

revealed that anticipated revenue will not cover increased program costs. Without a fee increase, FY 2002 revenues for seed testing and certification services are projected at \$137,000, costs are projected at \$172,000, and the trust fund balance is projected to be \$47,000 or 3.28 months of operating reserve. With a fee increase, FY 2002 revenues are projected at \$160,000, costs are projected at \$174,000, and the trust fund balance is projected to be \$68,000 or 4.69 months of operating reserve.

The hourly fee for service is established by distributing the projected annual program operating costs over the estimated revenue hours of service provided to users of the service. Revenue hours include the time spent conducting tests, keeping sample logs, preparing Federal Seed Analysis Certificates and storing samples. As program operating costs continue to rise, the hourly fees must be adjusted to enable the program to remain financially self-supporting as required by law. Program operating costs include the salaries and fringe benefits of seed analysts, supervision, training, and all administrative costs of operating the program.

Employee salaries and benefits account for approximately 75 percent of the total budget. A general and locality salary increase of 3.81 percent for 2001 and 4.77 percent for 2002 for Federal employees involved in the seed testing and certification service became effective in January 2002 and will affect program costs.

This fee increase is necessary to offset increased program operating costs resulting from: (1) Salary increases for all Federal employees for 2002, (2) increases in rent, (3) increases in costs of supplies needed for testing samples, and (4) purchases of replacement equipment needed to provide the service.

In view of these increases in costs, the Agency is increasing the hourly rate charged to applicants for the service, including the issuance of Federal Seed Analysis Certificates from \$44.40 to \$52.00. The fee for issuing additional duplicate certificates is increasing from \$11.10 to \$13.00 and a fee of \$13.00 is established for issuing preliminary reports.

This action will recover the costs associated with providing the voluntary testing service to the seed and grain industry. Although the user-fee increase will increase costs to individual firms, the cost for providing the seed testing and certification services will increase by an average of only \$13.00 per Federal Seed Analysis Certificate and \$1.90 for

each duplicate certificate. It is estimated that the total revenue generated will increase by approximately \$22,000 annually.

#### Summary of Public Comment

A notice of proposed rulemaking was published in the **Federal Register** (66 FR 53550) on October 23, 2001. No comments were received.

#### List of Subjects in 7 CFR Part 75

Administrative practice and procedure, Agricultural commodities, Reporting and recordkeeping requirements, Seeds, Vegetables.

For the reasons set forth in the preamble, 7 CFR part 75 is amended as follows:

#### PART 75—REGULATIONS FOR INSPECTION AND CERTIFICATION OF QUALITY OF AGRICULTURAL AND VEGETABLE SEEDS

1. The authority citation for part 75 continues to read as follows:

**Authority:** 7 U.S.C. 1622 and 1624.

##### **§ 75.41 [Amended]**

2. In § 75.41, “\$44.40” is removed and “\$52.00” is added in its place.

3. In § 75.43, a new paragraph (c) is added to read as follows:

##### **§ 75.43 Laboratory testing**

\* \* \* \* \*

(c) The charge for a preliminary report issued prior to completion of testing shall be \$13.00 and billed in accordance with paragraph (a) of this section.

##### **§ 75.47 [Amended]**

4. In § 75.47, “\$11.10” is removed and “\$13.00” is added in its place.

Dated: March 11, 2002.

**A.J. Yates,**

*Administrator, Agricultural Marketing Service.*

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#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 81

[Docket No. FV01-81-01 FR]

**RIN 0581-AC03**

#### Regulations Governing the California Prune/Plum (Tree Removal) Diversion Program

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

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes procedures for a California Prune/Plum Diversion Program. The program is voluntary and consists wholly of tree removal. The program is being implemented under clause (3) of Section 32 of the Act of August 24, 1935, as amended. The program will help the California dried plum industry address its severe oversupply problems. The tree removal is expected to bring supplies into closer balance with market needs, and provide some relief to growers faced with excess supplies and acreage, and low prices.

**EFFECTIVE DATE:** January 2, 2002.

#### **FOR FURTHER INFORMATION CONTACT:**

Ronald L. Cioffi, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW Stop 0237, Washington, D.C. 20250-0237; Telephone: 202-720-2491; Fax: 202-720-8938; or E-mail: [Ronald.Cioffi@usda.gov](mailto:Ronald.Cioffi@usda.gov).

Small businesses may request information on the diversion program by contacting Jay Guerber at the above address, telephone, fax, or E-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Executive Order 12866**

This final rule has been determined to be non-significant for the purposes of Executive Order 12866 by the Office of Management and Budget (OMB).

This final rule is effective January 2, 2002, to reflect the beginning of the application period specified in the proposed rule. Prompt notification of growers concerning their participation in the program and prompt tree removal are needed for the industry to achieve the expected program goals.

##### **Public Law 104-4**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State and local governments and the private sector. Under section 202 of the UMRA, the Agricultural Marketing Service (AMS) generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State and local governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the AMS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-

effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State and local governments or the private sector of \$100 million or more in any one year. Therefore, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

#### **Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions, or which would otherwise impede its full implementation. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the reporting and recordkeeping provisions generated by this final rule were approved by the Office of Management and Budget (OMB). The Agricultural Marketing Service received emergency approval under OMB No. 0581-0201, California Prune/Plum Tree Removal Program—Section 32 (as amended 7 U.S.C. 612c). The emergency approval expires May 31, 2002. A regular submission will be sent to OMB requesting approval for three years.

Two forms are needed for the administration of the tree removal program. Growers wishing to participate in the program submitted an "Application for Prune Tree Removal Program" (FV-298). The proposed rule estimated that about 200 growers would submit applications. The application period ended January 31, 2002, and a total of 481 program applications have been submitted. It is estimated that each form took about 30 minutes to complete. Thus, the total burden for filing grower applications has increased from 100 to 240.5 hours. A total of 10 hours has been added to cover the recordkeeping burden on growers. Thus, the total burden hours for the program will be 250.5 hours. After removing their trees, growers will then have to sign a statement (FV-299) stating they wish payment. No additional burden has been estimated for this second form which would require only a signature. Finally, participants will be required to retain records pertaining to the tree

removal program for two years after the year of removal.

#### **Executive Order 12372**

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V published at 48 FR 29115 (June 24, 1983).

#### **Executive Order 12612**

It has been determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various levels of government.

