

Rules and Regulations

Federal Register

Vol. 61, No. 39

Tuesday, February 27, 1996

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

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DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 404

RIN 0563-AB13

Noninsured Crop Disaster Assistance Program

AGENCY: Federal Crop Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Crop Insurance Corporation ("FCIC") hereby revises and makes final its regulations to provide a noninsured crop disaster assistance program ("NAP") to protect producers of crops for which insurance is not available. NAP provides a level of protection that, in most respects, is comparable to the catastrophic risk protection program offered to producers of insurable crops.

EFFECTIVE DATE: February 22, 1996.

FOR FURTHER INFORMATION CONTACT: For further information and a copy of the Regulatory Impact Analysis to the noninsured crop disaster assistance program, contact Diana Moslak, Federal Crop Insurance Corporation, Regulatory and Procedural Development Staff, U.S. Department of Agriculture, Washington, D.C. 20250. Telephone (202) 720-0713.

SUPPLEMENTARY INFORMATION:

Executive Order 12866 and Departmental Regulation 1512-1

This action has been reviewed under United States Department of Agriculture ("USDA") procedures established by Executive Order 12866 and Departmental Regulation 1512-1. This action constitutes a review as to the need, currency, clarity, and effectiveness of these regulations under those procedures. The sunset review date established for these regulations is May 1, 2000.

This rule has been determined to be "significant" for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget ("OMB").

Regulatory Impact Analysis

A Regulatory Impact Analysis has been completed and is available to interested persons at the address listed above. In summary, the analysis finds that the final NAP rule incorporates three significant changes when compared with the interim rule. First, the final NAP rule defines an "area" for NAP triggering purposes as at least 320,000 acres, at least \$80 million crop value, or the county, as determined by the Manager, FCIC. The interim rule used only the 320,000-acre and \$80 million value mechanisms. Second, the final rule allows different types or varieties of a crop or commodity to be treated as separate eligible crops. Previously, all types and varieties were treated as a single eligible crop. Third, the interim rule only provided NAP coverage for seeded forage crops. The final rule expands NAP coverage to include both seeded and native forage, except on state and Federal lands where NAP coverage is restricted to seeded forage.

Increasing the choices for defining NAP areas by adding a "county-level" option, providing greater flexibility in the definition of a crop, providing coverage for both seeded and native forage, and including the retroactivity provisions will increase NAP outlays. Some offset is provided by language that requires a five-producer minimum in the definition of a NAP area. The expected annual outlays under these regulations are about \$95 million to \$145 million, averaging \$120 million. The cost associated with the forage issue depends on the future of the Livestock Feed Program, as discussed in the analysis.

Although expected to result in higher Federal outlays, these changes are designed to improve the equity in NAP payments among growers. Experience in 1995 and interim rule comments indicate that various areas and crop types would not receive NAP payments under the interim rule, despite significant losses. In addition, some producers may not have received payments due to perils that were omitted from the crop insurance policy.

The improvements in equity are associated with changes in administrative costs. Program administration will likely be easier for FSA offices with the county designation added to the list of area definition options. However, additional administrative costs will be associated with the determination of losses by crop type, as well as the determination of losses qualifying for payment due to NAP coverage of both seeded and native forage.

Paperwork Reduction Act of 1995

This final rule amends the information collection requirements previously approved by OMB under OMB control number 0563-0016 through May 31, 1998. This rule increases the producer (respondent) audience participation due to increased availability for NAP assistance for seeded and native forage. This coverage excludes native forage on any federal or state owned lands, and any crops for which insurance is available in the county, that is affected by natural disaster and is not insurable under the producer's crop insurance policy. All of the forms cleared under OMB control number 0563-0016 represent the required forms to determine eligibility and losses qualifying for payment due to NAP coverage.

Revised reporting estimates and requirements for usage of OMB control number 0563-0016 will be submitted to OMB for approval under the provisions of 44 U.S.C. 35. Public comments are due by April 22, 1996.

The title of this information collection is "Noninsured Crop Disaster Assistance Program, Claim For Indemnity, Field Inspection And Appraisal Requirements." The information requested is required for proper administration of the Noninsured Crop Disaster Assistance Program. The burden for the NAP Program is reported on an as needed basis when disaster situations arise. The reporting burden for this collection of information is estimated to average 42 minutes per response for each of the 8.5 responses from approximately 15,172,500 respondents. The total annual burden on the public for this information collection is 10,620,750 hours.

The comment period for information collections under the Paperwork Act of 1995 continues through April 22, 1996. Comments are requested on the

following aspects of the Information Collection: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments should be submitted to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20503 and to Bonnie Hart, Advisory and Corporate Operations Staff, Regulatory Review Group, Farm Service Agency, U.S. Department of Agriculture, Washington, D.C. 20250. Copies of the information collection may be obtained from Bonnie Hart at the above address. Telephone (202) 690-2857.

Executive Order 12612

It has been determined under section 6(a) of Executive Order 12612, Federalism, that this rule does not have sufficient federalism implication to warrant the preparation of a Federalism Assessment. The provisions contained in this rule will not have a substantial direct effect on states or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government.

Regulatory Flexibility Act

This regulation will not have a significant impact on a substantial number of small entities. Most producers will be able to certify to their historical production levels at the time of application based on existing records, or they may elect to base their initial coverage on transitional or assigned yields. The amount of data collected from applicants will only be that needed to establish an acceptable yield, determine the number of acres planted, and determine the eligibility of the producer, crop, and acreage. The information required and time of collection is statutory. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. § 605) and no Regulatory Flexibility Analysis was prepared.

Federal Assistance Program

This program is listed in the Catalog of Federal Domestic Assistance under No. 10.450.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372 which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order 12778

The Office of the General Counsel has determined that these regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778. The provisions of this rule will preempt state and local laws to the extent such state and local laws are inconsistent herewith. The administrative appeal provisions published at 7 CFR part 780 and 7 CFR part 11, must be exhausted before any judicial action may be brought regarding the provisions of this regulation. The provisions of this rule that are not more restrictive than the interim rule will be effective retroactive to May 18, 1995, the date of publication of the interim rule. The provision in § 404.13 regarding the requirement that an "area" consist of a minimum of five producers before it can be approved is not effective retroactively.

Environmental Evaluation

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

National Performance Review

This regulatory action is being taken as part of the National Performance Review program to eliminate unnecessary or duplicative regulations and improve those that remain in force.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, FCIC generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or

to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FCIC to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Background

On October 13, 1994, the Federal Crop Insurance Act was amended by the Federal Crop Insurance Reform Act of 1994 ("Act"). This regulation provides the provisions necessary to carry out the noninsured crop disaster assistance program ("NAP") requirements of the Act. NAP replaces the Disaster Payment Program (7 CFR part 1477) and the Tree Assistance Program (7 CFR part 1478).

On May 18, 1995, FCIC published an interim rule in the Federal Register at 60 FR 26669 to add provisions to implement NAP. Following publication of that interim rule, the public was afforded 60 days to submit written comments, data, and opinions. On August 7, 1995, FCIC extended the comment period for the NAP regulations to August 18, 1995 (60 FR 40055). The comments received and FCIC responses are as follows:

Comment: § 404.5(b) Thirty-six comments received from state FSA offices recommended that section 404.5(b) be amended to allow the Administrator of FSA to review and approve or disapprove the state FSA committee recommendation of area eligibility.

Response: The Act specifies that FCIC will make determinations of area eligibility. The provision will not be changed.

Comment: § 404.5(c) Thirty-six comments received from state FSA offices recommended that section 404.5(c) be amended to allow county and State FSA committees to establish yields and prices.

Response: The Act specifies that FCIC shall establish yields and prices. The provision will not be changed.

Comment: § 404.7(e) Five comments, two from trade associations and three from other interested parties, were received suggesting that the definition of "Aquacultural species" contained in section 404.7(e) be changed to allow aquaculture on lands that are not

privately owned or in waters that are not a "controlled environment." One comment from an interested party requested clarification of "private property in water in a controlled environment" stating that fish are grown for human consumption in privately owned net pens (property) in sea water which is controlled by the net pens but owned by the nation or state. The state leases the bedlands under the cages to the private operator so that the cages can be set in place and moored. FCIC was urged to reconsider the proposed definition to explicitly allow caged fish and shellfish operations on state leased lands and waters.

Response: The definition provides for coverage of aquaculture that is produced in a controlled aquacultural environment. A controlled environment may include net pens on leased lands provided that the lease vests in the lessee all the rights and benefits of ownership of the leased land and does not merely provide a license to gather the aquacultural species found in the pen. Therefore, the provision will not be changed.

Comment: § 404.7(e) Two comments were received, one from a state government office and one from a trade association, stating that the definition of "Aquacultural species" excludes ornamental fish and aquatic plant industries from the NAP. The state government official recommended that section 404.7(e) be changed to include nonfood farm-raised fish and aquatic plants.

Response: The Act limits NAP to crops produced for food or fiber. The provision will not be changed.

