

conformance with Executive Order 12866.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing order now in effect, tart cherry handlers are subject to assessments. Funds to administer the order are derived from such assessments. It is intended that the assessment rate as issued herein would be applicable to all assessable tart cherries beginning July 1, 2002, and continue until amended, suspended, or terminated. This proposed rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposed rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would increase the assessment rate established for the Board for the 2002–2003 and subsequent fiscal periods for cherries that are utilized in the production of tart cherry products other than juice, juice concentrate, or puree from \$0.00175 to \$0.0019 per pound of cherries. The assessment rate for cherries utilized for juice, juice concentrate, or puree would also be increased from \$0.000875 to \$0.0019 per pound.

The tart cherry marketing order provides authority for the Board, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Board are producers and handlers of tart cherries. They are familiar with the Board's needs and with the costs for goods and services in their local area and are thus in a position to formulate an appropriate budget and assessment rate or rates as appropriate. The assessment rates are formulated and discussed in a public meeting. Thus, all directly affected persons have an

opportunity to participate and provide input.

For the 2001–2002 fiscal period, the Board recommended, and the Department approved, assessment rates that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by the USDA upon recommendation and information submitted by the Board or other information available to USDA.

Section 930.42(a) of the order authorizes a reserve sufficient to cover one year's operating expenses. The increased rates are expected to generate enough income to meet the Board's operating expenses in 2002–2003.

The Board met on January 24, 2002, and unanimously recommended 2002–2003 expenditures of \$522,500. The Board also recommended that an assessment rate of \$0.0019 be established for all tart cherry products if an amendment to do so passed in a May 2002 referendum of producers and processors. The amendment passed and was finalized by USDA on August 8, 2002 (67 FR 51698). The provisions requiring the establishment of different assessment rates for different products were removed. In their place, the Board is required to consider the volume of cherries used in making various products and the relative market value of those products in deciding whether the assessment rate should be a single, uniform rate applicable to all cherries or whether varying rates should be recommended for cherries manufactured into different products. Prior to the amendment passing in referendum, the Department issued a proposed rule on June 10, 2002 (67 FR 39637) proposing a dual assessment rate at higher amounts (\$0.0021 and \$0.00105, respectively, for high and low value cherry products) since the uniform assessment rate amendment was not yet effective. A rule withdrawing that proposal was published on April 2, 2003 (68 FR 15971). This proposal reflects the amended provisions and the Board's January 24, 2002 recommendation.

The amended assessment provisions allow the Board to recommend a uniform single assessment rate for all assessable tart cherries handled, or variable rates depending on the quantities and values of the cherries used in the various products. A two-tiered assessment rate scheme may be appropriate in some years, it may not be in others.

The amended order specifically provides that under § 930.41(f)(1) and (2) the established assessment rates may be uniform, or may vary depending on the product the cherries are used to

manufacture. The Board may consider the differences in the number of pounds of cherries utilized for various cherry products and the relative market values of such cherry products. The Board considered the above items and decided that one assessment rate should be recommended for all assessable tart cherries for the 2002–2003 fiscal period.

According to the Board, processors have developed a strong market for juice and concentrate products over the past few years. There is considerable belief that juice will be one of the growth outlets for tart cherries. This derives from the industry's promotional efforts being undertaken for juice and concentrate products, the segmentation of the market into retail and industrial components and the nutritional/nutraceutical profile of the product. As a result, there has been an increase in consumer recognition, acceptance, purchases, and the value of tart cherry juice and concentrate. According to the Board, prices received for tart cherry juice concentrate are now \$25.00 per gallon or more. This is derived by using the fairly common conversion ratio of 100 pounds to the gallon for mid-west production, which has a raw product value of \$0.25 per pound. Using a 50 gallon conversion for the product, as has been used on the west coast, this represents a per pound value of \$0.50. The difference in the west and mid-west conversion factors is that tart cherries produced in the western United States generally have a higher sugar content and larger fruit size, thus fewer raw product is needed. The average grower price received ranges between \$0.17 to \$0.20 per pound.

According to the Board, puree products are as valuable and comparable to juice and juice concentrate products. The Board reported that the spot price for single strength puree for 2001–02 was about \$0.60 cents per pound. The raw product equivalent (RPE) volume of pureed fruit was 539,504 pounds which is about 0.15 percent of all processed fruit. The Board also reported for 2001–02 that the price for five plus one product was \$0.67 cents per pound. Five plus one is a product of cherries and sugar which is manufactured by many processors (25 pounds of cherries and five pounds of sugar to make a 30 pound commercial container). It is the main product that handlers produce. Five plus one cherries are primarily sold and remanufactured into assorted bakery items, canned pie fill, and dried cherries. Since juice, juice concentrate, and puree are not considered to be low value products at this time, the Board considers one assessment to be