

Proposed Rules

Federal Register

Vol. 74, No. 217

Thursday, November 12, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AO-FV-08-0174; AMS-FV-08-0085; FV08-920-3]

Kiwifruit Grown in California; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendments to Marketing Order No. 920

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This is a recommended decision regarding proposed amendments to Marketing Order No. 920 (order), which regulates the handling of kiwifruit grown in California. Four amendments were proposed by the Kiwifruit Administrative Committee (committee), which is responsible for local administration of the order. These proposed amendments would redefine the districts into which the production area is divided and reallocate committee membership positions among the districts, revise the committee nomination and selection procedures, authorize the committee to conduct research and promotion programs, and revise committee meeting and voting procedures. The proposals are intended to improve the operation and administration of the order. This recommended decision invites written exceptions on the proposed amendments.

DATES: Written exceptions must be filed by December 14, 2009.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031-S, Washington, DC 20250-9200, Fax: (202) 720-9776 or via the Internet at <http://www.regulations.gov>. All comments should reference the docket number and the date and page number

of this issue of the **Federal Register**. All comments submitted in response to this rule will be included in the record and will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: <http://www.regulations.gov>. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

To the extent practicable, all documents filed with the hearing clerk should also be submitted electronically to Laurel May at the email address noted for her in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT:

Laurel May or Kathleen Finn, 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: Laurel.May@ams.usda.gov or Kathy.Finn@ams.usda.gov. Small businesses may request information on this proceeding 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, E-mail: Jay.Guerber@ams.usda.gov.

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on January 24, 2008, and published in the November 19, 2008, issue of the **Federal Register** (73 FR 69588).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendments to Marketing Order 920 regulating the handling of kiwifruit grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Laurel May, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act," and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held December 9, 2008, in Modesto, California. Notice of this hearing was published in the **Federal Register** on November 19, 2008 (73 FR 69588). The notice of hearing contained four proposals submitted by the committee.

The proposed amendments were recommended by the committee following deliberations at public meetings on January 30, 2008; April 22, 2008; and July 9, 2008. The proposed amendments were submitted to the Agricultural Marketing Service (AMS) on August 15, 2008. After reviewing the recommendation and other information submitted by the committee, AMS determined to proceed with the formal rulemaking process and schedule the matter for hearing.

The committee's proposed amendments to the order would: (1) Redefine the districts into which the production area is divided and reallocate committee membership positions among the districts; (2) revise committee nomination and selection procedures; (3) add authority for research and promotion programs; and (4) revise the committee's meeting and voting procedures.

In addition to the proposed amendments, AMS proposed to make any such changes to the order as may be necessary to conform to any amendment to the order that may result from the hearing.

Seven industry witnesses testified at the hearing. The witnesses represented kiwifruit producers and handlers in the production area, as well as the committee, and they all supported the recommended changes. The witnesses emphasized the need to modernize and update committee representation and procedures as well as equip the industry with additional tools to address the research and promotion needs of California kiwifruit.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of February 6, 2009, for

interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. No briefs were filed.

Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the order by redefining the production area's district boundaries and by reallocating committee membership positions among the districts;

(2) Whether to amend the order by requiring that nomination meetings be held by June 1 in each year when nominations are to be made and by specifying that mid-term committee vacancies may be filled by the Secretary based upon recommendations from the committee;

(3) Whether to amend the order by adding authority for the committee to establish and conduct research and promotion programs, by adding authority to accept voluntary contributions for use in such programs, and by requiring a supermajority approval for all committee actions pertaining to research and promotion; and

(4) Whether to amend the order by authorizing substitute alternates to represent absent members and alternates at meetings, by authorizing the committee to conduct meetings through telephone or other means of communication, and by specifying the voting procedures for various meeting formats.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1—Districts and Representation

Section 920.12, District, should be amended to redefine the districts into which the production area is divided. Section 920.20, Establishment and Membership, should also be amended to provide for flexible allocation of the eleven grower member and alternate seats among the districts and to remove the limitation of no more than two members and two alternates per district. Finally, § 920.21, Term of Office, should be amended to specify that the two-year terms of office of all members and alternates would begin and end simultaneously and to provide for the nomination of a new committee following the amendment process.