Comment: § 404.7(l) Four comments received from trade associations stated that many floricultural, nursery, turfgrass sod, and tree crops are produced in "crop years" ranging over several "calendar years." The trade associations suggested that the definition of "crop year" contained in section 404.7(l) be amended to clarify that losses occurring in a given calendar year will be covered even though the plant may not be harvested (or be ready to harvest) during that given year.

Response: The definition has been modified to clarify and explain how crops produced over multiple calendar years will be eligible for NAP.

Comment: § 404.7(n) Four comments received from trade associations requested clarification of the definition of "Eligible crop" contained in section 404.7(n) which states in part that "In the case of a crop that historically has multiple plantings in the same crop year that are planted or are prevented from being planted on the same or different

acreage will be considered different crops for determining NAP payments. This does not apply to a replacement crop." The trade associations stated that it is their interpretation that this provision is to provide that a loss is ineligible for NAP coverage even if the grower harvests other plantings in the same year.

Response: The definition has been modified to clarify that each planting of a crop with multiple plantings in the same crop year will be considered as a separate crop eligible for NAP payments.

Comment: § 404.7(p) One comment received from an USDA agency suggested that the definition of "FCIC" contained in section 404.7(p) be changed to reflect FCIC as a separate and distinct corporate entity.

Response: By definition, FCIC is a separate and distinct corporate entity. Therefore, no change is required.

Comment: § 404.7(q) One comment received from a trade association suggested that the definition of "good farming practices" contained in section 404.7(q) be changed to include alternative farming practices and innovations that are supported by research or practice appropriate to the type of farming undertaken.

Response: The definition allows alternative farming practices and innovations that are supported by data from the Cooperative State Research, Education, and Extension Service (CSREES). Therefore, no change is required.

Comment: § 404.7(r) and (ee) One comment was received from a state FSA office regarding the definitions for "Harvested" which excludes harvest by grazing except for "Seeded pasture" which is limited to "an annual crop intended for use as grazing only by domestic animals," contained in sections 404.7(r) and 404.7(ee), respectively. The state FSA official expressed concern that these definitions exclude nearly all forage crops harvested by grazing. The state FSA official suggested that eligibility for noninsured crop disaster assistance be based on crop yields and losses, not the method of harvest, and that grazing not be excluded from the "Harvest" definition.

Response: With respect to the definition of "Harvested," the intent is to define the term to include only those means of removing the crop that result in costs being incurred by the producer. Section 404.9(c) authorizes FCIC to reduce the NAP payment as a result of costs not incurred by the producer, such as harvesting. Because grazing does not result in a cost to the producer, it is not

considered as "harvested". With respect to the definition of "Seeded pasture," FCIC has changed the term to "Forage" to include both seeded and native forage crops that are harvested or grazed. Grazed forage will be eligible for NAP payments at reduced rates. Forage is defined as land covered with grass or other vegetation, produced under such range management practices as are necessary to sustain sufficient quality and quantity of grass or vegetation each year to be suitable for grazing or mechanical harvest to feed livestock in a commercial operation. NAP coverage for forage on any Federal or state owned lands is restricted to seeded forage.

Comment: § 404.7(r) One comment received from a congressional office stated that the definition of "Harvested" contained in section 404.7(r) is silent on disaster assistance to producers of crops that are harvested over multiple years and recommended a provision be added to embrace disaster assistance for crops harvested over multiple years.

Response: The paragraph has been modified to clarify when crops produced and harvested over multiple years are considered harvested.

Comment: § 404.7(v) Two comments received from aquaculture producers recommended that the NAP provisions cover loss of fish due to storms causing low pressure and heaving, hot humidity; cloudy weather causing low oxygen; high temperatures causing loss of appetite; drought causing water evaporation and stale water; diseases; and failure of equipment or down power lines due to lightening, storms, or wind stopping the aeration of oxygen.

Response: To qualify for NAP assistance, the Act provides that losses of the noninsured commodity be attributable to drought, flood, or other natural disaster, as determined by the Secretary. The definition of natural disaster has been modified to include eligible crop losses that may be attributable to damaging weather or adverse natural occurrences and related conditions.

Comment: § 404.7(y) Two comments were received regarding the definition of "Prevented planting" contained in section 404.7(y) as follows:

(1) One comment received from a USDA state office requested clarification of the definition of "Prevented planting" contained in section 404.7(y) which states in part, "The natural disaster that caused the prevented planting may occur prior to the planting period for the crop in the area, but must not occur earlier than the planting period for such crop the prior crop year." The state government official suggested that section 404.7(y) be

amended to specify whether a natural disaster that occurred in one year and carried over into the next year will receive NAP coverage.

(2) One comment received from a trade association stated that the requirement that "most producers in the surrounding area must have also been unable to plant the eligible crop in order for a producer to be eligible for a NAP payment" may impose an additional requirement not supported by the Act especially when a producer is otherwise eligible for NAP benefits and can show that planting was not feasible due to a natural disaster. The trade association suggested that this requirement be deleted from the definition of "Prevented planting."

Response: The definition has been modified to allow for the coverage of prevented planting when the cause of the prevented planting occurred after the final planting date of the previous crop year and before the final planting date of the crop year for which a NAP payment is requested. For crops with multiple plantings in 1 crop year, the cause of the prevented planting must occur after the planting of the previous planting period and before the final planting date of the current planting period. Further the paragraph has been amended to eliminate the requirement that most producers in the surrounding area must have also been unable to plant the eligible crop or other crops during the same planting period in order for a producer to be eligible for a prevented planting payment.

Comment: § 404.9(c) Five comments were received regarding section 404.9(c) which specifies that "FCIC will adjust the NAP payment rate for crops that are produced with significant and variable expenses that are not incurred because the crop acreage was prevented from being planted or planted but not harvested" as follows:

(1) Four comments received from trade associations suggested section 404.9(c) be clarified by providing the criteria to be used in determining potential reductions in the NAP payment rate for costs not incurred by the producer as a result of the crop acreage being prevented from planting or planted but not harvested. The trade associations also suggested that the regulations specify the person or office ultimately responsible for making the NAP payment rate reduction determinations as it relates specifically to specialty crops.

(2) One comment received from a USDA agency suggested that the rule include specifics for calculating the adjustment in the NAP payment rate and that the method used be similar to

those included in the 1994 *ad hoc* disaster program.

Response: The Act requires the development of a payment rate for a crop that is produced with a significant and variable harvesting expense that takes into consideration the stage of the crop at the time of loss; for example, not planted, planted but not harvested, or harvested. Because of all the variations that exist between crops, it is not possible to list all the factors that affect the costs associated with producing all crops. FCIC will approve all variable payment factors whether applicable to specialty or other crops. The method used in determining payments under the 1994 *ad hoc* disaster program will be taken into consideration.

Comment: § 404.11(a) Fifty-four comments, one from a congressional office, fourteen from producers, one from a trade association, one from a county FSA committee, one from a state FSA committee, and thirty-six from state FSA offices, were received requesting section 404.11(a) be changed to allow NAP benefits for seed crops, specifically grass, clover, alfalfa and legume seed crops and any other crop grown commercially for seed. The one comment received from the state FSA committee stated that legislation does not specifically exclude seed crops which are ultimately used for the production of crops for human consumption or livestock feed and, therefore, should be added to the list of crops eligible for NAP benefits.

Response: The Act specifies that the term "eligible crop" will include each commercial crop or other agricultural commodity (except livestock) that is produced for food or fiber. Seed crops are not produced for food or fiber. Further, the Act specifically included the exceptions to the food or fiber requirement. Crops not specifically included in the exception are not eligible for NAP. The provision will not be changed.

Comment: § 404.11(a) One comment received from a producer suggested that section 404.11(a) be changed to allow NAP payments by crop type rather than treating as a single eligible crop all types and varieties of a crop. This producer stated that the farmer who raises several types of a crop, as opposed to a farmer who raises only one type, may not qualify for a NAP payment if one type does not meet the 50 percent individual loss requirement. The producer also questioned whether crops such as tomatoes, basil, or flowers grown in a greenhouse would be eligible for NAP because pumpkins used for decoration are not covered by NAP, but flowers are, and whether indian corn, strawberry

corn, or blue corn are eligible crops under the NAP. The producer recommended all crops and corn grown outside be eligible for NAP payment.

Response: The paragraph has been revised to allow FCIC to treat different types and varieties of a crop or commodity as separate eligible crops provided they have significantly different prices or yields. The determination of whether a crop is eligible for NAP payments is not based on whether a crop is grown indoors or outdoors. The Act specified that crops grown for food or fiber, or included on the list of exceptions, are eligible regardless of where grown. This provision will not be changed.

Comment: § 404.11(a)(3) One comment received from a timber producer requested section 404.11(a)(3) be changed to include walnut trees planted for timber purposes as a crop eligible for NAP benefits.

Response: FCIC cannot expand the list of crops eligible for NAP payments beyond those crops designated by the Act. The provision will not be changed.

