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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 930

[Doc. No. AO-370-A8; AMS-FV-06-0213; FV07-930-2]

#### Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Order Amending Marketing Order No. 930

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Marketing Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. The amendments were proposed by the Cherry Industry Administrative Board (Board), which is responsible for local administration of the order. These amendments will: Authorize changing the primary reserve capacity associated with the volume control provisions of the order; authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage; establish an age limitation on product placed into reserves; revise the nomination and election process for handler members on the Board; revise Board membership affiliation requirements; and update order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative.

The amendments are designed to provide flexibility in administering the volume control provisions of the order and to update Board nomination, election, and membership requirements.

The amendments are intended to improve the operation and administration of the order.

**DATES:** This rule is effective July 15, 2010.

#### FOR FURTHER INFORMATION CONTACT:

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**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing issued on February 5, 2007, and published in the February 7, 2007, issue of the **Federal Register** (72 FR 5646), a Recommended Decision issued on May 7, 2009 and published in the May 12, 2009, issue of the **Federal Register** (74 FR 22112), and a Secretary's Decision and Referendum Order issued on January 6, 2010, and published in the January 13, 2010, issue of the **Federal Register** (75 FR 1724).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

#### Preliminary Statement

This final rule was formulated on the record of a public hearing held on February 21 and 22, 2007, in Grand Rapids, Michigan, and March 1 and 2, 2007, in Provo, Utah. Notice of this hearing was issued on February 5, 2007, and published in the February 7, 2007, issue of the **Federal Register** (72 FR 5646). The hearing was held to consider proposed amendments to the order.

The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7

U.S.C. 601-674), hereinafter referred to as the "Act", and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The Notice of Hearing contained several amendment proposals submitted by the Board. Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on May 7, 2009, filed with the Hearing Clerk, U.S. Department of Agriculture, a Recommended Decision and Opportunity to File Written Exceptions thereto. This Recommended Decision was published in the May 12, 2009, issue of the **Federal Register** (74 FR 22112). Six exceptions were filed during the exception period.

A Secretary's Decision and Referendum Order was issued on January 6, 2010, and published in the January 13, 2010, issue of the **Federal Register** (75 FR 1724). This document directed that a referendum among tart cherry growers and processors be conducted during the period February 1, 2010, through February 13, 2010 to determine whether they favor the proposed amendments to the order. To become effective, the amendments had to be approved by at least two-thirds of the growers voting in the referendum or two-thirds of the production represented by such growers. In addition, processors who had frozen or canned at least fifty percent of the volume of tart cherries had to vote in favor of the amendments for them to become effective. All of the proposed amendments were approved by growers and processors. The amendments included in this final order will:

1. Amend § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume control provisions of the order.

2. Amend § 930.54 of the order to authorize establishment of a minimum inventory level at which all remaining product held in reserves would be released to handlers for use as free tonnage.

3. Amend § 930.55 to establish an age limitation on product placed into reserves.

4. Amend § 930.23 to revise the nomination and election process for handler members on the Board, including revisions to conform this section to amendment of § 930.20 regarding membership affiliation requirements.

5. Amend § 930.20 to revise Board membership affiliation requirements.

6. Amend § 930.23 to update order language to more accurately reflect grower and handler participation in the nomination and election process in Districts with only one Board representative.

In addition to these amendments to the order, AMS proposed to make any such additional changes as may be necessary to the order to conform to any amendments that may be adopted. To the extent necessary, conforming changes have been made to the amendments.

An amended marketing agreement was subsequently mailed to all tart cherry handlers in the production area for their approval. The marketing agreement was not approved by handlers representing more than 50 percent of the volume of tart cherries handled by all handlers during the representative period of July 1, 2008, through June 30, 2009.

#### Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), 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 so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural producers have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$750,000. Small agricultural service firms, which include handlers regulated under the order, are defined as those with annual receipts of less than \$7,000,000.

There are approximately 40 handlers and processors of tart cherries subject to regulation under the order and approximately 600 producers of tart cherries in the regulated area. A majority of the producers, processors, and handlers are considered small entities according to the SBA's definition.