Currently, the production area, which comprises the state of California, is

divided into eight districts. Eight of the eleven grower member committee seats are allocated to the eight districts, with one additional seat assigned to each of the three districts with the highest volume production. No more than two members and alternates may represent any district. Witnesses testified that this structure was appropriate at the time the order was promulgated because kiwifruit acreage and growers were widely distributed throughout California.

Evidence provided at the hearing shows that most kiwifruit acreage and growers are now concentrated in two areas of the State. According to witnesses, under current order provisions, representation on the committee is no longer equitably distributed and does not reflect the concentration of growers and production in these two areas. Witnesses stated that the areas with greater production are under-represented on the committee. Witnesses further testified that it has become increasingly difficult in the past few years to fill committee positions to represent districts with fewer growers and lower production.

Hearing testimony supported amending the order by redefining the district boundaries and adding greater flexibility for the committee to recommend district boundaries and committee membership allocations. Witnesses testified that these changes would provide more equitable representation for all growers and production within the production area.

Specifically, witnesses supported amending the order by dividing the production area into three districts as follows: District 1 would include Butte, Sutter, and Yuba Counties; District 2 would include Tulare County; and District 3 would include all other California counties not included in Districts 1 and 2. The record shows that this district alignment would better serve the interests of the industry as it is currently distributed within the production area.

Witnesses also supported amending the order's membership allocation provisions. Allocation of the eleven grower member positions on the committee would be based upon five-year production averages for each district, or upon some other basis approved by the Secretary, to provide equitable representation for each district. Witnesses explained that the committee's staff would review production averages prior to each nomination period and would recommend a membership allocation that would reflect the then current

proportion of total kiwifruit production from each district. After its approval by the committee, the recommendation would be forwarded to USDA for review and approval prior to the beginning of the nomination period.

Currently, terms of office are staggered so that part of the committee is nominated and selected each year. Members and alternates are limited to three consecutive two-year terms in one position. Additionally, as explained above, current order provisions require the committee to reallocate three member and alternate seats each year, based on production for each of the districts. Witnesses testified that conducting the nominations process, reallocating some of the seats, and seating new members every year has become burdensome to the industry and disruptive to the administration of the order. Witnesses supported the proposal to synchronize all the terms of office to begin and end biannually. All eleven grower member and alternate seats would be assigned to represent the districts for the entire two-year term of office. Witnesses testified that if the districts are realigned as proposed under Material Issue Number 1, there would be ample candidates available from each district to fill committee seats.

Witnesses also supported adding a provision to the order that would provide that the terms of office for all current members would end on the last day of the fiscal period in which the amendment becomes effective and specify that nominations be conducted for new terms of office for all members as soon as practicable following implementation of the amendments. Under this proposal, terms of office for members or alternates who have served for less than two years at the time the current terms of office are terminated would not count toward tenure.

No testimony opposing the proposed amendments was given at the hearing. For the reasons stated above, it is recommended that § 920.12, District, be amended to define three districts into which the kiwifruit production area is divided. Further, it is recommended that § 920.20, Establishment and Membership, be amended to specify that the eleven grower member seats on the committee shall be allocated on the basis of five-year production history, or on some other basis recommended by the committee and approved by the Secretary, to provide for equitable representation on the committee. Finally, § 920.21, Term of Office, should be amended to provide for concurrent terms of office for all members that would begin and end every other year.

Section 920.21 should also provide that all current terms of office would end on the last day of the fiscal period in which the amendment becomes effective, and a new committee would be nominated as soon as practicable after that date. The section would be further amended to specify that terms of office for members or alternates who have served less than two years at the time the current terms of office are terminated would not count toward tenure. Additionally, references to three districts with additional seats in §§ 920.20 and 920.21 would be removed. Finally, a clarifying conforming change is made to the order language in § 920.20 that cross references § 920.31(l).

