

# Rules and Regulations

Federal Register

Vol. 71, No. 218

Monday, November 13, 2006

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 922

[Docket No. FV06-922-2 FIR]

#### Apricots Grown in Designated Counties in Washington; Temporary Relaxation of the Minimum Grade Requirement

**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 that relaxed the minimum grade requirement prescribed under the Washington apricot marketing order for the 2006 shipping season. The marketing order regulates the handling of fresh apricots grown in designated counties in the State of Washington, and is administered locally by the Washington Apricot Marketing Committee (Committee). This rule continues in effect the action that relaxed the fresh apricot minimum grade requirement from Washington No. 1 grade to Washington No. 2 grade. Taking into consideration pre-harvest hail damage, this change was made for the purpose of increasing the supply of marketable fresh apricots while increasing the potential for higher producer returns.

**EFFECTIVE DATE:** December 13, 2006.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Curry or Gary D. Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW Third Avenue, Suite 385, Portland, Oregon 97204-2807; Telephone: (503) 326-2724; Fax: (503) 326-7440; or E-Mail: [Robert.Curry@usda.gov](mailto:Robert.Curry@usda.gov) or [GaryD.Olson@usda.gov](mailto:GaryD.Olson@usda.gov).

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 20250-0237; 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 and Order No. 922 (7 CFR part 922) regulating the handling of apricots grown in designated counties in Washington, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. 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. Such 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.

The interim final rule being adopted by this rule relaxed the minimum grade requirement for fresh apricots produced in Washington State from Washington No. 1 grade to Washington No. 2 grade. Based on pre-harvest hail damage, this

change was made for the purpose of increasing the supply of marketable fresh apricots while increasing the potential for higher producer returns. The minimum grade requirement will revert to Washington No. 1 grade on April 1, 2007, for the 2007 and future seasons.

Section 922.52 of the order authorizes the issuance of regulations for grade, size, quality, maturity, pack, and container for any variety of apricots grown in the production area. Section 922.53 further authorizes the modification, suspension, or termination of regulations issued pursuant to § 922.52. Section 922.55 provides that whenever apricots are regulated pursuant to §§ 922.52 or 922.53, such apricots must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Minimum grade, maturity, color, and size requirements for Washington apricots regulated under the order are specified in § 922.321 *Apricot Regulation 21*. Section 922.321 provides, in part, that no handler shall handle any container of apricots unless such apricots grade not less than Washington No. 1, except for shipments subject to exemption under the regulation. In addition, the section provides that the Moorpark variety in open containers must be generally well matured. That section also provides that, with the exception of exempt shipments, apricots must be at least reasonably uniform in color, and be not less than 1⅝ inches in diameter, except for the Blenheim, Blenril, and Tilton varieties which must be not less than 1¼ inches in diameter. Individual shipments of apricots are exempt from these requirements if sold for home use only, do not, in the aggregate, exceed 500 pounds net weight, and each container is stamped or marked with the words "not for resale."

The interim final rule being adopted by this action revised paragraph (a)(1) of § 922.321 by temporarily changing the minimum grade requirement for fresh shipments of apricots from Washington No. 1 grade to Washington No. 2 grade for the 2006 shipping season only. This change was based on a request from a handler representing several producers and recommended by the Committee in a vote of nine to one to facilitate the handling of fruit damaged by hail. The

2006 Washington apricot shipping season started in late June and ended in early September, with most shipments made by early August. The Washington No. 1 minimum grade requirement will resume April 1, 2007, for the 2007 season and future seasons.

The Committee meets prior to and during each season to consider recommendations for modification, suspension, or termination of the regulatory requirements for Washington apricots which have been issued on a continuing basis. Committee meetings are open to the public and interested persons may express their views at these meetings. The USDA reviews information submitted by, and recommendations from, the Committee and other available information to determine whether modification, suspension, or termination of the regulatory requirements would tend to effectuate the declared policy of the Act.

Last spring, the Committee conveyed to USDA that widely scattered hail damage was reported within the Washington apricot production area as a result of late spring storms. The severe weather conditions resulted in damage to the crop making it difficult for apricots to meet the minimum grade requirements of Washington No. 1. The relaxation in the grade requirement provided for the handling of a larger portion of the Washington apricot crop than would have been permitted if the minimum grade requirement had remained at Washington No. 1. This action helped the industry meet consumer demand while providing for better producer returns.

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

There are approximately 300 apricot producers within the regulated production area and approximately 22 regulated handlers. Small agricultural producers are defined by the Small Business Administration (SBA) (13 CFR

121.201) as those having annual receipts of less than \$750,000, and small agricultural service firms are defined as those whose annual receipts are less than \$6,500,000.

For the 2005 apricot shipping season, the Washington Agricultural Statistics Service prepared a preliminary report showing that the total 5,600 ton apricot utilization sold for an average of \$997 per ton. Based on the number of producers in the production area (300), the average annual producer revenue from the sale of apricots in 2005 can thus be estimated at approximately \$18,611.

Average revenue per handler can be estimated using f.o.b. prices. According to USDA's Market News Service, 2005 fresh apricot f.o.b. prices ranged from \$15.00 to \$20.00 per 24-pound loose-pack container, and from \$14.00 to \$24.00 for 2-layer tray pack containers (which weigh an average of about 20 pounds each). Total apricot sales revenue at the f.o.b. shipper level can be estimated by taking the midpoints of each of the two ranges (\$17.50 and \$19.00) as representative annual average prices for each of the container types. The 2005 season fresh apricot pack-out of 4,471 tons can be assumed to be equally divided between the two container types, yielding an estimated quantity packed in each container type of 2,235.5 tons, or 4.471 million pounds. Dividing this quantity by the pounds per container yields the following handler sales revenue estimates: (a) 186,292 24-pound loose-pack containers, with an average price of \$17.50, valued at \$3,260,110 and (b) 223,550 two-layer tray pack containers, with an average price of \$19.00, valued at \$4,246,500. Combining the estimated handler sales revenue for the two container types (\$7,506,610) and dividing by the number of handlers (22) yields an annual average fresh apricot sales revenue estimate per handler of \$341,210. Since both the average annual producer and handler revenue figures are under the limits established by SBA, it is reasonable to assume that the majority of producers and handlers of Washington apricots may be classified as small entities.

