

# Rules and Regulations

Federal Register

Vol. 70, No. 35

Wednesday, February 23, 2005

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 979

[Docket No. FV05-979-1 FIR]

#### Melons Grown in South Texas; Temporary Suspension of Handling and Assessment Collection Regulations

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting, as a final rule, without change, an interim final rule suspending, for the 2004-05 fiscal period, the minimum grade, quality, maturity, container, pack, inspection, assessment collection, and other related requirements currently prescribed under the South Texas melon (cantaloupes and honeydews) marketing order (order). It also continues in effect the action that suspends reporting requirements, except for the acreage planting reports, which continue to be required during the suspension period. The order regulates the handling of melons grown in South Texas and is administered locally by the South Texas Melon Committee (Committee). This rule reduces handler costs while the industry evaluates whether the marketing order should be continued.

**EFFECTIVE DATE:** March 25, 2005.

#### FOR FURTHER INFORMATION CONTACT:

Belinda G. Garza, Texas Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1313 E. Hackberry, McAllen, Texas 78501; Telephone: (956) 682-2833, Fax: (956) 682-5942; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington,

DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement No. 156 and Order No. 979 (7 CFR part 979), regulating the handling of melons grown in South Texas, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

USDA is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. 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 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 not later than 20 days after the date of the entry of the ruling.

This rule continues in effect the action that suspends, for the remainder of the 2004-05 fiscal period, the minimum grade, quality, maturity, container, pack, inspection, and other related requirements previously prescribed under the South Texas melon

order. For the purpose of this rule, these requirements are referred to as handling requirements. It also continues in effect the suspension of the assessment collection and all reporting requirements, with the exception of the acreage planting reports, which continue to be required during the suspension period. This rule reduces industry expenses, while the industry evaluates whether the marketing order should be continued.

Section 979.52 of the order provides authority for grade, size, maturity, quality, and pack regulations for any variety of melons grown in the production area during any period. Section 979.52 also authorizes the modification, suspension, or termination of regulations issued under the order. Authority to terminate or suspend provisions of the order is specified in § 979.84.

Section 979.60 provides that whenever melons are regulated pursuant to § 979.52, such melons must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations. The cost of such inspection and certification is borne by handlers.

Prior to November 27, 2004, fresh market shipments of South Texas melons were required to be inspected and were subject to minimum grade, quality, maturity, and container and pack requirements. Section 979.304 Handling regulation (7 CFR part 979.304) stated that no handler could handle cantaloupes grown in the production area unless such cantaloupes met the requirements specified for U.S. Commercial grade or better, except that not more than 8 percent serious damage including not more than 5 percent decay would be permitted. Honeydew melons were also required to meet the requirements of U.S. Commercial grade except that not more than 20 percent serious damage was allowed including not more than 10 percent for melons affected by decay. In addition, the combined juice from the edible portion of a sample of honeydews selected at random could contain not less than 8 percent soluble solids as determined by an approved hand refractometer. Individual containers of honeydew melons could contain no less than 25 percent U.S. Commercial grade or better quality. Individual containers

of cantaloupe and honeydew melons could contain not more than double the specified lot tolerance for scorable defects.

The order's container and pack requirements were also specified in § 979.304. Cantaloupes and honeydew melons were required to be packed in fiberboard cartons of specified dimensions. Each carton was required to be marked to indicate the count; the name, address, and zip code of the shipper; the name of the product; and the words "Produce of U.S.A." or "Product of U.S.A." Additionally, if the carton was not clean and bright in appearance without marks, stains, or other evidence of previous use, the carton was required to be marked with the words "USED BOX." Honeydew melons were also required to be packed in bulk containers with specified dimensions.

Section 979.304 further included a minimum quantity exemption of 120 pounds per day, and reporting and safeguard requirements for special purpose and experimental shipments. Related provisions appeared in the regulations in § 979.106 *Registered handler*; § 979.152 *Handling of culls*; and § 979.155 *Safeguards*.

The Committee meets prior to and during each season to consider recommendations for modification, suspension, or termination of the regulatory requirements that have been issued on a continuing basis for South Texas melons. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA reviews Committee recommendations and information submitted by the Committee and other available information, and determines whether modification, suspension, or termination of the regulatory requirements would tend to effectuate the declared policy of the Act.

