and mitigate the downward pressure on prices that result from oversupply.

Following the promulgation of the order in 1996, the Board recommended regulations outlining two grower diversion options for the 1997 crop year, whole block and random row (63 FR 20019). Under whole block diversion, growers select entire orchard blocks to be left unharvested. With random row diversion, the Board randomly selects rows of trees the grower is to leave unharvested, providing growers with a way to divert a portion of an orchard rather than a whole orchard block.

For the 1998 crop year and subsequent seasons, the grower

diversion program was expanded to include two additional options, partial block and in-orchard tank diversions (63 FR 33523). Partial block diversion allows the grower to select a contiguous portion of an orchard block that will be left unharvested. With in-orchard tank diversion, cherries are harvested into tanks, the volume is calculated, and then diverted in the orchard.

The addition of these options provided growers with greater flexibility when considering diversion, and marked a substantial decline in the use of random row. For the last ten years, random row has been the least utilized grower diversion option, and accounted for less than three percent of total grower diversion during the last three seasons.

During the discussion of this issue, the Board noted several issues that have contributed to the nominal use of random row as a grower diversion option. Random row diversion is the least flexible of grower diversion options in terms of quality control. When a grower selects a whole block or partial block to divert, the grower controls which fruit will be harvested and which trees will be left unharvested. Similarly, under in-orchard tank diversion, the grower determines what fruit is picked and stored in the tanks for diversion. Consequently, these three methods allow the grower to incorporate quality into the decision of which cherries to divert. Delivering higher quality fruit not only brings the grower a greater return, but higher quality benefits the industry overall.

Under the random row method of diversion, the diverted rows are selected randomly by the Board. This could result in the best quality fruit being left in the orchard, with lower quality fruit delivered to handlers, leading to lower grower returns.

In addition to quality concerns, the logistics of random row also present particular challenges to the grower. With the exception of in-orchard tank diversion, all grower diversion methods require the grower to submit an orchard map to the Board. The burden of having to keep orchard maps precisely up-to-date is borne by growers. The random selection of rows by the Board places additional importance on the accuracy and precision of submitted maps. Inaccurate maps can lead to harvesting errors, with rows selected for diversion being inadvertently harvested.

Even if maps are kept current, diverting random rows during harvest can be challenging. While whole and partial block diversions allow growers to leave contiguous areas unharvested,

random row diversions require that specified rows be left unharvested, increasing the likelihood of error. Further, given the prevalence of contract harvesting, workers are often unfamiliar with the orchards they are harvesting, and mistakes are made in identifying the specific rows to be left unharvested.

The greater potential for error during harvesting is of major concern to growers because penalties for errors in random row diversion are costly. If a grower discovers an error during harvest, two trees must be left unharvested for every one of the trees improperly harvested in order to remain in compliance, with the grower only receiving the original diversion amount. If the grower reports an error at the end of harvesting, a reduced diversion amount is calculated. If an unreported error is discovered by the Board after harvesting is complete, no diversion certificate would be issued.

In addition to the issues affecting grower interest in this option, the Board also has concerns regarding the use of random row diversion. Specifically, the Board is concerned about the potential for miscalculations or misuse that could lead to overstated diversion amounts. Random row diversion differs from the other options in that the diverted tonnage receiving certificates is calculated based on volume delivered from the orchard. In contrast, whole and partial block diversions involve sampling trees in the selected area to determine the volume being diverted before harvest takes place, and in-orchard tank diversion is determined by the actual volume measured in the tanks.

Calculating the diverted volume after delivery creates opportunity for error. It can be difficult to determine if the volume delivered to the handler all came from appropriately mapped groves, included in the grower's diversion application. With diversion calculations based on delivered volume, it is important that the volume only include cherries from those orchards in which random rows were diverted. Some growers care for and deliver fruit from orchards other than their own. There is concern that the handler accepting delivery could easily mistake how much volume came from the grower's own mapped orchards, resulting in the overstatement of the amount diverted.