The geographic region regulated under the order covers the states of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According

to data presented at the hearing, bearing acreage in 1987–88 totaled 50,050 acres; by 2006–2007 it had declined to 37,200 acres. Michigan accounts for 74 percent of total U.S. bearing acreage with 27,700 bearing acres. Utah is second, with a reported 2,800 acres, or approximately eight percent of the total. The remaining states' acreage ranges from 700 to 2,000 acres.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supplies presents a marketing challenge for the tart cherry industry because demand for the product is relatively static. In addition, the demand for tart cherries is inelastic, which means a change in the supply has a proportionately larger change in the price level.

Authorities under the order include volume regulation, promotion and research, and grade and quality standards. Volume regulation is used under the order to augment supplies during short supply years with product placed in reserves during large supply years. This practice is intended to reduce the annual fluctuations in supplies and corresponding fluctuations in prices.

The Board is comprised of representatives from all producing areas based on the volume of cherries produced in those areas. The Board consists of a mix of handler and grower members, and a member that represents the public. Board meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Board deliberations, and each Board member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Board appointed a subcommittee to consider amendments to the marketing order. The subcommittee met several times for this purpose, and ultimately recommended several amendments to the order. The Board subsequently requested that USDA conduct a hearing to consider the proposed amendments. The views of all participants were considered throughout this process.

In addition, the hearing to receive evidence on the proposed amendments was open to the public and all interested parties were invited and encouraged to participate and express their views.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to update Board nomination, election, and membership requirements. The amendments are intended to improve the operation and administration of the order. Record evidence indicates the proposals are intended to benefit all producers and handlers under the order, regardless of size.

#### Amendment 1—Adding Authority To Change the Primary Reserve Capacity

This amendment revises § 930.50 of the order to authorize changing the primary reserve capacity associated with the volume control provisions of the order through informal rulemaking. Prior to this amendment, changing the reserve capacity required amendment of the order through the formal rulemaking process.

The order establishes a fixed quantity of 50 million pounds of tart cherries and tart cherry products that can be held in the primary reserve. Any reserve product in excess of the 50-million-pound limitation must be placed in the secondary reserve.

Free tonnage product can be sold to any market outlet, but most shipments are sold domestically, which is considered the primary market. Reserve product can be used only in specific outlets which are considered secondary markets. These secondary markets include development of export markets, new product development, new markets, and government purchases.

When the order was promulgated, a 50-million-pound limitation was placed on the capacity of the primary reserve. Proponents of the order proposed a limitation on the quantity of product that could be placed into the primary reserve. That limitation was incorporated into the order, and could only be changed through the formal rulemaking process.

Economic data presented when the order was promulgated indicated that a reserve program could benefit the industry by managing fluctuating supplies. Witnesses at the February and March 2007 hearing indicated the order has been successful in this regard. However, the record indicated that the order could be more flexible in allowing modifications to the 50-million-pound limitation should conditions warrant such a change in the future.

If the reserve capacity is changed, costs associated with storing product in reserves could also change. In addition, to the extent such a change could affect supplies in the marketplace, returns to

both growers and handlers could also be affected.

Any Board recommendation to change the reserve capacity will be required to be implemented through the informal rulemaking process. As part of the informal rulemaking process, USDA expects any Board recommendation to include an analysis of the pertinent factors and issues, including the impact of a proposed regulation on producers and handlers. During that process, the Board will recommend a change to USDA, and only if the recommendation is accompanied by adequate justification will USDA proceed with the change.

#### **Amendment 2—Adding Authority To Establish a Minimum Inventory Level at Which Reserves Will Be Released**

This amendment revises § 930.54 of the order to provide the Board with the authority to recommend establishment of a minimum inventory level at which reserves will be released and made available to handlers as free tonnage. Establishment of such a minimum inventory level will allow the Board to clear out the primary reserve and subsequently the secondary reserve when a specified minimum inventory level of tart cherries is reached. The specified minimum level would be established through the informal rulemaking process.