#### **Authority for Tree Removal Program**

The program is intended to reestablish prune/plum farmers' purchasing power. Programs to reestablish farmers' purchasing power are authorized by clause (3) of Section 32 of the Act of August 24, 1935, as amended (7 U.S.C. 612c) ("Section 32"). This clause of Section 32 authorizes USDA to " \* \* \* reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption." Section 32 also authorizes USDA to use Section 32 funds " \* \* \* at such times, and in such manner, and in such amounts, as USDA finds will effectuate substantial accomplishments of any one or more of the purposes of this section." Furthermore, "Determinations by USDA as to what constitutes \* \* \* normal production for domestic consumption shall be final."

#### **Need for the Tree Removal Program**

Production of prune/plums for marketing as dried plums is concentrated in California. Production of dried plums during the 2000 season increased for the second consecutive year, to nearly 219,000 tons (natural condition).

Changes in growing conditions have substantially altered the production outlook for 2001. Production was originally estimated to be 220,000 tons. However, due to a lighter crop-set in major producing areas, as well as freezing temperatures and hail, production for the 2001 crop year is now expected to range between 140,000 and 155,000 tons. This smaller crop somewhat alleviates the oversupply situation, but does not represent a

change in the longer-term oversupply situation.

When the crop was estimated at 220,000 tons in the spring of 2001, the industry discussed the use of volume control authorized under the Federal marketing order. In addition, carryin inventories from the 2000 crop year were reported at 100,829 tons. With this level of inventories and crop, the total available supply would have been 320,829 tons.

With this estimated crop size, establishing a 48 percent reserve (52 percent free tonnage) was discussed. The industry does not have a history of establishing reserve percentages, and reserve percentages were last used in the 1970's. The fact that the marketing order committee even considered use of the reserve provisions indicates the gravity with which the industry views the oversupply problem. The use of marketing order reserve provisions is intended to help industries deal with surplus production and facilitate orderly marketing of their crops.

The Prune Bargaining Association (PBA) represents about 40 percent of the independent growers and negotiates a selling price for its members. With the large anticipated crop for the 2001 season and the large carryin inventory, the PBA had difficulty establishing a price with handlers. Even with the smaller crop of 155,000 tons, the PBA could only negotiate a price of \$763 per ton. This compares to \$845 for the 2000 season, or a decrease of 9.7 percent. Although the price has been set, not all handlers have signed the agreement. Even this lower price may be too high in the eyes of the non-signing handlers, given current supply conditions.

The smaller crop size for 2001 has provided the industry some relief in reducing total available supplies. However, there are still a large number of nonbearing acres (15,000) that will become productive over the next six years. In addition, there are many acres with older, less productive trees which could be replanted in the near future. A tree removal program will assist growers who are facing difficult replanting decisions by allowing them to receive funds for the removal of trees and, at the same time, prohibit those growers from replanting prune/plums in those orchards. Prune/plum growers also tend to be producers of almonds, walnuts, and cling peaches. Plantings of these crops could increase in future years as growers remove prune/plum acreage.

Bearing acreage expanded to a record 86,000 acres during the 2000 season and the average yield increased 19 percent. Yields are anticipated to increase further as more densely planted acres

become productive over the next several years.

Nonbearing acreage, which is an indicator of future production levels, increased to an all-time high of 26,000 acres in 1998. This represented a 22-percent increase in the productive capacity of the industry. The non-bearing acres are more densely planted than in previous years which results in a higher yield per acre.

The dried plum industry faces a long-run surplus situation. For the 2000 crop year, bearing acres were 86,000 and non-bearing acres were 15,000. Bearing acres could exceed 100,000 in the near future. With yields in excess of 2.0 tons per acre, production could be expected to be above 200,000 tons in many crop years.

Total domestic shipments exceeded 100,000 tons for six seasons in the late 1980's and early 1990's, but have declined from a high of 108,085 processed tons in 1996. Per capita consumption has been steadily declining since 1980. Export shipments have been stagnant. As a result of these domestic and export trends, total shipments have never exceeded 190,000 processed tons.

Until recently, export shipments were a source of growth in the dried plum industry. In 2000, exports represented 47 percent of total shipments. However, the strong dollar and the downturn in the economies in Asia and Europe have significantly slowed export sales.

Due to the significant supply-demand imbalance, the industry anticipates several years in which the expected annual carryin inventories will exceed the industry's desirable carryin level of approximately 40,000 tons. If dried plum markets continue to be over-supplied with product, grower prices and grower relations with packers will deteriorate significantly. Even with the lower production estimate for the 2001 crop year, the carryout inventory is expected to exceed 76,000 tons.

High prices from 1992 through 1995, and a more balanced supply and demand situation, helped to stimulate investments in new acreage. This additional acreage came from a variety of sources, mainly rice and pasture land. Intensifying the anticipated surplus situation is the fact that new acres are more productive than existing acres, which causes output to grow more rapidly in proportion to acreage growth.

It takes dried plum trees 6 years to become fully productive. Many of the costs of producing plum trees are "sunk," making it difficult to reverse decisions once those acres are planted. Because supply is slow to adjust to changing market conditions, the

industry anticipates many years of production outpacing demand, resulting in continued distressed grower conditions.

From 1980 through 2000, the total cost per ton of producing dried plums exceeded the growers' season-average prices. Similarly, the total cost per acre exceeded revenue per acre.

However, it is also important to consider variable cost. In recent years, the total revenue per ton and per acre has been greater than the total variable cost per ton and per acre. Prices and revenues greater than variable costs provide some indication of why a dried plum producer continues to harvest and process a crop despite losing money.

#### **Tree Removal Diversion Program**

The industry is requesting a voluntary tree removal program estimated to cost \$17 million. The industry would like to remove a minimum of 20,000 bearing acres of prune/plum trees. With many of the current bearing acres reaching the age where replanting would be considered, the industry is trying to provide an incentive to growers to remove older trees, while ensuring that those orchards are not replanted with prune/plum trees.

To be eligible for the tree removal program, orchards must have a minimum yield of 1.5 tons of dried prune/plums per net-planted acre. With a minimum threshold yield of 1.5 tons of dried prune/plums per net-planted acre, sufficient land would be enrolled in the tree removal program to reduce annual production by approximately 30,000 tons. A net-planted acre is the actual acreage planted with prune/plum trees.

The industry has estimated that it will take \$8 to \$9 per tree to induce growers to participate in such a program. It is believed that financial institutions that provide growers operating funds would not allow them to participate if the payment per tree is below this level.