Comment: § 404.11(a) One comment was received from a FSA district director regarding sections which specify that eligible crops are those crops grown for food and fiber and then lists additional crops such as floriculture, ornamental nursery crops, Christmas trees, turfgrass sod, and industrial crops as eligible crops for NAP benefits. The FSA district director suggested that all of the exceptions to the crops produced for food or fiber be deleted or the provisions be broadened to include all crops produced for commercial purposes.

Response: The named crops, in addition to crops produced for food or fiber, are specified by the Act and, therefore, must be included. Further, the list of named crops cannot be expanded beyond those specified in the Act.

Comment: § 404.11(b)(3) One comment was received from a USDA agency regarding section 404.11(b)(3) which provides for NAP payments in the case of delayed plantings caused by a natural disaster. The USDA agency official states that since the Act provides "that an eligible crop means each commercial crop or other agricultural commodity (except livestock) for which the Catastrophic Risk Protection (CAT) Plan of Insurance is not available, and that is produced for food or fiber," there are no statutory exceptions. The USDA agency official recommends that if a crop is insurable under CAT, there should be no exceptions to cover losses from delayed plantings for NAP crops.

Response: The commentator may have misinterpreted the provision. A crop

that is not insurable under CAT because the natural disaster causing the damage was not an insurable cause of loss under CAT may be covered for the natural disaster under NAP, provided that all the other eligibility requirements are satisfied.

Comment: § 404.11(b)(6) Four comments were received from trade associations requesting FCIC to clarify the exemption contained in section 404.11(b)(3). The trade associations stated that the Clean Water Act and the swampbuster provisions provide exemptions from many of the features of current wetlands policy that affect agriculture. Perennial specialty crops were excluded from exemption resulting in discrimination against a large segment of American agriculture without any environmental benefit or preservation of wetlands. To avoid a similar situation, the trade associations requested the FCIC to clarify the exemption contained in this section to ensure past problems are not repeated and that specialty crops are not inappropriately excluded from NAP benefits.

Response: The regulations at section 12.5 of this title, incorporated into this rule by reference, contain the exceptions authorized by the Secretary for all USDA programs. It would be inappropriate for a clarification of section 12.5 to appear in this rule.

Comment: § 404.13 Sixty-three comments, fifteen from producers, three from trade associations, three from state government offices, two from congressional offices, one from a county FSA office, one from a county FSA committee, one from a state FSA committee, one from a district director, and thirty-six from state FSA offices, were received regarding section 404.13 which specifies the minimum area of 320,000 acres or a geographical area with a minimum average value of at least \$80 million for all crops produced annually and other interrelated provisions contained in section 404.19.

(1) Fifteen comments received from producers, two from trade associations, three from state government offices, one from a congressional office, one from a county FSA office, one from a county FSA committee, one from a state FSA committee, one from a district director, and thirty-six from state FSA offices stated that the minimum area requirement (320,000 acres or \$80 million value) contained in section 404.13 coupled with the 35 percent area-wide yield loss requirement contained in section 404.19(c) is excessively large.

(2) One comment received from a producer recommended elimination of

the area stating that if a small farm is wiped out by hail damage and the 35 percent area loss does not trigger, the farmer could possibly lose 100 percent of his crop with no compensation. One FSA district director stated that a producer would not be covered under the NAP for crop losses resulting from isolated storms such as hailstorms or thunderstorms. The FSA district director also stated that NAP discriminates against producers of noninsured crops because of the unavailability of insurance coverage in some states.

(3) Thirty-six comments received from state FSA offices recommended elimination of the area if statutorily permissible. If not statutorily permissible, the state FSA offices recommended the county FSA committee with state FSA committee concurrence be given the authority to delineate an area (with no minimum acreage) based on the agriculture in the county and the natural disaster affected area. One of the state FSA offices recommended using certain towns in determining the disaster area and states and suggested that "no disaster be smaller than a single town and none larger than where the disaster actually occurred." Another state FSA office stated that the 35 percent area loss requirement is not comparable to the catastrophic level of protection and recommended a smaller minimum area size or elimination of the area and reconsideration of the 35 percent area loss requirement.

(4) One comment received from a producer recommended the regional FSA office define an area.

(5) One comment received from a producer recommended that FSA committees decide if there is a payable loss.

(6) Three comments received from state government officials, one from a county FSA office, and one from a state FSA committee recommended the area be modified to provide assistance to localized areas that cannot meet the minimum area and area eligibility requirements.

(7) One comment received from a county FSA committee recommended the NAP be administered more like the CAT whereby eligibility is on an individual unit basis.

(8) One comment received from a trade association stated that the current provisions for defining an "area" are too burdensome. The trade association suggested the "area" be defined as a county with added exceptions to address situations wherein part of one county and part of another county could constitute an "area."

(9) One comment received from a congressional office stated that producers should not be denied coverage because an insufficient number of producers in the vicinity suffered similar losses. The comment suggested that section 404.13(d) be changed to allow eligibility for NAP benefits to be determined by local circumstances defined by the county FSA committee so as not to use acreage to deny NAP coverage for small diversified agricultural operations.

Response: The Act requires the average yield in the "area" be reduced by at least 35 percent before a crop is eligible for NAP payments. An area cannot be defined as a farm or town and comply with the intent of NAP, which is to provide protection against widespread disasters, not individual losses. The requirement that there be an area affected by a disaster and the amount of loss cannot be changed administratively. However, in response to comments received, the provision will be amended for clarity and changed to include "county" as an option when defining the area. In order to maintain program consistency, FCIC will continue to determine the expected area yield, the approved yields, and approve the "area" designation. To ensure program integrity, this section is also being amended to require that an approved area within the United States consist of a minimum of five producers of crops for which the area is designated.

Comment: § 404.15(b) One comment received from a trade association suggested section 404.15(b) be expanded to include special yield determination examples for organic and nonorganic and sustainable and traditional farming practices.

Response: FCIC is authorized to make yield adjustments based on different farming practices, which would include organic and nonorganic. Irrigated and nonirrigated are merely used as examples. However, the provision will be revised to avoid the perception that only irrigated and nonirrigated practices shall be considered.

Comment: § 404.15(d) One comment was received from a state government official regarding section 404.15(d) which states in part that "Approved yields for the eligible crop will be based on the producer's actual production history in accordance with the provisions of 7 CFR part 400, subpart G." The state government official states that to require the submission of 4 consecutive years production for producers who may have had a disaster in 2 consecutive years is not fair. The state government official recommended

that section 404.15(d) be amended to allow a producer who has more than 4 consecutive years of production records on noninsured crops to submit production records for any 4 of those years.

Response: The Act requires that approved yields be based on the producers actual production history over a period of at least the previous 4 consecutive years of production records and not more than 10 consecutive years of production records. Producers can only use assigned yields when records are not available. If the producer has had a disaster, production records will be available. Therefore, this provision will not be changed.

Comment: § 404.15(g) Three comments were received regarding section 404.15(g) as follows:

(1) One comment received from a producer recommended section 404.15(g) be amended to allow the FSA committee to determine the production records a producer must submit.

(2) One comment received from a trade association recommended section 404.15(g) be amended to include some intent to defraud or deceive when assessing criminal and civil actions against the producer for failure to provide adequate records.

(3) One comment was received from a state FSA committee recommending that section 404.15(g)(2) be changed to delete for use as adequate records "contemporaneous measurements, truck scale tickets, contemporaneous diaries, etc." Justification for this change was that such production information is not an adequate record for use in yield determination, is not verifiable, and makes administering the program more difficult. The state FSA committee suggested that unless the producer can provide verifiable production evidence, this production information not be considered as an adequate record for use in yield determination.

Response: Producers are not required to submit a specific type of record. The rule simply provides examples of record that may be considered acceptable to FCIC for the purposes of substantiating claims for NAP payments or yield certification. FCIC will consider all available sources of information including recommendations from county and state FSA committees; however, FCIC will make the determination as to whether the documentation provided is adequate. The applicable criminal and civil sanctions have an intentional or wilful requirement with respect to the providing of false or inaccurate information, including a false claim that records exist. In response to the

comments, the paragraph has been revised to require the producers to submit records that are acceptable to FCIC. If the information is not reliable or verifiable, the records will not be considered acceptable. No other change to the provision will be made.

Comment: § 404.17(b)(6) One comment was received from a producer recommending section 404.17(b)(6) be changed to require the producer to report planting dates only for those crops planted after the final acreage reporting date and to allow the county FSA committee to determine whether a producer planted late.

Response: It has been determined that if the acreage report does not contain a certification as to the date the crop being reported was planted, it will be difficult to determine if the crop was planted after the final acreage reporting date or final planting date established for insurance purposes. Information as to the date of planting should be readily available when the acreage report for the crop is filed. Accordingly, the paragraph is not changed.

Comment: § 404.17(b)(8) One comment was received from a producer recommending section 404.17(b)(8) be changed to allow a producer to prove yields at the application for NAP benefits date rather than at acreage reporting date.

Response: Because NAP payments are based on the actual production history of the producer, it is necessary to require producers to annually report the acreage and production of crops. Further, such information will be used to develop insurance products for those crops for which insurance is currently not available. Producers unable to provide adequate documentation of their yield will have a yield assigned in accordance with section 519 of the Act.

