

Rules and Regulations

Federal Register

Vol. 75, No. 102

Thursday, May 27, 2010

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 930

[Doc. No. AMS-FV-09-0069; FV09-930-2 FR]

Tart Cherries Grown in the States of Michigan, et al.; Final Free and Restricted Percentages for the 2009-2010 Crop Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule establishes final free and restricted percentages for the 2009-2010 crop year under the Federal marketing order regulating tart cherries grown in seven States (order). The percentages are 32 percent free and 68 percent restricted and establish the proportion of cherries from the 2009 crop which may be handled in commercial outlets. The percentages are intended to stabilize supplies and prices, and strengthen market conditions. The percentages were recommended by the Cherry Industry Administrative Board (Board), the body that locally administers the order. The order regulates the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin.

DATES: *Effective Date:* May 28, 2010.

FOR FURTHER INFORMATION CONTACT: 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, Fax: (301) 734-5275, or E-mail: Kenneth.Johnson@ams.usda.gov.

Small businesses may request information on complying with this regulation by contacting Antoinette

Carter, 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: Antoinette.Carter@ams.usda.gov.

SUPPLEMENTARY INFORMATION: This final 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 (Department) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, final free and restricted percentages may be established for tart cherries handled by handlers during the crop year. This final rule will establish final free and restricted percentages for tart cherries for the 2009-2010 crop year, beginning July 1, 2009, through June 30, 2010.

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 exempt therefrom. Such 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 in equity 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.

The order prescribes procedures for computing an optimum supply and preliminary and final percentages that establish the amount of tart cherries that can be marketed throughout the season.

The regulations apply to all handlers of tart cherries that are in the regulated districts. Tart cherries in the free percentage category may be shipped immediately to any market, while restricted percentage tart cherries must be held by handlers in a primary or secondary reserve, or be diverted in accordance with § 930.59 of the order and § 930.159 of the regulations, or used for exempt purposes (to obtain diversion credit) under § 930.62 of the order and § 930.162 of the regulations. The regulated Districts for this season are: District One—Northern Michigan; District Two—Central Michigan; District Three—Southern Michigan; District Four—New York; District Seven—Utah; and District Eight—Washington. Districts Five, Six, and Nine (Oregon, Pennsylvania, and Wisconsin, respectively) will not be regulated for the 2009-2010 season.

The order prescribes under § 930.52 that those districts to be regulated shall be those districts in which the average annual production of cherries over the prior three years has exceeded six million pounds. A district not meeting the six million-pound requirement shall not be regulated in such crop year. Because this requirement was not met in the Districts of Oregon, Pennsylvania, and Wisconsin, handlers in those districts are not subject to volume regulation during the 2009-2010 crop year.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. Demand for tart cherries and tart cherry products tends to be relatively stable from year to year. The supply of tart cherries, by contrast, varies greatly from crop year to crop year. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from crop year to crop year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely balanced. The primary purpose of setting free and restricted percentages is to balance supply with demand and reduce large surpluses that may occur.

Section 930.50(a) of the order prescribes procedures for computing an optimum supply for each crop year. The

Board must meet on or about July 1 of each crop year, to review sales data, inventory data, current crop forecasts and market conditions. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years, to which is added a desirable carryout inventory not to exceed 20 million pounds or such other amount as may be established with the approval of the Secretary. The optimum supply represents the desirable volume of tart cherries that should be available for sale in the coming crop year.

The order also provides that on or about July 1 of each crop year, the Board is required to establish preliminary free and restricted percentages. These percentages are computed by deducting the actual carryin inventory from the optimum supply figure (adjusted to raw product equivalent—the actual weight of cherries handled to process into cherry products) and subtracting that figure from either the current year's USDA crop forecast or from an average of such other crop estimates the Board votes to use. If the resulting number is positive, this represents the estimated over-production, which would be the restricted percentage tonnage. The restricted percentage tonnage is then

divided by the sum of the crop forecast for the regulated districts to obtain preliminary percentages for the regulated districts. The Board is required to establish a preliminary restricted percentage equal to the quotient, rounded to the nearest whole number, with the complement being the preliminary free tonnage percentage. If the tonnage requirements for the year are more than the USDA crop forecast, the Board is required to establish a preliminary free tonnage percentage of 100 percent and a preliminary restricted percentage of zero. The Board is required to announce the preliminary percentages in accordance with paragraph (h) of § 930.50.

