control regulations. The Board has approved a compliance plan at its January 29–30, 1998, meeting.

Sixth, the commenter believes it is a particularly serious matter that the Board appears to be functioning under the control of CherrCo, Inc., a new entity in the tart cherry industry. The Department is continuing to work with the Board on this issue. This issue will be addressed separately.

Finally, the commenter urges the Department to insist that the Board randomly conduct unannounced compliance inspections prior to next harvest to insure that reserves are maintained as certified and that required documentation is maintained properly by handlers.

The Board has the authority to inspect reserves and audit handlers as required. The Board will audit handlers, as appropriate, to ensure that proper inventory reserves are being maintained.

Accordingly, one change will be made to the rule as proposed, based on the comments received.

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that finalizing the interim final rule, with a change, as published in the **Federal Register** (63 FR 399, January 6, 1998), will tend to effectuate the declared policy of the Act.

It is also found that, for the 1997–98 crop year only, the proviso under § 930.59(b), which prohibits handlers from receiving diversion credit for juice and juice concentrate, should be suspended since such proviso does not tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

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

Accordingly, the interim final rule amending 7 CFR part 930 which was published at 63 FR 399 on January 6, 1998, is adopted as a final rule with the following change:

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

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

Authority: 7 U.S.C. 601–674.

2. Paragraph (f) of § 930.159 is revised to read as follows:

§ 930.159 Handler diversion.

* * * * *

(f) *Exempt uses.* To receive diversion credit for cherries used for exempt purposes, handlers must meet the terms and conditions specified in § 930.162. Each handler may receive diversion credit for up to one million pounds of exempted products each crop year, except that, for the 1997 season only, the one million pound exemption limitation for diversion credit does not apply to handlers exporting tart cherry products.

Dated: April 16, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 98–10659 Filed 4–21–98; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Docket No. FV97–930–5 FIR]

Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Issuance of Grower Diversion Certificates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting, as a final rule, with an appropriate modification to reflect a change in a certificate redemption date, an interim final rule establishing terms and conditions for the issuance of grower diversion certificates by the Cherry Industry Administrative Board (Board) under the marketing order for tart cherries. Handlers may use such certificates in order to satisfy their restricted percentage amounts when volume regulations are issued by the Secretary. Tart cherry handlers in Oregon, Pennsylvania, Washington and Wisconsin (Districts 5, 6, 8, and 9) are not subject to volume regulation at this time because these districts do not currently produce adequate tonnage to trigger such regulation under the order.

EFFECTIVE DATE: May 22, 1998.

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 930 (7 CFR Part 930), regulating the handling of tart cherries grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin, hereinafter referred to as the ''order.'' This marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order provisions now in effect, preliminary free and restricted percentages for tart cherries acquired by handlers during the 1997 crop year were established by the Board during its June 26–27, 1997, meeting. Final free and restricted percentages were recommended by the Board to the Secretary during its September 11–12, 1997, meeting and a proposed rule setting the final free and restricted percentages for the 1997–98 crop year at 55 percent and 45 percent, respectively. Final action concerning the final free and restricted percentages is being published separately in the **Federal Register**. This finalization of an interim final rule provides for the issuance of diversion certificates to growers for cherries diverted during the 1997 crop year. 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 the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary will rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule finalizes an interim final rule which provided for the issuance of diversion certificates to growers in volume regulated districts under the tart cherry marketing order for the 1997 crop year (July 1997 through June 1998). The order became effective September 25, 1996, and the initial Board was appointed in December 1996. The Board held meetings in January, February, March and June 1997, to consider its start-up costs and establish rules and regulations to implement the order authorities. At its meetings, the Board unanimously recommended that the regulations be forwarded to the Department for appropriate action.

In discussions, during its meetings, concerning volume regulation for the 1997 crop year, the Board considered guidelines and procedures for grower diversion. Growers in the States which would be subject to volume regulation were sent information about the Board's discussions and recommendations. A majority of the growers (approximately 700 out of 1,220) indicated interest in the diversion program, and in the districts which would be subject to volume regulation, a number of them voluntarily chose to divert cherries based on information disseminated by the Board concerning its deliberations and recommendations. The Board, during its meetings, continued considering various provisions of the order, such as those pertaining to optimum supply, and making recommendations which included recommended guidelines for grower diversion.

