

## DEPARTMENT OF AGRICULTURE

## Agricultural Marketing Service

## 7 CFR Part 930

[Docket No. FV97-930-2 PR]

**Tart Cherries Grown in the States of Michigan, et al.; Establishment of Rules and Regulations for Grower Diversion and a Compensation Rate for the Cherry Industry Administrative Board Public Member and Alternate Public Member**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

**SUMMARY:** This document contains rules and regulations for a grower diversion program under the tart cherry marketing order for the 1998-1999 and following crop years. It would also establish a compensation rate to be paid to the Cherry Industry Administrative Board (Board) public member and/or alternate public member when attending Board meetings.

**DATES:** Comments must be received by May 26, 1998.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this rule. Comments must be sent to the Docket Clerk, Fruit and Vegetable Programs, AMS, USDA, room 2525-S, PO Box 96456, Washington, DC 20090-6456; Fax: (202) 720-5698. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, F&V, AMS, USDA, room 2525-S, PO Box 96456, Washington, DC 20090-6456, telephone: (202) 720-5053, Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, PO Box 96456, room 2525-S, Washington, DC 20090-6456; telephone (202) 720-2491; Fax: (202) 720-5698.

**SUPPLEMENTARY INFORMATION:** This proposal is issued under Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the

"order." The marketing agreement and order are 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 (Department) is issuing this proposed rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect. This proposed rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposed rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on rules and regulations for grower diversion under the tart cherry marketing order and the establishment of a compensation rate of \$250 per meeting for the public member and alternate public member when attending Board meetings. The tart cherry marketing order became effective in September of 1996 and the Board met March 12-13, June 26-27, September 11-12, 1997, and January 29-30, 1998, to establish and recommend to the Secretary rules and regulations to implement order authorities. At its meetings, the Board recommended grower diversion regulations and a compensation rate for the public member and alternate public member to the Department for appropriate action.

An interim final rule was published in the **Federal Register** on August 25, 1997, to establish terms and conditions for the issuance of grower diversion certificates for the 1997-1998 crop season. A final rule is being published separately in the **Federal Register**. This proposed rule includes the terms and

conditions for the grower diversion program proposed to be used for 1998-1999 and subsequent crop years.

Section 930.33 of the order authorizes the Board to compensate the public member and/or alternate public member for performance of their duties. The Board at its discretion may request the attendance of the alternate public member at any or all meetings, notwithstanding the expected or actual presence of the public member. The \$250 compensation rate would allow the Board to compensate the public member and alternate public member for attending Board meetings. Such compensation is a per meeting rate. For example, if a Board meeting is convened and lasts four days or four hours, the public member and/or alternate public member attending the meeting would receive \$250. This action is intended to compensate them for loss of work and wages. This payment would be in addition to compensation for travel, lodging, meals, and other related costs incurred in attending public Board meetings.

The order in § 930.50 provides the method of establishing an optimum supply level of cherries for the crop year. The optimum supply is defined as the average of the prior three years' sales of tart cherries, adjusted for carry-in and desired carry-out inventory. The optimum supply consists of a free percentage amount of cherries which a handler could sell to any market and a restricted percentage amount, when warranted, which would have to be withheld from the market. Based on the optimum supply level, the Board establishes preliminary free and restricted percentages. No later than September 15, after harvesting and processing of the crop, the Board computes and recommends to the Secretary final free and restricted percentages based on actual crop amounts. After receiving the Board's recommendation, the Secretary designates the final free and restricted percentages through informal rulemaking if he finds that such action would tend to effectuate the purposes of the Act. The difference between any final free market percentage and 100 percent is the final restricted percentage. The Board established an optimum supply of 247 million pounds and preliminary free and restricted percentages for tart cherries acquired by handlers during the 1997-98 crop year during its June 26-27, 1997, meeting. Final free and restricted percentages which were recommended by the Board to the Secretary were established during its September 11-12, 1997, meeting. A proposed rule setting the final free and

restricted percentages for the 1997–98 crop year at 55 percent and 45 percent, respectively, was published in the **Federal Register** on January 21, 1998, (63 FR 3048). A final rule is being published separately in the **Federal Register**.