Comment: Two comments from trade associations were received regarding section 404.19(a). The comments are as follows:

(1) One comment received from a trade association suggested section 404.19(a) address the standards the Secretary will use in determining the natural disasters eligible for NAP payments. The trade association raises this issue in light of complaints that sustainable and alternative practices have been treated unfairly in the past.

(2) One comment received from a trade association suggested section 404.19(a)(3) address the standards that will be used to exclude NAP assistance for the failure of the producer to follow good farming practices. According to the trade association sustainable and alternative agricultural practices are frequently and erroneously labeled as

not "good farming practices" simply because they may be different from the traditional approach in the area. The trade association suggested section 404.19(a)(3) provide specificity on this point and provide producers with guidance as to what evidence they should present in order to show that their alternative methods were appropriate.

Response: The definition of "natural disaster" has been clarified to include both weather related and other natural occurrences or their consequences which may cause or accelerate the destruction or deterioration of a crop. Further, the definition of "good farming practices" allows alternative farming practices and innovations that are supported by data from the Cooperative State Research, Education, and Extension Service (CSREES). Therefore, a change is not required.

Comment: § 404.19(c)(1) Six comments, five from trade associations and one from a state FSA committee, were received regarding section 404.19(c)(1) which specifies that "The quantity will not be reduced for any quality consideration unless a zero value is established." One trade association recommended section 404.19(c)(1) be changed to include quality adjustment for hay crops in the disaster calculation for NAP payment. Four trade associations recommended FCIC develop a more flexible approach that focuses on the value of the damaged but not "dead" crop and whether the crop will be marketable in the future at a reasonable price. The state FSA committee recommended the same quality loss guidelines provided under CAT be also available to producers under the NAP.

Response: Many of the crops eligible for quality adjustments under the crop insurance program have generally accepted grades and standards upon which to base such adjustments. There are no such generally accepted grades and standards for most NAP crops. Therefore, no change is made.

Comment: Seven comments, one from a state government official, one from a producer, one from a FSA district director, and four from trade associations, were received regarding section 404.19(c)(2). The comments are as follows:

(1) One comment was received from a state government official regarding section 404.19(c)(2) which states that "A prevented planting NAP payment will be made if the producer is prevented from planting more than thirty-five percent (35%) of the total eligible acreage intended for planting to the eligible crop." The state government

official recommended the provision be changed to specify the percentage of guarantee that will be paid to a producer. The state government official suggested the guarantee be specified at a rate of not less than 65 percent for producers who are prevented entirely from planting a crop.

(2) Two comments, one from a producer and one from an FSA district director, were received regarding section 404.19(c)(2)(A) which states that "Eligible crop acreage will not exceed 100% of the simple average of the number of acres planted to the crop by the producer in the loss area during the years used to determine the approved yield, unless FCIC has previously agreed in writing to approve acreage exceeding this limit." The producer requested FCIC reconsideration of this provision in light of crop rotations and the planting of other crops. The FSA district director stated the provision discriminates against producers of noninsured crops because a producer of an insured crop is not subject to this restriction.

(3) Four comments were received from trade associations regarding section 404.19(2)(D)(i) which specifies that NAP payments for prevented planting will not be available for "tree crops and other perennials." The trade associations stated it is arbitrary and capricious to exclude turfgrass sod, floricultural, and ornamental nursery crops as perennials ineligible for NAP prevented planting. Because many of these crops can be produced in a period ranging from a few months to several years, depending upon the area of the country and a wide variety of agronomic considerations, the trade associations suggested a more flexible approach be developed by FCIC.

Response: Section 519(d)(1) of the Act limits the production eligible for payment to less than 50 percent of the producer's approved yield. Section 404.23 is added to specify how losses will be paid to producers eligible for prevented planting or reduced yield NAP payments. In § 404.19, paragraphs (c)(2) (A), (B), and (C) have been deleted and acreage which was prevented from planting due to a natural disaster, and the producer can prove was intended to be planted, may be eligible for NAP payments. Tree crops and perennials may be eligible for prevented planting NAP payments provided the producer can prove adequate resources were available, or on order, to plant, grow, and harvest the crop, if applicable.

Comment: § 404.21(a). Two comments, one from a state FSA committee and one from a trade association were received regarding

section 404.21(a) which specifies that "Any person with a share in the eligible crop who would be entitled to a NAP payment must make application and provide a notice of damage or loss within 15 calendar days after the occurrence of the prevented planting (the end of the planting period) or damage to the crop." The state FSA committee stated that the 15-day notification is too limiting and suggested the provision be changed to allow for a 30- or 45-day notification period. The trade association also stated that the 15-day notice of damage was too restrictive.

Response: The time period for providing notice of loss is comparable to the insurance requirement and allows for timely inspection of the damaged crop, if necessary. Longer time periods may make it difficult to accurately assess the extent of the damage and prevent the producer from destroying the crop and putting the acreage to another use.

Comment: § 404.27(a). One comment received from a state government official suggested that section 404.27(a) be amended by replacing the words "erroneously represented" with the words "knowingly misrepresented". Justification for this change was that the provision implies that a farmer who unwittingly benefited from another's action could face cruel and unduly harsh penalties due to acts of which he or she was totally unaware.

Response: The paragraph has been clarified to replace "erroneously represented" with "misrepresented." Further, the paragraph has been revised to require that producers "knowingly" adopt, participate, or benefit from a scheme or device to conform to the requirement of the Act.

Comment: § 404.27(c)(2). One comment received from a trade association suggested section 404.27(c)(2) be amended to include the "knowing" or "intentional" submission of false information.

Response: Since section 404.27(a) has already been revised to require a "knowing" adoption, participation, or benefiting from the scheme or device, a change is not required here.

Comment: § 404.29(a). One comment received by a trade association suggested section 404.29(a) include a provision to provide for refund of monies by the producer as a result of an FCIC error and that such provision not require the producer to pay interest or pay the money back "on demand." The trade association suggested that after a set period of time FCIC should not be allowed to recompute and correct its own mistakes and should within that set

period of time establish an equitable repayment schedule agreed upon by the parties involved.

Response: There is a statute of limitation that governs the period within which FCIC can bring an action to recover funds that are owed to it. Further, since NAP is a government funded program, payments cannot be made or retained that are not authorized by law.

Comment: § 404.33. Two comments, one from a state government official and one from a trade association, were received regarding section 404.33 as follows:

(1) One comment from a state government official suggested that this section be amended by removing the words "The appeal, reconsideration, or review of all determinations made under this part . . ." and inserting in its place the words "Any determination made by the agency, which the producer believes to be adverse to his or her participation in the program, can be appealed, reconsidered, or reviewed by the agency." The state government official also suggested that the words "must be in accordance with part 780 of this title or the regulations promulgated by the National Appeals Division, whichever is applicable" be replaced with a new paragraph to read as follows:

"All appeals will be heard under the new regulations that are published for the National Appeals Division, including the right of a producer to participate in mediation with the agency. If the appeal is in a state with a certified mediation program, then the agency must notify the producer in writing, of his or her right to mediation."

(2) One comment received from a trade association suggested this section include appeal rights through the National Appeals Division on whether the designation of an area is appealable. The trade association also suggested that these regulations provide more specific guidance in keeping with the National Appeals Division regulations particularly notice provisions, timeframes, and any informal appeal options.

Response: Since the National Appeals Division has specific jurisdictional requirements, no change is necessary. Further, the Act requires that informal appeal processes in effect on the date of its enactment remain in effect and producers are provided their choice of forums. Mediation is available under 7 CFR part 780. Rules of general applicability are not appealable and the area designation is a rule of general applicability. Since the notice, timeframe, and informal appeal options

are specifically stated in the referenced part and regulation, it would be redundant to include them here.

Comment: One comment received from an USDA agency recommended that participation in the NAP be linked to other price support, production adjustment, conservation programs, and the CAT program. Justification for this change was to provide equitable treatment to all producers and to be consistent with the Act which requires the FCIC to establish a NAP program to provide coverage equivalent to the CAT program.

Response: The Agency determined that it would not require linkage between CAT and NAP unless specifically required by the Act.

Comment: One comment received from a USDA agency recommended an administrative fee similar to the CAT program be charged producers prior to the time they receive benefits under the NAP. Justification for this charge was to ensure fair and equitable treatment of all producers and to help cover administrative costs for delivering the program.

Response: The comment cannot be implemented because the Act does not authorize collection of fees from NAP producers.

Comment: One comment received from a USDA agency suggested that a producer should have a history of growing the crop in order to receive NAP benefits. Justification for this change was to ensure that a producer has the knowledge, expertise, and intent to produce the crop.

Response: This suggestion would have the affect of penalizing new producers. FSA's operating procedure delegates to the county committees the responsibility of determining that good farming practices were used in producing the crop. If good farming practices were not used or the producer cannot prove that a crop was intended for planting, the producer is ineligible for NAP payments.