The order in section 930.50 provides the method of establishing an optimum supply level of cherries for the crop year. The optimum supply consists of a free percentage amount which a handler may sell and a restricted percentage amount, when warranted, which will have to be withheld from the market. Based on the optimum supply level, the Board establishes preliminary free and restricted percentages. Preliminary percentages were established by the Board on July 2, 1997, pursuant to Section 930.50(b) of the order, using Department estimates of the upcoming crop. Preliminary free and restricted percentages of 66 and 34 percent, respectively, were announced to the industry in accordance with section 930.50(h) of the order. No later than September 15, after harvest and processing of the crop have been completed, the Board is required to compute, and recommend to the Secretary, final free and restricted percentages based on actual crop amounts. After receiving the Board's recommendation, the Secretary designates the final free and restricted percentages through the informal rulemaking process if the Secretary finds that designating such percentages would tend to effectuate the declared policy of the Act. For this season, the proposed free and restricted percentages are 55 percent and 45 percent, respectively, as published in the January 21, 1998, **Federal Register** (63 FR 3048). A final action concerning the final free and restricted percentages is being published separately in the **Federal Register**. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent would be the final restricted percentage. A handler can satisfy restricted percentage obligations established by regulation by holding restricted percentage cherries in an inventory reserve that the handler maintains, by redeeming grower diversion certificates, or by diverting cherries.

Section 930.58 of the tart cherry marketing order provides authority for voluntary grower diversion. Growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Growers may be issued diversion certificates by the Board stating the weight of cherries diverted. The grower may then present the certificate to a handler in lieu of actual cherries. The handler can apply the weight of cherries represented by the certificate against the handler's restricted percentage amount.

The Board recommended rules and regulations specifying the guidelines for the grower diversion program. First, the Board recommended that any grower desiring to divert in the orchard would first need to apply to the Board. The application would include the name, address, phone number and a statement signed by the grower agreeing to abide by all the rules and regulations for diversion. In addition, the grower would be required to provide maps of such grower's orchard.

The Board recommended two types of in-orchard diversion for the 1997–98 crop year. These are random row diversion, in which orchard rows are randomly chosen by the Board, using a computer program, to be left unharvested, and whole block diversion, in which a whole definable orchard block is left unharvested. Trees below a certain age (in this rule, six years or less) would not qualify for diversion, since these trees are not yet in full production.

The Board recommended that all grower diversion certificates must be redeemed with handlers by November 1. After November 1, grower diversion certificates would not be valid. It was intended that diversion certificates be used within the same crop year that they were issued, as if a crop had been produced. The November 1 date would allow handlers adequate time to meet their restricted percentage amounts after final percentages had been established. However, due to the fact this is a new program in its first year of operation, the November 1 deadline was extended to February 5, 1998 (See the handler diversion regulation published January 6, 1998, 63 FR 399). A conforming modification is made in this rule by removing the reference to the November 1 deadline.

The Board also recommended guidelines concerning random row and whole block diversion and compliance procedures for growers to follow under the grower diversion program.

This crop year a number of growers voluntarily diverted cherries based on preliminary free and restricted percentages which had been announced by the Board and on recommendations concerning diversion which the Board made to the Secretary. One hundred twenty of them received diversion certificates. The interim rule and this finalization provides for the issuance of grower diversion certificates by the Board subject to certain specified terms and conditions. In order to receive a certificate, a grower must show, to the satisfaction of the Board, that cherries were in fact diverted. This may be accomplished in a number of ways. Information about the grower's production must be submitted to the Board. In addition, the grower must agree to allow the Board to confirm reported diversion figures by allowing a Board compliance officer to visit the grower's orchard.

After obtaining the necessary information concerning diversion by a grower, the Board would issue a diversion certificate. The diversion

certificate would be issued for an amount equal to the estimated volume of cherries diverted by the grower.