Handlers can satisfy their restricted percentage in various ways. The restricted percentage cherries can be maintained in handler-owned inventory reserve pools. Handlers can also satisfy restricted percentage obligations by redeeming grower diversion certificates, exporting cherries to designated countries, shipping to exempt outlets, contributing to charitable organizations or diverting cherries at the handler's facility.

The maximum volume of cherries that can be held in the primary inventory reserve is 50 million pounds. Handlers can establish a secondary inventory reserve after the primary inventory reserve has reached its maximum volume. There is no maximum volume in the secondary inventory reserve. Each handler establishing a reserve (primary and secondary) is required to pay all of his or her own storage expenses. Reserve cherries can be released for sale upon Board approval into commercial outlets when the current crop is not expected to fill demand.

Section 930.58 of the tart cherry marketing order provides authority for voluntary grower diversion. Growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Growers would receive diversion certificates from the Board stating the weight of cherries diverted. The grower could then present this certificate to a handler in lieu of actual cherries. The handler could apply the weight of cherries represented by the certificate against the handler's restricted percentage amount. In comments concerning the 1997–98 grower diversion program there were concerns that such program could act as an insurance policy for cherries that are not marketable contrary to the intent of the order. The overall intent of the order is that only cherries that have reached a harvestable, marketable condition be allowed to be diverted. Therefore, in order to further clarify this concept, this rule would provide that the Board would not allow diversion credit to a grower whose fruit was destroyed before it set and/or matured on the tree, or whose fruit is unmarketable. If marketable fruit were to be damaged or destroyed by acts of nature such as storms or hail, diversion credit could be granted.

A new § 930.158 is proposed to be added to the rules and regulations specifying the guidelines for grower diversion for the 1998–99 and subsequent crop years. First, any grower desiring to divert in the orchard would need to request an application form from the Board and would need to apply by June 15, 1998, for the 1998–99 crop year and by April 15 for subsequent crop years. The application would include the name, address, phone number and a signed statement certifying that the grower will abide by all the rules and regulations for diversion. In addition, the grower would need to include maps of such grower's orchard. Each map would include the grower's name, address and location of the orchard.

The Board has recommended four types of in-orchard diversion. These are: (1) Random row diversion, in which rows of cherry trees are randomly selected by the Board's computer programs to remain unharvested; (2) whole block diversion, in which an entire orchard block is left unharvested; (3) partial block diversion, in which a contiguous portion of a definable block is diverted; and (4) in-orchard tank diversion, in which cherries harvested into tanks are measured, calculated and then diverted in the orchard. The regulations for the 1997–98 crop year only provide for random row and whole block diversion.

For all types of diversion, except tank diversion, growers would need to map each orchard block they intend to divert. A block would be defined as a group of trees that are of similar age, running in the same direction and having definable boundaries (e.g., roads, ditches). If a grower desires to divert using the random row method, all of the grower's orchards would need to be mapped, since random row diversion would involve diverting a certain amount of trees from all the grower's orchards. If the grower elects whole or partial block diversion, all blocks to be diverted would need to be mapped. The maps would need to be supplied to the Board so that the Board can calculate the diversion amounts. New maps would not need to be prepared each season. However, maps would have to be updated to reflect any substantive changes in the grower's orchard such as new trees or trees destroyed by inclement weather.

It is proposed that, for the 1998–99 and subsequent crop years, only trees more than six years old would qualify for diversion. This rule proposes that trees which are six years old or younger should not be eligible for diversion because tart cherry trees do not come

into full commercial production before they are five to seven years old. These figures are based on information from the National Agricultural Statistical Service (NASS), and from record testimony. Using trees which are not producing cherries or which are only beginning to come into full production when calculating diversion amounts would result in figures which are not representative of a grower's true production.

By July 1 of each crop year in which volume regulation is recommended, a grower that has provided the Board with the required orchard maps would have to inform the Board of such grower's intention to divert in the orchard and the method of diversion. If a grower does not elect the method of diversion by July 1, then only random row or in-orchard tank diversion would be available and the Board would provide the information necessary for the grower to divert by the random row method.