Under the order, handlers cannot access the secondary reserve until the primary reserve is empty. Thus, one handler who has not completely disposed of or otherwise fulfilled its reserve obligation can prevent access to the secondary reserve by other handlers.

This amendment will allow the Board to recommend informal rulemaking to establish a minimum inventory level at which it can clear out the primary reserve in order to provide the industry access to secondary reserve inventories.

If such a minimum inventory level is established, costs to both handlers and the Board could be reduced. Handlers incur costs in maintaining reserves. According to the record, these costs include the cost of storage, which can be in the range of \$.01 per pound per month. Handlers also incur costs associated with tracking their own inventory levels. Witnesses stated that when inventory levels reach a minimal amount the costs of tracking inventory outweigh the benefit from carrying inventory in the primary reserve.

A significant portion of the Board staff's time is directed at tracking reserve inventory maintained at handlers' facilities. Hearing witnesses testified that while it is difficult to quantify the exact value of the Board

staff's time to conduct these activities, the time could be better spent on other industry issues, and it is unnecessary to track minimal levels of inventory.

The establishment of a minimum inventory level at which reserves will be released could have a positive impact on the market. As inventories are released from the reserves, products could be sold, generating revenue for the industry.

If the authority provided by this amendment is utilized, it is expected to reduce costs to handlers and the Board, thus having a positive economic impact.

#### **Amendment 3—Establishing an Age Limitation on Products Placed Into Reserves**

This amendment revises § 930.55 to require that products placed in reserves must have been produced in the current or immediately preceding two crop years. This amendment will allow the Board to place an age limit on products carried in the reserve. The purpose of the amendment is to help ensure that products of saleable quality are maintained in reserve inventories.

Witness supported the amendment by stating that it will add credibility to product quality for all products carried in the reserve. Prior to this amendment, handlers could carry products they have no intention of selling just to meet their reserve obligation. This amendment will require handlers to rotate product in their reserve inventory, thus preventing them from maintaining the same product in the reserve year after year. Product held in inventory tends to deteriorate over time. This amendment will help ensure that when reserve product is ultimately released, it is in saleable condition and can satisfy the market's needs. Assuring product is available to satisfy the market helps to foster long term market stability.

In terms of costs, handlers may experience some minimal costs associated with periodically rotating product through their reserve inventory. It is difficult to estimate such costs because they will vary depending upon each handler's operation. To the extent costs may increase, they will be proportionate to each handler's share of the entire industry's reserve inventory. Each handler's reserve inventory obligation is based on the handler's share of the total crop handled. Thus, small handlers will not be disproportionately burdened.

It is anticipated that the benefits of providing a good quality product in reserves to ultimately supply markets when needed will outweigh any costs associated with implementation of this amendment.

#### **Amendment 4—Revision of Nomination and Election Process for Handler Members on the Board**

This amendment relates to nomination and election of Board members under § 930.23 of the order. It will require a handler to receive support from handlers that handled at least five percent of the average production of tart cherries in the applicable district in order to be a candidate and to be elected by the industry and recommended to the Secretary for Board membership. Prior to this amendment, there was no accounting for handler volume in the nomination and balloting process. Each handler was entitled to one equal vote. This amendment will continue to allow each handler to have one vote, but will also require handler candidates to be supported by handlers representing at least five percent of the average production in the applicable district to be eligible to run for a Board position and to be elected by the industry for recommendation to the Secretary. This will help to ensure that handler members on the Board represent the interests of handlers in their district that account for at least a minimal percentage of the volume in the district. The amendment proposed by the Board was modified by AMS. The amendment as modified by AMS will not apply the five percent support requirements to candidates whose potential election could prevent a sales constituency conflict from occurring, as discussed under amendment number five. The modification will help to ensure that all qualified handlers can participate in the election process.

This amendment is not anticipated to have a significant economic impact on small businesses. It only affects the nomination and election criteria for membership on the Board by adding volume as an element of support to help ensure that Board membership reflects the interests of its constituency. All qualified handlers, regardless of size, will continue to be able to participate in the nomination and election process. The process will continue to allow for both small and large handlers to be represented on the Board.