At its September 16, 2004, meeting, the Committee unanimously recommended suspending, for the 2004–05 fiscal period, the handling, assessment collection, and all reporting requirements, except for the acreage planting reporting requirement. The 2004–05 fiscal period began October 1, 2004, and ends September 30, 2005.

The objective of the handling and inspection requirements is to ensure that only acceptable quality cantaloupe and honeydew melons enter fresh market channels, thereby ensuring consumer satisfaction, increasing sales, and improving returns to growers. While the industry continues to believe that quality is an important factor in maintaining sales, the Committee believes that the cost of inspection and

certification (mandated when minimum requirements are in effect) would exceed the benefits derived, especially in view of reduced melon acreage and yields in recent years.

The South Texas cantaloupe and honeydew melon industry has been shrinking due to the inability to provide dependable supplies because of adverse weather conditions, a lack of success in breeding improved quality melons buyers desire, and intense foreign and domestic competition. South Texas historically had enjoyed a marketing window of approximately six weeks beginning about May 1 each season. That window has steadily eroded in recent years due to strong competition and quality problems with Texas melons. As a result, acreage has decreased dramatically from a high of 27,463 acres in 1987 to 4,780 in 2004. The number of producers and handlers also has declined.

The Committee recommended suspending the regulations and assessment collections for one fiscal period in hopes that new plants might be developed and help revive the industry. Some in the industry believe that the order is no longer needed. The suspensions are designed to decrease handler costs, while the industry evaluates whether the marketing order should be continued.

Underlying economics for the South Texas melon industry did not justify continuing the regulations for 2004–05. Too little revenue would be generated for an effective marketing and promotion program, and buyer demands have superseded the regulations in dictating quality requirements. Buyers have been requesting better quality melons.

This rule continues in effect the action that enables handlers to ship melons without regard to the minimum grade, quality, maturity, container, pack, inspection, and related requirements for the remainder of the 2004–05 fiscal period. It continues in effect the action that decreases industry expenses associated with inspection and assessments. This rule does not restrict handlers from seeking inspection on a voluntary basis.

Consistent with the temporary suspension of § 979.304, this rule also continues in effect the action that suspends § 979.106, § 979.152, and § 979.155 of the rules and regulations in effect under the order for the 2004–05 fiscal period. Section 979.106 provided for the registration of handlers, § 979.152 detailed procedures for the handling of cull melons, and § 979.155 provided safeguard requirements for special purpose shipments and

established reporting and recordkeeping requirements when such exemptions were in place.

In addition, this rule also continues in effect the action that temporarily suspends § 979.219 requiring that an assessment rate of \$0.09 per carton of melons be collected from South Texas melon handlers. Consistent with suspension of § 979.219, § 979.112 specifying late payment charges on delinquent assessments is also suspended. Authorization to assess melon handlers enables the Committee to incur expenses that are necessary to administer the marketing order. With the suspension of handling, inspection, and assessment requirements, a limited Committee budget is needed for program administration and the collection of the acreage planting reports.

For the period of the suspension, the Committee recommended a reduced budget of \$70,959 to cover anticipated expenses. Adequate funds to cover these expenses are currently in the Committee's reserves.

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (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 in order that 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 16 handlers of South Texas melons who are subject to regulation under the marketing order and approximately 29 melon growers in the regulated area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$5,000,000, and small agricultural growers are defined as those having annual receipts of less than \$750,000.

Most of the handlers are vertically integrated corporations involved in growing, shipping, and marketing melons. For the 2003–04 marketing year, the industry's 16 handlers shipped melons produced on 4,780 acres with the average and median volume handled being 89,012 and 10,655 containers,

respectively. In terms of production value, total revenue for the 16 handlers was estimated to be \$12,175,919, with the average and median revenues being \$760,996 and \$91,094, respectively.

The South Texas melon industry is characterized by growers and handlers whose farming operations generally involve more than one commodity, and whose income from farming operations is not exclusively dependent on the production of melons. Alternative crops provide an opportunity to utilize many of the same facilities and equipment not in use when the melon production season is complete. For this reason, typical melon growers and handlers either double-crop melons during other times of the year or produce alternative crops, like onions.