For random row diversion, such estimated volume is calculated by applying the percentage of the grower's production diverted to the actual average volume per acre of cherries produced and harvested. For example, Grower A farms 1,000 acres and elects to divert 20 percent of the harvestable acreage (200 acres). The grower harvests the remaining 800 acres and obtains 6,400,000 pounds of cherries, which represents a yield per acre of 8,000 pounds. Such grower would receive a diversion certificate for 1,600,000 pounds of cherries (8,000 lbs multiplied by the 20 percent of the total acreage diverted; in this instance, 200 acres).

For whole block diversion, the weight of a harvested sample of 5 percent of each block, provided by the grower, is used to calculate the total volume of diverted cherries to be credited on the diversion certificate. For example, Grower B farms 1,000 acres and elects to whole block divert a 200 acre block. If the 5 percent of the harvested trees in the block diverted yield 80,000 pounds of cherries, the grower receives a diversion certificate for 1,600,000 pounds (80,000 pounds divided by 5 percent (.05) yields 1,600,000 pounds). The rest of the block is unharvested.

After receiving a certificate from the Board, the grower may offer the certificate to a handler to be redeemed. Based upon the recommendations of the Board, guidelines and procedures for grower diversion for 1998 and subsequent seasons will be established through another rulemaking action.

The Regulatory Flexibility Act and Effects on Small Businesses

The Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has prepared this final regulatory flexibility analysis. The Regulatory Flexibility Act (RFA) would allow AMS to certify that regulations do not have a significant economic impact on a substantial number of small entities. However, as a matter of general policy, AMS' Fruit and Vegetable Programs (Programs) no longer opt for such certification, but rather perform regulatory flexibility analyses for any rulemaking that would generate the interest of a significant number of small entities. Performing such analyses shifts the Programs' efforts from determining whether regulatory flexibility analyses are required to the consideration of regulatory options and economic impacts.

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

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

One comment was received concerning the regulatory flexibility analysis. The commenter argued that AMS has provided no economic analysis concerning the interim rule, did not consider any alternatives, and did not provide a pre-rule opportunity to comment. We disagree. An initial regulatory flexibility analysis was performed in the interim rule and alternatives considered were discussed. It was also explained why the rule was issued as an interim final.

Section 930.58(b) authorizes the Board to issue diversion certificates to growers in volume regulated districts under the tart cherry marketing order if cherries are diverted according to terms and conditions specified in the order, or according to such other terms and conditions that the Board, with the approval of the Secretary, may establish. The tart cherry marketing order was promulgated on September 25, 1996, and the Board met several times in 1997 to recommend rules and regulations to implement the order authorities. The Board is required under the order to review its marketing policy on or before July 1 and then make recommendations to the Secretary for volume regulation, if such regulation is deemed necessary. The Board met June 26–27, 1997, to review sales data, inventory data, crop forecasts and market conditions in order to establish an optimum supply volume which is then used in calculating a preliminary free market tonnage. The Board established and announced the optimum supply level and preliminary free and restricted percentages for the 1997–98 crop year as required by the order. On September 11–12, 1997, the Board reviewed its marketing policy and previous recommendations and recommended final free market tonnage and restricted tonnage percentages of 55 and 45 percent, respectively. A proposed rule setting these percentages for the 1997–98 crop year was published in the **Federal Register** on January 21, 1998, (63 FR 3048). Final action concerning the final free and restricted percentage is being published separately in the **Federal Register**.

The impact of this rule is beneficial to growers. Grower diversion is one of the methods under the order that a handler can utilize to meet any such handler's restricted percentage. Growers may voluntarily choose to divert because they have cherries that do not meet expected quality standards, or because they are unable to find a processor willing to process some or all of their cherries. Before choosing to divert, the grower will most likely evaluate the harvesting and other cultural costs that will be saved by diverting and locate a handler that will be willing to redeem such grower's diversion certificate.