#### **Amendment 5—Revision of Board Membership Affiliation Requirements**

This amendment revises § 930.20 to allow more than one Board member to be affiliated with the same sales constituency from the same district, if such a conflict cannot be avoided.

Prior to this amendment, § 930.20 did not allow more than one Board member to be affiliated with the same sales constituency from the same district

under any circumstances. The purpose of that provision is to prevent any one sales constituency from having a controlling influence on Board issues and actions. However, a situation occurred in District 7, Utah, where this particular provision of the order did not allow the district from having two representatives on the Board, as it was entitled to under section 930.20(b) of the order. In that situation, the only candidates willing to serve on the Board from Utah were affiliated with the same sales constituency. Thus Utah was only able, under the marketing order rules, to seat one of the two Board representatives it was entitled to.

This amendment is designed to prevent a similar problem from occurring in the future by allowing more than one Board member affiliated with the same sales constituency to represent a district, if such a sales constituency conflict cannot be avoided. The hearing record is clear that the sales constituency provision should not prevent a district from having its allocated number of seats on the Board if there are eligible candidates willing to serve on the Board.

This amendment is not expected to have an economic impact on growers or handlers. It relates to representation on the Board, and is intended to help ensure each area covered under the order has the opportunity to achieve its allocated representation on the Board.

**Amendment 6—Update Order Language To Accurately Reflect Grower and Handler Participation in the Nomination and Election Process in Districts With Only One Board Representative**

This amendment to § 930.23 revises and updates order language to more accurately reflect grower and handler participation in the nomination and election process in districts with only one Board representative.

Sections 930.23(b)(5) and (c)(4) previously referenced Districts 5, 6, 8 and 9 in regard to the nomination and election process. Those were the districts entitled to one Board seat when the order was initially promulgated. However, districts that are entitled to one Board seat have changed over time due to shifts in production. Amending § 930.23(b)(5) and (c)(4) by removing the specific references to Districts 5, 6, 8 and 9 and replacing it with generic language to cover any district that is entitled to only one Board representative based on the representative calculation established in § 930.20 will update order language to better reflect the constantly changing tart cherry industry.

This amendment updates order language to remove incorrect references to district representation in the event production shifts occur. It has no economic impact on handlers, growers, or any other entities.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impacts of the proposed amendments to the order on small entities. The record evidence is that some of the proposed amendments may result in some minimal cost increases while others will result in cost decreases. To the extent there are any cost increases, the benefits of the proposed changes are expected to outweigh the costs. In addition, changes in costs as a result of these amendments would be proportional to the size of businesses involved and would not unduly or disproportionately impact small entities. The informational impact of these amendments is addressed in the Paperwork Reduction Act discussion that follows.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule. These amendments are intended to improve the operation and administration of the order to the benefit of the tart cherry industry.

**Paperwork Reduction Act**

Information collection requirements for part 930 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581-0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Implementation of these amendments will not trigger any changes to those requirements. It is possible that a change to the reporting requirements may occur in the future if the Board believes it would be necessary to assist in program compliance efforts. Should any such changes become necessary in the future, they would be submitted to OMB for approval.

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.

**Civil Justice Reform**

These amendments to Marketing Order 930 have been reviewed under

Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

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 no later than 20 days after the date of the entry of the ruling.

**Order Amending the Order Regulating the Handling of Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin**

*Findings and Determinations*

The findings and determinations hereinafter set forth are supplementary to the findings and determinations that were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

**(a) Findings and Determinations Upon the Basis of the Hearing Record**

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601–612), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon proposed amendment of Marketing Agreement and Order No. 930 (7 CFR part 930), regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of tart cherries grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

(3) The marketing order, as amended, and as hereby proposed to be further amended, is limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of tart cherries grown in the production area; and

(5) All handling of tart cherries grown in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

(b) *Determinations.* It is hereby determined that:

(1) Handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping tart cherries covered by the order as hereby amended) who, during the period July 1, 2008, through June 30, 2009, handled 50 percent or more of the volume of such cherries covered by said order, as hereby amended, have not signed a marketing agreement; and

(2) The issuance of this amendatory order, further amending the aforesaid order, is favored or approved by at least two-thirds of the producers who participated in a referendum on the question of approval and who, during the period of July 1, 2008 through June 30, 2009, (which has been determined to be a representative period), have been engaged within the production area in the production of such cherries, such producers having also produced for market at least two-thirds of the volume of such commodity represented in the referendum.