Material Issue Number 2—Nominations and Vacancies

Section 920.22, Nomination, of the order should be amended to specify that nomination meetings should be conducted in the grower districts by June 1 of each year in which nominations are made. Currently, the order requires that such nomination meetings be held by July 15 each year. Witnesses explained that the committee has found it necessary to conduct nomination meetings earlier than currently prescribed in the order to ensure that the selection process is completed prior to the August 1 beginning of the terms of office. According to witnesses, the order should be amended to codify what has become a regular practice for the committee. Additionally, as described under Material Issue Number 1, the committee proposed amending the order to provide for concurrent terms of office for all members that would begin and end every other year. Witnesses noted that if that proposed amendment is implemented, there would be no need to conduct nomination meetings every year.

Section 920.26, Vacancies, should also be amended to authorize the Secretary to select a successor to fill mid-term committee vacancies that may occur after consideration of recommendations from the committee. Currently, the order specifies that vacancies must be filled by following the same procedures described for annual committee nominations and selections. Witnesses testified that conducting the entire nomination and selection process to fill mid-term vacancies is burdensome to the industry. Witnesses stated that the committee is aware of qualified growers from each district who would be available to serve out the unexpired terms of members who have vacated

their seats. Testimony supported amending the order to provide that mid-term vacancies may be filled by selections made by the Secretary after consideration of recommendations that may be submitted by the committee unless such selection is deemed unnecessary by the Secretary.

No testimony or evidence opposing this proposal was provided at the hearing. For the reasons stated above, it is recommended that § 920.22, Nomination, be amended to specify that grower district nomination meetings should be held by June 1 of each year in which nominations are to be made. Further, it is recommended that § 920.26, Vacancies, be amended to authorize the Secretary to select members to fill mid-term vacancies based upon recommendations from the committee.

Material Issue Number 3—Research and Promotion

A new section 920.47, Production research, marketing research and development, providing authority to establish and conduct research and promotion programs, should be added to the order. An additional section, § 920.45, Contributions, authorizing the committee to accept voluntary contributions for research and promotion projects, should also be added to the order. Finally, paragraph (a) of § 920.32, Procedure, should be amended to specify that actions of the committee with respect to research and promotion activities should require at least eight concurring votes.

Currently, the committee is not authorized to conduct research or promotion programs, and it is not authorized to accept voluntary contributions for any purpose. Research and promotion programs for the California kiwifruit industry are currently conducted under a state marketing order, and the state program is authorized to accept contributions for its research programs.

Witnesses at the hearing supported amending the order by adding research and promotion authority. Although they did not identify specific projects that the committee is considering at this time, those testifying about this proposed amendment explained that the committee should have authority to conduct research and promotion programs if the need arises. Further, witnesses stated that the committee does not intend to duplicate the efforts of the state program.

Hearing witnesses testified in support of the proposed amendment to add authority to accept voluntary contributions for use in research and

promotion projects. The record shows that industry members have made voluntary financial contributions in the past to support research projects such as the improvement of maturity testing methods and the lengthening of kiwifruit shelf life, both of which were considered critical to the industry. Witnesses testified that such financial support from the industry would be likely to continue if the committee is authorized to accept voluntary contributions.

The record shows that contributions could supplement assessment funds earmarked for research and promotion projects. Witnesses stated that the declining California kiwifruit production would eventually erode the base upon which assessments are collected, and the committee would be limited as to the number and type of projects it could support. Additionally, § 920.41 of the order specifies a cap on the assessment rate that the committee can levy on handlers. With such a cap on the assessment rate, witnesses could foresee a time when the committee might be unable to collect enough assessment revenue to fund extensive research or promotion projects. Voluntary contributions could augment the committee's available funds and allow the committee to conduct important projects.

One witness suggested that voluntary contributions could also bolster the committee's share of projects requiring matching funds. For example, the California kiwifruit industry is interested in raising the demand for its product in the export market. Voluntary contributions could boost the committee's efforts to raise matching funds for participation in USDA's Market Access Program, which helps domestic producers develop and expand their international markets.

The hearing record supports specifying that voluntary contributions would be free of any encumbrances by the donor and would be used at the committee's discretion. Expenditure of contributed funds would be subject to the committee's annual financial audits.

Under the order, eight members constitute a quorum, and most committee actions require the concurrence of the majority of those in attendance. Supermajorities of eight concurring votes are currently required for actions with respect to expenses, assessments, and recommendations for shipping and inspection regulations. The committee proposed amending the order by requiring eight concurring votes for actions with respect to research and promotion if the order is amended to authorize such activities.