Comment: One comment received from a USDA agency recommended limits be placed on producers from receiving NAP benefits on acreages that substantially increased over the previous year's planting. Justification for this change was to help prevent producers from significantly expanding planted acres on certain crops on the basis of the NAP benefits available.

Response: The Act does not provide for limiting NAP benefits if a producer increases acreage of a crop. The Act only limits the use of assigned yields when the crop acreage in the county has significantly increased from previous years.

Comment: One comment received from a trade association stated that since producers must file annual acreage reports it is imperative that they be notified on the availability of NAP. The trade association suggested post-disaster sign-up for the first few years of this program.

Response: The Act requires producers to annually provide records of previous years acreage, yield, and production. Further, producers are required to file acreage reports showing the current crop years planted and prevented planted acreage. These requirements cannot be changed. Under the Act, producers are not required to submit an application for payment until the application deadline, which occurs after the loss has occurred.

With the exception of a few minor editorial or technical corrections, other changes made by FCIC are as follows:

(1) Removed the reference to the definitions for actual yield, adjusted yield, and replacement crop at § 404.7(b), (c), and (dd) because those terms are not relevant to this program;

(2) Removed the reference to the definition for master yield at § 404.7(u) because there are no master yields under NAP;

(3) Added a definition for CAT, FSA, NASS; and NAP in § 404.7 for clarity;

(4) Added a definition for ornamental nursery crop at § 404.7 to clarify which nursery crops are covered;

(5) Added a provision to § 404.11 which makes NAP assistance available for any crop for which insurance is available in the county, that is affected by natural disaster that is not insurable under the producer's crop insurance policy for clarity even though such coverage was available under the interim rule;

(6) Revised § 404.13 for clarity, added "county" as an option for area designations, and require a minimum number of producers for NAP areas within the United States;

(7) Added § 404.23 to clarify how NAP payments are calculated and redesignated the remaining sections accordingly.

Good cause is shown to make this rule effective upon public filing with the Federal Register, and without the 30-day period required by the Administrative Procedure Act. The interim rule implemented the NAP requirements mandated by the amendments to the Federal Crop Insurance Act by the Federal Crop Insurance Reform Act of 1994. This final rule needs expedited implementation in order to facilitate the processing of pending applications for NAP benefits. Therefore, good cause is shown to make

this rule effective in less than 30 days after publication.

List of Subjects in 7 CFR Part 404

Agricultural commodities, Disaster assistance, Reporting and recordkeeping requirements.

Final Rule

Accordingly, 7 CFR Part 404 is revised to read as follows:

PART 404—NONINSURED CROP DISASTER ASSISTANCE PROGRAM—REGULATIONS FOR THE 1995 AND SUCCEEDING CROP YEARS

Sec.

- 404.1 General statement.
 - 404.3 Applicability.
 - 404.5 Administration.
 - 404.7 Definitions.
 - 404.9 Coverage.
 - 404.11 Eligibility.
 - 404.13 Area.
 - 404.15 Yield determinations.
 - 404.17 Acreage report.
 - 404.19 Loss requirements.
 - 404.21 Application for payment and notice of loss.
 - 404.23 Payments for reduced yield and prevented planting.
 - 404.25 Multiple benefits.
 - 404.27 Payment and income limitations.
 - 404.29 Misrepresentation, scheme and device, and fraud.
 - 404.31 Refunds to the Corporation.
 - 404.33 Cumulative liability.
 - 404.35 Appeals.
 - 404.37 Exemption from levy.
 - 404.39 Estates, trusts, and minors.
 - 404.41 Death, incompetence, or disappearance.
 - 404.43 OMB control numbers.
- Authority: 7 U.S.C. 1506(l), 1506(p).

§ 404.1 General statement.

The Federal Crop Insurance Act, as amended by the Federal Crop Insurance Reform Act of 1994, requires the Federal Crop Insurance Corporation to implement a noninsured crop disaster assistance program to provide eligible producers of eligible crops with protection comparable to the catastrophic risk protection plan of crop insurance. NAP is designed to help reduce production risks faced by producers of crops for which Federal crop insurance under the Act is not available. NAP will reduce financial losses that occur when natural disasters cause a catastrophic loss of production or prevented planting of an eligible crop. Payment eligibility is based on an expected yield for the area and the producer's approved yield based on actual production history, or a transitional yield if sufficient production records are not available. Production for both the applicable area expected yield and the individual

producer approved yield for the unit must fall below specified percentages in order to be eligible for payments under this part.

§ 404.3 Applicability.

The provisions contained in this part are applicable to each eligible producer and each eligible crop, acreage, or cause of loss for which CAT coverage is not otherwise available.

§ 404.5 Administration.

(a) The NAP program will be administered under the general supervision of the FCIC, and will be carried out through state and county committees and offices of the Farm Service Agency, or other local USDA offices as designated by FCIC.

(b) The state FSA committee will, in accordance with this part, recommend the geographical size and shape of the area where a natural disaster has occurred, and whether the area eligibility requirement has been satisfied. The recommendation of eligibility must be approved by FCIC.

(c) FCIC will determine all yields and prices under this part.

(d) No delegation herein to a state or county FSA committee will preclude the FCIC Manager from determining any question arising under NAP or from reversing or modifying any determination made by a state or county FSA committee.

§ 404.7 Definitions.

Act—The Federal Crop Insurance Act as amended. (7 U.S.C. 1501 *et seq.*)

Actual production history—Refer to 7 CFR part 400, subpart G, except that the terms of subpart G will read as follows when referring to NAP:

| Insurance Terms | NAP Terms |
|------------------------------------|-----------------------------|
| Agent | Local office representative |
| Claim | Application for payment |
| claim for indemnity | Application for payment |
| Indemnity payment | NAP payment |
| Insurable acreage | Eligible acreage |
| Insurable cause | Natural disaster |
| Insurable crop | Eligible crop |
| Insurance company ... | Provider |
| Insurance purposes .. | NAP purposes |
| Insured | Eligible producer |
| Insured producer | Eligible producer |
| Uninsurable acreage . | Ineligible acreage |
| Uninsurable production. | Ineligible production |
| Uninsured cause of loss appraisal. | Assigned production |
| Uninsured production | Ineligible production |

APH—Actual production history.
Approved yield—An APH yield calculated and approved by FCIC, used

to determine any NAP payment in accordance with 7 CFR part 400, subpart G.

Aquacultural species—Any species of aquatic organism grown as food for human consumption or fish raised as feed for fish that are consumed by humans, and which is propagated and reared in an aquatic medium by a commercial operator on private property in water in a controlled environment.

Area—The geographic region recommended by the state FSA committee, and approved by FCIC in accordance with § 404.13, where a natural disaster has occurred which may qualify producers in the area for NAP payments.

Assigned yield—A yield assigned for a crop year in the base period, in accordance with 7 CFR part 400, subpart G, if the producer does not file an acceptable production report by the production reporting date.

Average market price—The price, or dollar equivalent on an appropriate basis; for example, pound, bushel, ton, for an eligible crop established by FCIC for determining NAP payments. Such price will be on a harvested basis without the inclusion of transportation, storage, processing, packing, marketing or other post-harvest expenses and will be based, in part, on historical data.

CAT—A catastrophic risk protection plan of insurance offered by FCIC authorized under section 508(b) of the Act and 7 CFR part 402.

CCC—The Commodity Credit Corporation.

County expected yield—The eligible crop yield established by the State FSA committee and approved by FCIC for the county. Such yield information may be obtained from NASS, CSREES, credible nongovernmental studies, yields in similar areas, and similar reference material. For planted annual crops, such yield will be based on the acreage planted for harvest.

Crop year—The period of time within which the crop is normally grown and designated by the calendar year in which the crop is normally harvested in the area. For crops harvested over two calendar years, the crop year will be the calendar year in which the majority of the crop would have been harvested. For crops grown over more than two calendar years, each year in the growing period will be considered as a separate crop year designated by the calendar year in which the crop sustained a loss. For crops for which CAT is available, the crop year will be as defined by CAT.

CSREES—The Cooperative State Research, Education, and Extension Service.

Eligible crop—An agricultural commodity for which CAT is not available and which is commercially produced for food or fiber as specified in this part. Eligible crop shall also include floricultural, ornamental nursery, and Christmas tree crops, turfgrass sod, and industrial crops. In the case of a crop that historically has multiple plantings in the same crop year that are planted or are prevented from being planted, each planting may be considered a different crop for determining NAP payments. In the case of a crop that has different varieties or types, each variety or type may be considered a separate crop for determining NAP payments, if FCIC determines there is a significant difference in price or yield between the varieties or types.

Expected area yield—The eligible crop yield established and approved by FCIC for the geographic area.

Forage—Land covered with grass or other vegetation, produced under such range management practices as are necessary to sustain sufficient quality and quantity of grass or vegetation each year to be suitable for grazing or mechanical harvest to feed livestock in a commercial operation. NAP benefits for forage produced on any Federal or state owned lands are available only for seeded forage.

FCIC—The Federal Crop Insurance Corporation, a wholly owned Government corporation within the Farm Service Agency (FSA), United States Department of Agriculture.