This type of one-time decrease in production would more closely align supply with demand, while assuring an adequate supply. This would allow the industry to concentrate their efforts on rebuilding demand for future years.

The industry has already undertaken a smaller-scale tree removal program. However, to finance this grower-initiated tree pull program, grower assessments for promotion were reduced from \$50 per ton to \$30 per ton. Less money is available for promotion, but growers felt that this re-direction of funds was necessary to help address the oversupply situation.

The tree removal program would be administered through the Agricultural

Marketing Service (AMS) and the Prune Marketing Committee (Committee). The Committee is an administrative agency appointed by AMS to locally administer the terms of Federal Marketing Order No. 993.

Any prune/plum producer wishing to participate in the program filed an application with the Committee. The application period began January 2, and ended January 31, 2002.

Each applicant provided information needed by the Committee to operate the program. This included, for example, the number of trees the applicant wished to remove and their location. The applicant also will have to certify that he/she has not contracted to sell the land or otherwise already arranged to have the trees removed for commercial purposes (e.g., shopping centers, housing developments, resorts, etc.). Applicants should note that under the regulations, they bear responsibility for ensuring that prune/plum trees are not replanted, whether by themselves or by successors to the land, until after June 30, 2004, and that if they fail to prevent such replanting, they must refund any USDA payment, with interest, made in connection with the tree removal program. The Committee will review each application for completeness, and make reasonable efforts to contact growers to obtain any missing information.

In order to be eligible to participate in the program, the orchards or blocks of trees being removed from production would have to have a minimum yield of 1.5 dried tons per net-planted acre during either the 1999 or 2000 crop years. A net-planted acre is the actual acreage planted with prune/plum trees. This means that abandoned orchards will not be eligible for participation. USDA considered establishing the minimum qualifying yield at 2.2 tons per acre, but determined that at that level, too many orchards would be ineligible for the program. A lower yield would not reduce production as much as the industry desires.

USDA has allocated \$17 million for this program, including administrative costs. Applications would be approved until the level of available funding was reached. Each participating grower will have to then remove trees from production by June 30, 2002. Growers will be paid \$8.50 for each eligible tree removed. This level of payment is deemed necessary for a significant number of growers to participate in the tree-removal program. It would cover most of the costs of removing the trees (bulldozing, cutting, etc.), and preparing the land for other uses. The costs vary depending on the number of acres

removed. Some cost savings may accrue with larger acreage removals.

Estimated costs for removing, piling, chipping, or other disposal methods range from \$142–\$225 per acre or from \$1.29–\$2.05 per tree. Costs for removing the roots and other debris are expected to range from \$163–\$289 per acre or from \$1.48–\$2.63 per tree. Leveling of the ground is expected to cost \$161–\$401 per acre or \$1.46–\$3.65 per tree. Fumigation of the tree holes is expected to cost \$550 per acre or \$5.00 per tree. This would amount to \$9.23–\$13.33 for each tree removed. The \$8.50 payment under the program is expected to offset most of the grower's costs, but should be sufficient to encourage growers to participate in the program.

Each grower participating in the program will have to agree not to replant prune/plum trees on land cleared under this program through June 30, 2004. Because it takes new acres at least six years to be productive, acreage participating in the tree-removal program would not return to commercial prune/plum production for at least eight years and possibly nine years because plantings occur in January and February. Alternative crops could be planted. Additionally, the current economic conditions in the industry, specifically weak demand, reduced per capita consumption, stagnant domestic shipments and exports, and declining grower prices and revenues, would appear to limit the incentives for replanting acreage to prune/plum trees.

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule 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 actions in order that small businesses will not be unduly or disproportionately burdened.

There are approximately 1,250 producers of dried plums in California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than \$750,000. An estimated 32 producers, or less than 13 percent of the 1,250 total producers, would be considered large producers with annual incomes over \$750,000.

This final rule establishes a tree removal diversion program for California dried prune/plums. Authority for the program is provided in clause (3)

of Section 32 of the act of August 24, 1935, as amended.

Participation in the diversion program is strictly voluntary, so individual producers, both small and large, can weigh the benefits and costs for their own operations before deciding whether to participate in the program.

#### Economic Assessment of the Tree Removal Diversion Program

To assess the impact a tree removal program would have on prices growers receive for their product, impacts on grower prices and inventories with a tree removal program and without a tree removal program were estimated. An econometric model was developed for the purpose of estimating nominal season average grower prices under both scenarios.

A tree removal program will directly reduce the number of bearing acres, but there will not be an impact until the 2002 crop year since harvesting of the 2001 crop is completed.

In 2000, there were still 15,000 non-bearing acres. The industry has indicated that no additional plantings of prune/plum trees for acreage expansion are occurring at this time. Therefore, after the 15,000 non-bearing acres come into production, the productive capacity of the industry is assumed to stay constant.

The tree removal analysis assumes that 20,000 acres are removed through the tree removal program, while 3,000 of the non-bearing acres become productive in 2002. This results in bearing acres being reduced from 86,000 in 2001 to 69,000 in 2002. Bearing acres increase by 3,000 acres in each of the subsequent years until 2007, rising to 72,000 in 2003, 75,000 in 2004, 78,000 in 2005, and 81,000 in 2006 and 2007.

At the time the analysis was performed, production for the 2001 crop year was estimated by the Department's National Agricultural Statistics Service (NASS) at 155,000 natural condition tons. Marketable production is generally 93 percent of total production, yielding an estimated 144,500 marketable tons for 2001. Carryin inventory for the 2001 crop year was computed by the marketing order committee at 100,829 tons as of June 30, 2001. These figures are used to derive an estimated total available supply of 244,979 tons for 2001. This level of supply accounts for the fact that a number of voluntary measures have been taken by the industry to reduce the level of production for the 2001 crop year, including crop abandonment and cutbacks on cultural practices.

Shipments are estimated to grow by 1 percent annually, which results in

estimated total shipments of 165,932 tons for 2001. The one percent growth in shipments reflects decreased government surplus purchases and possible retail price effects.

For 2002, total shipments are estimated at 167,591 tons and the carryin inventory is estimated at 79,047 tons. With the tree removal diversion program reducing bearing acres to 69,000 for the 2002 crop year, total available supply is estimated at 257,440 tons. It should be noted that through 2001, carryin inventory does not exactly match the prior year's difference between total available supply and total shipments. This is due to shrinkage and other minor adjustments computed by the Federal marketing order committee. However, for this analysis, the estimated carryin from 2002 to 2007 is estimated to be the exact difference between estimated total supply and estimated shipments from the prior year.