(3) In the absence of a signed marketing agreement, the issuance of this amendatory order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers of tart cherries in the production area.

### **Order Relative to Handling of Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin**

*It is therefore ordered,* That on and after the effective date hereof, all handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin shall be in conformity to, and in compliance with the terms and conditions of the said order as hereby amended as follows:

The provisions of the proposed order amending the order amending the order contained in the Secretary's Decision issued on January 6, 2010, and published in the **Federal Register** on January 13, 2010 (75 FR 1724), shall be and are the terms and provisions of this order amending the order and are set forth in full herein.

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

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

■ For the reasons set forth in the preamble, Chapter XI of Title 7 of the Code of Federal Regulations 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. Revise paragraph (g) of § 930.20 to read as follows:

#### **§ 930.20 Establishment and membership.**

(g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

■ 3. Revise paragraphs (b)(2) and (b)(5), redesignate paragraph (c)(3) as

paragraph (c)(3)(i), add a new paragraph (c)(3)(ii), and revise paragraph (c)(4) of § 930.23 to read as follows:

#### **§ 930.23 Nomination and election.**

\* \* \* \* \*

(b) \* \* \*

(2) In order for the name of a handler nominee to appear on an election ballot, the nominee's name must be submitted with a petition form, to be supplied by the Secretary or the Board, which contains the signature of one or more handler(s), other than the nominee, from the nominee's district who is or are eligible to vote in the election and that handle(s) a combined total of no less than five percent (5%) of the average production, as that term is used § 930.20, handled in the district.

*Provided*, that this requirement shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g). The requirement that the petition form be signed by a handler other than the nominee shall not apply in any district where fewer than two handlers are eligible to vote.

\* \* \* \* \*

(5) In districts entitled to only one Board member, both growers and handlers may be nominated for the district's Board seat. Grower and handler nominations must follow the petition procedures outlined in paragraphs (b)(1) and (b)(2) of this section.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(ii) To be seated as a handler representative in any district, the successful candidate must receive the support of handler(s) that handled a combined total of no less than five percent (5%), of the average production, as that term is used in § 930.20, handled in the district; *Provided*, that this paragraph shall not apply if its application would result in a sales constituency conflict as provided in § 930.20(g).

(4) In districts entitled to only one Board member, growers and handlers may vote for either the grower or handler nominee(s) for the single seat allocated to those districts.

\* \* \* \* \*

■ 4. Revise paragraph (i) of § 930.50 to read as follows:

#### **§ 930.50 Marketing policy.**

\* \* \* \* \*

(i) *Restricted Percentages.* Restricted percentage requirements established under paragraphs (b), (c), or (d) of this section may be fulfilled by handlers by either establishing an inventory reserve

in accordance with § 930.55 or § 930.57 or by diversion of product in accordance with § 930.59. In years where required, the Board shall establish a maximum percentage of the restricted quantity which may be established as a primary inventory reserve such that the total primary inventory reserve does not exceed 50-million pounds; *Provided*, That such 50-million-pound quantity may be changed upon recommendation of the Board and approval of the Secretary. Any such change shall be recommended by the Board on or before September 30 of any crop year to become effective for the following crop year, and the quantity may be changed no more than one time per crop year. Handlers will be permitted to divert (at plant or with grower diversion certificates) as much of the restricted percentage requirement as they deem appropriate, but may not establish a primary inventory reserve in excess of the percentage established by the Board for restricted cherries. In the event handlers wish to establish inventory reserve in excess of this amount, they may do so, in which case it will be classified as a secondary inventory reserve and will be regulated accordingly.

