

November 24, 2010

Mr. Martin Engler, Senior Marketing Specialist
Ms. Parisa Salehi, Marketing Specialist
Formal Rulemaking Team
MOAB, F&V, AMS, USDA

Re: Amendment Process for In-orchard Grower Diversion Credits
Via e-mail

Dear Martin and Parisa,

We appreciate your inputs on finalizing and formalizing the changes to the various sections of 7 CFR Part 930 that will implement the concept of "bottom line" in-orchard diversion credits for the red tart cherry industry. Attached to this electronic mail are the proposed changes to sections 10, 50 and 58 of Part 930 that are needed to implement this change in the order.

On behalf of the tart cherry industry, I hereby request that you move this proposal forward for hearing. As I understand the process, this is initiated by publication of the Notice of Hearing on Proposed Rulemaking in the Federal Register setting forth the substance of the proposed changes and the times and places for hearings on this issue. Please proceed with publication of this notice at the earliest possible date.

As you are well aware, the issue of bottom line in-orchard diversion credits is viewed by the industry as being critical to effectively dealing with annual surpluses of production and to correcting the anomaly associated with in-orchard diversions in years with high or increasing restriction. Quick correction of this problem will benefit all, but it will benefit growers very significantly.

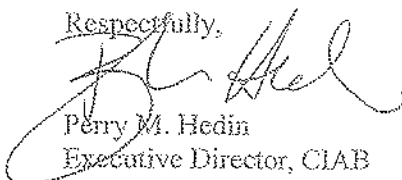
Our industry anxiously awaits the completion of this amendment process and resolution of this matter. It is our hope, desire and intent that this change be effective for the 2012 crop year which commences July 1, 2012. Mr. Michael Durando, Branch Chief, MOAB, stated at a meeting with Mr. David Shipman, Associate Administrator, AMS, Mr. Ray Rowley, Alternate Member and Chairman, Diversion Committee, and me his assurance that a single item amendment process such as this could be accomplished within 18 months. We are well along on that timeline.

We must move with alacrity to have this amendment completed in time for the 2012 crop. As Ray Rowley mentioned, Spring is a busy time for growers. The earlier in the calendar year we can have the hearings, the more easily we can secure grower participation in the hearing process. With the various time requirements you mentioned to us, that is to say the time that it will take to move this matter through AMS and USDA, the 30 day notice requirement from publication to hearing and other, unpredictable time requirements, we will have to keep on top of this to hit our target dates.

As we discussed, the CIAB will require an attorney to represent it. Given that the CIAB is precluded from spending funds on outside attorneys, it will be necessary that OGC appoint one of its staff members to represent the CIAB. I would appreciate learning who that person is as soon as it is decided.

Thank you for your assistance to date on this matter.

Respectfully,



Perry M. Hedin
Executive Director, CIAB

§ 930.10 Handle.

Handle means the process to brine, can, concentrate, freeze, dehydrate, pit, press or puree cherries, or in any other way convert cherries commercially into a processed product, or divert cherries pursuant to §930.59 or obtain grower diversion certificates issued pursuant to §930.58, or otherwise place cherries into the current of commerce within the production area or from the area to points outside thereof:

Provided, That the term *handle* shall not include:

- (a) The brining, canning, concentrating, freezing, dehydration, pitting, pressing or the converting, in any other way, of cherries into a processed product for home use and not for resale.
- (b) The transportation within the production area of cherries from the orchard where grown to a processing facility located within such area for preparation for market.
- (c) The delivery of such cherries to such processing facility for such preparation.
- (d) The sale or transportation of cherries by a grower to a handler of record within the production area.
- (e) The sale of cherries in the fresh market in an unpitted condition.

§ 930.50 Marketing policy.