The Board met on June 18, 2009, and computed, for the 2009–2010 crop year, an optimum supply of 183 million pounds. The Board recommended that the desirable carryout figure be zero pounds. Desirable carryout is the amount of fruit required to be carried into the succeeding crop year and is set by the Board after considering market circumstances and needs. This figure can range from zero to a maximum of 20 million pounds.

The Board calculated preliminary free and restricted percentages as follows:

The USDA estimate of the crop for the entire production area was 284 million pounds; a 31 million pound carryin (based on Board estimates) was subtracted from the optimum supply of 183 million pounds which resulted in the 2009–2010 poundage requirements (adjusted optimum supply) of 152 million pounds. The carryin figure reflects the amount of cherries that handlers actually had in inventory at the beginning of the 2009–2010 crop year. Subtracting the adjusted optimum supply of 152 million pounds from the USDA crop estimate, (284 million pounds) results in a surplus of 131 million pounds of tart cherries. The surplus was divided by the production in the regulated districts (269 million pounds) and resulted in a restricted percentage of 49 percent for the 2009–2010 crop year. The free percentage was 51 percent (100 percent minus 49 percent). The Board established these percentages and announced them to the industry as required by the order.

The preliminary percentages were based on the USDA production estimate and the following supply and demand information available at the June meeting for the 2009–2010 year:

| | Millions of pounds | |
|---|--------------------|------------|
| Optimum Supply Formula: | | |
| (1) Average sales of the prior three years | | 183 |
| (2) Plus desirable carryout | | 0 |
| (3) Optimum supply calculated by the Board at the June meeting | | 183 |
| Preliminary Percentages: | | |
| (4) USDA crop estimate | | 284 |
| (5) Carryin held by handlers as of July 1, 2008 | | 31 |
| (6) Adjusted optimum supply for current crop year | | 152 |
| (7) Surplus | | 131 |
| (8) USDA crop estimate for regulated districts | | 269 |
| | Free | Restricted |
| (9) Preliminary percentages (item 7 divided by item 8 x 100 equals restricted percentage; 100 minus restricted percentage equals free percentage) | 51 | 49 |

Between July 1 and September 15 of each crop year, the Board may modify the preliminary free and restricted percentages by announcing interim free and restricted percentages to adjust to the actual pack occurring in the industry. No later than September 15, the Board must recommend final free and restricted percentages to the Secretary.

The Secretary establishes final free and restricted percentages through the informal rulemaking process. These percentages make available the tart cherries necessary to achieve the optimum supply figure calculated by the Board. The difference between any

final free percentage designated by the Secretary and 100 percent is the final restricted percentage.

The Board met on September 10, 2009, and recommended final free and restricted percentages. The actual production reported by the Board was 355 million pounds, which is a 71 million pound increase from the USDA crop estimate of 284 million pounds. The Board adjusted the optimum supply figure from 183 million pounds calculated for preliminary percentages to 176 million pounds when calculating the final percentages. This adjustment was made because the sales figure for June 2009, which is used to compute

three-year average sales, was estimated for preliminary percentages, but was based on actual numbers for final percentages.

A 52 million pound carryin (based on handler reports) was subtracted from the optimum supply of 176 million pounds which resulted in the 2009–2010 poundage requirements (adjusted optimum supply) of 124 million pounds. Subtracting the adjusted optimum supply of 124 million pounds from the USDA crop estimate (355 million pounds), results in a surplus of 231 million pounds of tart cherries. The surplus was divided by the production in the regulated districts (338 million

pounds) and resulted in a restricted percentage of 68 percent for the 2009–2010 crop year. The free percentage was