FSA—Formerly the Consolidated Farm Service Agency; now the Farm Service Agency of the United States Department of Agriculture.

Good farming practices—The cultural practices generally used in the area for the crop to make normal progress toward maturity and produce at least the individual unit approved yield. The practices are normally those recognized by CSREES as compatible with agronomic and weather conditions in the area.

Harvested—A single harvest crop is considered harvested when the producer has, by hand or mechanically, removed the crop from the field. Crops with multiple harvests in one year or harvested over multiple years are considered harvested when the producer has, by hand or mechanically, removed at least one mature crop from the field. The crop is considered harvested once it is taken off the field and placed in a truck or other conveyance. (Exceptions: Hay is considered harvested when in the bale, whether removed from the field or not. Grazing is not considered harvesting for

the purpose of determining a payment rate factor.)

Livestock—Any farm or other animal excluding aquacultural species and, including but not limited to domestic avian, ruminant, equine, and swine species grown or maintained for any purpose.

Local office—The FSA office or other USDA office designated by FCIC.

NASS—The National Agricultural Statistics Service, an agency of the United States Department of Agriculture.

Native forage—Grass or other vegetation occurring naturally without seeding.

Natural disaster—Means damaging weather, including but not limited to drought, hail, excessive moisture, freeze, tornado, hurricane, excessive wind, or any combination thereof; or adverse natural occurrence such as earthquake, flood, or volcanic eruption; or related condition, including but not limited to heat, insect infestation, or disease, which occurs as a result of an adverse natural occurrence or damaging weather occurring prior to or during harvest that directly causes, accelerates, or exacerbates the destruction or deterioration of an eligible crop, as determined by the Secretary.

NAP—The noninsured crop disaster assistance program.

Operator—The person who is in general control of the farming operation on the farm during the crop year.

Ornamental nursery crop—A decorative plant grown in a container or controlled environment for commercial sale.

Person—A person as defined in 7 CFR part 1497, subpart B.

Prevented planting—The inability to plant a crop with proper equipment during the planting period for the crop or commodity. A producer must prove that the producer intended to plant the eligible crop and that such crop could not be planted due to natural disaster reasonably related to the basis for the area designation under § 404.13, as determined by the FCIC Manager. The natural disaster that caused the prevented planting must have occurred after the final planting date for the previous crop year and before the final planting date for the crop year in which a request for NAP payment was made. For crops with multiple plantings in a single crop year and one crop has been harvested, the natural disaster must occur, after the harvest of the harvested crop and before the end of the planting period for the next planting of the crop.

Producer—A person who, as owner, landlord, tenant, or sharecropper, is entitled to share in the production from

the eligible commodity or in the proceeds thereof.

Production report—A written record showing the commodity's annual production and used to determine the producer's yield for NAP purposes. The report contains yield history by unit, if applicable, including planted acreage for annual crops, eligible acreage for perennial crops, and harvested and FCIC appraised production for the previous crop years. This report must be supported by verifiable written records, measurement of farm-stored production, or by other records of production approved by FCIC. Information contained in an application for payment is considered a production report for the unit for the crop year for which the application was filed.

Qualifying gross revenues means:

(1) With respect to a person who receives more than 50 percent of such person's gross income from farming, ranching, and forestry operations, the annual gross income for the calendar year from such operations; and

(2) With respect to a person who receives 50 percent or less of such person's gross income from farming, ranching, and forestry operations, the person's total gross income from all sources.

Reseeded or replanted crop—The same crop planted on the same acreage after the first planting of the crop has failed.

Seeded forage—Acreage which is mechanically seeded with grasses or other vegetation at regular intervals, at least every 7 years, in accordance with good farming practices.

Share—The producer's percentage of interest in the eligible crop as an owner, operator, or tenant at the beginning of the crop year. For the purposes of determining eligibility for NAP payments, the producer's share will not exceed the producer's share at the earlier of the time of loss or the beginning of harvest. Acreage or interest attributed to a spouse, child, or member of the same household may be considered part of the producer's share unless considered a separate person.

Transitional NAP yield ("T" Yield)—An estimated yield based on the county expected yield adjusted for individual producers as determined by FCIC. The T-yield will be used in the approved yield calculation process when less than four consecutive crop years of actual or assigned yields are available. (See APH).

Unit—For the noninsured crop disaster assistance program, all acreage of the eligible crop in the county for the crop year:

(1) In which the person has 100 percent crop share; or

(2) Which is owned by one person and operated by another person on a share basis.

(Example: If, in addition to the land the person owns, the person rents land from five landlords, three on a crop share basis and two on a cash basis, the person would be entitled to four units, one unit for each crop share lease and one unit which includes the two cash leases and the land owned by the person.) Land rented for cash, a fixed commodity payment, or any consideration other than a share in the crop on such land will be considered as owned by the lessee. No unit other than that stated herein will be permitted.

§ 404.9 Coverage.

(a) Producers who are eligible to receive NAP payments for crop years 1995 through 1998 will receive coverage against loss in yield greater than 50 percent of the producer's approved yield for the eligible crop payable at 60 percent of the established average market price for the crop.

(b) Producers who are eligible to receive NAP payments after crop year 1998 will receive coverage against loss in yield greater than 50 percent of the producer's approved yield for the eligible crop payable at 55 percent of the established average market price for the crop.

(c) FCIC will adjust the NAP payment rate for crops that are produced with significant and variable expenses that are not incurred because the crop acreage was prevented from being planted or planted but not harvested.

(d) NAP payments will be determined by unit based on the production of all acreage of that crop (planted and eligible prevented from being planted) in the unit.

(e) Each producer's NAP payment will be based on the producer's share of the eligible crop.

§ 404.11 Eligibility.

Eligible crops under this part will be any commercial agricultural crop, commodity, or acreage of a commodity grown for food or fiber for which CAT is not available under 7 CFR part 402 unless excluded by paragraph (b) of this section. Different types or varieties of a crop or commodity may be treated as a separate eligible crop, if FCIC determines there is a significant difference in price or yield.

(a) NAP payments will be made available for:

(1) Any commercial crop grown for food;

(2) Any commercial crop planted and grown for livestock consumption,

including but not limited to grain and forage crops;

(3) Any commercial crop grown for fiber, excluding trees grown for wood, paper, or pulp products;

(4) Any commercially produced aquacultural species;

(5) Floriculture crops;

(6) Ornamental nursery crops;

(7) Christmas tree crops;

(8) Turfgrass sod;

(9) Industrial crops; and

(10) Any crop, for which crop insurance under the Act is available in the county, that is affected by a natural disaster that is not insurable under the producer's crop insurance policy.

(b) NAP payments will not be available:

(1) For losses of livestock or their by-products;

(2) To any person who has qualifying gross revenues in excess of \$2 million;

(3) For any acreage in any area for any crop for which CAT is available, unless the loss was caused by a natural disaster that is not covered under CAT and all other eligibility requirements for NAP are satisfied;

(4) To any person who, in accordance with chapter VII of 7 CFR and section 1764 of the Food Security Act of 1985, has been convicted under Federal or state law of planting, cultivating, growing, producing, harvesting or storing a controlled substance in any applicable crop year;

(5) Producing an agricultural commodity in any crop year on a field on which highly erodible land is predominant, unless the person is exempt under the provisions of § 12.5 of this title; or

(6) Producing an agricultural commodity in any crop year on converted wetland, unless the person is exempt under the provisions of § 12.5 of this title.

(c) Any tenant, landlord, or producer on the unit separate from the person determined to be ineligible under this provision will remain eligible for NAP payments for their share of the crop unless such tenant, landlord, or producer on the unit is:

(1) Also convicted of planting, cultivating, growing, producing, harvesting or storing a controlled substance;

(2) Also in violation of chapter XII of the Food Security Act of 1985 and the regulations issued thereunder; or

(3) Otherwise determined by FCIC to be ineligible for NAP payments.

§ 404.13 Area.

(a) For the purposes of this part, acreage affected by a natural disaster, or any adjustment thereto, will be included

in the area recommended by the state FSA committee and submitted to FCIC for approval, regardless of whether the commodity produced on the affected acreage suffered a loss.

(b) Except for eligible areas identified in paragraph (f) of this section, an approved area shall include at least five producers of crops on separate and distinct farms for which the area has been approved for the payment of NAP benefits. Notwithstanding this provision, FCIC may approve an area having fewer than five producers if the Manager determines that such area will suffer significant economic consequences as a result of the disaster.

(c) An area may be designated as follows:

(1) A county;

(2) Aggregated acreage that is at least 320,000 acres; or

(3) Aggregated acreage with not less than \$80 million average value for all crops produced annually.

(d) If the aggregated acreage affected by the natural disaster does not meet the minimum requirement specified in paragraph (c)(2) or (3) of this section, the aggregated acreage will be expanded by adding acres from around the affected acreage, until the minimum requirement is met.

(e) The area may not be defined in any manner that intentionally includes or excludes producers or crops.