#### Random Row Diversion

Based on orchard maps submitted to the Board by the grower, the Board, using a computer program, would randomly designate rows of trees in each orchard block for nonharvest and inform the grower of this designation. This designation would be based upon the preliminary restricted percentage amount computed and announced by the Board. For example, if the preliminary restricted percentage is 20 percent, the Board's computer would randomly select rows of trees across all blocks in the grower's orchard to allow the grower to divert 20 percent of such grower's crop. The grower, however, would not have to choose this diversion amount. No less than seven days prior to each grower's individual harvest date, such grower could request a different diversion percentage (either smaller or greater). The purpose of the seven day notice is to allow the Board adequate time to prepare a different orchard map using different percentages.

To divert cherries through random row diversion, the grower would not harvest the designated rows. After completing harvest of all trees not designated for diversion, the grower would be required to notify the Board and/or a Board compliance officer. Such grower would also need to provide the Board with total harvested production amounts so the Board could calculate the amount of grower diversion tonnage to be placed on the diversion certificate. Independent confirmation by the Board of the grower's production would also be provided by the handler on Board form number two.

Growers would receive diversion certificates only after confirmation of diversion is provided to the Board. After harvest, the Board's compliance staff would visit the grower's orchards to ensure that the rows selected on the orchard map for random row diversion had not been harvested. Once the orchard has been visited by a compliance officer and the grower has carried out the terms and conditions for random row diversion, a diversion certificate would be issued to the grower. The diversion certificate would represent the weight of cherries diverted by the grower. The grower could then present the certificate to a handler to be redeemed.

#### **Whole Block Diversion**

Whole block diversion would involve diversion of the production from an entire block of cherry trees.

In whole block diversion, the value of the diversion would be determined by application of a statistical sampling protocol. For example, if a block has 5 rows or less, 3 rows would be randomly chosen to be sampled. If a block has 6 to 15 rows, 4 rows would be randomly chosen to be sampled. If a block has 16 or more rows, 5 rows would be randomly chosen to be sampled.

The Board originally recommended that a 5 percent sample size be used. However, after the first season of operation, the Board determined that the statistical method of sampling would be much more accurate in obtaining the weight of what is to be diverted. From each of the rows to be sampled, ten contiguous originally planted tree sites would be sampled within the rows. A tree site is a planted tree or an area where a tree was planted and may have been uprooted or died. Only trees over age of six years old would be harvested for the sample. For example, if it is determined that five rows are to be sampled, then 10 tree sites in each of the five rows would be sampled. A total of 50 tree sites would be sampled ((10 original tree sites)  $\times$  (5 rows) = 50 trees). If a total of 4600 pounds is harvested from the sample trees and this is divided by 50 tree sites, a yield of 92 pounds per tree site will be obtained. The yield for the block is found by multiplying 92 pounds per site by 880 trees that were mapped in the block to yield 80,960 pounds per block.

The Board discussed another sampling option. This would have required that mapping be done by the grower each year the grower applied for diversion. However, the Board felt that was an undue burden on the grower. Using the proposed sampling method would only require the grower to map

an orchard one time and update the map, as necessary, to reflect any substantive changes in the grower's orchard. The grower would not need to redo the map every year such grower may want to divert.

Prior to sampling, the grower would notify the Board to allow observation of the sampling process by a compliance officer. After harvest, the compliance officer could again visit the grower's orchard to verify that diversion actually took place.

A diversion certificate would be issued for an amount equal to the volume of cherries diverted by the grower. The grower could then present the certificate to a handler to be redeemed.

#### **Partial Block Diversion**

The Board recommended that partial block diversion be available as an option to growers. Inclusion of this option would permit growers added flexibility. Also, it would help discourage the tendency of growers to break up large blocks into multiple small blocks. Partial block diversion would also speed up the orchard diversion activity by decreasing the sampling time for growers and the Board. Growers may wish to divert only partial blocks of marketable, harvestable cherries that have been subjected to storm damage or are of lower quality. For example, this would allow a grower that has a block that is 35 rows by 40 trees per row to divert contiguous rows 1 through 22 and harvest rows 23 through 35. The partial block would be sampled as in whole block diversion. This provides the grower with more options when determining if such grower should in-orchard divert.