32 percent (100 percent minus 68 percent).
The final percentages are based on the Board’s reported production figures and

the following supply and demand information available in September for the 2009–2010 crop year:

| | | Million pounds |
|---|------|------------------------|
| Optimum Supply Formula: | | |
| (1) Average sales of the prior three years | | 176 |
| (2) Plus desirable carryout | | 0 |
| (3) Optimum supply calculated by the Board | | 176 |
| Final Percentages: | | |
| (4) Board reported production | | 355 |
| (5) Plus carryin held by handlers as of July 1, 2009 | | 52 |
| (6) Tonnage available for current crop year | | 407 |
| (7) Surplus (item 6 minus item 3) | | 231 |
| (8) Production in regulated districts | | 338 |
| | Free | Percentages restricted |
| (9) Final Percentages (item 7 divided by item 8 × 100 equals restricted percentage; 100 minus restricted percentage equals free percentage) | 32 | 68 |

The USDA’s “Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders” specify that 110 percent of recent years’ sales should be made available to primary markets each season before recommendations for volume regulation are approved. This goal would be met by the establishment of a preliminary percentage which releases 100 percent of the optimum supply and the additional release of tart cherries provided under § 930.50(g). This release of tonnage, equal to 10 percent of the average sales of the prior three years sales, is made available to handlers each season. The Board recommended that such release should be made available to handlers the first week of December and the first week of May. Handlers can decide how much of the 10 percent release they would like to receive on the December and May release dates. Once released, such cherries are available to handlers for free use. Approximately 18 million pounds would be made available to handlers this season in accordance with Department Guidelines. This release would be made available to every handler in proportion to each handler’s percentage of the total regulated crop handled. If a handler does not take his/her proportionate amount, such amount remains in the inventory reserve.

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. There are approximately 40 handlers of tart cherries who are subject to regulation under the tart cherry marketing order and approximately 600 producers of tart cherries in the regulated area. Small agricultural service firms, which includes handlers, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000, and small agricultural producers are defined as those having annual receipts of less than \$750,000. A majority of the producers and handlers are considered small entities under SBA’s standards. The principal demand for tart cherries is in the form of processed products. Tart cherries are dried, frozen, canned, juiced, and pureed. During the period 1997/98 through 2008/09, approximately 96 percent of the U.S. tart cherry crop, or 244.4 million pounds, was processed annually. Of the 244.4 million pounds of tart cherries processed, 61 percent was frozen, 27 percent was canned, and 12 percent was utilized for juice and other products. Based on National Agricultural Statistics Service data, acreage in the United States devoted to tart cherry production has been trending downward. Bearing acreage has declined from a high of 50,050 acres in 1987/88 to 34,650 acres in 2008/09. This

represents a 31 percent decrease in total bearing acres. Michigan leads the nation in tart cherry acreage with 70 percent of the total and produces about 75 percent of the U.S. tart cherry crop each year. The 2009/10 crop is large in size at 355 million pounds. This production level is 71.5 million pounds greater than the 283.6 million pounds estimated by the National Agricultural Statistics Service (NASS) in June. The largest crop occurred in 1995 with production in the regulated districts reaching a record 395.6 million pounds. The price per pound received by tart cherry growers ranged from a low of 7.3 cents in 1987 to a high of 46.4 cents in 1991. These problems of wide supply and price fluctuations in the tart cherry industry are national in scope and impact. Growers testified during the order promulgation process that the prices they received often did not come close to covering the costs of production. The industry demonstrated a need for an order during the promulgation process of the marketing order because large variations in annual tart cherry supplies tend to lead to fluctuations in prices and disorderly marketing. As a result of these fluctuations in supply and price, growers realize less income. The industry chose a volume control marketing order to even out these wide variations in supply and improve returns to growers. During the promulgation process, proponents testified that small growers and processors would have the most to gain from implementation of a marketing order because many such growers and handlers had been going out of business due to low tart cherry prices. They also testified that, since an order would help

increase grower returns, this should increase the buffer between business success and failure because small growers and handlers tend to be less capitalized than larger growers and handlers.

Aggregate demand for tart cherries and tart cherry products tends to be relatively stable from year-to-year. Similarly, prices at the retail level show minimal variation. Consumer prices in grocery stores, and particularly in food service markets, largely do not reflect fluctuations in cherry supplies. Retail demand is assumed to be highly inelastic, which indicates that price reductions do not result in large increases in the quantity demanded. Most tart cherries are sold to food service outlets and to consumers as pie filling; frozen cherries are sold as an ingredient to manufacturers of pies and cherry desserts. Juice and dried cherries are expanding market outlets for tart cherries.