The analysis also assumes that yields will fluctuate up and down, in keeping with the known "alternate bearing" tendency of prune/plum trees. Estimated production, computed by multiplying acreage times yield, fluctuates accordingly.

As carryin inventories are reduced, the total available supply moderates for crop years 2003 through 2007, relative to the situation without a tree removal program. This results in season average grower prices ranging from \$845 to \$1,084 during that same time span. It should be noted that the margin of error for these estimates becomes very large for future crop years.

Even though season-average grower prices per ton rise under the tree removal program, all product produced is not necessarily of marketable quantity. Costs are incurred on all the production, but revenue is received only on product actually marketed. Thus, the economic effect of the tree removal program on a per acre basis is to dramatically reduce losses and bring producer returns closer to a break-even level. With losses still being incurred by producers, there should be only a limited incentive to further expand production as a result of the tree removal program. It will remain for growers to control costs and to expand demand to ensure their longer-term economic stability.

Grower prices are a small component of the finished dried plum product and are not closely associated with movements in retail prices. However, the increases in grower prices estimated for crop years 2003 through 2007 may have an impact on retail prices. The extent of any retail price increases would depend on processor and retailer

margins and the pricing and availability of substitute products, such as raisins or other dried fruits. It should be noted that dried plum prices are estimated to increase with or without a tree removal program, but the magnitude of the grower price increase is greater with the program.

Without a tree removal program, bearing acres are estimated to increase to 89,000 by the 2002 crop year. Production would be in excess of 200,000 tons, resulting in carryout inventories in excess of 100,000 tons in 2002. In addition, under this scenario, 2002 grower prices are estimated at \$789 per ton. With high inventories and low grower prices, market forces are assumed to induce growers to remove less productive acres and the number of bearing acres is estimated to decline from 89,000 in 2002 to 84,000 in 2007. Even with the decline in bearing acres, production and inventories remain excessive from 2002 through 2007. However, in 2007, carryout inventories fall to an estimated 6,592 tons.

Under both scenarios, grower prices increase and inventories become more manageable. The difference is that, under a tree removal program, adjustments to inventories and prices occur more rapidly. This would accelerate benefits to growers, who would otherwise be struggling to break even in a depressed market, until market forces brought about a slow correction.

In addition to the direct impact on growers' prices and revenues that a tree removal program would have, there are also indirect impacts. A tree removal program will assist in decreasing burdensome (undesirable) carryout inventories. Without a tree removal program, large quantities of dried plums held in packers' inventories prevent grower pools from being closed, which delays grower payments. Large amounts of undesirable inventory lead to strained grower-packer relations. In an attempt to sell the excessive inventories, packers reduce f.o.b. prices, which in turn leads to market share battles and lower prices being passed back to producers. A more balanced supply and demand situation allows growers and packers to jointly continue developing markets in ways that benefit the entire industry.

#### **Industry Self-Help Initiatives**

The California dried plum industry has undertaken an initiative to reduce acreage and production. The industry implemented a pre-harvest tree removal program during the 2001 crop year. The industry collected about \$3 million to support this effort by reducing assessments under their California State

marketing order from \$50 to \$30 a ton. The \$20 per ton reduced assessment was used to support the industry tree removal program.

The program was successful in removing about 2,500 acres. The effects of this industry self-help diversion are included in the analysis of the Federal program.

The industry also has taken measures to stimulate demand, including: (1) The development of new products and new uses for dried plums; (2) marketing efforts to attract younger customers; and (3) domestic and export market promotion programs under the California State marketing order and the Foreign Agricultural Service's Marketing Assistance Program (MAP). One of the most recent initiatives involved securing approval from the Food and Drug Administration to change the name "dried prunes" to "dried plums." This has allowed the industry to redirect its generic marketing efforts to attract a new generation of consumers.

#### **Benefits of the Program**

The economic assessment of the tree removal program indicates that it is expected to benefit producers, particularly small, under-capitalized producers, as well as the entire dried plum industry, including packers. The per ton sales price is projected to increase from 2002–2007, reducing losses and moving producer returns closer to break-even levels. The benefit to producers from reduced losses is projected to total approximately \$93 million over the six-year period 2002–2007. The benefits over the six-year period would average nearly \$15.5 million annually. The proposed rule incorrectly indicated that the benefit to producers from reduced losses would be about \$128 million and that the benefits over the six-year period would average nearly \$24 million annually.

#### **Costs of the Program**

The major cost of the program would be the payment to producers for removing their prune/plum trees. A total of \$17 million, less Committee administrative costs, is available for the tree removal program. Committee administrative costs for reviewing applications and verifying tree removals are expected to be about \$125,000. Major expense categories for administration include costs for salaries and benefits; vehicle rental and maintenance; insurance and overhead; and supplies.

Total producer costs associated with filing applications to participate in the program and maintaining records for the

period specified after tree removal are expected to be about \$2,500. These costs were estimated to be \$1,000 in the proposed rule. The increased producer cost estimate is due to the increased number of applications and the addition of 10 hours to cover grower recordkeeping. The number of applications received was estimated to be 200 in the proposed rule and the actual number received was 481.

#### **Overall Assessment**

Payments made through this program could help prune/plum producers by addressing the oversupply problem that is adversely affecting the dried plum industry. A tree removal program is expected to allow supply to be adjusted downward more quickly. Market forces will also result in supplies being reduced, but this adjustment may occur more slowly, likely resulting in a number of farm failures. The tree-removal program may be beneficial in reducing the risk of loan default for lenders that financed prune/plum growers. This program will likely help small, under-capitalized producers to stay in business. These producers are often efficient, but do not have adequate resources to continue to operate given the current depressed conditions within their industry.

Reducing the level of unprofitability also should provide opportunities for the industry to engage in additional demand-enhancing activities, especially directed at the domestic market. Even a moderate increase in domestic per capita consumption will have a significant, positive impact on grower returns.

Costs for the program would include the \$17 million to be paid growers and to the Committee for administration costs under the Federal tree removal diversion program. Additionally, growers would incur costs totaling about \$2,500 to comply with the filing and record-keeping requirements of the program.

