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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 981

[Docket No. AO-214-A7; AMS-FV-07-0050; FV07-981-1]

Almonds Grown in California; Recommended Decision on Proposed Amendment of Marketing Order No. 981

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. 981 (order), which regulates the handling of almonds grown in California. Two amendments were proposed by the Almond Board of California (Board), which is responsible for local administration of the order. These proposed amendments would: authorize the establishment of specific outgoing quality requirements for different markets; and authorize the establishment of container marking and labeling requirements. The proposals are intended to provide additional flexibility in administering the quality control provisions of the order and provide the industry with additional tools to aid in the marketing of almonds. This recommended decision invites written exceptions on the proposed amendments.

DATES: Written exceptions must be filed by January 17, 2008.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1081-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**. Comments 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>.

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102-B, Fresno, California 93721; Telephone: (559) 487-5110, Fax: (559) 487-5906, or E-mail:

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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@usda.gov.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding; Notice of Hearing issued on June 29, 2007, and published in the July 6, 2007, issue of the **Federal Register** (72 FR 36900).

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 981 regulating the handling of almonds grown in California, and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Martin Engeler, 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 August 2, 2007, in Modesto, California. Notice of this hearing was published in the **Federal Register** on July 6, 2007 (72 FR 36900). The notice of hearing contained the two proposals submitted by the Board.

The proposed amendments were recommended by the Board following deliberations at public meetings on November 28, 2006, and February 27, 2007, and were submitted to the Agricultural Marketing Service (AMS) on March 12, 2007. After reviewing the recommendation and other information submitted by the Board, AMS determined to proceed with the formal rulemaking process and schedule the matter for hearing.

The Board's proposed amendments to the order would: (1) Authorize the establishment of different outgoing almond quality requirements for different markets; and (2) authorize the establishment of container marking and labeling requirements.

USDA also proposed to make such changes to the order as may be necessary, if any of the proposed changes are adopted, so that all of the order's provisions conform to the effectuated amendments.

Eleven industry witnesses testified at the hearing. These witnesses represented almond producers and handlers in the production area, as well as Board staff, and all were supportive of the proposed amendments. The witnesses emphasized the need to equip the industry with updated and more comprehensive tools for the marketing of California almonds, and testified that the two proposed amendments would assist in this matter.

Witnesses offered testimony in support of the Board's recommendation to add authority for different outgoing quality requirements for shipments to different markets. Under that authority, the Board could recommend the establishment of outgoing quality requirements to meet the specifications of particular markets. According to testimony, this would assure delivery of a consistent quality product, which would help maintain customer confidence and market share.

Witnesses also supported the recommendation to add general authority for container marking and labeling requirements. If implemented, this authority would enable the Board to recommend the establishment of container marking and labeling regulations to aid in the orderly marketing of almonds. Such container marking or labeling could include information about the product's origin, product handling instructions, or other information responsive to market demands.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of September 24, 2007, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. The filing deadline was extended to September 26, 2007. Two briefs were filed during that period: one brief summarized witness testimony from the hearing and supported adoption of the proposed order amendments; and the second brief provided a brief history of the California almond industry, clarified the intent of the Board's proposed amendment regarding container

marking and labeling, and offered general support for both proposed amendments.

Material Issues

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

- (1) Whether to amend the order to authorize establishment of different outgoing quality requirements for different markets; and
- (2) Whether to amend the order to authorize establishment of container marking and labeling requirements.

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—Authority To Establish Different Outgoing Quality Requirements for Different Markets

Section 981.42(b) of the order should be amended to authorize the establishment of specific outgoing quality requirements for different markets. That section currently authorizes the establishment of minimum outgoing quality requirements applicable to almonds to be handled or to be processed into manufactured products. However, it does not authorize different quality requirements for product shipped to different market destinations. Quality requirements authorized under § 981.42(b) may be established through informal rulemaking after recommendation by the Board and implementation by USDA. If authority to establish different outgoing quality requirements for different markets is added to this subsection in the order as proposed, implementation of such requirements would also require recommendation by the Board and subsequent establishment of regulations by USDA through informal rulemaking.