\* \* \* \* \*

■ 5. Add a new paragraph (d) to § 930.54 to read as follows:

**§ 930.54 Prohibition on the use or disposition of inventory reserve cherries.**

\* \* \* \* \*

(d) Should the volume of cherries held in the primary inventory reserves and, subsequently, the secondary inventory reserves reach a minimum amount, which level will be established by the Secretary upon recommendation from the Board, the products held in the respective reserves shall be released from the reserves and made available to the handlers as free tonnage.

■ 6. Revise paragraph (b) of § 930.55 to read as follows:

**§ 930.55 Primary inventory reserves.**

\* \* \* \* \*

(b) The form of the cherries, frozen, canned in any form, dried, or concentrated juice, placed in the primary inventory reserve is at the option of the handler. The product(s) placed by the handler in the primary inventory reserve must have been produced in either the current or the preceding two crop years. Except as may be limited by § 930.50(i) or as may be permitted pursuant to §§ 930.59 and 930.62, such inventory reserve portion shall be equal to the sum of the products obtained by multiplying the weight or

volume of the cherries in each lot of cherries acquired during the fiscal period by the then effective restricted percentage fixed by the Secretary; *Provided*, That in converting cherries in each lot to the form chosen by the handler, the inventory reserve obligations shall be adjusted in accordance with uniform rules adopted by the Board in terms of raw fruit equivalent.

\* \* \* \* \*

Dated: June 9, 2010.

**Rayne Pegg,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. 2010-14286 Filed 6-14-10; 8:45 am]

**BILLING CODE 3410-02-P**

## **NUCLEAR REGULATORY COMMISSION**

### **10 CFR Part 72**

**[NRC-2010-0140]**

**RIN 3150-A186**

### **List of Approved Spent Fuel Storage Casks: MAGNASTOR System, Revision 1**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Direct final rule.

**SUMMARY:** The U. S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the NAC International Inc. (NAC) MAGNASTOR System listing within the "List of Approved Spent Fuel Storage Casks" to include Amendment No. 1 to Certificate of Compliance (CoC) Number 1031. Amendment No. 1 to the MAGNASTOR System CoC will change Technical Specifications (TS) related to neutron absorber qualification and acceptance testing. Specifically, the amendment will revise TS 4.1.1.b and incorporate by reference into the MAGNASTOR CoC, Sections 10.1.6.4.5, 10.1.6.4.6, 10.1.6.4.7, and 10.1.6.4.8 of the Final Safety Analysis Report (FSAR) regarding the acceptance testing of borated aluminum alloy and borated metal matrix composite neutron absorber material. The amendment will also include other changes in Appendices A and B of the TS to incorporate minor editorial corrections.

**DATES:** The final rule is effective August 30, 2010, unless significant adverse comments are received by July 15, 2010. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to

the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

**ADDRESSES:** You can access publicly available documents related to this document using the following methods:

*Federal e-Rulemaking Portal:* Go to <http://www.regulations.gov> and search for documents filed under Docket ID NRC-2010-0140. Address questions about NRC dockets to Carol Gallagher at 301-492-3668; e-mail [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).

*NRC's Public Document Room (PDR):* The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Documents Access and Management System (ADAMS):* Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-899-397-4209, 301-415-4737, or by e-mail to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). An electronic copy of the proposed CoC, TS, and preliminary safety evaluation report (SER) can be found under ADAMS Package Number ML100130178. The ADAMS Accession Number for the NAC application, dated March 26, 2009, is ML090890292.

CoC No. 1031, the TS, the preliminary SER, and the environmental assessment are available for inspection at the NRC PDR, Room O-1F21, One White Flint North, 11555 Rockville Pike, Rockville, MD. Single copies of these documents may be obtained from Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6219, e-mail [Jayne.McCausland@nrc.gov](mailto:Jayne.McCausland@nrc.gov).

**FOR FURTHER INFORMATION CONTACT:** Jayne M. McCausland, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6219, e-mail [Jayne.McCausland@nrc.gov](mailto:Jayne.McCausland@nrc.gov).

**SUPPLEMENTARY INFORMATION:**