

DEPARTMENT OF AGRICULTURE**Farm Service Agency****7 CFR Part 701**

RIN 0560-AG26

Emergency Conservation Program

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts with revisions a proposed rule that set out regulations for the Emergency Conservation Program (ECP) and also provides for resolving matters related to other programs that have been administered under the same part. The revisions made are essentially technical in nature.

DATES: March 4, 2004.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:**Discussion of Final Rule**

The Emergency Conservation Program (ECP) provides cost-share assistance to farmers and ranchers to rehabilitate farmland damaged by wind erosion, floods, hurricanes, or other natural disasters, and for carrying out emergency water conservation measures during periods of severe drought.

On August 1, 2002, FSA published a proposed rule in the **Federal Register** (67 FR 49879). The proposed rule removed references to the Agricultural Conservation Program (ACP) and the Forestry Incentives Program (FIP). ACP was repealed by the Federal Agriculture Improvement and Reform Act of 1996 (Pub. L. 104-127) and administration of FIP was reassigned to the Natural Resources Conservation Service (NRCS) by the Department of Agriculture Reorganization Act of 1994 (Pub. L. 103-354). The proposed rule also proposed to clarify, expand, and revise the ECP to reflect current policy and make the program more efficient and easier to administer. The proposed rule had a 60-day comment period, which ended September 30, 2002.

Changes From Proposed Rule

No substantive changes were made to the proposed rule. The Agency removed provisions that made participants ineligible for ECP if they received an

FSA emergency loan. Also, section 701.15 of this rule provides for cost sharing for producers who started a practice up to 60 days before their county received a disaster designation. And the part's sections were renumbered.

Summary of Public Comments

Comments in response to the proposed rule were received from one farmer organization. The comments are addressed as follows:

Assistance to Confinement Operations

First, the respondent noted that in the preamble of the proposed rule FSA stated that it was considering allowing ECP assistance for confined livestock operations for natural disasters other than drought, to include assistance such as debris removal, and that the proposed rule gave no indication of what other options were being considered. The proposed rule described the only option being considered, that is, allowing ECP assistance for cleanup of confinement buildings in non-drought disasters, and included it in the proposed rule in order to obtain public comments. The respondent does not believe such assistance should be allowed. FSA agrees and did not include that change in the final rule.

Second, the respondent agrees with the provision making land used for greenhouses or other confined areas, such as corrals, milking parlors, barn lots or feeding areas, ineligible. However, they also believe restoration of animal waste lagoons should be ineligible as well. The rule does not specifically address restoration of animal waste lagoons. However, conservation structures are eligible under the statute and are specifically provided for in section 701.12. The lagoons are considered to be conservation structures. The respondent's suggestion was therefore not adopted in the final rule.

Agency Discretion

The respondent believes the proposed rule allows FSA too much discretion in determinations that should be spelled out in the rule and subject to public notice and comment, as exemplified by the frequent use of the phrase "as determined by the Deputy Administrator." The respondent identifies several specific areas of concern.

First, the rule allows FSA discretion in determining broad program decisions such as application periods, deadlines and provisions for late applications. The respondent agrees that such discretion

is appropriate and no change was made in the final rule in that respect.

Second, FSA issues notices, handbooks and other policy statements regarding the ECP, as it does for all of its programs. These internal directives are available to the public at any FSA office. The respondent believes that the rule leaves too many substantive provisions to be implemented through such vehicles rather than through public notice and comment rulemaking. The respondent cites a specific provision, what qualifies as farmland for ECP purposes, as an example, and believes FSA should include such standards in the rule. FSA agrees that substantive program provisions should be described in as detailed a manner as possible in the rule. The final rule was revised to explain provisions more thoroughly and minimize the number of discretionary provisions and exceptions. However, the possible situations and disasters that the ECP may need to address in the future is too great for the regulation to leave the agency without considerable flexibility. Thus, in the final rule, a number of determinations are left to FSA's discretion.

Third, the respondent states that section 701.80 of the proposed rule, *Not an entitlement program*, which states that the regulations do not create an entitlement and that the Deputy Administrator's powers are permissive, could deter producer challenges to agency decisions. The respondent argues that the final rule should make it clear that producers may appeal decisions of the Deputy Administrator to the extent they turn on questions of fact and compliance with clear standards, whether in a rule or a policy statement. To avoid any possible misunderstanding, that section was removed. It should be noted that section 701.34 of the final rule addresses appeals and incorporates by reference the appeal regulations at 7 CFR parts 7 and 780, which apply to all FSA programs. It should also be noted, however, that section 701.80 of the proposed rule was accurate in setting out that the ECP is not an entitlement program. A provision to that effect has been added elsewhere in the regulations. ECP requests can be denied for any reason and all claims are subject to the availability of funds. Also, a provision in section 701.1 relating to appeals was dropped as unnecessary because the other provisions in the rule relating to appeals are governing on the matter.

Cost-Share Levels

The proposed rule proposed simplifying the calculation of maximum

ECP cost-share levels by providing for a standard maximum cost-share of 75 percent of the maximum allowable cost of a practice, as opposed to the previously used sliding scale that provided lower percentages for increasing costs. The respondent agrees that the calculation should be simplified, but offers a suggestion for a somewhat different process. By its suggestion, the maximum cost share might be 75 percent up to the median of ECP costs for the last three years, based on a survey of FSA program use, plus a substantially lower rate, perhaps 30 percent, of remaining costs. Such a process, the respondent argues, would be easier to administer than the old one, would retain the benefits of a tiered system, and would prevent limited ECP funds from being exhausted by a few large programs.