Witnesses supported the addition of this supermajority voting requirement to ensure widespread support for any research or promotion projects the committee may undertake.

No testimony or evidence opposing this proposal was offered at the hearing. For the reasons stated above, it is recommended that a new § 920.47, Production research, marketing research and development, be added to the order to authorize the committee to recommend and conduct research and promotion programs. It is also recommended that a new § 920.45, Contributions, be added to the order to authorize the committee to accept financial contributions for use in their research and promotion programs and to specify that the committee will retain complete control of any such contributions. Finally, it is recommended that § 920.32(a) be amended to specify that eight concurring votes are required for all committee actions with respect to research and promotion.

Material Issue Number 4—Meeting and Voting Procedures

Section 920.27 should be revised to specify that grower members and their respective alternates may be represented by any other alternates from the same district at committee meetings if necessary to obtain a quorum. Section 920.32(b) should also be amended to authorize the committee to meet via telephone, video conference, or other means of communication.

Currently, the order authorizes a member's own alternate to represent him or her at meetings during the member's absence. In the case of the three districts allocated two members, an alternate may act in the stead of the other member of that district and his or her alternate, if necessary.

If membership allocation is amended as described under Material Issue Number 1, some districts could be represented by more than two members. This proposal would revise the language of § 920.27 to authorize the committee to designate any available alternate to represent any absent grower member and his or her alternate from the same district, if necessary to obtain a quorum.

Witnesses at the hearing noted that, due to increased demands on their time, growers have found it increasingly difficult to attend meetings that are held at great distances from their districts. Citing recent examples, witnesses described occasions when the committee was unable to conduct business in a timely manner because they were unable to meet quorum requirements.

Witnesses supported amending the order to authorize the committee to appoint any available alternates to represent absent members and alternates from the same district in order to obtain a quorum. Witnesses agreed that substitute alternates from the same districts as the absent members are likely to have similar views regarding industry issues and could represent the views of their districts, as well as the entire industry, appropriately.

Currently, the order authorizes the committee to vote by telephone or other means of communication, but if an assembled meeting is held, all votes must be cast in person. This proposal would enable the committee to hold meetings through other means of communication when appropriate.

As noted above, hearing witnesses testified that time and distance constraints make attendance at assembled meetings difficult for committee members as well as other interested persons. Consequently, meeting attendance has dropped. According to witnesses, meeting attendance could improve if the meetings were more accessible to as many participants as possible. Witnesses expected that providing more meeting options would improve the likelihood that quorum requirements could be met, and that committee business could be conducted in a timely manner.

According to evidence provided at the hearing, teleconference meetings are currently used by other kiwifruit industry organizations. Witnesses testified that teleconferencing has greatly enhanced the efficiency and effectiveness of those other groups.

Witnesses explained that the committee holds approximately three meetings per year. Subcommittees meet more frequently, as needed. If the authority to conduct research and promotion activities, as described under Material Issue Number 3, is added to the order, witnesses anticipate that many more meetings could be needed to discuss and recommend potential projects. Witnesses stated that the work of the committee and subcommittees would be facilitated by adding the flexibility to meet by telephone or other means of communication.

Witness testimony indicates that the committee would provide for assembly of interested persons at sites such as county farm bureau offices, where all could participate in videoconference meetings. As well, the committee would continue to publicize meeting information and provide relevant materials and call-in instructions on its Web site or by mail to those requesting

it. Witnesses stated that all interested persons would have access to committee meetings and would be encouraged to participate.

Section 920.32(b) should be further amended to specify that videoconferences would be considered assembled meetings, and that votes cast at such meetings would be considered as cast in person. However, votes cast by members participating in meetings through other methods of communication should be by roll call. Currently, the order provides that votes by telegraph or other means of communication shall be confirmed in writing.

No opposing testimony regarding this proposal was offered at the hearing. For the reasons stated above, it is recommended that § 920.27 should be amended to authorize the committee to appoint substitute alternates to act in the stead of absent members from the same district, if necessary to obtain a quorum. Further, § 920.32(b) should be amended to allow the committee to meet by telephone and other means of communication, to specify that videoconference meetings shall be considered assembled meetings and that votes cast at such meetings shall be considered in-person, and to require votes cast at non-assembled meetings to be taken by roll call.