(a) *Optimum supply.* On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years reduced by average sales that represent dispositions of exempt cherries and restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is necessary to recommend otherwise with respect to sales of exempt and restricted percentage cherries, to which shall be added a desirable carry-out inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

(b) *Preliminary percentages.* On or about July 1 of each crop year, the Board shall establish a preliminary free market tonnage percentage which shall be calculated as follows: from the optimum supply computed in paragraph (a) of this section, the Board shall deduct the carry-in inventory to determine the tonnage requirements (adjusted to a raw fruit equivalent) for the current crop year which will be subtracted from the current year USDA crop forecast or by an average of such other crop estimates the Board votes to use. If the resulting number is positive, this would represent the estimated overproduction which would be the restricted tonnage. This restricted tonnage would then be divided by the sum of the crop forecast(s) for the regulated districts to obtain a preliminary restricted percentage, rounded to the nearest whole number, for the regulated districts. If subtracting the current crop year requirement, computed in the first sentence from the current crop forecast, results in a negative number, the Board shall establish a preliminary free market tonnage percentage of 100 percent with a preliminary restricted percentage of zero. The Board shall announce these preliminary percentages in accordance with paragraph (h) of this section.

(c) *Interim percentages.* Between July 1 and September 15 of each crop year, the Board may modify the preliminary free market tonnage and restricted percentages to adjust to the actual pack occurring in the industry. The Board shall announce any interim percentages in accordance with paragraph (h) of this section.

(d) *Final percentages.* No later than September 15 of each crop year the Board shall review the most current information available including, but not limited to, processed production and grower diversions of cherries during the current crop year. The Board shall make such adjustments as are necessary between free and restricted tonnage to achieve the optimum supply and recommend such final free market tonnage and restricted percentages to the Secretary and announce them in accordance with paragraph (h) of this section. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent shall be the final restricted percentage. With its recommendation, the Board shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Board shall give consideration to the following factors:

- (1) The estimated total production of 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.
- (10) The quantity of grower- diverted cherries during the crop year.

(f) *Modification.* In the event the Board subsequently deems it advisable to modify its marketing policy, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the holding of such meeting, which report shall show the Board's recommended modification and the basis therefor.

(g) *Additional tonnage to sell as free tonnage.* In addition, the Board, in years when restricted percentages are established, shall make available tonnage equivalent to an additional 10 percent, if available, of the average sales of the prior 3 years, as defined in paragraph (a) of this section, for market expansion.

(h) *Publicity.* The Board shall promptly give reasonable publicity to growers and handlers of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them and to the public. Similar publicity shall be given to growers and handlers of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Board, where they shall be made available for examination. The Board shall notify handlers, and give reasonable publicity to growers, of its computation of the optimum supply, preliminary percentages, and interim percentages and shall notify handlers of the Secretary's action on final percentages by registered or certified mail.

(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.

(j) *Inventory Reserve Release.* In years when inventory reserve cherries are available and when the expected availability of cherries from the current crop plus expected carryin inventory does not fulfill the optimum supply, the Board shall release not later than November 1st of the current crop year such volume from the inventory reserve as will satisfy the optimum supply.

(k) The Board, with the approval of the Secretary, may establish rules and regulations necessary and incidental to the administration of this section.

§ 930.58 Grower diversion privilege.

(a) *In general.* Any grower may voluntarily elect to divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler. ~~as though there were actual harvested cherries.~~ Any grower diversions completed in accordance with this section, but which are undertaken in districts subsequently exempted by the Board from volume regulation under §930.52(d), shall qualify for diversion credit.

(b) *Eligible diversion.* Grower diversion certificates shall be issued to growers only if the cherries are diverted in accordance with the following terms and conditions or such other terms and conditions that the Board, with the approval of the Secretary, may establish. Diversion may take such of the following forms which the Board, with the approval of the Secretary, may designate: uses exempt under §930.62; nonhuman food uses; or other uses, including diversion by leaving such cherries unharvested.

(c) *Application/mapping.* The Board, with the approval of the Secretary, shall develop rules and regulations providing for the diversion of cherries by growers. Such regulations may include, among other things:

(1) The form and content of applications and agreements relating to the diversion, including provisions for supervision and compensation; and

(2) Provisions for mapping areas in which cherries will be left unharvested.

(d) *Diversion certificate.* If the Board approves the application it shall so notify the applicant and conduct such supervision of the applicant's diversion of cherries as may be necessary to assure that the cherries have been diverted. After the diversion has been accomplished, the Board shall issue to the diverting grower a diversion certificate stating the weight of cherries diverted. Where diversion is carried out by leaving the cherries unharvested, the Board shall estimate the weight of cherries diverted on the basis of such uniform rule prescribed in rules and regulations as the Board, with the approval of the Secretary, may recommend to implement this section.