The Board decided to limit partial block diversions to one partial block per grower per year. This would alleviate the time that compliance officers would need to spend observing sampling and diversion at grower's premises. The Board may evaluate partial block diversions at the end of the season to decide if it is not timely or not cost effective to administer by the compliance officers. Based on this evaluation the Board may recommend increasing the number of partial block diversions or eliminate this type of diversion as an option to growers. The grower should inform the Board by July 1 if such grower elects to whole or partial block divert. If whole block or partial block diversion is not selected by July 1, growers who wish to divert could then choose the random row method or the in-orchard tank method of diversion.

#### **In-Orchard Tank Diversion**

The Board recommended that in-orchard tank diversion be authorized to growers as another option for diversion. The Board discussed at length the fact that the grower diversion program must be grower friendly in order for growers to take full advantage of the program. Adding options to the grower diversion program provides more flexibility to the grower.

A grower diverting by this method would need to notify the Board and compliance officers of such diversion. Growers may wish to use tank diversion when marketable cherries in part of the orchard have sustained damage or are of lower quality. Such cherries could be picked and placed in harvesting tanks until a compliance officer could come to the orchard to probe the tanks for volume measurement and observe the destruction of the cherries on the grower's premises.

To use this diversion option a grower would need to inform a compliance officer that such grower has tanks ready for diversion. The Board recommended that the grower have no fewer than 10 tanks for diversion prior to informing the compliance officer. This would keep the cost of inspections to a minimum and decrease the compliance officer's time from traveling from location to location to observe a small amount of in-orchard tank diversion. The Board discussed the fact that 10 tanks is not a large amount, since each tank holds about 1,000 pounds and 10 tanks would be about a truckload of cherries. This would not be an undue hardship on small growers that wish to take advantage of such diversion.

After the grower informs the compliance officer of such diversion, the compliance officer would have up to five days to come to the grower's premises to probe the tanks and observe the diversion. This would allow the compliance officer the flexibility to schedule visits throughout the area and save compliance costs.

#### **Compliance**

In-orchard diversion by growers is a voluntary action. However, once chosen, growers are expected to meet all of the terms and conditions for diversion to receive a diversion certificate and to be diligent in actually diverting the percentage of the crop for which they have applied. Handlers depend upon growers to accurately divert the percentages requested as they make their marketing and storage decisions throughout the season. Thus, in the case where growers fail to properly divert all of the cherries

specified in their application, such growers should not receive diversion credit for the undiverted cherries.

When a grower chooses random row diversion, such grower would not harvest trees in rows that have been randomly chosen by the Board's computer programs, to be left unharvested. Unintended errors could occur during harvest that could void a grower's diversion efforts. The Board has recommended that growers who choose random row diversion should be permitted to rectify any unintended errors that may occur during harvest. Therefore, under this proposal, growers who fail to properly divert designated rows, but who otherwise meet the terms and conditions of diversion, would have to divert cherries in addition to those randomly chosen, but would still receive the diversion percentage originally applied for.

For example, a grower's map could require such grower to random row divert rows 5 and 6 and such grower may harvest row 5 in error. Such grower would then be required to divert another two rows to make up for the mistake in diverting. This would discourage mistakes being made in the orchard since such growers know they may have to divert more cherries to correct a mistake. This recommended adjustment would allow a grower to correct an error in the orchard and still receive a diversion certificate.

However, if growers are harvesting at the end of the orchard and thus, do not have an opportunity to rectify a mistake by diverting additional rows or trees, the Board could reduce the grower's diversion certificate by using the two for one method. For example, a grower specifies a diversion amount of 20 percent on the original application for diversion (and does not increase or decrease such percentage by the June 15, 1998, cutoff date for the 1998-99 crop year and by April 15 for subsequent crop years). Subsequently, the grower fails to divert a complete block or all of the specified rows, resulting in diversion of only 16 percent of the crop. Thus, the grower has failed to divert an additional 4 percent of the crop. The Board would then multiply that percent by two and subtract that amount from the original diversion application amount. This would reduce the diversion amount by twice the amount of the mistake that was made and therefore, a 2 for 1 reduction would be made as explained above. In this example, 2 times 4 percent equals 8 percent; which, when subtracted from the original percentage of 20 percent, yields a diversion credit of 12 percent of the grower's total production. Thus,

the grower would receive a diversion certificate equal to 12 percent of the originally requested amount.