Demand for tart cherries at the farm level is derived from the demand for tart cherry products at retail. In general, the farm-level demand for a commodity consists of the demand at retail or food service outlets minus per-unit processing and distribution costs incurred in transforming the raw farm commodity into a product available to consumers. These costs comprise what is known as the "marketing margin."

The supply of tart cherries, by contrast, varies greatly. The magnitude of annual fluctuations in tart cherry supplies is one of the most pronounced for any agricultural commodity in the United States. In addition, since tart cherries are processed either into cans or frozen, they can be stored and carried over from year-to-year. This creates substantial coordination and marketing problems. The supply and demand for tart cherries is rarely in equilibrium. As a result, grower prices fluctuate widely, reflecting the large swings in annual supplies.

In an effort to stabilize prices, the tart cherry industry uses the volume control mechanisms under the authority of the Federal marketing order. This authority allows the industry to set free and restricted percentages. These restricted percentages are only applied to states or districts with a 3-year average of production greater than six million pounds.

The primary purpose of setting restricted percentages is an attempt to bring supply and demand into balance. If the primary market is over-supplied with cherries, grower prices decline substantially.

The tart cherry sector uses an industry-wide storage program as a

supplemental coordinating mechanism under the Federal marketing order. The primary purpose of the storage program is to warehouse supplies in large crop years in order to supplement supplies in short crop years. The storage approach is feasible because the increase in price—when moving from a large crop to a short crop year—more than offsets the costs for storage, interest, and handling of the stored cherries.

The price that growers receive for their crop is largely determined by the total production volume and carryin inventories. The Federal marketing order permits the industry to exercise supply control provisions, which allow for the establishment of free and restricted percentages for the primary market, and a storage program. The establishment of restricted percentages impacts the production to be marketed in the primary market, while the storage program has an impact on the volume of unsold inventories.

The volume control mechanism used by the cherry industry results in decreased shipments to primary markets. Without volume control the primary markets (domestic) would likely be over-supplied, resulting in lower grower prices.

To assess the impact that volume control has on the prices growers receive for their product, an econometric model has been developed. The econometric model provides a way to see what impacts volume control may have on grower prices. The three districts in Michigan, along with the districts in Utah, New York, and Washington are the restricted areas for this crop year and their combined total production is 338 million pounds. A 68 percent restriction means 108 million pounds is available to be shipped to primary markets from these four states. Production levels of 10.7 million pounds for Wisconsin, 2.7 million pounds for Oregon, and 3.8 million pounds for Pennsylvania (the unregulated areas in 2009/10), result in an additional 17.2 million pounds available for primary market shipments.

In addition, USDA requires a 10 percent release from reserves as a market growth factor. This results in an additional 18 million pounds being available for the primary market. The 108 million pounds from Michigan, Utah, Washington, and New York, the 17.2 million pounds from the other producing states, the 18 million pound release, and the 52 million pound carryin inventory gives a total of 195.2 million pounds being available for the primary markets.

The econometric model is used to estimate the impact of establishing a

reserve pool for this year's crop. With the volume controls, grower prices are estimated to be approximately \$0.12 per pound higher than without volume controls.

The use of volume controls is estimated to have a positive impact on growers' total revenues. With regulation, growers' total revenue from processed cherries are estimated to be \$17.3 million higher than without restrictions. The without restrictions scenario assumes that all tart cherries produced would be delivered to processors for payments.

It is concluded that the 68 percent volume control would not unduly burden producers, particularly smaller growers. The 68 percent restriction would be applied to the growers in Michigan, New York, Utah, and Washington. The growers in the other three states covered under the marketing order will benefit from this restriction.

Recent grower prices have been as high as \$0.44 per pound in 2002–03 when there was a crop failure. Prices in the last two crop years have been \$0.268 in 2007–08 and \$0.372 per pound in 2008–09. At current production levels, yield is estimated at approximately 10,251 pounds per acre. At this level of yield the cost of production is estimated to be \$0.25 per pound (costs were estimated by representatives of Michigan State University with input provided by growers for the current crop). While grower prices have not been established in the 2009–10 crop year, some processors have received an initial payment of ten cents per pound. Additional payments by processors will be based on the volume of packed crop for the 2009–10 marketing year. The final grower price will likely be around \$0.15 per pound for the combined free and restricted production. Thus, this year's grower price even with regulation is estimated to be below the cost of production. The use of volume controls is believed to have little or no effect on consumer prices and will not result in fewer retail sales or sales to food service outlets.