Conforming Changes

AMS also proposed to make such changes as may be necessary to the order to conform to any amendment that may result from the hearing. Any such changes have been previously identified.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than \$7,000,000. Small agricultural growers have been defined

as those with annual receipts of less than \$750,000.

There are approximately 30 handlers of kiwifruit subject to regulation under the order and approximately 220 growers of kiwifruit in the regulated area. Information provided at the hearing indicates that the majority of the handlers would be considered small agricultural service firms. Hearing testimony also suggests that the majority of growers would be considered small entities according to the SBA's definition.

The order regulates the handling of kiwifruit grown in the state of California. Total bearing kiwifruit acreage has declined from a peak of approximately 7,300 acres in 1992–93 to about 4,000 acres in 2007–08. Approximately 24,500 tons of kiwifruit were produced in California during the 2007–08 season—a decline of approximately 27,800 tons compared to the 1992–93 season. According to evidence provided at the hearing, approximately 30 percent of the 2007–08 California kiwifruit crop was shipped to export markets, including Canada, Mexico, Central American, and Asian destinations.

Under the order, outgoing grade, size, pack, and container regulations are established for kiwifruit shipments, and shipping and inventory information is collected. Program activities administered by the committee are designed to support large and small kiwifruit growers and handlers. The 12-member committee is comprised of eleven grower representatives from the production area, as well as a public member. Committee meetings in which regulatory recommendations and other decisions are made are open to the public. All members are able to participate in committee deliberations, and each committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

Following several discussions within the kiwifruit industry, the committee considered adding authority to conduct research and promotion programs to provide maximum flexibility to the order. An amendment subcommittee was appointed to develop recommendations for this and other possible order revisions. The subcommittee developed a list of proposed amendments to the order, which was then presented to the committee.

The committee met to review and discuss the subcommittee's proposals at its meetings on January 30, 2008, April 22, 2008, and July 9, 2008. At those meetings, the committee voted

unanimously to support the four proposed amendments that were forwarded to AMS and subsequently considered at the hearing.

The proposed amendments are intended to provide the committee and the industry with additional flexibility in administering the order and producing and marketing California kiwifruit. Record evidence indicates that the proposals are intended to benefit all growers and handlers under the order, regardless of size.

All grower and handler witnesses supported the proposed amendments at the hearing. Several witnesses commented on the implications of implementing research and promotion programs under the order. In that context, witnesses stated that they expected the benefits to growers and handlers to outweigh any potential costs.

A description of the proposed amendments and their anticipated economic impact on small and large entities is discussed below.

Proposal 1—Districts and Representation

Proposal 1 would amend the order by redefining the districts into which the production area is divided and providing for the allocation of committee membership positions between the districts. Such allocation would be based upon five-year production averages, or upon another basis approved by the Secretary. This proposal would also provide for concurrent terms of office for all committee members, who would be selected biannually.

At the time the order was promulgated, kiwifruit acreage was more widespread throughout California and there were many more growers involved in kiwifruit production. The order originally provided for eight grower districts within the production area, with one membership seat apportioned to each district, and an additional seat reallocated annually to each of the three districts with the highest production in the preceding year. The structure was designed to afford equitable representation for all districts on the committee.

The concentration of planted acreage into two main regions and the decline in the number of growers over time has prompted the committee to evaluate the appropriateness of the current committee structure. The committee believes that consolidating the districts and providing for reallocation of grower seats as proposed would better reflect the current composition of the industry. The revisions would ensure that the

interests of all large and small entities are represented appropriately during committee deliberations. Synchronizing all the terms of office to begin and end at the same time would simplify administration of the order and reduce disruptions to committee business. Adoption of the proposed amendment would have no economic impact on growers or handlers of any size.

Proposal 2—Nominations and Vacancies

Proposal 2 would amend the order by specifying that grower nomination meetings be held by June 1 of each nomination year and that mid-term vacancies may be filled by selections made by the Secretary after consideration of recommendations that may be submitted by the committee, unless such selection is deemed unnecessary by the Secretary.