Witnesses testified that California almonds comprise approximately 80 percent of the world's almond production and that over two-thirds of California's almonds are exported to approximately 90 countries worldwide. According to record evidence, the 2007–08 crop is estimated to approximate 1.330 billion pounds, which would be the largest California almond crop ever produced. Witnesses testified that to ensure the industry can sustain adequate market demand for production at that level, it must be equipped with necessary tools that will allow it to respond to rapidly changing global market requirements.

Witnesses indicated that the California almond industry faces a wide

array of market regulations and standards for such factors as appearance, aflatoxin levels, pesticide residues, organic standards, fumigation, and methods of testing for compliance with those standards. Many of these requirements are not harmonized across the different markets. Witnesses explained that there is a tendency for countries to adopt standards from other countries and then modify them, so that the standards and requirements proliferate and become increasingly complex. One witness suggested that a shipment of product could meet the requirements of one country but be rejected by another country.

Meeting the demands of increasingly diverse markets with substantially different standards and requirements is an ongoing challenge for the almond industry. However, witnesses testified that maintaining customer confidence in the quality of their product is essential for the economic well being of the industry; so the ability to meet those standards is crucial.

Currently, the order authorizes the establishment of outgoing quality regulations that are applicable to all almonds, regardless of their destination. Witnesses stated that handling all almonds in such a manner as to meet the requirements of one particular market may not always be practical for shipments to other destinations and could generate unnecessary costs for handlers. The industry desires to avoid the complication and expense of applying the quality standards of one market to shipments for other markets where they may not be required or appropriate.

However, at the same time, witnesses indicated that not making country and region-specific mandatory marketing requirements compulsory as part of outgoing quality regulations in the order is causing a disruption in the flow of almonds to specific markets, such as the European Union (EU). Witnesses explained that the EU has established a maximum tolerance for aflatoxin in almonds shipped to its member countries. Handlers who choose to ship almonds to the EU must comply with EU specifications. However, under the current order regulations, there are no mandatory requirements pertaining to aflatoxin for California almonds. Witnesses explained that, in the absence of the authority to establish specific outgoing quality requirements for shipments to the EU, the almond industry developed a voluntary aflatoxin testing protocol for handlers to follow when shipping almonds to the EU. The intent of the program was to ensure the product meets EU

requirements before being shipped, therefore minimizing the number of rejected shipments and the expenses and delays associated with them. The industry also hoped to prevent the erosion of confidence in the overall quality of California almonds and the implementation of even tighter controls in the EU.

However, according to witness testimony, the voluntary nature of the industry's program did not sufficiently assure the EU that its requirements would be met. Beginning on September 1, 2007, EU officials implemented a program requiring mandatory aflatoxin testing of California almond shipments upon arrival in the EU. This program requires mandatory testing of five percent of shipments of almonds from California handlers participating in the voluntary California aflatoxin testing program, and mandatory testing of 100% of shipments of almonds from California handlers not participating in the voluntary program. One witness stated that similar controls mandated for other crops have resulted in increased rejections, costs to producers, market disruption, and loss of market share.

Testimony provided at the hearing shows that it is impractical to require aflatoxin testing for almond shipments to all markets, which is the only alternative available under the current order authority. To do so would impose unnecessary expenses for shipments to markets that do not require aflatoxin testing. Neither do witnesses want to risk unfavorable consequences to the entire industry, including the potential for even greater testing frequency by the EU, due to the failure of some shipments to meet import requirements. The authority to establish testing requirements for all shipments to the EU would reduce the risk that one shipment with aflatoxin levels exceeding the EU tolerance could compromise the industry's reputation and market position.

Witnesses testified that the authority to establish different requirements for different markets would prove useful in other domestic and international market situations that could arise. If the proposed amendment is adopted, the Board would be authorized to establish, with the approval of the Secretary, specific outgoing quality regulations to address critical market issues as they arise. Currently, handlers routinely meet individual market requirements as part of conducting business in those markets. However, witnesses stressed that the industry's reputation would be reinforced by implementation of mandatory, rather than voluntary,

compliance with certain market demands.