Without the use of volume controls, the industry could be expected to start to build large amounts of unwanted inventories. These inventories have a depressing effect on grower prices. The econometric model shows for every 1 million-pound increase in carryin inventories, a decrease in grower prices of \$0.0036 per pound occurs. The use of volume controls allows the industry to supply the primary markets while avoiding the disastrous results of over-supplying these markets. In addition, through volume control, the industry has an additional supply of cherries that

can be used to develop secondary markets such as exports and the development of new products. The use of reserve cherries in the production shortened 2002/03 crop year proved to be very useful and beneficial to growers and packers.

In discussing the possibility of marketing percentages for the 2009–2010 crop year, the Board considered the following factors contained in the marketing policy: (1) The estimated total production of tart cherries; (2) the estimated size of the crop to be handled; (3) the expected general quality of such cherry production; (4) the expected carryover as of July 1 of canned and frozen cherries and other cherry products; (5) the expected demand conditions for cherries in different market segments; (6) supplies of competing commodities; (7) an analysis of economic factors having a bearing on the marketing of cherries; (8) the estimated tonnage held by handlers in primary or secondary inventory reserves; and (9) any estimated release of primary or secondary inventory reserve cherries during the crop year.

The Board's review of the factors resulted in the computation and announcement in September 2009 of the free and restricted percentages proposed to be established by this rule (32 percent free and 68 percent restricted).

One alternative to this action would be not to have volume regulation this season. Board members stated that no volume regulation would be detrimental to the tart cherry industry due to the size of the 2009–2010 crop. Returns to growers would not cover their costs of production for this season which might cause some to go out of business.

As mentioned earlier, the Department's "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" specify that 110 percent of recent years' sales should be made available to primary markets each season before recommendations for volume regulation are approved. The quantity available under this rule is 110 percent of the quantity shipped in the prior three years.

The free and restricted percentages established by this rule release the optimum supply and apply uniformly to all regulated handlers in the industry, regardless of size. There are no known additional costs incurred by small handlers that are not incurred by large handlers. The stabilizing effects of the percentages impact all handlers positively by helping them maintain and expand markets, despite seasonal supply fluctuations. Likewise, price stability positively impacts all producers by allowing them to better

anticipate the revenues their tart cherries will generate.

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

While the benefits resulting from this rulemaking are difficult to quantify, the stabilizing effects of the volume regulations impact both small and large handlers positively by helping them maintain markets even though tart cherry supplies fluctuate widely from season to season.

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 under the tart cherry marketing order have been previously approved by OMB and assigned OMB Number 0581–0177.

Reporting and recordkeeping burdens are necessary for compliance purposes and for developing statistical data for maintenance of the program. The forms require information which is readily available from handler records and which can be provided without data processing equipment or trained statistical staff. As with other, similar marketing order programs, reports and forms are periodically studied to reduce or eliminate duplicate information collection burdens by industry and public sector agencies. This rule does not change those requirements.

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.

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 on all issues. Like all Board meetings, all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on March 17, 2010 (75 FR 12702). Copies of the rule were mailed or sent via facsimile to all Board members and alternates. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending April 1, 2010, was provided to allow interested persons to respond to the proposal.

Two comments were received during the comment period in response to the

proposal. The commenters, both representing processors of canned tart cherry products, opposed the increased volume regulation from the preliminary percentages to the final percentages.

Both commenters stated that the products they produce are not in oversupply and the volume regulation percentages at the increased level are burdensome to their companies' operations.

The first commenter stated that they utilize all of the diversion activities like: export activity, new products, donated products, grower diversion activity and putting product in the reserve. Since they package all of their products in steel cans at harvest the increase in the volume regulation forced them to purchase frozen products to put in the reserve to satisfy the increased reserve obligation. They do not market frozen cherries in any form. They also stated that the grower diversion certificates they had became less valuable because they are treated as production and the increased percentage is applied to those; and therefore they can only utilize 32 percent of the orchard diverted pounds to satisfy regulation on the pounds processed for their sales.