With the availability of other diversion options that offer the grower more flexibility and less potential problems, random row represents a very small percentage of total grower diversion. Further, with the higher potential for harvesting errors and for

miscalculations of diversion amounts, the Board believes random row is the most problematic of the diversion options. Consequently, the Board unanimously recommended this action which suspends the regulations providing random row as a grower diversion option. The Board voted to suspend the regulations rather than eliminating them altogether in the event the industry would want to reinstate random row diversion in the future.

Final 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 final regulatory flexibility analysis.

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.

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

According to the National Agricultural Statistics Service, and Board data, the average annual grower price for tart cherries during the 2009–2010 season was \$0.197 per pound, and total shipments were around 227 million pounds. Therefore, average receipts for tart cherry producers were around \$75,000, well below the SBA threshold for small producers. The Food Institute estimates 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 \$4.8 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 action changes the grower diversion regulations prescribed under the order. This rule suspends

indefinitely the regulations in § 930.158 establishing random row as a method of grower diversion. With growers consistently choosing other diversion methods which offer more flexibility and fewer potential problems, the Board recommended this suspension to bring grower diversion requirements in line with current industry practices. The authority for this action is provided for in § 930.58 of the order. The Board unanimously recommended this action at a meeting on March 24, 2011.

This final rule will not impose any additional costs on growers. The grower diversion program under the order is completely voluntary. In an effort to stabilize supplies and prices, the tart cherry industry uses mechanisms under the order to attempt to bring supply and demand into balance. Under voluntary grower diversion, growers can divert cherries from production in exchange for Board issued grower diversion certificates stating the quantity diverted. Growers can then present these certificates to handlers who may redeem them as a method of complying with their restricted percentage obligation under volume regulation. By diverting cherries from production, growers can avoid the costs of harvesting and transporting fruit, reduce the supply, and mitigate the downward pressure on prices that result from oversupply.

This action suspends only the regulations that provide random row as a method of grower diversion. The other three options, whole block, partial block, and in-orchard tank, remain unchanged by this action. Random row is the least utilized of the grower diversion options, with the other three options accounting for 97 percent of diversion volume. Consequently, this change brings the regulations in line with current industry preferences and practices. Further, the remaining grower diversion options offer the grower some flexibility to control quality, which in turn could increase grower returns. The effects of this rule are not expected to be disproportionately greater or less for small entities than for larger entities.

One alternative action considered by the Board was to remove the regulations pertaining to random row diversion. However, the Board agreed that suspension would be the most appropriate action should the industry determine it would like to reinstate random row as a diversion option in the future. Thus, termination was rejected as an alternative.

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 MI, NY, PA, OR, UT, WA and WI. 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 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.

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule. Further, the public comments received concerning the proposal did not address the initial regulatory flexibility analysis.

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, the Board's meeting was widely publicized throughout the tart cherry industry and all interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the March 24, 2011, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action as published in the **Federal Register** on Monday, July 18, 2011 (76 FR 42072). Copies of the rule were mailed or sent via facsimile to all Board members and tart cherry handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 10-day comment period ending July 28, 2011, was provided to allow interested persons to respond to the proposal.

One comment was received during the comment period. The commenter, a small grower, opposed the proposed change. The commenter claimed that random row diversion allows their operation to save time and labor. The commenter stated that by using random row they do not have to wait for weights and estimates for each load and it speeds up harvesting as the trees that are to remain unpicked are marked in advance.

Grower diversion is a voluntary program established under the order. Growers can choose whether or not they

want to participate. While this action suspends random row as an option under grower diversion, three options remain: whole block, partial block, and in-orchard tank. Of these options, whole block and partial block can be used similarly to random row by leaving segments of the grower's production unharvested. Further, like random row, weights and estimates of each load are not required and the trees that are to remain unharvested are determined in advance, so harvest speeds are not affected. In addition to having characteristics similar to random row, whole and partial block diversions also provide the grower with control over which trees will be left unharvested, allowing the grower some flexibility to control for quality.

Accordingly, no changes will be made to the rule as proposed, based on the comment received.

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

After consideration of all relevant matter presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that the provision suspended, as hereinafter set forth, no longer tends to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already processing tart cherries from the 2011 crop and the Board wants to implement this change as soon as possible. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 10-day comment period was provided for in the proposed 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 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:

■ A. Suspend paragraph (b)(1) indefinitely.