Establishing different requirements for different markets would help insure that substandard almonds do not find their way to the market and destroy consumer confidence and harm industry returns. Furthermore, the flexibility provided in this amendment would allow the application of such requirements to be limited to shipments destined for specified markets, saving handlers the additional burden or cost of meeting regulations other than those necessary for each market. Thus, it is recommended that § 981.42(b) be amended to include authority for the Board, with the approval of the Secretary, to establish different outgoing quality requirements for different markets. There was no testimony in opposition to this proposal.

Furthermore, USDA is recommending changes to the proposed language of the amendment to § 981.42(b) that was published in the notice of hearing. The word “recommend” would be changed to “establish” to harmonize and conform the proposed language with that already present in this subsection regarding the establishment of outgoing quality requirements. In addition, the proposed language in the amendment would be moved within the paragraph.

Material Issue Number 2—Authority To Establish Container Marking and Labeling Requirements

A new section 981.43 should be added to the order to authorize the establishment of marking and labeling requirements for bulk containers. A definition of “container” is included in the amendatory text for this section to clarify that the regulation would be applicable to receptacles used in the packaging or handling of almonds. Specifying that only bulk containers be included in this authority was not part of the Board’s original proposal. However, proponents testified that it was their original intent.

Currently, very limited authority for marking and labeling requirements exists in this marketing program. Adding this section would provide for the establishment of general authority for making requirements for the marking or labeling of bulk almond containers as appropriate to meet industry and market needs. Such requirements could be established through informal rulemaking after recommendation by the Board and implementation by USDA and could be included in the order’s administrative rules and regulations.

Proponents of the proposal testified that this amendment might be necessary as market requirements change.

Witnesses cited several instances in which such authority would assist with the orderly marketing of California almonds. For instance, marking or labeling requirements could be implemented that would complement regulations implemented under the authority for different outgoing quality requirements described under Material Issue Number 1. In the case of aflatoxin testing for almond shipments to the EU, container labeling could be required to indicate that such testing requirements had been met.

One witness testified that product handling instructions in foreign languages might be appropriately applied to containers in export shipments. Other witnesses stated that labeling containers with proper handling and storage instructions could help maintain the quality of almonds, ensuring greater customer satisfaction.

The record shows that the lack of marking and labeling authority impeded the industry’s efforts to restore customer confidence following recalls of California almonds in 2001 and 2004. As a precaution against *Salmonella* contamination, some handlers treated and/or reprocessed their almonds. Individual handlers were able to mark containers to indicate whether their almonds had been treated, but there was no standardized industry language to express a consistent message to consumers about such treatment. This left customers down the supply chain uncertain about the state of the almonds they received. Proponents stated that if they’d had the authority to recommend container marking and labeling regulations, the Board could have determined how best to mark containers of treated almonds in a consistent way to assure customers that the almonds had been treated.

Proponents of the proposed amendment also testified that adding authority to recommend container marking and labeling would be a useful tool that would allow the industry to respond to evolving market situations.

As mentioned above, witnesses testifying in support of the amendment suggested revising the proposal to include a reference to bulk containers. Proponents stated that they wanted to clarify that the authority to recommend container marking and labeling should apply only to bulk containers of almonds, and not to packages sold at the retail level. Although some handlers ship almonds in both bulk and retail or consumer packages, many do not. Witnesses stated that it has never been the industry’s intent to regulate the marking or labeling of retail packages. Although the Board did not specify

limiting authority for marking and labeling to bulk containers in their original proposal, witnesses testified that it was widely understood among industry members that only authority to recommend the marking and labeling of bulk containers was intended to be part of the proposal. Witnesses were asked whether the industry might prefer to retain greater flexibility to address needs that could arise in the future by preserving the language of their original proposal. However, witnesses confirmed that they wanted to specify more limited authority to regulate the marking and labeling of bulk containers only. All of the witnesses supported modifying the original proposed language in this regard. Further, other minor language changes are intended to conform with record evidence.