(f) In lieu of the paragraph (a) and (c) of this section, for eligible areas outside the United States, the area shall include 10 or more producers of the crop. Notwithstanding this provision, FCIC may approve an area outside the 50 United States having fewer than 10 producers of the crop for which the area is requested if the Manager determines that such area will suffer significant economic consequences as a result of the disaster.

§ 404.15 Yield determinations.

(a) FCIC will establish expected area yields for eligible crops for each county or area for which the NAP is available, using available information, which may include, but is not limited to, NASS data, CSREES records, credible nongovernment studies, yields in similar areas, and reported approved yield data. For planted annual crops, such yields will be based on the acreage planted for harvest.

(b) FCIC may make county yield adjustments taking into consideration different yield variations due to different farming practices in the county such as: irrigated, nonirrigated, organic, nonorganic; different types and varieties of a crop; and intended use.

(c) In establishing expected area yields for eligible crops:

(1) If the approved area corresponds to a single county, the expected area yield will be the yield established by FCIC for that county, including any adjustments permitted by this section; or

(2) If the approved area encompasses portions of a county or more than one county, the expected area yield will be the weighted average of the yields established by FCIC for those counties in the area, including any adjustments permitted by this section.

(3) FCIC may adjust expected area yields if:

(i) The cultural practices, including the age of the planting or plantings, are different from those used to establish the yield.

(ii) The expected area yield established on a state or county level is determined to be incorrect for the area.

(d) FCIC will establish approved yields for purposes of providing assistance under this part. Approved yields for the eligible crop will be based on the producer's actual production history in accordance with the provisions of 7 CFR part 400, subpart G.

(e) The approved yield established for the producer for the year in which the NAP payments are offered will be equal to the average of the consecutive crop year yields, as established by FCIC, reported and certified of that producer for that eligible crop.

(f) If a producer receives an assigned yield for a year of natural disaster because production records were not submitted by the production reporting deadline, the producer will be ineligible to receive an assigned yield for the year of the next natural disaster unless adequate production records for the eligible crop from the previous one or more years, as applicable, are provided to the local office. The producer shall receive a zero yield for those years the producer is ineligible to receive an assigned yield.

(g) FCIC will select certain producers on a random or targeted basis and require those selected to provide records acceptable to FCIC to support the information provided. Producers may also be required to support the yield certification at the time of loss adjustment or on post-audit. Each certification must be supported by records acceptable to FCIC. Failure to produce records acceptable to FCIC will result in FCIC establishing the yield in accordance with APH and may subject the producer to criminal and civil false claims actions under various Federal statutes as well as refund of any amount received. In addition, sanctions as set

out at 7 CFR part 400, subpart R may be imposed for false certification. Records acceptable to FCIC may include:

(1) commercial receipts, settlement sheets, warehouse ledger sheets, or load summaries if the eligible crop was sold or otherwise disposed of through commercial channels provided the records are reliable or verifiable; and

(2) such documentary evidence as is necessary in order to verify the information provided by the producer if the eligible crop has been sold, fed to livestock, or otherwise disposed of other than through commercial channels such as contemporaneous measurements, truck scale tickets, and contemporaneous diaries, provided the records are reliable or verifiable.

(h) Any producer who has a contract to receive a guaranteed payment for production, as opposed to delivery, of an eligible crop will have the production adjusted upward by the amount of the production corresponding to the amount of the contract payment received.

(i)(1) Producers will not be eligible to receive an assigned yield if the acreage of the crop in a county for the crop year has increased by more than 100 percent over any year in the preceding seven crop years, unless:

(i) The producer provides adequate records of production costs, acres planted, and yield for the crop year for which NAP payments are being sought.

(ii) FCIC determines that the records provided under this paragraph are inadequate, FCIC may require proof that the eligible crop could have been marketed at a reasonable price had the crop been harvested.

(2) The provisions of this section will not apply if:

(i) The crop has been inspected prior to the occurrence of a loss by a third party acceptable to FCIC; or

(ii) The FSA county executive director, with concurrence of the FSA state director, makes a recommendation for an exemption from the requirements and such recommendation is approved by FCIC.

§ 404.17 Acreage report.

(a) Producers must file one or more acreage reports annually at the local office no later than the date specified by FCIC for each crop the producer will want made eligible for the NAP program. The acreage report may be filed by the farm operator. Any producer will be bound by the acreage report filed by the farm operator unless the producer files a separate acreage report prior to the acreage reporting date.

(b) That acreage report must include all of the following information:

(1) All acreage in the county of the eligible crop (for each planting in the event of multiple plantings) in which the producer has a share;

(2) The producer's share at the time of planting or the beginning of the crop year;

(3) The FSA farm serial numbers;

(4) The crop, practice, and intended use;

(5) All persons sharing in the crop (including the identity of any person having a substantial beneficial interest in the crop (refer to 7 CFR part 400, subpart Q) and the person's employer identification number or social security number, if the person wishes to receive any payment under the Act);

(6) The date the crop was planted;

(7) Acreage prevented from being planted; and

(8) Production from the previous crop year. (For example: The producer reported the crop acreage planted in 1995. The producer must then report the 1995 production for that acreage by the 1996 acreage reporting date for the crop.)

(c) A person's failure to submit the required information by the designated acreage reporting dates may result in the denial of NAP payments. If there is a change of ownership, operation, or share within the farming operation after the acreage reporting date, the local office must be notified not later than 30 calendar days after the change and proof of the change must be provided in order to maintain eligibility for payments under this part.

§ 404.19 Loss requirements.

(a) To qualify for payment under this part, the loss or prevented planting of the eligible crop must be due to a natural disaster as defined at § 404.7.

(b) NAP assistance will not cover losses due to:

(1) The neglect or malfeasance of the producer;

(2) The failure of the producer to reseed or replant to the same crop in the county where it is customary to reseed or replant;

(3) The failure of the producer to follow good farming practices for the commodity and practice;

(4) Water contained or released by any governmental, public, or private dam or reservoir project, if an easement exists on the acreage affected for the containment or release of the water;

(5) Failure or breakdown of irrigation equipment or facilities; or

(6) Except for tree crops and perennials, inadequate irrigation resources at the beginning of the crop year.

(c) A producer of an eligible crop will not receive NAP payments unless the

projected average or actual yield for the crop, or an equivalent measurement if yield information is not available, in the area falls below 65 percent of the expected area yield. Once this area, and all other, eligibility requirements have been satisfied:

(1) A reduced yield NAP payment will be made to a producer if the total quantity of the eligible crop that the producer is able to harvest on the unit is less than 50 percent of the approved yield for the crop due to natural disaster reasonably related to the basis for the area designation under § 404.13, as determined by the FCIC Manager, factored for the share of the producer for the crop. Production from the entire unit will be used to determine whether the producer qualifies for a NAP payment. The quantity will not be reduced for any quality consideration unless a zero value is established.

(2) A prevented planting NAP payment will be made if the producer is prevented from planting more than 35 percent of the total eligible acreage intended for planting to the eligible crop. Producers must have intended to plant the crop and prove that they were prevented from planting the crop due to natural disaster reasonably related to the basis for the area designation under § 404.13 and the producer may be required to prove that such producer had the resources available to plant, grow, and harvest the crop, as applicable.

(d) NAP payments for prevented planting will not be available for:

(1) Tree crops and other perennials, unless the producer can prove resources were available to plant, grow, and harvest the crop, as applicable;

(2) Land which planting history or conservation plans indicate would remain fallow for crop rotation purposes; or

(3) Land used for conservation purposes or intended to be or considered to have been left unplanted under any program administered by USDA.

§ 404.21 Application for payment and notice of loss.

(a) Any person with a share in the eligible crop who would be entitled to a NAP payment must provide a notice of damage or loss within 15 calendar days after the occurrence of the prevented planting (the end of the planting period) or recognizable damage to the crop. For the 1995 crop year only, the notice must be filed within the later of July 3, 1995, or 15 days after the occurrence of the prevented planting or damage to the crop. The notice must be filed at the local office serving the area

where the producer's unit is located. The farm operator may provide the notice for all producers with an interest in the crop. All producers on a farm will be bound by the operator's filing or failure to file the application for payment unless the individual producers elect to timely file their notice.

(b) Applications for NAP payments must be filed, on our form, by the applicant with the local office no later than the first acreage reporting date for the crop in the crop year immediately following the crop year in which the loss occurred.

(1) If the producer chooses not to harvest the crop, all eligible acres and crop units for which the producer intends to make an application for payment must be left intact until the units have been appraised or released by an FCIC loss adjuster.

(2) If the producer harvests the crop, the producer must provide such documentary evidence of crop production as FCIC may require which may include leaving representative samples of the crop for inspection.

(c) Failure to make timely application or to supply the required documentary evidence shall result in the denial of NAP payments.

(d) Payments under this part may be assigned by the eligible producer only on our form and such assignment is effective only when approved by FCIC. Failure of FCIC to make payment in accordance with such assignment will not give rise to any liability on the part of FCIC to the assignee.

§ 404.23 Payments for reduced yields and prevented planting.