Growers, when aware of such errors, would need to immediately inform the Board when such errors are made during the diversion process to ensure that they continue to meet the terms and conditions of diversion. Growers who divert more than their preliminary percentage would not receive additional diversion credit. The Department agrees with this recommendation. The "two for one" method is a necessary part of compliance for the diversion provisions because it is important that the industry accurately projects the annual tonnage of cherries available for market.

The Board recommended that all grower diversion certificates should be redeemed with handlers by November 1. After November 1, grower diversion certificates would not be valid. It was intended that diversion certificates be used within the same crop year that they were issued, as if a crop had been produced. The November 1 date would allow handlers adequate time to meet their restricted percentage amounts after final percentages have been established.

#### **Compensation**

The Board also recommended adding a new § 930.133 to provide a compensation rate of \$250 to be paid to the public member and to the alternate public member for each meeting they attend. Section 930.33 provides that the public member and alternate public member shall receive such compensation as the Board may establish and the Secretary may approve. The public and alternate public member cannot have a financial interest in the tart cherry industry. To attend meetings, it may be necessary for them to be absent from their places of employment. Therefore, the Board recommended a compensation rate be established. This payment would be in addition to compensation for travel, lodging, meals, and other related costs incurred in attending Board meetings. For example, if a Board meeting is convened and lasts for a day or two or only four hours, the public member and/or alternate public member attending the meeting would receive \$250.

#### **The Regulatory Flexibility Act and Effects on Small Businesses**

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

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

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

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

This proposed rule would establish rules and regulations for grower diversion under the tart cherry marketing order. The order was promulgated on September 25, 1996. The Board was established on December 20, 1996, met several times in 1997 and recommended numerous rulemaking actions. The Board recommended establishing an assessment rate and late payment charges, procedures for grower and handler diversion and exemptions for certain order provisions. The Board also recommended regulations for the issuance of grower diversion certificates and final free and restricted percentages for the 1997-98 crop year. These actions were recommended at Board meetings held March 12-13, June 26-27, September 11-12, 1997, and January 29-30, 1998.

The impact of this rule would be beneficial to growers. The receipt of grower diversion certificates is one of the methods under the order that handlers can utilize to meet any such

handler's restricted percentage. Growers may voluntarily choose to divert because they have an abundance of low value, poor quality marketable cherries or because they are unable to find a processor willing to process some or all of their cherries. Before choosing to divert, the grower would most likely evaluate the harvesting and other cultural costs that could be saved by diverting and locate a handler that would be willing to redeem such grower's diversion certificate. An interim final rule was published on August 25, 1997, (62 FR 44881) establishing terms and conditions for the issuance of grower diversion certificates by the Board for the 1997-98 crop year. A final rule is being published separately in the **Federal Register**.

Initially, about 700 growers expressed an interest in participating in the voluntary grower diversion program. However, because of the exceptional quality of 1997-98 tart cherry crop, fewer growers opted to participate in the grower diversion program. As such, approximately 120 growers (65 growers diverting by random row and 55 diverting by whole block diversion) received diversion certificates for a total of 6,139,600 pounds of diverted cherries for an average of 51,163 pounds of cherries diverted per grower. Although it is difficult to quantify the overall effect the grower diversion program has had on the tart cherry industry at this time, information from the Board indicates that the program's economic impact on both the handlers and growers appears to have been positive. There seems to be overall satisfaction among both growers and handlers with this year's returns. The economic impact of the grower diversion provisions of this proposed regulation are also expected to be positive. They should result in benefits to both growers and handlers which are similar to those which resulted from the 1997-98 program. In addition, this proposed rule offers growers greater flexibility when diverting their cherries.

With regard to methods of diversion, this rule proposes four different ones: Random row, whole block, partial block and in-orchard tank. During diversion for the 1997-1998 season only the first two were used. The Board discussed limiting the blocks to be diverted to 5 acre blocks, but felt that this could have an adverse impact on small growers that produce on less than 5 acre blocks. Therefore, the Board recommended there be no limit on the size of orchard blocks to be diverted. The Board also discussed a sampling option that would have required mapping to be done by

the grower each year the grower applied for diversion, but rejected it because it would be an undue burden on the grower. Using the sampling methods in this proposal would only require the grower to map an orchard one time and not redo the map every year such grower may want to divert.