Currently, the order requires that nomination meetings be held by July 15 of each year, but that deadline does not allow for timely processing of the nominations and selections of new members prior to the August 1 beginning of the terms of office. The committee has been conducting nomination meetings earlier than prescribed by the order and proposed this revision to codify what has become normal practice.

Any vacancies that occur under the current order provisions must be filled by repeating the nomination and selection process outlined for new members. Allowing the Secretary to fill vacancies as proposed would streamline the process of filling vacancies and reduce disruption to committee business.

Adoption of this proposal would have no economic impact upon growers or handlers of any size.

Proposal 3—Research and Promotion

Proposal 3 would amend the order by adding authority for the committee to conduct research and promotion projects and to accept voluntary contributions to assist with funding those projects. This proposal would also amend the order by requiring the concurring vote of eight members for any action with respect to research and promotion. Currently, the committee is not authorized to conduct research or promotion programs, and it is not authorized to accept voluntary contributions for any purpose.

Historically, kiwifruit research has been conducted by other industry organizations and funded through private as well as public revenues. Currently, the California Kiwifruit Commission, a state marketing program,

is authorized to conduct research and promotion projects for the industry. According to the hearing record, the committee has not identified any specific projects that it wants to conduct at this time, nor does it intend to duplicate the efforts of the state program. However, it would like to add authority to conduct such projects in the event that a need for new projects arises.

Further, the committee proposed adding authority to accept voluntary funds to conduct research and promotion projects to augment the assessment revenues they might budget for such purposes. The order specifies a cap on the rate handlers may be assessed to support the committee's programs and activities. According to witnesses, the current assessment rate is well below the established cap, but supporting research and promotion projects in the future could require more money than what the shrinking industry is likely to collect through assessments. Voluntary contributions could also augment matching funds required from the committee for participation in USDA-sponsored market development programs.

Finally, the committee recommended adding a provision that all actions with respect to research and promotion would require eight concurring committee votes. Witnesses explained that this supermajority approval would ensure that research and promotion projects undertaken by the committee would benefit the industry as a whole. Adding authority to conduct research and promotion projects would not, of itself, have any economic impact on growers or handlers of any size. If research and promotion projects were implemented under this authority in the future, the assessment rate for handlers would likely increase to cover the cost of those expenditures. The value of any proposed projects, as well as recommendations for increased assessment rates, would be evaluated by the committee and approval would require the concurring vote of eight members. Any increases in cost would be borne proportionately by handlers according to the volume of kiwifruit they ship. Those costs could be offset by voluntary contributions. Witnesses testified that any increases in cost due to implementation of this proposal would be offset by benefits expected to accrue to growers and handlers as improved production and post-harvest handling methods and new market opportunities are developed. Any increased costs would be proportional to a handler's size and would not unduly or disproportionately impact small entities.

Proposal 4—Meeting and Voting Procedures

Proposal 4 would amend the order by allowing the committee to designate substitute alternates to represent absent members from the same district at meetings if necessary to secure a quorum. Currently, under most circumstances, only a member's respective alternate may represent the member if the member is unable to attend a meeting. For districts with only one member, there is no provision for when both the member and his or her alternate are unavailable for a meeting. In the past, meetings have been cancelled at the last minute because attendance was insufficient to meet quorum requirements.

If implemented, the proposed amendment would allow alternates not otherwise representing absent members to represent other members at committee meetings in order to secure a quorum. This would help ensure that quorum requirements could be met and that committee business could be addressed in a timely manner.

This proposal would further authorize the committee to meet by telephone or other means of communication. Video conference meetings would be considered assembled meetings and votes taken at such meetings would be considered in-person. Votes by telephone or other types of non-assembled meetings would be by roll call.

Witnesses testified that this amendment would provide the committee with greater flexibility in scheduling meetings and would be consistent with current practices in other kiwi industry settings. The use of telephone and other means of communication would allow greater access to committee meetings for members as well as other interested persons. Additionally, administration of the order would be improved as urgent committee business could be addressed in a timely manner.