USDA recommends that § 981.43 authorizing the Board, with approval of the Secretary, to establish container marking and labeling requirements be added to the order. USDA further recommends that the language of the proposed amendment be modified to specify that such authority would apply only to bulk containers.

Furthermore, USDA is recommending a change to the proposed language of the new § 981.43 that was published in the notice of hearing. The word “recommend” would be changed to “establish” to harmonize and conform the proposed language with that already present in this subsection regarding the establishment of outgoing quality requirements.

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. Conforming changes are identified in the above discussion of the material issues.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (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 \$6,500,000. Small agricultural producers have been defined as those with annual receipts of less than \$750,000.

There are approximately 104 handlers of almonds subject to regulation under the order and approximately 6,000 producers of almonds in the regulated area. Information provided at the hearing indicates that approximately 50 percent of the handlers would be considered small agricultural service firms. According to data reported by the National Agricultural Statistics Service (NASS), the two-year average crop value for 2005–06 and 2006–07 was \$2.283 billion. Dividing that average by 6,000 producers yields average estimated producer revenues of \$380,500, which suggests that the majority of almond producers would also be considered small entities according to the SBA's definition.

The order regulates the handling of almonds grown in the state of California. The California almond bearing acreage increased nearly 40 percent between 1996 and 2006, from 418,000 to 585,000 acres. Approximately 1.115 billion pounds (shelled basis) of almonds were produced during the 2006–07 season. Bearing acreage for the 2007–08 season is estimated to be 615,000 acres. NASS has forecasted that the 2007–08 crop will reach 1.330 billion pounds (shelled basis). More than two thirds of California's almond crop is exported to approximately 90 countries worldwide, and comprises nearly 80 percent of the world's almond supply.

Under the order, incoming and outgoing quality regulations are established, statistical information is collected, production research projects are conducted, and marketing research and generic promotion programs are sponsored. Program activities administered by the Board are designed to support large and small almond producers and handlers. The 10-member Board is comprised of both producer and handler representatives from the production area. Board meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Board deliberations, and each Board member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Board's Food Quality and Safety Committee discussed the need for amendments to the order at meetings held on May 12, 2005; July 20, 2005; and November 1, 2006. The Board

approved language for two proposed amendments to the order at their meeting on November 28, 2006. During a conference call on February 27, 2007, the Board confirmed that the two amendments should be proposed to USDA. The views of all participants were considered throughout this process.

In addition, the hearing to receive evidence on the proposed changes was open to the public and all interested parties were invited and encouraged to participate and provide their views.

The proposed amendments are intended to provide the Board and the industry with additional flexibility in the marketing of California almonds. Record evidence indicates that the proposals are intended to benefit all producers and handlers under the order, regardless of size. There would be no cost implications for handlers or growers from adding the proposed order authorities. Costs of implementation would be incurred only if specific additional requirements were established following future informal rulemaking. All grower and handler witnesses supported the proposed amendments and commented on the implications of implementing specific requirements in the future. In that context, witnesses stated that they expected the benefits to be substantial and the costs of any future requirements to be minimal.

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

Proposal 1—Adding the Authority To Establish Different Outgoing Quality Requirements for Different Markets

The record shows that the proposal to add authority to establish different outgoing quality requirements for different markets would, in itself, have no economic impact on producers or handlers of any size. Regulations implemented under that authority could impose additional costs on handlers required to comply with them. However, witnesses testified that establishing mandatory regulations for different markets could increase the industry's credibility and reduce the risk that shipments of substandard product could jeopardize the entire industry's reputation. Record evidence shows that any additional costs are likely to be offset by the benefits of complying with those requirements.

