

Rules and Regulations

Federal Register

Vol. 73, No. 143

Thursday, July 24, 2008

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 Parts 916 and 917

[Docket No. AMS-FV-07-0160; FV08-916/917-1 FIR]

Nectarines and Peaches Grown in California; Changes in Handling Requirements for Fresh Nectarines and Peaches

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture is adopting, as a final rule, with a change, an interim final rule changing the handling requirements applicable to well matured fruit covered under the nectarine and peach marketing orders (orders). The orders regulate the handling of nectarines and peaches grown in California and are administered locally by the Nectarine Administrative and Peach Commodity Committees (committees). This rule continues in effect the action that updated the variety-specific size requirements to reflect changes in commercially significant varieties. This will enable handlers to continue to ship fresh nectarines and peaches in a manner that meets consumer needs, increases returns to producers and handlers, and reflects current industry practices.

DATES: *Effective Date:* August 25, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer Garcia, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906; or E-mail: Jen.Garcia@usda.gov or Kurt.Kimmel@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.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order Nos. 916 and 917, both as amended (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."

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. 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 action that modified handling requirements applicable to well matured fruit covered under the nectarine and peach orders. It also continues in effect the action that updated variety-specific size requirements to reflect changes in

commercially significant varieties. These changes enable handlers to continue to ship fresh nectarines and peaches in a manner that meets consumer needs, increases returns to producers and handlers, and reflects current industry practices.

Sections 916.52 and 917.41 of the orders provide authority for handling regulations for fresh California nectarines and peaches. The regulations may include grade, size, maturity, quality, pack, and container requirements. The orders also provide that whenever such requirements are in effect, the fruit subject to such regulation must be inspected by the Federal or Federal-State Inspection Service (Inspection Service) and certified as meeting the applicable requirements.

The nectarine order has been in effect since 1939, and the peach program has been in effect since 1958. The orders have been used over the years to establish a quality control program that includes minimum grades, sizes, and maturity standards. That program has helped improve the quality of product moving from the farm to market, and has helped growers and handlers more effectively market their crops. Additionally, the orders have been used to ensure that only satisfactory quality nectarines and peaches reach the consumer. This has helped increase and maintain market demand over the years.

Sections 916.53 and 917.42 authorize the modification, suspension, or termination of regulations issued under §§ 916.52 and 917.41, respectively. Changes in regulations have been implemented to reflect changes in industry operating practices and to solve marketing problems as they arise. The committees meet whenever needed, but at least annually, to discuss the orders and the various regulations in effect and to determine if, or what, changes may be necessary to reflect industry needs. As a result, regulatory changes have been made numerous times over the years to address industry changes and to improve program operations.

Currently, handling requirements are in effect for nectarines and peaches packed in containers marked "CA WELL MAT" or "California Well Matured." The term "well matured" is defined in the orders' rules and regulations, and has been used for many years by the

industry to describe a level of maturity higher than the definition of "mature" in the United States Standards for Grades of Nectarines (7 CFR 51.3145 through 51.3160) and United States Standards for Grades of Peaches (7 CFR 51.1210 through 51.1223). Other handling requirements were suspended in 2007 to reduce handler inspection costs.

The committees met on December 18, 2007, and unanimously recommended that the handling requirements be revised for the 2008 season, which began in April. The committees announced a crop estimate of 21,000,000 containers of nectarines and 23,500,000 containers of peaches at their April 29, 2008, meetings.

Both orders provide authority (in §§ 916.52 and 917.41) to establish size requirements. Size regulations encourage producers to leave fruit on the tree longer, which improves both the size and maturity of the fruit. Acceptable fruit size provides greater consumer satisfaction and promotes repeat purchases, thereby increasing returns to producers and handlers. In addition, increased fruit size results in increased numbers of packed containers of nectarines and peaches per acre, which is also a benefit to producers and handlers.

Varieties recommended for specific size regulations have been reviewed and such recommendations are based on the specific characteristics of each variety. The committees conduct studies each season on the range of sizes attained by the regulated varieties and those varieties with the potential to become regulated, and determine whether revisions to the size requirements are appropriate.