Finally, the first commenter stated that they will not support the renewal of the order as it is currently being implemented. The cost of regulation is limiting available funds to promote and increase utilization of their products. They believe this was not the intent of the marketing order.

The second commenter stated that the frozen tart cherry handlers over the years have repeatedly encouraged over production by producers. The commenter reiterated that their products (canned cherries) are not in excess supply. Their company was shocked and totally unprepared for the increase in regulation to 68 percent. According to the commenter, this increased regulation will result in severe financial consequences, including job losses and a diminished level of investment in new products for the company. This commenter asked USDA to reconsider this level of regulation and asked for relief from this level of regulation even if it would only extend to the canned cherry segment of the industry.

In response to the commenters, the tart cherry marketing order regulations do not apply to handlers according to the type of cherry products they pack. The order applies to the industry as a whole, regardless of which market segment individual handlers are involved in. The reserve formula under the order is designed to ensure that aggregate market needs can be met with

free percentage cherries and does not differentiate between product types.

When the Board met in June 2009 and made its recommendation for preliminary free and reserve percentages, it utilized a crop estimate of 284 million pounds. It also computed a surplus of 131 million pounds, according to the order formula. The actual crop materialized at a much higher level (355 million pounds). The larger crop, combined with a higher carryin inventory than initially estimated and a lower optimum supply due to lower sales from previous years, resulted in a larger surplus than initially estimated. These changes resulted in a higher restricted percentage and a lower free percentage than initially recommended by the Board as preliminary percentages. However, the reserve formula under the order is designed to ensure that aggregate market needs can be met with free percentage cherries. The Board followed the formula prescribed in the order in making its recommendation concerning volume regulation.

In addition, the marketing order does not dictate what types of products must be placed in the reserve or the products that can be used to satisfy a handler's restricted obligation. Handlers can use whatever form of product that is available to them to meet their restricted obligation. This provision takes into account that handlers process different types of products.

The Board is continuing to work with USDA to solve the oversupply situation and most recently made a recommendation to add another feature to their grower diversion program to remove more cherries from production to bring supply more in line with demand. The industry also has an active domestic promotion program designed to help increase the demand for tart cherries.

The Board has also made a recommendation to make grower diversion certificates more valuable to the handler by making them not be counted as production. This recommendation is under consideration by the USDA.

Accordingly, no changes will be made to the rule as proposed, based on the comments 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 Antoinette Carter at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including information and recommendation submitted by the Board and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping tart cherries from the 2009–2010 crop. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a fifteen day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

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

PART 930—TART CHERRIES GROWN IN 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. Section 930.256 is added to read as follows:

Note: This section will not appear in the annual Code of Federal Regulations.

§ 930.256 Final free and restricted percentages for the 2009–2010 crop year.

The final percentages for tart cherries handled by handlers during the crop year beginning on July 1, 2009, which shall be free and restricted, respectively, are designated as follows: Free percentage, 32 percent and restricted percentage, 68 percent.

Dated: May 21, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–12770 Filed 5–26–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0028; Airspace Docket No. 10–AWP–1]

Amendment of Area Navigation Route Q–15; California

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Area Navigation Route Q–15 by modifying a segment of the airway to provide adequate separation from restricted area R–2508 Complex, CA. This action is necessary for the safety and management of instrument flight rules (IFR) operations within the National Airspace System (NAS).

DATES: *Effective Date:* 0901 UTC, July 29, 2010. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On February 24, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to amend Area Navigation Route Q–15 in California (75 FR 8286). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received. With the exception for the order of the points listed, (Q–15 route has been reversed to comply with policy that odd numbered routes be described with the points listed from South to North,) this amendment is the same as that proposed in the NPRM.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by replacing the DOBNE waypoint of Q–15 with the KENNO waypoint to adequately provide the additional lateral separation from the boundary of R–2508 and Q–15. The operational benefits of this change will positively impact the day-to-day traffic flow on Q–15 within the NAS.