This amendment is expected to benefit growers and handlers of all sizes by improving committee efficiencies and encouraging greater participation in industry deliberations. The amendment is not expected to result in any significant increased costs to producers or handlers.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule. These amendments are intended to improve the operation and administration of the order and to assist in the production and marketing of California kiwifruit.

Committee meetings regarding these proposals, as well as the hearing date and location, were widely publicized throughout the kiwifruit industry, and all interested persons were invited to attend the meetings and the hearing and to participate in committee deliberations on all issues. All committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Paperwork Reduction Act

Current information collection requirements for Part 920 are approved by the Office of Management and Budget (OMB), under OMB Number 0581-0189—"Generic OMB Fruit Crops." No changes in these requirements are anticipated as a result of this proceeding. Should any such changes become necessary, they would be submitted to OMB for approval.

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.

Civil Justice Reform

The amendments to Marketing Order No. 905 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

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

no later than 20 days after the date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs and proposed findings and conclusions based on the record evidence were solicited in this proceeding. No briefs were filed.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(1) The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of kiwifruit grown in the production area (California) in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

(3) The marketing order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of kiwifruit grown in the production area; and

(5) All handling of kiwifruit grown in the production area as defined in the marketing order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate because the 2009–2010 fiscal period has already begun, and it would be preferable to have these changes, if adopted, in place for this fiscal period. All written exceptions

timely received will be considered, and a grower referendum will be conducted, before any of these proposals are implemented.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 920 is proposed to be amended as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 920.12 to read as follows:

§ 920.12 District.

District means the applicable one of the following described subdivisions of the production area or such other subdivision as may be prescribed pursuant to § 920.31:

(a) *District 1* shall include Butte, Sutter, and Yuba Counties.

(b) *District 2* shall include Tulare County.

(c) *District 3* shall include all counties within the production area not included in Districts 1 and 2.

3. Revise § 920.20 to read as follows:

§ 920.20 Establishment and membership.

There is hereby established a Kiwifruit Administrative Committee consisting of 12 members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he or she is an alternate. The 12-member committee shall be made up of the following: One public member (and alternate), and eleven members (and alternates). With the exception of the public member and alternate, all members and their respective alternates shall be growers or employees of growers. In accordance with § 920.31(l), district representation on the committee shall be based upon the previous five-year average production in the district and shall be established so as to provide an equitable relationship between membership and districts. The committee may, with the approval of the Secretary, provide such other allocation of membership as may be necessary to assure equitable representation.

4. Revise § 920.21 to read as follows:

§ 920.21 Term of office.

The term of office of each member and alternate member of the committee shall be for two years from the date of their selection and until their successors are selected. The terms of office shall

begin on August 1 and end on the last day of July, or such other dates as the committee may recommend and the Secretary approve. *Provided*, That the terms of office of all members and alternates currently serving will end on the last day of the fiscal period in which this amended provision becomes effective, with nominations for new terms of office to be conducted as soon as practicable after the effective date of the amendment. Members may serve up to three consecutive 2-year terms not to exceed 6 consecutive years as members. Alternate members may serve up to three consecutive 2-year terms not to exceed 6 consecutive years as alternate members. *Provided*, That any term of office less than two years as a result of the amendment will not count toward tenure.

5. In § 920.22, revise the first sentence of paragraph (a) to read as follows:

§ 920.22 Nomination.

(a) Except as provided in paragraph (b) of this section, the committee shall hold, or cause to be held, not later than June 1 of each year in which nominations are made, or such other date as may be specified by the Secretary, a meeting or meetings of growers in each district for the purpose of designating nominees to serve as grower members and alternates on the committee. * * *

* * * * *

6. Revise § 920.26 to read as follows:

§ 920.26 Vacancies.

To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate member of the committee to qualify, or in the event of the death, removal, resignation, or disqualification of any member or alternate member of the committee, a successor for the unexpired term of such member or alternate member of the committee shall be selected by the Secretary after consideration of recommendations which may be submitted by the committee, unless such selection is deemed unnecessary by the Secretary. The selection shall be made on the basis of representation provided for in § 920.20.

7. Revise § 920.27 to read as follows:

§ 920.27 Alternate members.