Nectarines: Section 916.356 of the order's rules and regulations specifies minimum size requirements for fresh nectarines in paragraphs (a)(2) through (a)(9). This rule continues in effect the action that revised paragraphs (a)(3), (a)(4), and (a)(6) of § 916.356 to establish variety-specific minimum size requirements for 11 varieties of nectarines that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2007 season. This rule also continues in effect the action that removed the variety-specific minimum size requirements for four varieties of nectarines whose shipments fell below 5,000 containers during the 2007 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Burnecteleven (Summer Flare® 30) variety of

nectarines, recommended for regulation at a minimum size 84. A minimum size of 84 means that a packed standard lug box will contain not more than 84 nectarines. Studies of the size ranges attained by the Burnecteleven (Summer Flare® 30) variety revealed that 100 percent of the containers met the minimum size of 84 during the 2006 and 2007 seasons. Sizes ranged from size 30 to size 70, with 9.6 percent of the fruit in the 30 sizes, 50 percent of the packages in the 40 sizes, 32.9 percent in the 50 sizes, 6.2 percent in the 60 sizes, and 1.3 percent in the 70 sizes.

A review of other varieties with the same harvesting period indicated that the Burnecteleven (Summer Flare® 30) variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to handle the variety confirm this information regarding minimum size and harvesting period, as well. Thus, the recommendation to place the Burnecteleven (Summer Flare® 30) variety in the variety-specific minimum size regulation at a minimum size 84 is appropriate. This recommendation results from size studies conducted over a two-year period.

Historical data such as this provides the committee with the information necessary to recommend the appropriate sizes at which to regulate various nectarine varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when such size recommendations are deliberated. Producer and handler comments are also considered at both committee and subcommittee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, paragraph (a)(3) of § 916.356 was revised to include the Polar Ice and Polar Light nectarine varieties; paragraph (a)(4) of § 916.356 was revised to include the Burnectthirteen (Snow Flare® 22), Burnectfourteen (Snow Flare® 21), and White Sun nectarine varieties; and paragraph (a)(6) of § 916.356 was revised to include the Burnecteleven (Summer Flare® 30), Burnectfifteen (Summer Flare® 27), Grand Bright, La Reina, Saucer, and Sugar Pearl™ nectarine varieties.

This rule also continues in effect the action that revised paragraph (a)(6) of § 916.356 to remove the August Snow, Prima Diamond XVIII, Sparkling Red, and Summer Grand nectarine varieties from the variety-specific minimum size requirements because fewer than 5,000 containers of each of these varieties

were produced during the 2007 season. Nectarine varieties removed from the nectarine variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (a)(7), (a)(8), and (a)(9) of § 916.356.

Peaches: Section 917.459 of the order's rules and regulations specifies minimum size requirements for fresh peaches in paragraphs (a)(2) through (a)(6), and paragraphs (b) and (c). This rule continues in effect the action that revised paragraphs (a)(2), (a)(3), (a)(5), and (a)(6) of § 917.459 to establish variety-specific minimum size requirements for 15 peach varieties that were produced in commercially significant quantities of more than 10,000 containers for the first time during the 2007 season. This rule also continues in effect the action that removed the variety-specific minimum size requirements for eight varieties of peaches whose shipments fell below 5,000 containers during the 2007 season.

For example, one of the varieties recommended for addition to the variety-specific minimum size requirements is the Super Lady variety of peaches, which was recommended for regulation at a minimum size 96. A minimum size of 96 means that a packed standard lug box contains not more than 96 peaches. Studies of the size ranges attained by the Super Lady variety revealed that 98.9 percent of the containers met the minimum size of 96 during the 2006 and 2007 seasons. The sizes ranged from size 40 to size 96, with 6.9 percent of the containers meeting the size 40, 4 percent meeting the size 50, 20.5 percent meeting the size 60, 29.8 percent meeting the size 70, 15.6 percent meeting the size 80, 4.5 percent meeting the size 84, 4.9 percent meeting the size 88, and 12.7 percent meeting the size 96 in the 2007 season.

A review of other varieties with the same harvesting period indicated that the Super Lady variety was also comparable to those varieties in its size ranges for that time period. Discussions with handlers known to pack the variety confirm this information regarding minimum size and the harvesting period, as well. Thus, the recommendation to place the Super Lady variety in the variety-specific minimum size regulation at a minimum size 96 is appropriate.

Historical data such as this provides the committee with the information necessary to recommend the appropriate sizes at which to regulate various peach varieties. In addition, producers and handlers of the varieties affected are personally invited to comment when

such size recommendations are deliberated. Producer and handler comments are also considered at committee meetings when the staff receives such comments, either in writing or verbally.