Benefits to growers under the tree removal program could total approximately \$93 million. The first step in this calculation is to multiply marketable production for each of the six years (2002–2007) times the difference between grower price and variable cost, and to sum those figures. This is done for each of the two scenarios (with and without a tree pull program). The \$93 million difference between those figures represents a conservative (low-end) estimate of program benefits resulting from reduced grower losses. This cost calculation assumes that the acreage on which trees are removed remains idle, and that

growers must therefore absorb all fixed costs on that acreage. To the extent that the land is put to other productive uses, growers would not be absorbing all fixed costs of producing prune/plums, and grower benefits would be higher.

If growers are earning more, it follows that processors and/or retailers beyond the farmgate would pay higher raw product costs to obtain the prune/plums from the growers. These higher costs could be passed on to consumers through higher retail prices or could be absorbed as reduced operating margins for other affected sectors of the economy—processors, wholesalers, or retailers. An estimate of these costs is obtained by multiplying the estimated grower price changes over each of the six years (2002–2007) times annual shipments (an average of the prune/plum shipments with the tree pull program and without the tree pull program). That figure, summed over the six years, is approximately \$68 million. However, this \$68 million cost is likely overstated due to the fact that grower prices are currently less than the cost of production. Adjustments in retail prices, and retailer and processor margins, are anticipated to change with or without a tree removal program.

Another cost of the tree removal program is the reduced economic activity due to the growers purchasing fewer inputs (labor, chemicals, etc.) from the reduction in prune/plum acres managed and harvested. Input producers (laborers and agricultural chemical firms) would see less revenue because of lowered purchases of these inputs. To the extent that acreage removed is replanted in other crops, those costs could be somewhat offset by purchases of inputs to produce the alternative crops. This cost of the tree removal program is difficult to quantify and is not included in this analysis.

Savings over the same period of up to \$60 million could be realized through reduced surplus removal purchases of dried plum products for Federal feeding programs. These government savings would be used to purchase other commodities for use in school and other food assistance programs.

Historically, the dried plum industry has not relied heavily on the Federal surplus removal program. Since the 1991 season, the industry has requested and received surplus removal purchases in only 4 of the past 11 seasons. Should supplies be reduced as expected through the tree removal program, it would be unlikely that the dried plum industry would seek government assistance in the form of surplus removal purchases for several years to come.

## Conclusion

Based on this information, USDA has determined that there is a surplus of dried plums, and that reestablishment of producers' purchasing power would be encouraged by using Section 32 funds to reduce supplies under a Diversion Program for Dried Plums/Prunes consisting wholly of a tree-removal program. USDA has further determined that this program is expected to be a long-term solution to the oversupply situation that exists in the California dried plum industry, and that it will provide relief to growers.

Notice of this action was published in the **Federal Register** on December 17, 2001. Interested persons were invited to submit comments until January 16, 2002. Eleven comments were received. Most of them supported the tree removal program and expressed appreciation to USDA for proposing to put the program in place. Other commenters requested changes or clarifications to the eligibility, removal, and replanting requirements, and several suggested alternatives to tree removal. One commenter did not support the proposed program.

One commenter suggested that USDA should buy the surplus production and distribute the dried plums to needy persons in the United States and outside the United States. Another suggested that USDA should arrange to have the trees removed and shipped to other countries so they could be replanted and possibly provide food for needy people. USDA generally purchases commodities requested by users in quantities which can be distributed quickly. Available storage space is limited and storage is quite expensive. The tree removal program, on the other hand, is designed to help the California dried plum industry by bringing supplies more closely in line with market needs, and by providing more lasting benefits. Consumers should benefit through a stabilized market and reduced fluctuation in supplies and prices. The idea of shipping trees as a gift to needy countries with compatible climates and growing conditions has merit. However, the cost of removal, packaging of the trees with their roots intact, and the shipment to various countries would be prohibitive and the survival rate of the trees would probably be quite low.

Six comments were received from individuals requesting changes or clarifications to the eligibility, replanting, and tree removal requirements of the program.

Comments from two representatives of the California raisin industry

requested USDA to incorporate a provision into the tree removal program specifying that each grower participating in the tree removal program must agree not to replant raisin grape vines on land cleared under the tree removal program through June 30, 2004, to prevent harming the raisin industry. A prune/plum grower from the Santa Clara Valley suggested that the yield requirements be reduced from 1.5 to 1.2 tons per acre to recognize that yields in the Santa Clara Valley are traditionally lower than the yields in the Central Valley of California, where most of the prune/plums are grown.

Adding prohibitions on what could or could not be planted on land cleared under this program goes beyond the intended scope of the program and does not appear justified at this time. The limits placed on producers with respect to the trees involved in this program reflect that at a minimum prune/plum producers should not be allowed to accept the payment and, in the near future, recommit the same ground to prune/plum trees.

The program will assure that removal is not part of the normal process of tree replacement. The program directly affects land identified by the producer as prime prune/plum production land. Market conditions, moreover, would govern what producers will or will not plant. Producers are not likely to plant a crop which can be expected to be in surplus. In the end, USDA's desire was to have this program be as simple as possible.

With respect to changes in the yield per acre limit, the suggestion was not adopted because USDA desires program dollars to be used for removing higher yielding trees. The program is designed to benefit the industry by stabilizing supplies and prices of dried plums.

Two comments were received from the Executive Director of the Prune Marketing Committee. The commenter requested that an exception be made to the eligibility requirements specifying that the trees removed must have yielded at least 1.5 tons per net-planted acre during the 1999 or 2000 crop years. The commenter reported that some producers might not have the required production information because the producers did not harvest, or only harvested a portion of, their crops during the 1999 or 2000 crop years. The commenter indicated that these producers' crops generated little or no revenue because their handlers either pro-rated the quantity of dried plums they purchased or made no purchases of dried plums during 1999 or 2000.

The commenter further indicated that these producers should not be further

disadvantaged by declaring them ineligible to participate because they were not able to sell any of their fruit or only some of their fruit during the 1999 or 2000 crop years. The commenter requested that these producers be allowed to qualify if they sold production during the 2001 or 1998 crop years.

This comment was not adopted because expanding the eligibility base period could result in some growers gaining an advantage over other growers. While some producers could fare better than other producers under a broader base period, the point of the program is to achieve an overall reduction in the level of the commodity available for market. The simplest and most assured manner for achieving this goal is to limit producer eligibility to production from the 1999 or 2000 crop years as was proposed. Moreover, limiting eligibility to these two crop years will provide some measure of assurance of uniform treatment among producers and should help the public's understanding of the program.