Witnesses cited decreased delays and demurrage charges, as well as fewer rejected loads and increased customer confidence, as expected benefits. Recently, almonds have been rejected in

the EU due to aflatoxin levels exceeding its importing tolerances. Information provided at the hearing shows that the rejection of a 44,000 pound container of almonds in the EU costs about \$10,000, or 22.7 cents per pound. The cost includes demurrage for unanticipated delays at port, warehousing product while awaiting official import testing results, shipping rejected almonds back to the U.S., and shipping a replacement container back to the EU.

To reduce the risk of rejections, the California almond industry developed a voluntary aflatoxin testing protocol. Witnesses estimated that the cost of the pre-export testing, including the value of the sample, analytical fees, courier fees, and sampling labor is less than 2 cents per pound, which is less than 10 percent of the cost associated with a rejection. Proponents testified that if a requirement that all almonds destined for the EU be tested prior to shipment was established under authority provided by the proposed order amendment, handlers would incur the cost of testing, but those costs would be expected to be more than offset by the reduced risk of rejections.

It's likely that most handlers are already complying with their customers' specific market requirements on a voluntary basis as a part of doing business, but witnesses explained that mandatory requirements lend credibility to the entire industry. In addition, such requirements could reduce the risk that one shipment of substandard product would jeopardize the entire industry's reputation.

Currently, outgoing quality requirements established under the order apply to all handler entities regardless of size. If the proposed amendment and subsequent regulations established thereunder are implemented, distribution of any increased costs between small and large entities would depend on the requirements established for the markets to which individual handlers shipped their almonds as well as the volume of almonds shipped to those markets. But increases in cost would be equitable to all entities because requirements for each market would be imposed uniformly on all handlers shipping to that market.

Witnesses explained that almonds are used in many different ways by the various markets. In Europe, almonds are widely used as marzipan and ingredients for baked goods, candy, and other dishes. In India and the Middle East, almonds are presented as gifts at holidays and weddings, and play a part in other cultural traditions. India imports large quantities of inshell

almonds that are then processed by hand. The wide range of uses leads to a similarly wide array of customer requirements.

According to record testimony, handlers adapt their export methods to satisfy customer requirements. One witness explained that it is often difficult for smaller handlers to stay informed of rapidly changing import regulations. The witness stated that small handlers in particular would benefit from the proposed authority to establish different requirements for different markets by avoiding costly mistakes that could be associated with not understanding various market and import requirements. If regulations were established under the proposed authority, the Board would provide information about updated requirements to the industry.

Finally, one witness explained that having the ability under the order to establish different outgoing quality requirements for different markets would not restrict handlers' choices regarding which markets to supply. Rather, the provision would ensure that the important standards that differentiate markets would be consistently met by all handlers shipping to those markets.

Proposal 2—Adding the Authority To Establish Container Labeling and Marking Requirements

The proposal described in Material Issue No. 2 would add § 981.43 to the order to provide general authority to establish container and marking requirements. If implemented, the proposed amendment would allow the Board, through the informal rulemaking process, to recommend and establish uniform container marking and labeling regulations in response to evolving market requirements. Under current order provisions, there is only very limited authority for container marking and labeling requirements.

Witnesses testified that the lack of this authority has hindered them from adapting quickly and appropriately to recent market situations. In one case described at the hearing, the industry was unable to implement container marking or labeling following recalls for possible *Salmonella* contamination. Witnesses stated that customer confidence in almond quality could have been reinforced if the necessary authority to establish marking and labeling requirements had been available. Such authority would have allowed the industry to prescribe labeling to clearly indicate which almonds had been produced and

handled or treated to reduce risk of contamination.

The proposed amendment would allow the industry to respond to evolving market needs as they develop by establishing uniform and consistent marking and labeling requirements. According to proponents, the ability to communicate important product information to customers in a uniform and consistent manner will be essential as the industry strives to maintain its position in the expanding global marketplace.

If the proposed amendment is implemented, costs of complying with any regulations established thereunder would not be disproportionate to small businesses. Witnesses testified that applying labels and marks to almond containers is currently a common practice, and industry handlers already have container marking processes and equipment in place. Therefore, the costs associated with the addition of uniform marking or labeling requirements would be minimal for both small and large entities. The record shows that any costs would likely be offset by the benefits derived from being more responsive to market demands.