For reasons similar to those discussed in the preceding paragraph, paragraph (a)(2) of § 917.459 was revised to include the Supechfifteen and Super Lady peach varieties; paragraph (a)(5) of § 917.459 was revised to include the Crimson Queen, Sauzee Queen, and Supechnine peach varieties; and paragraph (a)(6) of § 917.459 was revised to include the Burpeachtwentyone (Summer Flame® 26), Candy Princess, Jasper Flame, Natures #10, Peach-N-Cream, Queen Jewel, September Blaze, Strawberry, Summer Fling, and Sweet Henry peach varieties.

This rule also continues in effect the action that revised paragraph (a)(2) of § 917.459 to remove the Sugar Snow peach variety; paragraph (a)(3) of § 917.459 to remove the May Snow peach variety; paragraph (a)(5) of § 917.459 to remove the Raspberry, Sugar Jewel, and Sunlit Snow peach varieties; and paragraph (a)(6) of § 917.459 to remove the Late Ito Red, Magenta Gold, and Scarlet Snow peach varieties from the variety-specific minimum size requirements because less than 5,000 containers of each of these varieties was produced during the 2007 season. Peach varieties removed from the peach variety-specific minimum size requirements become subject to the non-listed variety size requirements specified in paragraphs (b) and (c) of § 917.459.

The committees recommended these changes in the minimum size requirements based on a continuing review of the sizing and maturity relationships for these nectarine and peach varieties, and the consumer acceptance levels for various fruit sizes. This rule is designed to establish minimum size requirements for fresh nectarines and peaches consistent with expected crop and market conditions. This should help establish and maintain orderly marketing conditions for these fruits in the interests of producers, handlers, and consumers.

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 action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of

business subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

Industry Information

There are approximately 145 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 550 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those whose annual receipts are less than \$6,500,000. Small agricultural producers are defined by the SBA as those having annual receipts of less than \$750,000. A majority of these handlers and producers may be classified as small entities.

The committees' staff has estimated that there are fewer than 30 handlers in the industry who would not be considered small entities. For the 2007 season, the committees' staff estimated that the average handler price received was \$9.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 722,223 containers to have annual receipts of \$6,500,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2007 season, the committees' staff estimates that small handlers represent approximately 80 percent of all the handlers within the industry.

The committees' staff has also estimated that fewer than 65 producers in the industry would not be considered small entities. For the 2007 season, the committees estimated the average producer price received was \$4.50 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 166,667 containers of nectarines and peaches to have annual receipts of \$750,000. Given data maintained by the committees' staff and the average producer price received during the 2007 season, the committees' staff estimates that small producers represent more than 88 percent of the producers within the industry.

With an average producer price of \$4.50 per container or container equivalent, and a combined packout of nectarines and peaches of 42,382,098 containers, the value of the 2007 packout is estimated to be \$190,719,441.

Dividing this total estimated grower revenue figure by the estimated number of producers (550) yields an estimate of average revenue per producer of about \$346,763 from the sales of peaches and nectarines.

Under authority provided in §§ 916.52 and 917.41 of the orders, grade, size, maturity, pack, and container marking requirements are established for fresh shipments of California nectarines and peaches, respectively. Such requirements are in effect on a continuing basis.

Sections 916.356 and 917.459 of the orders' rules and regulations establish minimum sizes for various varieties of nectarines and peaches. This rule continues in effect the action that made adjustments to the minimum sizes authorized for certain varieties of each commodity for the 2008 season. Minimum size regulations are put in place to encourage producers to leave fruit on the trees for a longer period of time, increasing both maturity and fruit size. Increased fruit size increases the number of packed containers per acre, and coupled with heightened maturity levels, also provides greater consumer satisfaction, which in turn fosters repeat purchases that benefit producers and handlers alike.

Annual adjustments to minimum sizes of nectarines and peaches, such as these, are recommended by the committees based upon historical data, producer and handler information regarding sizes attained by different varieties, and trends in consumer purchases.

An alternative to such action would include not establishing minimum size regulations for these new varieties. Such an action, however, would be a significant departure from the committees' past practices and represent a significant change in the regulations as they currently exist. For these reasons, this alternative was not recommended.

The committees make recommendations regarding the revisions in handling requirements after considering all available information, including comments received by committee staff. At the meetings, the impact of and alternatives to these recommendations are deliberated. The committees consist of individual producers and handlers with many years of experience in the industry who are familiar with industry practices and trends. All committee meetings are open to the public and comments are widely solicited. In addition, minutes of all meetings are distributed to committee members and others who have requested them, and are also available on the committees' Web site, thereby

increasing the availability of this critical information within the industry.