The Board discussed alternatives to its recommendation to issue grower diversion certificates for the 1997 crop year. The Board considered not issuing grower diversion certificates for the 1997 crop year but believed this action would serve the economic interests of both growers and handlers.

The Board also discussed limiting the blocks to be diverted to no less than 5 acre blocks, but felt that this would have an adverse impact on small growers that produce on less than 5 acre blocks. Therefore, the Board recommended not restricting the size of orchard blocks which could be diverted.

This rule does not contain any reporting or recordkeeping requirements in addition to those already considered or approved during the order promulgation proceeding. The only written information requested from a grower choosing to divert cherries for 1997 is an orchard map and the grower's final production volume. Since growers maintain this information as part of their normal farming operations, it takes approximately 10 minutes to prepare a map and less than a minute to total the final production volume.

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 have been previously approved by OMB and assigned OMB Number 0581–0177.

As with all Federal marketing order programs, reports and forms are

periodically reviewed to reduce information requirements and duplication by industry and public sectors. In addition, the Department has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

The Board's meetings were widely publicized throughout the tart cherry industry and all interested persons were invited to attend the meetings and participate in Board deliberations. All Board meetings were open to the public and all entities, both large and small, were able to express their views on these issues. The Board itself is composed of 18 members, of which 17 members are growers and handlers and one represents the public. Also, the Board has a number of appointed committees to review certain issues and make recommendations to the Board.

An interim final rule concerning this action was issued by the Department on August 18, 1997, and published in the **Federal Register** (62 FR 44881) on August 25, 1997. Copies of the rule were mailed by the Board's staff to all Board members, and tart cherry handlers. Finally, the rule was made available through the Internet by the Office of the Federal Register.

A 30-day comment period was provided to allow interested persons to respond to the interim final rule. One comment from a person representing an industry organization was received during the comment period in response to the rule.

In addition to that portion of the comment concerning the regulatory flexibility analysis, the commenter raised a variety of issues concerning and complaining about this rulemaking and the tart cherry program. We disagree with this comment. This rulemaking action is consistent with the Agricultural Marketing Agreement Act of 1937 and the tart cherry marketing order and other applicable law.

First, the commenter stated that the interim final rule violates the Administrative Procedure Act. The commenter stated that the Board recommended the proposal several months prior to the issuance of the rule, and the issuance is well after harvest. The commenter further stated that the Agricultural Marketing Service (AMS) based its decision making on this rule on additional information that AMS has kept secret, and that AMS has not demonstrated ''good cause'' for its failure to provide a 30 day delayed effective date.

The Board has worked diligently along with USDA in discussing and formulating rules and regulations to implement authorities under this new marketing order. It met January, February, March, June, and September of 1997, and recommended rulemaking actions at various meetings. However, since this is a new program, these recommendations needed to be discussed at more than one meeting, and in some instances, modified. Growers were aware of the procedures being recommended for participation in a grower diversion program. As a result, many of them were voluntarily diverting cherries with the anticipation that rules would be forthcoming and that they would be able to obtain diversion certificates. An interim final rule with an opportunity for comment (30-day comment period) was issued. The comments have been reviewed and are addressed in this rulemaking. With regard to the comment regarding ''secret'' information, there is no basis for such statement. AMS has, and will continue to conduct the tart cherry program as it does for all other marketing order programs with required and appropriate public promulgation. AMS considers all relevant information which may have a bearing on the tart cherry marketing order program conducted under the authority of the Agricultural Marketing Agreement Act of 1937.

Second, the commenter objected to the November 1, 1997, deadline for providing diversion certificates to the Board in order to meet reserve obligations. The commenter also stated that USDA has not acted on any of the percentage recommendations made at the June and September meetings. Final free and restricted percentages were proposed by the Secretary on January 21, 1998 (63 FR 3048). Final action concerning the final free and restricted percentage is being published separately in the **Federal Register**. Also, the November 1 deadline for handlers to redeem grower diversion certificates was extended to February 5, 1998, by the handler diversion regulation published on January 6, 1998 (63 FR 399).