In the event that the area loss requirement has been satisfied for the crop and either:

(a) The producer has sustained a loss in yield in excess of 50 percent of the producer's approved yield established for the crop the NAP low yield payment will be determined by:

(1) Multiplying the producer's approved yield by the total eligible acreage planted to the eligible crop;

(2) Multiplying the product of paragraph (a)(1) of this section by 50 percent;

(3) Subtracting the total production from the total eligible acreage from the result in paragraph (a)(2) of this section;

(4) Multiplying the product of paragraph (a)(3) of this section by the producer's share of the eligible crop;

(5) Multiplying the result of paragraph (a)(4) of this section by the applicable payment factor in accordance with § 404.9(c);

(6) Multiplying the result in paragraph (a)(5) of this section by :

(i) For the 1995 through 1998 crop years, 60 percent of the average market price, as determined by FCIC, or any comparable coverage, as determined by FCIC: or

(ii) For the 1999 and subsequent years, 55 percent of the average market price, as determined by FCIC, or any comparable coverage, as determined by FCIC: or

(b) The producer has been unable to plant at least 35 percent of the acreage intended for the eligible crop, the NAP payment will be determined by:

(1) Multiplying the producer's acreage intended to be planted to the eligible crop by 35 percent;

(2) Subtracting the result in (b)(1) of this section from the number of eligible prevented planting acres as determined in § 404.19 (c) (2);

(3) Multiplying the result of (b)(2) of this section by the producer's share of the eligible crop;

(4) Multiplying the producer's approved yield by the result of (b)(3) of this section;

(5) Multiplying the result of (b)(4) of this section by the approved prevented planting payment factor in accordance with § 404.9(c);

(6) Multiplying the result of (b)(5) of this section by:

(i) For the 1995 through 1998 crop years, 60 percent of the average market price, as determined by FCIC, or any comparable coverage, as determined by FCIC: or

(ii) For the 1999 and subsequent years, 55 percent of the average market price, as determined by FCIC, or any comparable coverage, as determined by FCIC.

§ 404.25 Multiple benefits.

(a) If a producer is eligible to receive NAP payments under this part and benefits under any other program administered by the Secretary for the same crop loss, the producer must choose whether to receive the other program benefits or NAP payments. The producer is not eligible for both. Such election does not relieve the producer from the requirements of making a production and acreage report.

(b) Applicable programs include, but are not limited to, the Emergency Livestock Feed Assistance Program and any other program determined by FCIC to compensate the producer for the same crop loss.

§ 404.27 Payment and income limitations.

NAP payments made to eligible producers are subject to the following provisions:

(a) For the purpose of making such payments, the term "producer" will be

considered to mean the term "person" as determined in accordance with 7 CFR part 1497, subpart B.

(b) No person shall receive payments for a crop year under this part in excess of \$100,000.

(c) A person who has qualifying gross revenues in excess of \$2 million for the previous calendar year shall not be eligible to receive NAP payments under this part.

(d) Simple interest on payments to the producer which are delayed will be computed on the net payments ultimately found to be due, from and including the 61st day after the latter of the date the producer signs, dates, and submits a properly completed application for payment on the designated form, the date disputed applications are adjudicated, or the date the area is approved for NAP payments. Interest will be paid unless the reason for failure to timely pay is due to the producer's failure to provide information or other material necessary for the computation or payment. The interest rate will be that established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611), and published in the Federal Register semiannually on or about January 1 and July 1 of each year and may vary with each publication.

§ 404.29 Misrepresentation, scheme and device, and fraud.

(a) If FCIC determines that any producer has misrepresented any fact or has knowingly adopted, participated in, or benefitted from, any scheme or device that has the effect of defeating, or is designed to defeat the purpose of this part, such producer will not be eligible to receive any payments applicable to the crop year for which the scheme or device was adopted.

(b) If any misrepresentation, scheme or device, or practice has been employed for the purpose of causing FCIC to make a payment which FCIC otherwise would not make under this part:

(1) FCIC will withhold all or part of the payment that would otherwise be due.

(2) All amounts paid by FCIC to any such producer, applicable to the crop year in which the offense occurred, must be refunded to FCIC together with interest and other amounts as determined in accordance with this part.

(3) FCIC may impose such other penalties or administrative sanctions as authorized by section 506(n) of the Federal Crop Insurance Act, as amended

or available under 7 CFR part 400, subpart R.

(c) Scheme and device may include, but is not limited to:

(1) Concealing any information having a bearing on the application of the rules of this part;

(2) Submitting false information to the FCIC or any county or state FSA committee; or

(3) Creating fictitious entities for the purpose of concealing the interest of a person in the farming operation.

§ 404.31 Refunds to the Corporation.

(a) In the event that there is a failure to comply with any term, requirement, or condition for payment made in accordance with this part, or the payment was established as a result of erroneous information provided by any person, or was erroneously computed, all such payments or overpayments will be refunded to FCIC on demand, together with interest.

(b) Interest will accrue in accordance with the provisions of 7 CFR § 1403.9.

(c) Interest on any amount due the FCIC found to have been received by the producer as a result of fraud, misrepresentation, scheme or device, or presenting a false application for payment will start on the date the producer received the payment.

(d) Recovery of delinquent debts and set off will be in accordance with 7 CFR part 1403.

(e) If FCIC determines it is necessary to contract with a collection agency or to employ an attorney to assist in collection, the producer will pay all the expenses of collection.

(f) All amounts paid will be applied first to the payment of expense of collection, second to the reduction of any penalties which may have been assessed, then to the reduction of accrued interest, then to the reduction of the principal balance.

§ 404.33 Cumulative liability.

(a) The liability of any producer for any payment or refunds, which is determined in accordance with this part to be due to FCIC, will be in addition to any other liability of such producer under any civil or criminal fraud statute or any other statute or provision of law including, but not limited to, 18 U.S.C. 286, 287, 371, 641, 1001; 1014, and 31 U.S.C. 3729.

(b) All producers on the unit receiving payments under this part will be jointly and severally liable to repay any unearned NAP payments.

§ 404.35 Appeals.

The appeal, reconsideration, or review of all determinations made

under this part, except the designation of an area for which there is no appeal rights because it is determined a rule of general applicability, must be in accordance with part 780 of this title.

§ 404.37 Exemption from levy.

Any payment that is due any person under this part will be made without regard to questions of title under state law and without regard to any attachment, levy, garnishment, or any other legal process against the crop, and the proceeds thereof, which may be asserted by any creditor, except statutory liens of the United States.

§ 404.39 Estates, trusts, and minors.

(a) Program documents executed by persons legally authorized to represent estates or trusts will be accepted only if such person furnishes evidence of the authority to execute such documents.

(b) A minor who is otherwise eligible will be eligible for NAP payments under this part only if such person meets one of the following requirements:

(1) The minor establishes that the right of majority has been conferred on the minor by court proceedings or by statute;

(2) A guardian has been appointed to manage the minor's property and the applicable program documents are executed by the guardian; or

(3) A bond is furnished under which the surety guarantees any loss incurred for which the minor would be liable had the minor been an adult.

§ 404.41 Death, incompetence, or disappearance.

In the case of death, incompetence or disappearance, of any person who is eligible to receive NAP payments in accordance with this part, such payments will be disbursed in accordance with part 707 of this title.

§ 404.43 OMB control numbers.

These regulations amend the information collection requirements previously approved by the Office of Management and Budget ("OMB") under OMB control number 0563-0016.

Done in Washington, D.C., on February 22, 1996.

Suzette M. Dittrich,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 96-4411 Filed 2-22-96; 3:00 pm]

BILLING CODE 3410-FA-P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 204

[INS No. 1690-95]

RIN 1115-AD91

Immigrant Petitions; Children of Widows or Widowers

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This rule adopts without change an interim rule published in the Federal Register on July 31, 1995, by the Immigration and Naturalization Service ("the Service"), which amended the Service's regulations by providing clarifying language and procedures for according immigrant status to children of widows or widowers who were not previously eligible for immigration benefits as derivative immediate relatives. This rule was necessary to enhance family well-being by promoting the family unity relationship between the child and his or her widowed mother or father.

EFFECTIVE DATE: This final rule is effective February 27, 1996.

FOR FURTHER INFORMATION CONTACT: Ramonia Law-Hill, Senior Adjudications Officer, Adjudications Division, Immigration and Naturalization Service, 425 "I" Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-5014.

SUPPLEMENTARY INFORMATION: On July 31, 1995, the Commissioner of the Immigration and Naturalization Service published in the Federal Register at 60 FR 38947-38948 an interim rule with request for comments. The rule implemented section 219(b) of the Immigration and Nationality Technical Corrections Act of 1994, Public Law 103-416, dated October 25, 1994. The rule enabled the child of a widow or widower to be included in the widow or widower's petition and to accompany or follow to join the widow or widower to the United States as a derivative immediate relative. The rule enhanced family well-being by promoting the family relationship between the child and his or her widowed mother or father.

The public was provided with a 60-day comment period which ended on September 29, 1995. No comments were received. Accordingly, the Service is adopting the interim rule as a final rule without change.