An alternate member of the committee, during the absence of the member for whom that individual is an alternate, shall act in the place and stead of such member and perform such other duties as assigned. In the event both a member and his or her alternate are unable to attend a committee meeting, the committee may designate

any other alternate member from the same district to serve in such member's place and stead if necessary to secure a quorum. In the event of the death, removal, resignation, or disqualification of a member, the alternate of such member shall act for him or her until a successor for such member is selected and has qualified.

8. Revise § 920.32 to read as follows:

§ 920.32 Procedure.

(a) Eight members of the committee, or alternates acting for members, shall constitute a quorum, and any action of the committee shall require the concurring vote of the majority of those present: *Provided*, That actions of the committee with respect to expenses and assessments, research and promotion activities, or recommendations for regulations pursuant to §§ 920.50 through 920.55 of this part shall require at least eight concurring votes.

(b) Committee meetings may be assembled or held by telephone, video conference, or other means of communication. The committee may vote by telephone, facsimile, or other means of communication. Votes by members or alternates present at assembled meetings shall be cast in person. Votes by members or alternates participating by telephone or other means of communication shall be by roll call; *Provided*, That a video conference shall be considered an assembled meeting, and votes by those participating through video conference shall be considered as cast in person.

9. Add a new § 920.45 to read as follows:

§ 920.45 Contributions.

The committee may accept voluntary contributions, but these shall only be used to pay expenses incurred pursuant to § 920.47. Furthermore, such contributions shall be free from any encumbrances by the donor, and the committee shall retain complete control of their use.

10. Add a new § 920.47 to read as follows:

§ 920.47 Production research, marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production and post-harvest research, and marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of kiwifruit. The expense of such projects shall be paid from funds collected pursuant to §§ 920.41 and 920.45.

Dated: November 5, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

[FR Doc. E9-27135 Filed 11-10-09; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 161 and 165

[Docket No. USCG-1998-4399]

RIN 1625-AA58 (Formerly RIN 2115-AF75)

Vessel Traffic Service Lower Mississippi River

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a Vessel Traffic Service (VTS) on the Lower Mississippi River and transfer certain vessel traffic management (VTM) provisions of the Mississippi River, Louisiana—Regulated Navigation Area to the VTS. The proposed rule would implement current practices and operating procedures appropriate to an Automatic Identification System (AIS)-based VTS and facilitate vessel transits, enhance good order, promote safe navigation, and improve existing waterway operating measures. The rule also proposes minor conforming revisions to the existing VTM provisions and related regulations.

DATES: Comments and related material must either be submitted to our online docket via <http://www.regulations.gov> on or before January 11, 2010 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG-1998-4399 using any one of the following methods:

(1) *Federal eRulemaking Portal:* <http://www.regulations.gov>.

(2) *Fax:* 202-493-2251.

(3) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the

“Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Lieutenant Commander Jim Larson, Office of Shore Forces (CG-7413), Coast Guard; telephone 202-372-1554, e-mail James.W.Larson@uscg.mil. If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

- I. Public Participation and Request for Comments
 - A. Submitting Comments
 - B. Viewing Comments and Documents
 - C. Privacy Act
 - D. Public Meeting
- II. Abbreviations
- III. Background
 - A. Regulatory History
 - B. Vessel Traffic Services
 - C. Stakeholder Involvement
 - D. Automatic Identification System Concept
- IV. Summary of Changes Between NPRM and SNPRM
- V. Discussion of Comments
- VI. Discussion of Supplemental Notice of Proposed Rulemaking
 - A. Section 161.2 Definitions
 - B. Section 161.6 Preemption
 - C. Section 161.12 Vessel Operating Requirements
 - D. Section 161.65 Vessel Traffic Service Lower Mississippi River
 - E. Section 165.810 Mississippi River, LA—Regulated Navigation Area
- VII. Regulatory Analyses
 - A. Regulatory Planning and Review
 - B. Small Entities
 - C. Assistance for Small Entities
 - D. Collection of Information
 - E. Federalism
 - F. Unfunded Mandates Reform Act
 - G. Taking of Private Property
 - H. Civil Justice Reform
 - I. Protection of Children
 - J. Indian Tribal Governments
 - K. Energy Effects
 - L. Technical Standards
 - M. Environment

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you have provided.