including, if the diversion is to be by means of destruction of the cherries, a detailed description of the means of destruction and the disposition of such cherries. This type of description would be necessary to ensure that the cherries were not marketed in any form. Any notification of diversion would contain an agreement that the proposed diversion is to be supervised by the Board and that the costs of diversion will be paid by the handler. The proponents testified that uniform fees for supervision should be established by regulation.

Exempt Use Diversion

The diversion of cherries for exempt uses would first need to be approved by the Board. Tart cherries could be exempted from certain order provisions if they are diverted in accordance with the order; used for new product and/or new market development; or used for experimental purposes or for other uses designated by the Board, including processing into products for markets utilizing less than 5 percent of the preceding 5 year average production of cherries. The list of exemptions could be expanded, with the approval of the Secretary, through the informal rulemaking process. The Board may also want to provide that handlers can sell reserve cherries in existing inventory reserves into specific outlets if handlers first notify the Board. This would allow handlers to dispose of inventory reserve cherries if their individual economic situations make continued storage unfeasible, but would prevent such cherries from interfering with normal commercial markets for free market tonnage cherries. The application for exempt usage would show the uses to which the diverted cherries would be put and contain an agreement that the diversion would be carried out under the supervision of the Board, with the cost of diversion to be paid by the applicant. The applicant would be notified of the Board's approval or disapproval.

Upon receiving verification of an approved diversion, the Board would issue to the diverting handler a handler diversion certificate. The diversion certificate would show the quantity of cherries diverted by such handler. Such a certificate would satisfy any restricted percentage or diversion requirement up to the inspected weight of the cherries involved. Such diversion would reduce that handler's processing, storage, and inspection costs. For example, if a handler receives and processes 1,000 tons of cherries and a restricted percentage of 20 percent is established, the handler would have to place 200

tons of processed cherries into the primary inventory reserve. If the handler diverts 100 tons of cherries before processing, the required volume of restricted inventory reserve would be reduced to 100 tons.

The proponents took no position on what other exempt uses the Board may establish. However, handlers from Oregon and Washington expressed concern that juice concentrate could be established by the Board as a use eligible for diversion credit. Some handlers in Washington and Oregon process all or the majority of their cherries into juice concentrate. There is a wide selection of concentrators available in that area and there was testimony that cherries produced in Washington and Oregon have a high brix (sugar content) level desirable for juice concentrate. Testimony showed that small businesses in that area could be unduly burdened if the Board decided to allow diversion credit for juice concentrate as this could cause an artificially induced increase in the volume of juice concentrate in the marketplace, lowering prices for all such products. Therefore, the evidence presented on this issue has persuaded the USDA to modify the proposed provision to prohibit the use of juice concentrate for diversion credit.

Determination of Districts Subject to Volume Regulation

The order should provide for the establishment of districts for the purposes of volume regulations. The proponents testified in support of their proposal, that upon adoption of this order, districts subject to volume regulation would be those districts in which the average annual production of cherries over the prior three years exceeded 15 million pounds. Record evidence shows that Michigan, Utah and New York would be regulated States at this time. Using the proposed 15 million pound minimum production figure, Oregon, Pennsylvania, Washington and Wisconsin would not be regulated at this time. Handlers in districts not subject to volume regulation would not be subject to annual restricted percentages, except to the extent they might handle cherries grown in a regulated district. In such case, the handler would treat a portion of the cherries from the regulated district as restricted percentage cherries, just as if the handler were in a regulated district.

The proponents further testified in support of their proposal that districts not currently meeting the production requirement of 15 million pounds should automatically be subject to

regulation in the marketing year in which the production of cherries in the district is projected to exceed 150 percent of the average production experienced in 1989 through 1992. This period reflects a normal production cycle for tart cherries. This period could be changed with approval of the Secretary through the informal rulemaking process. This provision is designed to catch surges in production that occasionally occur in order to more equitably distribute the burden of controlling burdensome supplies. Proponents testified that, while a district may not historically be a large producer and thus not warrant permanent volume regulation, producing over 50 percent more than its historical average warrants a district's becoming subject to volume regulation, albeit on a temporary basis.

It was also the proponents' position that if a district's production exceeds 150 percentum of the base period as a result of increased capacity to produce (i.e., increased bearing acreage), then beginning with the next crop year such district should be permanently subject to volume regulation. However, if a district, over a rolling three-year period following the year of subjection to regulation, drops below the 150 per centum trigger, such district would become unregulated again.

After review of the proponent's proposal concerning the trigger for regulation and the testimony and other record evidence concerning this issue, the Department has determined it would be overly complicated for the Board to administer and possibly inequitable to handlers and growers. Proponents testified that it is not the intent to regulate States with smaller production volumes (e.g., Pennsylvania, Oregon) because when one State's production is up the other State's production is likely to be down. The smaller States' aggregate volume is not a critical amount when compared to the total volume of tart cherries produced. Proponents stated that a purpose of the proposed order was to make sure that when smaller producing States (e.g., Washington, Oregon, Wisconsin) expand production, they do not take advantage of the system and become free riders. The proponents also testified that some districts could be regulated even though they have less than 15 million pounds annual production if they exceed the 150 percent trigger mechanism. For example, if Wisconsin's production for the 1989 through 1992 period is 7 million, 5 million, 8 million and 9 million pounds, respectively, the average for those four years would be 7.25 million pounds. Then 7.25 would