Based on the SBA's definition of small entities, the Committee estimates that all of the 16 handlers regulated by the order would be considered small entities if only their spring melon revenues are considered. However, revenues from other productive enterprises might push a number of these handlers above the \$5,000,000 annual receipt threshold. Of the 29 growers within the production area, few have sufficient acreage to generate sales in excess of \$750,000; therefore, the majority of growers may be classified as small entities.

At its September 16, 2004, meeting, the Committee unanimously recommended suspending, for the 2004–05 fiscal period, the handling, assessment collection, and all reporting requirements, except for the acreage planting reporting requirement. The Committee requested that the rule be effective for the 2004–05 fiscal period, which began October 1, 2004, and ends September 30, 2005.

The objective of the handling and inspection requirements was to ensure that only acceptable quality cantaloupe and honeydew melons entered fresh market channels, thereby ensuring consumer satisfaction, increasing sales, and improving returns to growers. While the industry continues to believe that quality is an important factor in maintaining sales, the Committee believes that the cost of inspection and certification (mandated when minimum requirements are in effect) would exceed the benefits derived, especially in view of reduced melon acreage and yields in recent years. This results in reduced melon shipments and reduced assessment income.

The South Texas cantaloupe and honeydew melon industry has been shrinking due to the inability to provide dependable supplies because of adverse weather conditions, a lack of success in

breeding improved quality melons buyers desire, and intense foreign and domestic competition. South Texas historically had enjoyed a marketing window of approximately six weeks beginning about May 1 each season. That window has steadily eroded in recent years due to strong competition and quality problems in Texas melons. As a result, acreage has decreased dramatically from a high of 27,463 acres in 1987 to 4,780 in 2004. The number of producers and handlers also has declined. Some in the industry believe that the marketing order is no longer needed.

Underlying economics for the South Texas melon industry did not justify continuing the regulations for 2004–05. Too little assessment revenue would be generated for an effective marketing and promotion program, and buyer demands have superseded the regulations in dictating quality requirements.

This rule continues in effect the action that enables handlers to ship melons without regard to the minimum grade, quality, maturity, container, pack, inspection, and related requirements for the remainder of the 2004–05 fiscal period. It decreases industry expenses associated with inspection and assessments. This rule does not restrict handlers from seeking inspection on a voluntary basis.

In addition, this rule also continues in effect the action that suspends § 979.219 requiring that an assessment rate of \$0.09 per carton of melons be collected from South Texas melon handlers. Consistent with the suspension of § 979.219, § 979.112 specifying late payment charges on delinquent assessments continues to be suspended. Authorization to assess melon handlers enables the Committee to incur expenses that are necessary to administer the marketing order.

With the suspension of handling, inspection, and assessment requirements, a limited Committee budget is needed for program administration and collection of acreage planting reports. For the period of the suspension, the Committee recommended a reduced budget of \$70,959 to cover anticipated expenses. Adequate funds to cover these expenses are currently in the Committee's reserves.

The Committee anticipates that this rule will not negatively impact small businesses. This rule continues in effect the action that suspends minimum grade, quality, maturity, container, pack, inspection, assessment collection, some reporting, and other related requirements. Further, this rule continues in effect the action that allows

handlers and growers the choice to obtain inspection for melons, as needed, thereby reducing costs for the industry. The total cost of inspection and certification for fresh shipments of South Texas melons during the 2003–04 marketing season was \$46,000. These costs will not be incurred during the 2004–05 season.

The suspension of the assessment collection requirements for the 2004–05 season also results in some cost savings. Assessment collections during the 2003–04 season totaled \$102,988. Absent the suspension of § 979.219, assessments collected during the 2004–05 season would have been about \$292,840.

The Committee considered suspension of the marketing order, but wished to continue receiving data on plantings for a one-year period before deciding whether the order should be continued.

It is possible that the Committee might recommend that the order be terminated after the 2004–05 fiscal period if conditions do not improve. Some Committee members felt that termination was premature, while others felt the order should be immediately eliminated. The Committee recommended the suspension of regulations for one fiscal period as an orderly and reasonable compromise. This will enable the Committee to study the impact of suspension, allow the continued collection of data on acreage projections, and minimize disruption if the Committee chooses to recommend termination after the 2004–05 fiscal period.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection requirements being suspended by this rule were approved previously by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0178. Suspension of some of the reporting requirements is expected to reduce the reporting burden on small or large South Texas melon handlers by 6.12 hours, and should further reduce industry expenses. During the suspension period, handlers will not have to file the following forms with the Committee: Application for Registered Handler (1.74 burden hours); Certification for Handling Melons for Processing (0.70 burden hours); Relief or Charity Certification for Handling Melons Which Fail to Meet the South Texas Rules and Regulations (0.35 burden hours); Certificate of Privilege (0.83 burden hours); and Special Purpose Shipment (2.50 hours). This rule will not impose any additional reporting or recordkeeping requirements

on either small or large melon handlers. 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. In addition, as noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this rule.