■ B. In paragraph (c)(3), redesignate the first two sentences as paragraph (c)(3)(i) and the remaining sentences as paragraph (c)(3)(ii).

■ C. Newly designated paragraph (c)(3)(ii) is suspended indefinitely.

Dated: October 14, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–27276 Filed 10–20–11; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 953

[Doc. No. AMS–FV–11–0027; FV11–953–1 FR]

Irish Potatoes Grown in Southeastern States; Suspension of Marketing Order Provisions

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule continues in effect the interim rule that suspended the marketing order for Irish potatoes grown in Southeastern states (order), and the rules and regulations implemented thereunder, through March 1, 2014. The order regulates the handling of Irish potatoes grown in Southeastern states and is administered locally by the Southeastern Potato Committee (Committee). The Committee believes advances in farming technology and production quality have reduced the need for the order. When considering the costs associated with continuing the order, the Committee unanimously recommended that the order be suspended.

DATES: *Effective Date:* October 22, 2011 through March 1, 2014.

FOR FURTHER INFORMATION CONTACT:

Dawana J. Clark, Marketing Specialist, or Kenneth G. Johnson, Regional Manager, DC Marketing Field Office, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA; *Telephone:* (301) 734–5243, *Fax:* (301) 734–5275, or *E-mail:* Dawana.Clark@ams.usda.gov or Kenneth.Johnson@ams.usda.gov.

Small businesses may request information on complying with this

regulation by contacting Laurel May, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; *Telephone:* (202) 720–2491, *Fax:* (202) 720–8938, or *E-mail:* Laurel.May@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement No. 104 and Marketing Order No. 953, both as amended (7 CFR part 953), regulating the handling of Irish potatoes grown in Southeastern states, 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 not later than 20 days after the date of the entry of the ruling.

This rule continues in effect the interim rule that suspended the order and all provisions prescribed thereunder through March 1, 2014. The suspension includes, but is not limited to, grade, size, quality, assessment, reporting, and inspection requirements. The Committee believes advances in farming technology and production quality have reduced the need for the order. When considering the costs associated with continuing the order, the Committee agreed that the order should be suspended. The Committee met on February 17, 2011, and unanimously recommended suspending the order for three years, through March 1, 2014.

The order was promulgated in 1948, and regulates the handling of Irish potatoes grown in designated counties of Virginia and North Carolina. The order has been used to provide the industry with grade, size, quality, and inspection requirements. The order also authorizes reporting and recordkeeping functions required for the operation of the order. The program is funded by assessments imposed on handlers.

Over the past several years, the Southeastern potato industry has been in decline, with acreage and production trending downward. Production has fallen from an estimated 1,600,000 hundredweight for the 1996–97 season, to a current estimate of 600,000 hundredweight for the 2010–11 season. In 1996, there were approximately 150 growers and 60 handlers in the production area. Currently, there are approximately 20 growers and 10 handlers covered in the production area.

The Committee met February 17, 2011, to discuss the continued need for the order. During the discussion, several members mentioned that the order was promulgated at a time when the industry was having an issue with the quality of potatoes being produced. The purpose of the order was to establish standards to improve the quality of marketed product.

Since the implementation of the order, the quality of Southeastern potatoes has greatly improved. Advances in farm machinery and improvements in the grading process have helped to ensure that only quality product is being shipped to buyers. Concerns the industry previously had prior to implementation of the order are no longer an issue, and for the past several years, some industry members have started questioning the continued need for the order and its associated costs.

At the meeting, members were informed that to maintain the order, the Committee would have to incur some additional administrative expenses. To cover these costs, the Committee would need to increase the assessment rate. Committee members agreed that the industry would not support an assessment increase.

In addition to the assessment costs, comments were also made regarding the cost of inspection by the Committee required under the order. It was stated that some industry members see the cost of mandatory inspection as an unnecessary burden. Other Committee members expressed concern over whether inspection would still be available if the order was suspended. This issue was resolved when members were assured that inspection would still