This commenter also questioned a statement in the supplementary information section of the proposed rule that appeared on page 64920, first column, last paragraph of the December 17, 2001, issue of the **Federal Register**. The statement specified that the applicant would have to certify that he/she has not contracted to sell the land or otherwise already arranged to have the trees removed. The commenter indicated that the language implies that a grower cannot sell a prune orchard to another grower who agrees not to replant trees until after June 30, 2004, and could also exclude a grower who is in the process of buying a prune orchard.

It was not the intent of USDA to prevent participants from selling their orchards should they so choose after enrollment in the program. However, the owner who accepts the payment, or is the party of record for program purposes, will still be liable for ensuring that the two-year planting prohibition is followed even though the participant no longer owns the land. The non-planting promise is a guarantee by the participant that no one (not just the participant) will plant the property with prune/plum trees during the two-year non-planting period. Further, it was and remained the intent of USDA that only those persons who are the current owners of the property, and have not already contracted to sell the property or destroy the trees could participate. This is to avoid conflict where title to the property is already in transition—

and where the new buyer may be expecting the trees to stay.

The certification that producer applicants are required to sign, guarantees that they have not made prior arrangements to sell the land or remove the trees for commercial purposes. That is, they guarantee that the land is not going to be commercially developed for shopping centers, housing developments, vacation resorts, or similar such purposes. It was determined that including such non-agricultural land in the program would not serve the purposes of the program.

The Chairman of the Prune Marketing Committee suggested that the application period be extended for an additional 15 to 30 days to give producers more time to apply. The commenter indicated that this would be extremely helpful to the industry in obtaining as many participants as possible. This commenter subsequently withdrew the request. An extension of the application period was considered but was found not to be necessary in light of producer program interest and the fact that no material changes were found appropriate or needed based on the comments received. Had a need for material change in the program been found warranted and appropriate based on the comments received, an extension or other action would have been taken to allow for the adjustment. Deadlines were set out clearly in the proposed rule and the program was widely publicized in the industry.

Another commenter raised questions regarding the definition of the term "removal" in § 81.3. In the proposed rule, the term was defined to mean that the prune/plum trees are no longer standing and capable of producing a crop. The provision states that the producer can accomplish removal by any means the producer desires. The commenter contends that grafting other fruit stock to a prune/plum tree should be considered removal under the proposed definition. The commenter states that the prune/plum trees would no longer be standing, nor will they be able to produce a crop of prune/plums. In fact, no part of the prune/plum tree would be left.

This procedure would advance the likelihood of the production of other crops, and it is preferred that the program be neutral in that respect. Also, this would add unneeded complication to the program. Given that producer interest in the program is very high without this allowance, there does not appear to be any need to increase the attractiveness of the program. Moreover, the intent of the program is to remove prune/plum trees and the roots of those

trees. Grafting is not consistent with the intent of the program. Therefore, the definition of removal has been clarified to exclude grafting as a method of removal and to specify that "removal" means that the prune/plum trees are no longer standing and capable of producing a crop, and that the roots of trees have been removed.

A final commenter indicated that he was opposed to the program. He stated that the industry got itself into the oversupply situation and should not look to the government to get itself out of it. This program is a valid exercise of the authority granted USDA under section 32. USDA is monitoring this program very closely to ensure that program objectives are attained. The majority of the industry supports this program having considered a number of less effective alternatives to balance supplies and demand.

All of the comments received have been thoroughly reviewed. Some adjustments have been made in the rule for clarity and to assure accomplishment of the goals of the program as set out in the proposed rule and as set out in this final rule.

After consideration of all relevant matter presented, including the comments received, and other information, it is found that this final rule, as hereinafter set forth, will tend to effectuate the policy of 7 U.S.C. 612c.

Pursuant to 5 U.S.C. 553, it is also found that no good cause existed for delaying the effective date of this rule. Such delay would be contrary to the public interest because prune/plum producers needed to know immediately whether they would be accepted into the program by February 14, 2002. Eligible producers wanted to begin removing the prune/plum trees. In addition, further delay could have jeopardized the ability of the program to accomplish its goal of reducing the supply of dried plums. As a technical matter, the rule has been made retroactive to January 2, 2002, for the reasons given. In fact, however, no obligations were undertaken until February 14, 2002. If for any reason January 2, 2002, is considered inappropriate as an effective date, then the effective date will be considered February 14, 2002, which was well after the close of the comment period. Program issues were open until that date.

#### List of Subjects in 7 CFR Part 81

Administrative practice and procedures, Agriculture, Prunes, Reporting and record keeping requirements, Surplus agricultural commodities.



For the reasons set forth in the preamble, Title 7, Subtitle B, Chapter I is amended as follows:

1. In Subtitle B, Chapter I, part 81 is added to read as follows:

## **PART 81—PRUNE/DRIED PLUM DIVERSION PROGRAM**

Sec.

- 81.1 Applicability.
- 81.2 Administration.
- 81.3 Definitions.
- 81.4 Length of program.
- 81.5 General requirements.
- 81.6 Rate of payment; total payments.
- 81.7 Eligibility for payment.
- 81.8 Application and approval for participation.
- 81.9 Inspection and certification of diversion.
- 81.10 Claim for payment.
- 81.11 Compliance with program provisions.
- 81.12 Inspection of premises.
- 81.13 Records and accounts.
- 81.14 Offset, assignment, and prompt payment.
- 81.15 Appeals.
- 81.16 Refunds; joint and several liability.
- 81.17 Death, incompetency or disappearance.

**Authority:** 7 U.S.C. 612c.

### **§ 81.1 Applicability.**

Pursuant to the authority conferred by Section 32 of the Act of August 24, 1935, as amended (7 U.S.C. 612c) (Section 32), the Secretary of Agriculture will make payment to California producers who divert prune/plums by removing trees on which the fruit is produced in accordance with the terms and conditions set forth herein.

### **§ 81.2 Administration.**

The program will be administered under the direction and supervision of the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA), and will be implemented by the Prune Marketing Committee (Committee). The Committee, or its authorized representatives, does not have authority to modify or waive any of the provisions of this subpart. Such power shall rest solely with the Administrator of AMS, or delegatee. The Administrator or delegatee, in the Administrator's or delegatee's sole discretion can modify deadlines or other conditions, as needed or appropriate to serve the goals of the program. In all cases, payments under this part are subject to the availability of funds.