Regarding the impact of this action on the affected entities, both large and small entities are expected to benefit from the changes, and the costs of compliance are not expected to be significantly different between large and small entities.

This rule will not impose any additional reporting or recordkeeping requirements on either small or large nectarine and peach 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.

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

In addition, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Further, the committees' meetings were widely publicized throughout the nectarine and peach industry and all interested parties were invited to attend the meetings and participate in committee deliberations. Like all committee meetings, the December 18, 2007, meetings were public meetings and all entities, both large and small, were able to express their views on this issue.

Also, the committees have a number of appointed subcommittees to review certain issues and make recommendations to the committees. The committees' Tree Fruit Quality Subcommittee met on December 11, 2007, and discussed this issue in detail. That meeting was also a public meeting and both large and small entities were able to participate and express their views.

An interim final rule concerning this action was published in the **Federal Register** on March 18, 2008. Copies of the rule were posted on the committees' Web site. In addition, the rule was made available through the Internet by USDA and the Office of the **Federal Register**. That rule provided a 60-day comment period which ended May 19, 2008. One comment was received from the committees' staff. The comment stated that the trademark name for the currently regulated Burpeachsixteen variety had been established as "Spring Flame® 24." Section 917.459(a)(6) has been modified to include the new trademark name.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at the following Web site: <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>. 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 committees' recommendations, and other information, it is found that finalizing this interim final rule, with a change, as published in the **Federal Register** (73 FR 14372, March 18, 2008) will tend to effectuate the declared policy of the Act.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

■ Accordingly, the interim final rule amending 7 CFR parts 916 and 917 which was published at 73 FR 14372 on March 18, 2008, is adopted as a final rule with the following change:

PART 917—FRESH PEARS AND PEACHES GROWN IN CALIFORNIA

■ 1. The authority citation for part 917 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 917.459 is amended by revising the introductory text of paragraph (a)(6) to read as follows:

§ 917.459 California peach grade and size regulation.

* * * * *

(6) Any package or container of August Lady, Autumn Flame, Autumn Red, Autumn Rich, Autumn Rose, Autumn Snow, Burpeachtwo (Henry II®), Burpeachthree (September Flame®), Burpeachfour (August Flame®), Burpeachfive (July Flame®), Burpeachsix (June Flame®), Burpeachseven (Summer Flame® 29), Burpeachfifteen (Summer Flame® 34), Burpeachsixteen (Spring Flame® 24), Burpeachtwenty (Summer Flame®), Burpeachtwentyone (Summer Flame® 26), Candy Princess, Coral Princess, Country Sweet, Diamond Princess, Earlirich, Early Elegant Lady, Elegant

Lady, Fancy Lady, Fay Elberta, Full Moon, Galaxy, Glacier White, Henry III, Henry IV, Ice Princess, Ivory Princess, Jasper Flame, Jasper Treasure, Jillie White, Joanna Sweet, John Henry, Kaweah, Klondike, Last Tango, Natures #10, O'Henry, Peach-N-Cream, Pink Giant, Pink Moon, Prima Gattie 8, Prima Peach 13, Prima Peach XV, Prima Peach 20, Prima Peach 23, Prima Peach XXVII, Princess Gayle, Queen Jewel, Rich Lady, Royal Lady, Ruby Queen, Ryan Sun, Saturn (Donut), September Blaze, September Snow, September Sun, Sierra Gem, Sierra Rich, Snow Beauty, Snow Blaze, Snow Fall, Snow Gem, Snow Giant, Snow Jewel, Snow King, Snow Magic, Snow Princess, Sprague Last Chance, Spring Candy, Strawberry, Sugar Crisp, Sugar Giant, Sugar Lady, Summer Dragon, Summer Fling, Summer Lady, Summer Sweet, Summer Zee, Sweet Blaze, Sweet Dream, Sweet Henry, Sweet Kay, Sweet September, Tra Zee, Valley Sweet, Vista, White Lady, or Zee Lady variety peaches unless:

* * * * *

Dated: July 21, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–16956 Filed 7–23–08; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Docket No. AMS–FV–08–0044; FV08–981–1 IFR]

Almonds Grown in California; Relaxation of Incoming Quality Control Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule relaxes the incoming quality control requirements prescribed under the California almond marketing order (order). The order regulates the handling of almonds grown in California and is administered locally by the Almond Board of California (Board). This rule changes the date by which almond handlers must satisfy their inedible disposition obligation from August 31 to September 30 of each year. This will provide handlers more flexibility in their operations in light of larger almond crops.