Interested persons were invited to present evidence at the hearing on the probable regulatory and informational impact of the proposed amendments to the order on small entities. The record evidence is that while there will be no economic impact from the implementation of the two proposed amendments, some costs may be associated with regulation that may be established under the authority of the amendments. However, the record indicates that the costs would be outweighed by the benefits expected to accrue to the California almond industry.

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 to the benefit of the industry.

Board meetings regarding these proposals as well as the hearing date and location were widely publicized throughout the almond industry, and all interested persons were invited to attend the meetings and the hearing, and to participate in Board deliberations on all issues. All Board 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

Information collection requirements for Part 981 are currently approved by the Office of Management and Budget (OMB), under OMB Number 0581-0178, Vegetable and Specialty Crops. Implementation of these proposed amendments would not trigger any changes to those requirements. Should any such changes become necessary in the future, 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 981 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

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, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons

are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

One motion and a brief supporting the motion were submitted requesting that the Secretary expedite the formal rulemaking process by omitting this recommended decision and the period allowed for the filing of exceptions to AMS' findings herein. The motion was filed on October 3, 2007, and the brief supporting the motion was filed on October 12, 2007. The Rules of Practice allow omission of a recommended decision only when the Secretary finds, on the basis of the record, due and timely execution of his functions imperatively and unavoidably require such omission. No such finding may be made in this instance. Absent from the hearing record is testimony or other evidence that would form a basis to make such a determination. Further, interested persons would have no opportunity to comment on this request to omit the recommended decision. Therefore, this motion is denied.

A second motion, also filed on October 3, 2007, requested that four corrections be made to one of the exhibits presented at the hearing, although the hearing transcript and all exhibits were certified by the Administrative Law Judge on October 1, 2007. Nevertheless, AMS is granting the first three of those corrections as such corrections would make references in exhibits and testimony uniform. However, the fourth correction is denied. The requested change would make the result of the calculation in the exhibit incorrect, and it would be in conflict with testimony in the hearing transcript, which is correct.

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 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 almonds 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 almonds grown in the production area; and

(5) All handling of almonds 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 20-day comment period is provided to allow interested persons to respond to this proposal. Twenty days is deemed appropriate because these proposed changes have been widely publicized and implementation of the changes, if adopted, would be desirable to benefit the industry as soon as possible. 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 981

Almonds, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 981 is proposed to be amended as follows:

PART 981—ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Amend paragraph (b) of § 981.42 by adding the following sentence before the last sentence to read as follows:

§ 981.42 Quality Control.

* * * * *

(b) * * * The Board may, with the approval of the Secretary, establish different outgoing quality requirements for different markets. * * *

3. Add a new § 981.43 to read as follows:

§ 981.43 Marking or Labeling of Containers.

The Board may, with the approval of the Secretary, establish regulations to require handlers to mark or label their containers that are used in packaging or handling of bulk almonds. For purposes of this section, *container* means a box, bin, bag, carton, or any other type of receptacle used in the packaging or handling of bulk almonds.

Dated: December 21, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

[Docket No. PRM–2–13]

Lincoln County, Nevada; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of Petition for rulemaking.

SUMMARY: The NRC is denying a petition for rulemaking submitted March 23, 2007, by Lincoln County, Nevada, related to its potential participation as an affected unit of local government (AULG) in the NRC proceeding concerning the Department of Energy's proposed repository for high-level radioactive waste at Yucca Mountain, Nevada. Lincoln County desires an amendment to 10 CFR 2.314(b) to allow it and other AULGs to be represented in the proceeding by any duly authorized individual, including a non-attorney consultant. The Commission is denying the petition as unnecessary because the current regulations allow Lincoln County the representation it seeks.

ADDRESSES: Publicly available documents related to this petition, including the petition for rulemaking and the NRC's letter of denial to the petitioner, are available for public inspection or copying in the NRC Public Document Room, 11555 Rockville Pike, Rockville, Maryland. These documents are also available on the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the