### **§ 81.3 Definitions.**

(a) *Administrator* means the Administrator of AMS.

(b) *AMS* means the Agricultural Marketing Service of the U.S. Department of Agriculture.

(c) *Application* means "Application for Prune Tree Removal Program."

(d) *Committee* means the Prune Marketing Committee established by the Secretary of Agriculture to locally administer Federal Marketing Order No. 993 (7 CFR Part 993), regulating the handling of dried prunes produced in California.

(e) *Diversion* means the removal of prune-plum trees after approval of applications by the Committee through June 30, 2002.

(f) *Producer* means an individual, partnership, association, or corporation in the State of California who grows prune/plums that are dehydrated into dried plums for market.

(g) *Removal* means that the prune-plum trees are no longer standing and capable of producing a crop, and the roots of the trees have been removed. The producer can accomplish removal by any means the producer desires. Grafting another type of tree to the rootstock remaining after removing the prune/plum tree would not qualify as removal under this program.

### **§ 81.4 Length of program.**

Producers diverting prune/plums by removing prune-plum trees must complete the diversion no later than June 30, 2002.

### **§ 81.5 General requirements.**

(a) To be eligible for this program, the trees to be removed must have yielded at least 1.5 tons of dried prune/plums per net-planted acre during the 1999 or 2000 crop year. A net-planted acre is the actual acreage planted with prune-plum trees. Abandoned orchards and dead trees will not qualify. In new orchards diverted, qualifying trees must be at least 5 years of age (6th leaf), contain at least two scaffolds, and be capable of producing at least 1.5 tons per net-planted acre. The block of trees for removal must be easily definable by separations from other blocks and contain at least 1,000 eligible trees or comprise an entire orchard.

(b) Any grower participating in this program must agree not to replant prune-plum trees on the land cleared under this program through June 30, 2004. Participants bear responsibility for ensuring that trees are not replanted, whether by themselves, or by successors to the land, or by others, until after June 30, 2004. If trees are replanted before June 30, 2004, by any persons, participants must refund any USDA payment, with interest, made in

connection with this tree removal program.

### **§ 81.6 Rate of payment; total payments.**

(a) The rate of payment for each eligible prune-plum tree removed will be \$8.50 per tree.

(b) Payment under paragraph (a) of this section will be made after tree removal has been verified by the staff of the Committee.

(c) The \$8.50 per tree payment shall be the total payment. USDA will make no other payment with respect to such removals. The producer will be responsible for arranging, requesting, and paying for the tree removal in the specified orchard blocks or orchard(s), as the case may be.

(d) Total payments under this program are limited to no more than \$17,000,000. No additional expenditures shall be made, unless the Administrator or delegatee in their sole and exclusive discretion shall, in writing, declare otherwise.

### **§ 81.7 Eligibility for payment.**

(a) If total applications for payment do not exceed \$17,000,000, less administration costs, payments will be made under this program to any eligible producer of prune/plums who complies with the requirements in § 81.8 and all other terms and conditions in this part.

(b) If applications for participation in the program authorized by this part exceed \$17,000,000, less administration costs, the Committee will approve the applications (subject to the requirements in § 81.8) in the order in which the completed applications are received in the Committee office up to the funding limit of \$17,000,000, less administration costs, for the program. Any additional applications will be denied.

(c) The Administrator or his delegatee may set other conditions for payment, in addition to those provided for in this part, to the extent necessary to accomplish the goals of the program.

### **§ 81.8 Application and approval for participation.**

(a) Applications will be reviewed for program compliance and approved or disapproved by Committee office personnel.

(b) Applications for participation in the Prune-Plum Diversion Program can be obtained from the Committee office at 3841 North Freeway Boulevard, Suite 120, Sacramento, California 95834; telephone (916) 565-6235.

(c) Any producer desiring to participate in the prune-plum diversion program must have filed an application with the Committee by January 31,



2002. The application shall be accompanied by a copy of any two of the following four documents: Plat Map from the County Hall of Records; Irrigation Tax Bill; County Property Tax Bill; or any other documents containing an Assessor's Parcel Number. Such application shall include at least the following information:

- (1) The name, address, telephone number and tax identification number/ social security number of the producer;
  - (2) The location and size of the production unit to be diverted;
  - (3) The prune/plum production from the orchard or portion of the orchard to be diverted during the 1999–2000 and 2000–2001 seasons;
  - (4) A statement that all persons with an equity interest in the prune/plums in the production unit to be diverted consent to the filing of the application. That is, the statement must show that the applicant has clear title to the property in question, and/or as needed, the statement must show an agreement to participate in the tree removal program from all lien or mortgage holders, and/or land owners, lessors, or similar parties with an interest in the property to the extent demanded by AMS or to the extent that such persons could object to the tree removal. However, obtaining such assent shall be the responsibility of the applicant who shall alone bear any responsibilities which may extend to third parties;
  - (5) A statement that the applicant agrees to comply with all of the regulations established for the prune/ plum diversion program;
  - (6) A certification that the information contained in the application is true and correct;
  - (7) The year that the unit of prune/ plums was planted;
  - (8) An identification of the handler(s) who received the prune/plums from the producer in the last two years.
- (d) After the Committee receives the producer applications, it shall review them to determine whether all the required information has been provided and that the information appears reliable.
- (e) As previously indicated, if the number of trees to be removed in such applications, multiplied by \$8.50 per tree, exceeds the amount of funds available for the diversion program, each grower's application will be considered in the order in which they are received at the Committee office. AMS may reject any application for any reason, and its decisions are final.
- (f) After the application reviews and confirmation of eligible trees are completed, the Committee shall notify the applicant, in writing, as to whether

or not the application has been approved and the number of trees approved for payment after removal. If an application is not approved, the notification shall specify the reason(s) for disapproval. AMS shall be the final arbiter of which applications may be approved or rejected, and the final arbiter of any appeal.

#### **§ 81.9 Inspection and certification of diversion.**

When the removal of the prune-plum trees is complete, the producer(s) will notify the Committee on a form provided by the Committee. The Committee will certify that the trees approved for removal from the block or orchard, as the case may be, have been removed, and notify AMS.

