

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 Department 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 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 the Department's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

Findings and Conclusions; Discussion of Exceptions

The findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the August 4, 2003, issue of the **Federal Register** (68 FR 45990) are hereby approved and adopted subject to the following additions and modifications.

Material Issue Number 5(a)—Other Definitions

Based upon the exception filed, the findings and conclusions under material issue number 5(a) of the Recommended Decision (pertaining to the definition of "assessed weight") are revised by adding the following seven paragraphs after the fourteenth paragraph of that section:

In its exception, the proponents asked that the definition of "assessed weight" be revised to include a reference to § 983.39(b)(4) and (5), the sections that pertain to the maximum level of defects allowable in certified pistachios.

Proponents commented that the Recommended Decision definition of "assessed weight" differs from that which was published in the Notice of Hearing as the words "edible inshell" were removed in the former. Proponents agreed with the change. However, proponents commented that the elimination of those words makes the definition unclear as to what standards are to be used in determining "assessed weight." The proponents recommend that this uncertainty be eliminated by incorporating into the definition a reference to § 983.39(b)(4) and (5).

By referring to § 983.39 (b)(4) and (5) in the definition of "assessed weight,"

the applicable maximum defects allowed by that section are incorporated into "assessed weight." This reference makes clear that the "assessed weight" is determined after the test for defects is completed. This would also make this definition consistent with the determination of the weight of pistachios presently used by handlers to calculate their payments to producers. In § 983.53, the " * * assessed weight of pistachios received by the handler" in each year would be used to determine each handler's pro-rata share of the expenses authorized by the Department for the operation of the proposed order.

The proponents' exception has merit, and § 983.6 of the proposed order has been revised accordingly.

Based upon the exception filed, the findings and conclusions under material issue number 5(a) of the Recommended Decision (pertaining to the definition of "districts") are revised by adding the following four paragraphs after the twenty-fourth paragraph of that section:

In its exception, proponents commented that the committee should be required to obtain a vote of at least seven concurring members in order to recommend any future changes in district boundaries, and that such requirement should be included in the definition of "districts". Proponents noted that this requirement was part of the process by which the industry reached a consensus on the proposed marketing order program.

Section 983.34 of the proposed order sets forth voting requirements for committee actions. That section provides that any recommendation for a change in the establishment of the committee (which would include revisions in district boundaries) would require at least seven concurring votes. It is not necessary to repeat this requirement under the definition of "districts."

The proponents' exception also stated that at least seven concurring votes should be required only if the recommended change is not based on an action of the California Pistachio Commission (CPC) to change district boundaries. If the change were based on a CPC action, only a simple majority vote would be required.

While the CPC's definition of districts could be considered by the committee in drawing up marketing order districts, any recommendation to change marketing order districts would be evaluated by USDA on its own merits. Thus, the same committee voting requirements would be appropriate for any recommendation to change district boundaries. Further, there was no testimony at the hearing in support of

the lower voting threshold for some recommendations to change district boundaries. For these reasons, the proponents' exception relative to the definition of the term "districts" is denied.

Based upon the exception filed, the findings and conclusions under material issue number 5(a) of the Recommended Decision (pertaining to the definition of "edible pistachios") are revised by adding the following paragraph after the twenty-sixth paragraph of that section:

The proponents' exception recommended that the definition of "edible pistachios" in proposed § 983.13 be deleted. As previously discussed, the term "edible pistachios" has been deleted from § 983.6 and is not used elsewhere in the proposed order. Thus, this definition is not needed and should be deleted. This modification has been made.

Material Issue Number 5(d)—Quality and Inspection Requirements

Based upon the exception filed, the findings and conclusions under material issue number 5(d) of the Recommended Decision (pertaining to the aflatoxin requirements) are revised by adding the following four paragraphs at the end of the section entitled "Proposed Aflatoxin Provisions."

In its exception, the proponents suggested that § 983.38(b) be amended to specify that any recommendation by the committee for a change in the maximum allowable aflatoxin level would require a vote of at least seven concurring committee members.

Section 983.46 of the proposed order sets forth voting requirements for committee actions. That section states that any changes in the aflatoxin requirements require a vote of at least seven committee members. It is not necessary to repeat the voting requirement in § 983.38(b).

The proponents also took exception to the requirement (in § 983.46) that any change in the aflatoxin provisions of the proposed order must be because of "changed conditions".

While we agree that the language, "by reason of changed conditions" in § 983.46 is not necessary, we do note, as stated in a previous paragraph, that § 983.38(b) provides authority for changing the allowable level of aflatoxin in the event industry conditions change or research shows that a change in the aflatoxin level would be appropriate. Accordingly, § 983.46(a) is modified by deleting the words "by reason of changed conditions."

Based upon the exception filed, the findings and conclusions under material issue number 5(d) of the Recommended