This rule adopts, as a final rule, an interim final rule that revised paragraph (a)(1) of § 922.321 by temporarily changing the minimum grade requirement for fresh shipments of apricots from Washington No. 1 grade to Washington No. 2 grade for the 2006 season only. The Washington No. 1 minimum grade requirement will resume April 1, 2007, for the 2007 season and future seasons. Section 922.52 of the order authorizes the

issuance of regulations for grade, size, quality, maturity, pack, and container for any variety of apricots grown in the production area. Section 922.53 further authorizes the modification, suspension, or termination of regulations issued pursuant to § 922.52.

The Committee believes that this action has not negatively impacted small businesses. The interim final rule relaxed the minimum grade requirement in the order's handling regulations and was intended to provide enhanced marketing opportunities for the Washington apricot industry.

Given the emergency nature of the relaxation, the Committee's recommendation was made via the vote-by-mail procedures of the order. With ten of the twelve members responding, nine members supported the temporary grade change and one member opposed it. The only alternative to a grade relaxation offered on the ballot was to leave the minimum grade at Washington No. 1, which was not adopted.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large apricot handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. In addition, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

An interim final rule regarding this action was published in the **Federal Register** on August 2, 2006. Copies of the rule were made available to the apricot industry by the Committee's staff, as well as through the Internet by USDA and the Office of the Federal Register. That rule provided for a 60-day comment period which ended October 2, 2006. No comments were received.

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

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that the

interim final rule, without change, as published in the **Federal Register** (71 FR 43643, August 2, 2006) will tend to effectuate the declared policy of the Act.

#### List of Subjects in 7 CFR Part 922

Apricots, Marketing agreements, Reporting and recordkeeping requirements.

#### PART 922—APRICOTS GROWN IN DESIGNATED COUNTIES IN WASHINGTON

■ Accordingly, the interim final rule amending 7 CFR part 922 which was published at 71 FR 43643 on August 2, 2006, is adopted as a final rule without change.

Dated: November 7, 2006.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E6–19079 Filed 11–9–06; 8:45 am]

BILLING CODE 3410–02–P

#### DEPARTMENT OF AGRICULTURE

##### Agricultural Marketing Service

##### 7 CFR Part 930

[Docket No. FV06–930–1 FIR]

#### Tart Cherries Grown in the States of Michigan, et al.; Change in Certain Provisions/Procedures Under the Handling Regulations for Tart Cherries

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, with a change, an interim final rule removing volume limitations on new product development, new market development and market expansion activities to facilitate such activities; allowing handlers to receive diversion credit for the voluntary destruction of finished, marketable products that have deteriorated in condition to provide handlers more flexibility; adding a procedure to keep Cherry Industry Administrative Board (Board) representation in line with current district production levels; and revising grower application and mapping procedures under the grower diversion program to make the process less burdensome. These changes are intended to improve the operation of the marketing order and to increase the demand for tart cherries and tart cherry products. The changes were unanimously recommended by the Board, the body that locally administers

the marketing order. The marketing order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

**EFFECTIVE DATE:** December 13, 2006.

#### FOR FURTHER INFORMATION CONTACT:

Patricia A. Petrella or Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Unit 155, 4700 River Road, Riverdale, MD 20737; Telephone: (301) 734–5243, or Fax: (301) 734–5275.

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 20250–0237; 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 and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the “order.” The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.”

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. 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 exempt 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 in equity 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 changes to § 930.162, Exemptions, that removed volume limitations on new product development, new market development, and market expansion activities utilized by handlers to earn diversion credits to meet restricted percentage regulation withholding requirements. Handler diversion is authorized under § 930.59 of the order and, when volume regulation is in effect, handlers may fulfill restricted percentage requirements by diverting cherries or cherry products rather than placing tart cherries in an inventory reserve. Volume regulation is intended to help the tart cherry industry stabilize supplies and prices in years of excess production. Volume regulation percentages are in effect for the 2005–2006 crop year (71 FR 1915, January 12, 2006). This rule also continues in effect an action that allowed handlers to receive diversion credit for the voluntary destruction of finished marketable product; added a procedure to keep Board representation in line with district production levels; and revised grower application and mapping procedures.

Section 930.62 provides that the Board, with the approval of the Secretary, may exempt from the provisions of §§ 930.41 (Assessments), 930.44 (Quality control), 930.51 (Issuance of volume regulations), 930.53 (Modification, suspension, or termination of regulations), and 930.55 through 930.57 (Reserve regulations) cherries which are diverted in accordance with § 930.59. According to § 930.62, cherries that are diverted in accordance with § 930.59 may be used for new product development and new market development, used for experimental purposes, or used for any other purpose designated by the Board, including cherries processed into products for markets for which less than 5 percent of the preceding 5-year average production of cherries were utilized.

Section 930.162 specifies procedures for obtaining approval for exempt uses which include new product development, new market development, and market expansion. Currently, these provisions specify volume limitations for these exempt uses. The limitations are specified in § 930.162(b)(1) which states that once total industry utilization for a new product exceeds 2 percent of the 5-year average production of tart cherries, the product shall no longer be considered under development and not be eligible for a new product development exemption. The maximum