#### **§ 81.10 Claim for payment.**

(a) To obtain payment for the trees removed, the producer must submit to the Committee by June 30, 2002, a completed form provided by the Committee. Such form shall include the Committee's certification that the qualifying trees from the blocks or orchards have been removed. If all other conditions for payment are met, AMS will then issue a check to the producer in the amount of \$8.50 per eligible tree removed.

#### **§ 81.11 Compliance with program provisions.**

If USDA on its own, or on the advice of the Committee, determines that any provision of this part have not been complied with by the producer, the producer will not be entitled to diversion payments in connection with tree removal. If a producer does not comply with the terms of this part, including the requirement specified in § 81.5(b), the producer must refund, with interest, any USDA payment made in connection with such tree removal, and will also be liable to USDA for any other damages incurred as a result of such failure. The Committee or USDA may deny any producer the right to participate in this program or the right to receive or retain payments in connection with any diversion previously made under this program, or both, if the Committee or USDA determines that:

- (a) The producer has failed to properly remove the prune/plum trees from the applicable block or the whole orchard regardless of whether such failure was caused directly by the producer or by any other person or persons;
- (b) The producer has not acted in good faith in connection with any activity under this program; or

(c) The producer has failed to discharge fully any obligation assumed by, or charged to, him or her under this program.

#### **§ 81.12 Inspection of premises.**

The producer must permit authorized representatives of USDA or the Committee, at any reasonable time, to have access to their premises to inspect and examine the orchard block where trees were removed and records pertaining to the orchard to determine compliance with the provisions of this part.

#### **§ 81.13 Records and accounts.**

(a) The producers participating in this program must keep accurate records and accounts showing the details relative to the prune/plum tree removal, including the contract entered into with the firm or person removing the trees, as well as the invoices.

(b) The producers must permit authorized representatives of USDA, the Committee, and the General Accounting Office, or their delegates, at any reasonable time to inspect, examine, and make copies of such records and accounts to determine compliance with provisions of this part. Such records and accounts must be retained for two years after the date of payment to the producer under the program, or for two years after the date of any audit of records by USDA, whichever is later. Any destruction of records by the producer at any time will be at the risk of the producer when there is reason to know, believe, or suspect that matters may be or could be in dispute or remain in dispute.

#### **§ 81.14 Offset, assignment, and prompt payment.**

(a) Any payment or portion thereof due any person under this part shall be allowed without regard to questions of title under State law, and without regard to any claim or lien against the crop proceeds thereof in favor of the producer or any other creditors except agencies of the U.S. Government.

(b) Payments which are earned by a producer under this program may be assigned in the same manner as allowed under the provisions of 7 CFR part 1404.

(c) Prompt payment interest from AMS will not be applicable.

#### **§ 81.15 Appeals.**

Any producer who is dissatisfied with a determination made pursuant to this part may make a request for reconsideration or appeal of such determination. The Deputy Administrator of Fruit and Vegetable Programs shall establish the procedure for such appeals.

**§ 81.16 Refunds; joint and several liability.**

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under the application of this part, and if any refund of a payment to AMS shall otherwise become due in connection with the application of this part, all payments made under this part to any producer shall be refunded to AMS together with interest.

(b) All producers signing an application for payment as having an interest in such payment shall be jointly and severally liable for any refund, including related charges, that is determined to be due for any reason under the terms and conditions of the application of this part.

(c) Interest shall be applicable to refunds required of any producer under this part if AMS determines that payments or other assistance were provided to a producer who was not eligible for such assistance. Such interest shall be charged at the rate of interest that the United States Treasury charges the Commodity Credit Corporation (CCC) for funds, as of the date AMS made benefits available. Such interest shall accrue from the date of repayment or the date interest increases as determined in accordance with applicable regulations. AMS may waive the accrual of interest if AMS was at fault for the overpayment.

(d) Interest allowable in favor of AMS in accordance with paragraph (c) of this section may be waived when there was no intentional noncompliance on the part of the producer, as determined by AMS. Such decision to waive or not waive the interest shall be at the discretion of the Administrator or delegatee.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed for those claims which are addressed in 7 CFR part 792.

(f) Producers must refund to AMS any excess payments, as determined by AMS, with respect to such application.

(g) In the event that a benefit under this part was provided as the result of erroneous information provided by the producer, or was erroneously or improperly paid for any other reason, the benefit must be repaid with any applicable interest.

**§ 81.17 Death, incompetency, or disappearance.**

In the case of death, incompetency, disappearance, or dissolution of a prune/plum producer that is eligible to receive benefits in accordance with this part, such person or persons who would, under 7 CFR part 707 be eligible

for payments and benefits covered by that part, may receive the tree-removal benefits otherwise due the actual producer.

Dated: March 8, 2002.

**A.J. Yates,**  
*Administrator, Agricultural Marketing Service.*

[FR Doc. 02-6098 Filed 3-11-02; 3:09 pm]

BILLING CODE 3410-02-P

**DEPARTMENT OF AGRICULTURE****Agricultural Marketing Service****7 CFR Parts 916 and 917**

[Docket No. FV01-916-3 FIR]

**Nectarines and Peaches Grown in California; Revision of Reporting Requirements for Fresh Nectarines and Peaches**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule revising the reporting requirements under the marketing orders for California nectarines and peaches by modifying the requirement that all handlers submit a monthly destination report. This rule continues in effect the relaxation of the requirement by establishing an exemption for handlers who ship fewer than 50,000 containers or container equivalents of tree fruit, including nectarines, peaches, and plums. The marketing orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative (NAC) and Peach Commodity Committees (PCC) (committees). The handling of plums grown in California is regulated by a California State marketing order.

**EFFECTIVE DATE:** April 15, 2002.

**FOR FURTHER INFORMATION CONTACT:**

Terry Vawter, Marketing Specialist, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, suite 102B, Fresno, California, 93721; telephone (559) 487-5901, Fax: (559) 487-5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20090-0237; telephone: (202) 720-2491; Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW STOP 0237, Washington, DC 20090-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement Nos. 124 and 85, and Marketing Order Nos. 916 and 917 (7 CFR parts 916 and 917) regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the "orders." The orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

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. This rule will 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 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 modification of the reporting requirements under the orders' rules and regulations by establishing an exemption from filing mandatory monthly destination reports for handlers who handle less than 50,000 containers or container equivalents of nectarines, peaches, and plums. While nectarines and peaches are regulated under the Federal marketing orders, plums are regulated under a California state marketing order. Most handlers,