This proposed rule would also establish a compensation rate of \$250 per meeting for the public member and alternate public member when attending Board meetings. The public member and alternate public member would receive \$250 whether the Board meeting convened and lasted for one or two days or only four hours. The compensation to be paid to the public member and alternate public member would compensate such persons for loss of work or wages since such persons do not have a financial interest in the tart cherry industry. There was consideration for a lower compensation rate but the Board decided to proceed with the above mentioned amount. The Board did not support a lower compensation rate because it did not adequately compensate the public member and alternate public member for their time to attend Board meetings.

This proposed rule would not impose any reporting or recordkeeping requirements on either small or large tart cherry growers or handlers in addition to those already considered or approved during the order promulgation proceeding. The only written information requested from a grower is an orchard map and the grower's final production volume. Since growers maintain this information as part of their normal farming operations, it takes approximately 10 minutes to prepare a map and less than a minute to total the final production volume. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any relevant Federal rules which duplicate, overlap or conflict with this proposed rule.

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

The Board's meetings were widely publicized throughout the tart cherry industry and all interested persons were invited to attend the meeting and

participate in Board deliberations. Like all Board meetings, the March, June, September 1997, meetings and January 1998 meeting were public meetings and all entities, both large and small, were allowed to express their views on these issues. The Board itself is composed of 18 members, of which 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations to the Board. The Board's Diversion Subcommittee met on March 12, 1997, and discussed grower diversion in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

A 30-day comment period is provided to allow interested persons to respond to this proposal. This comment period is appropriate because the 1998-99 crop year will begin on July 1, 1998. All written comments timely received will be considered before a final determination is made on this matter.

#### **List of Subjects in 7 CFR Part 930**

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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

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

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

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

2. A new § 930.133 is added to read as follows:

##### **§ 930.133 Compensation rate.**

A compensation rate of \$250 per meeting shall be paid to the public member and to the alternate public member when attending Board meetings. Such compensation is a per meeting rate. For example, if a Board meeting is convened and lasts one or two days or only four hours, the public member and/or alternate public member attending the meeting would receive \$250 each.

3. A new § 930.158 is added to read as follows:

**§ 930.158 Grower diversion and grower diversion certificates.**

(a) *Grower diversion certificates.* The Board may issue diversion certificates to growers in districts subject to volume regulation who have voluntarily elected to divert in the orchard all or a portion of their tart cherry production which otherwise, upon delivery to handlers, would become restricted percentage cherries. Growers may offer the diversion certificate to handlers in lieu of delivering cherries. Handlers may redeem diversion certificates with the Board through November 1 of each crop year. After November 1 of the crop year that crop year's grower diversion certificates are no longer valid. Cherries that have reached a harvestable, marketable condition will be eligible for diversion. Diversion will not be granted to growers whose fruit was destroyed before it set and/or matured on the tree, or whose fruit is unmarketable. If marketable fruit were to be damaged or destroyed by acts of nature such as storms or hail diversion credit could be granted.

(b) *Application and mapping for diversion.* Any grower desiring to divert cherries using methods other than random row or in-orchard tank shall submit a map of the orchard or orchards to be diverted, along with a completed Grower Diversion Application, to the Board by June 15, 1998, for the 1998–99 crop year (July 1, 1998 through June 30, 1999) and April 15 for subsequent crop years. The application includes a statement which must be signed by the grower which states that the grower agrees to comply with the regulations established for a tart cherry diversion program. Each map shall contain the grower's name and number assigned by the Board, the grower's address, block name or number when appropriate, location of orchard or orchards and other information which may be necessary to accomplish the desired diversion. On or before July 1, the grower should inform the Board of such grower's intention to divert in-orchard and what type of diversion will be used. The four types of diversion are random row diversion, whole block diversion, partial block diversion and in-orchard tank diversion. A grower who informs the Board about the type of diversion he or she wishes to use by July 1 can elect to use any diversion method or a combination of diversion methods. Only random row or in-orchard tank diversion methods may be used if the Board is not so informed by July 1. Trees that are six years or younger do not qualify for diversion.