Third, the commenter stated that growers were sent information, the content of which was not specified, about the 1997 diversion program. The commenter further stated that any such advance information highlights AMS's failure to follow the APA's mandatory procedures for reasoned decision making. Information pertaining to the grower diversion program being recommended by the Board was distributed by the Board. This was discussed in the interim final rule that was published concerning grower diversion. Further, the grower diversion program is voluntary. A number of growers chose to divert cherries in anticipation of receiving diversion certificates. Regulations concerning the program were adopted and issued as an interim final rule and are being made final in this action.

Fourth, the commenter stated that the rule disallowing cherries from trees six years or younger from the diversion program is entirely arbitrary; that the concept behind diversion is keeping pounds of marketable cherries off the market, and has nothing to do with trees. Allowing the use of trees which are not yet bearing cherries or which are just beginning to bear cherries in calculating diversion amounts would result in figures which are not representative of a grower's true production. Information used to arrive at the age of trees eligible for diversion came from record testimony and from the National Agricultural Statistics Service (NASS), which only counts trees in its statistical reports that are six years and older.

Fifth, the commenter stated that a key component of the Final Order implementing the marketing order was that the order not be used as a form of ''crop insurance'' for cherries which are not marketable, and that the interim rule contains no assurance that diverted cherries are marketable. The diversion program should not be and is not a crop insurance program for unmarketable cherries. The diversion program for the 1997–98 crop year provides that growers can divert all or a portion of their cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. To receive grower diversion certificates, growers must also agree to allow the Board to confirm that diversion of such cherries has actually taken place. Diverted production is measured based on the amount equal to the estimated volume of cherries diverted by the grower. The grower must agree to allow a Board compliance officer to visit the grower's orchard to ensure that diversion requirements are satisfied. The issue of unmarketable cherries will be further considered when diversion rules for the 1998–99 and the following crop years are drafted.

Sixth, the commenter stated that there is no sufficient guarantee of compliance and that the Board has not adopted a compliance plan as part of its annual marketing policy. The commenter also stated that the 5 percent sample size provided by the grower could be weighted with ''lead'' cherries therefore abusing the system. Grower diversion for the 1997–98 crop year was sampled and measured under the supervision of Board compliance staff. Therefore, before issuing certificates, the Board

should know whether diversion requirements are met. The Board has recommended an improved sampling method to be in place for the 1998–99 crop year and subsequent seasons. The Department is also continuing to work with the Board to further develop and refine the compliance plan for the tart cherry marketing order for future seasons.

Finally, the commenter questioned the composition of the Board and whether some members should be disqualified. The Board was properly nominated in accordance with USDA and order procedures, and selected on December 20, 1996. Concerns that have been raised about the composition of the Board and questions about the eligibility of certain members to serve on the Board are being reviewed by the Department and will be addressed separately.

Accordingly, no changes are made to the rule as drafted in the interim final rule, based on the comment received. However, as discussed, this rule does delete the certificate redemption date in § 930.100(a).

After consideration of all relevant material presented, including the Board's recommendation, and other information, it is found that this final rule as hereinafter set forth, will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 930

Cherries, Marketing agreements, Reporting and recordkeeping requirements.

Accordingly, the interim final rule amending 7 CFR 930 which was published at 62 FR 44881 on August 25, 1997, is adopted as a final rule with the following changes:

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. In § 930.100, paragraph (a) is revised to read as follows:

§ 930.100 Grower diversion certificates.

(a) In accordance with paragraph (b) of this section, the Board may, for the 1997 crop year, issue diversion certificates to growers, in districts subject to volume regulation (Northwest Michigan, Central Michigan, New York, and Utah) who have voluntarily elected to divert in the orchard all or a portion of their 1997 tart cherry production which otherwise, upon delivery to handlers, would become restricted percentage cherries. Growers may offer the diversion certificate to handlers in lieu of delivering cherries.

* * * * *

Dated: April 16, 1998.

Robert C. Keeney,

Deputy Administrator, Fruit and Vegetable Programs.

[FR Doc. 98–10658 Filed 4–21–98; 8:45 am]

BILLING CODE 3410–02–P