Further, the Committee's meeting was widely publicized throughout the melon industry and all interested persons were invited to attend the meeting and participate in Committee deliberations. Like all Committee meetings, the September 16, 2004, meeting was a public meeting and all entities, both large and small, were able to express their views on this issue.

An interim final rule concerning this action was published in the **Federal Register** on November 26, 2004. Copies of the rule were mailed by the Committee's staff to all Committee members and melon handlers. In addition, the rule was made available through the Internet by USDA and the Office of the Federal Register. That rule provided for a 60-day comment period which ended January 25, 2005. One comment was received during that period. The comment concerned melon imports from Mexico and is, therefore, not applicable to this rulemaking action because the South Texas melon marketing order does not impact melon imports. The comment also stated that the Committee should be disbanded. The Committee is authorized under the marketing order and the Act. No changes are made as a result of the comment.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/fv/moab.html>. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the Committee's recommendation, and other information, it is found that the regulations suspended in this final rule, which adopts, without change, the interim final rule, as published in the **Federal Register** (69 FR 68761, November 26, 2004), no longer tend to effectuate the declared policy of the Act.

#### **List of Subjects in 7 CFR Part 979**

Marketing agreements, Melons, Reporting and recordkeeping requirements.

#### **PART 979—MELONS GROWN IN SOUTH TEXAS**

n Accordingly, the interim final rule amending 7 CFR part 979 which was published at 69 FR 68761 on November 26, 2004, is adopted as a final rule without change.

Dated: February 16, 2005.

**Kenneth C. Clayton,**

*Acting Administrator, Agricultural Marketing Service.*

[FR Doc. 05-3389 Filed 2-22-05; 8:45 am]

BILLING CODE 3410-02-P

#### **DEPARTMENT OF AGRICULTURE**

##### **Agricultural Marketing Service**

##### **7 CFR Part 985**

[Docket No. FV04-985-2 IFR-A]

##### **Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Revision of the Salable Quantity and Allotment Percentage for Class 3 (Native) Spearmint Oil for the 2004-2005 Marketing Year**

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

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule amends a prior interim final rule that increased the quantity of Class 3 (Native) spearmint oil produced in the Far West that handlers may purchase from, or handle for, producers during the 2004-2005 marketing year. The prior interim final rule increased the Native spearmint oil salable quantity from 773,474 pounds to 1,095,689 pounds, and the allotment percentage from 36 percent to 51 percent. This rule increases the Native spearmint oil salable quantity by an additional 171,873 pounds from 1,095,689 pounds to 1,267,562 pounds, and the allotment percentage by an additional 8 percent from 51 percent to 59 percent. The Spearmint Oil Administrative Committee (Committee), the agency responsible for local administration of the marketing order for spearmint oil produced in the Far West, unanimously recommended this rule to avoid extreme fluctuations in supplies and prices and to help maintain stability in the Far West spearmint oil market.

**DATES:** Effective June 1, 2004, through May 31, 2005; comments received by April 25, 2005, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments

concerning this rule. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; e-mail: [moab.docketclerk@usda.gov](mailto:moab.docketclerk@usda.gov); or Internet: <http://www.regulations.gov>. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <http://www.ams.usda.gov/fv/moab.html>.

##### **FOR FURTHER INFORMATION CONTACT:**

Susan M. Hiller, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1220 SW., Third Avenue, Suite 385, Portland, Oregon 97204; telephone: (503) 326-2724, Fax: (503) 326-7440; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237; telephone: (202) 720-2491, Fax: (202) 720-8938, or e-mail: [Jay.Guerber@usda.gov](mailto:Jay.Guerber@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Order No. 985, as amended (7 CFR part 985), regulating the handling of spearmint oil produced in the Far West (Washington, Idaho, Oregon, and designated parts of Nevada and Utah), hereinafter referred to as the "order." The order is 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 of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. 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