(1) *Random row diversion.* Using the orchard map furnished by the grower,

the Board will randomly select rows of trees within the orchard to be diverted. The amount of cherries to be diverted will be based on the preliminary restricted percentage amount established pursuant to § 930.50. A grower may elect a different percentage amount; however, the grower needs to inform the Board as soon as possible after the preliminary percentages are announced of this other amount, but in no event shall this be less than seven days in advance of harvest. The designated rows indicated by the map must not be harvested. After completing harvest of the remaining rows in the orchard, the grower must notify the Board and/or the Board's compliance officer. A compliance officer will then be allowed to observe the grower's orchard to assure that the selected rows have not been harvested. The grower must inform the Board of the total production of the orchard to calculate the tonnage that was diverted.

(2) *Whole block diversion.* Based on maps supplied by the grower, a sampling procedure will be used to determine the amount of cherries in the orchard to be diverted. A block is defined as rows that run the same direction, are similar in age, and have definable boundaries. The Board would require a number of trees to be sampled depending on the size of the block. For example, if a block has 5 rows or less, 3 rows would be randomly chosen to be sampled, if a block has 6 to 15 rows, 4 rows would be randomly chosen to be sampled, and if a block has 16 or more rows, 5 rows would be randomly chosen to be sampled. From each of the rows to be sampled ten contiguous originally planted tree sites will be sampled within the rows. Only trees more than five years old will be harvested for the sample. For example, if it is determined that five rows are to be sampled and 10 trees in the five rows are to be sampled, then a total of 50 trees are to be sampled ((10 original tree sites) × (5 rows) = 50 trees). A total of 4600 pounds will be harvested from the sample trees which is divided by 50 trees to obtain a yield of 92 pounds per tree. To find the yield for the block, 92 pounds is multiplied by 880 trees that were mapped in the block to yield 80,960 pounds per block. The harvested tonnage will be converted to a volume that represents the entire block of cherries. The grower should inform the Board when the samples are being taken so a compliance officer can observe the sampling. The compliance officer would be allowed to confirm that the block has been diverted.

(3) *Partial block diversion.* Partial block diversion will also be accomplished using maps supplied by

the grower. Sampling will be done as in whole block diversion except that only partial blocks would be selected and sampled. Growers may divert one partial block per year. Such block must be mapped and would be sampled as described under whole block diversion. Rows used in partial block diversion must be contiguous.

(4) *In-orchard tank diversion.* Growers wishing to in-orchard tank divert must pick the cherries to be diverted and place them in harvesting tanks. A compliance officer would then probe the tanks for volume measurement and observe the destruction of the cherries on the grower's premises. Growers wishing to take advantage of this option must have at least 10 tanks ready for diversion. The compliance officer has up to five days to come to the grower's premises to observe the diversion after being contacted.

(c) *Compliance.* Growers who voluntarily participate in the grower diversion program must sign and file with the Board a Grower Diversion Application. By signing the application, a grower agrees to the terms and conditions of the grower diversion program as contained in these regulations. To be eligible to receive diversion credit, growers voluntarily choosing to divert cherries must meet the following terms and conditions:

(1) In order to receive a certificate, a grower must demonstrate, to the satisfaction of the Board, that rows or trees which were selected for diversion were not harvested. Trees six years old or younger do not qualify for diversion.

(2) The grower must furnish the Board with a total harvested production amount so the Board can calculate the amount of grower diversion tonnage to be placed on the diversion certificate. The Board will confirm the grower's production amount with information provided by handlers (to which the grower delivers cherries) on Board form Number Two.

(3) The grower must agree to allow a Board compliance officer to visit the grower's orchard to confirm that diversion has actually taken place. If the terms and conditions for whole block, partial block or in-orchard tank diversion are not completed, the Board shall not issue the grower a diversion certificate. If a grower who chooses random row diversion harvests rows that were designated not to be harvested, the grower should inform the Board immediately of the error. The grower will then be required to divert twice the amount (rows or trees) incorrectly harvested to correct the mistake. The grower will still receive a diversion certificate equal to the original

requested amount. However, in instances where a grower is at the end of harvesting the orchard and fails to divert a complete block or specified rows, the Board shall multiply by two the difference between the original diversion amount and the actual diverted amount. The Board shall subtract that amount from the diversion application amount. Thus, the grower would receive a grower diversion certificate equal to a portion of the originally requested amount. If the grower does not inform the Board of such errors, the grower will not receive a diversion certificate.

Dated: April 17, 1998.

**Robert C. Keeney,**

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