FSA did not adopt the suggestion. The Agency feels a 75-percent cost-share rate, as proposed, is sound for several reasons, primarily because practice costs vary between regions and often from county to county. Basing eligible costs on a statistical median determined at the national level could be detrimental to producers in high-cost areas relative to those in low-cost areas. Conversely, costs based on smaller geographic areas could be highly inaccurate because the smaller areas may have had insufficient similar practices completed during the survey period, be it 3 years or another period. Inaccuracy would increase as the area and number of observations used to calculate the median cost declined. Also, there is not a discrete number of eligible ECP practices. Practices may include combinations of activities to address the problems caused by the disaster. Analyzing the costs to obtain a National costs for conservation measures would be impractical. Thus, FSA feels that State and County committees are in the best position to determine costs for conservation practices in their area, subject to guidance provided by National Office directives, and to limit the Agency's share of that cost as provided in this rule. The respondent's concern that large or expensive projects will exhaust available funding is mitigated by the limitations on payments per person and per practice provided in the rule.

Assistance for Limited Resource Farmers

The proposed rule solicited comments on providing increased cost shares of up to 90 percent to limited resource farmers. The respondent supports such a change and also suggests that FSA develop guidelines for outreach to

limited resource farmers. FSA agrees and the final rule provides for cost shares of up to 90 percent to limited resource farmers. With regard to outreach, FSA has procedures for outreach to limited resource farmers and intends to continue to implement them.

Reduction for Emergency Loans

The proposed rule provided that FSA emergency loans received by a farmer for "same or similar expenses" as the ECP would be counted as duplicate payments, and ECP cost-share payments would be reduced accordingly. The respondent suggests that this provision be removed because loans, unlike grants, must be repaid, and thus are not truly cost-share payments. FSA agrees and removed the provision from the final rule but retains the right to adjust benefits to avoid duplication with other programs.

Duplicate Payments and Effect of Other Assistance on Eligible Costs

The respondent states that the proposed rule is not clear on how receipt of outside assistance would affect eligibility for ECP, partly because the issue is addressed in several different sections in ways that appear to be inconsistent and partly by confusing duplicate payments with a higher rate of cost share. The Agency agrees that the issue could be explained more clearly. In this rule the Agency clearly labeled the section limiting the maximum cost share per practice, separated the maximum cost share per person into a distinct section, and clarified that participation in other conservation programs that overlap the ECP land and practice can affect the amount of ECP cost share a participant may receive. Also, the agency tried to limit confusion by placing the limits and restrictions as close to each other in the rule, and in as logical an order, as possible.

Offsets

Section 701.87 of the proposed rule proposed to make ECP payments subject to collection by administrative and Treasury offsets. The respondent urges FSA to use statutory authority to exempt disaster-related payments from offsets and not offset ECP payments. However, there is no statutory authority for USDA on its own to exempt ECP payments from offsets, and USDA does not feel in any event that such an exemption is justified at this time, but will continue to review that consideration as the need arises. Generally, it is essential that farmers remain current with their obligations or seek specific relief related to those perennial difficulties if the

farmer is going to continue to make use of Federal agricultural programs.

Water Resources

The respondent mentions that the current rule refers to affected farmland and water resources but the proposed rule only refers to farmland. The respondent assumes that water resources that meet all other eligibility requirements would continue to be eligible for assistance under the proposed rule.

The former rule provided regulations for three conservation programs: ACP, FIP and ECP. This rule provides regulations for only the ECP, and the ECP is not changed as it relates to water resources. Specifically defining water resources as eligible throughout the rule was not necessary as water-related eligibilities are defined and set out elsewhere by specific provisions in the regulations. FSA will continue to administer the ECP in accordance with authorizing law and provide assistance for water resources if authorized.

Other Changes

Other clarifying or technical changes have been made. For example, a provision related to liability for suits against the U.S. in the event of a practice failure or problem was removed as redundant and as stating the obvious.

Executive Order 12866

In conformance with Executive Order 12866 this rule has been determined to be not significant and, therefore, it has not been reviewed by the Office of Management and Budget.

Federal Assistance Programs

The titles and numbers of the Federal Assistance Programs, as found in the Catalog of Federal Domestic Assistance, to which this rule applies are: Emergency Conservation Program (ECP)—10.054; Agricultural Conservation Program (ACP)—10.063; and Forestry Incentives Program (FIP)—10.064.

Regulatory Flexibility Act

This rule is not subject to the Regulatory Flexibility Act because the Farm Service Agency (FSA) is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for this rule.

Environmental Review

The Agency completed a final environmental impact statement and record of decision, which are on file and available to the public in the Administrative Record at the address specified in the **ADDRESSES** section. It is

also available electronically at: <http://www.fsa.usda.gov/dafp/cepd/epb/nepa.htm>.

Executive Order 12372

This program is not subject to the provisions of Executive Order 12372, which requires 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 12612

This rule does not have Federalism implications that warrant the preparation of a Federalism Assessment. 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.

Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988. This final rule is not retroactive and it preempts State laws to the extent they conflict with this rule. Before any judicial action may be brought regarding the provisions of this rule the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Unfunded Mandates Reform Act of 1995 (UMRA)

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

Paperwork Reduction Act

The Office of Management and Budget approved the information collection requirements of this regulation, provided an expiration date of October 31, 2005, and assigned it OMB control number 0560-0082.

List of Subjects in 7 CFR Part 701

Agriculture, Disaster assistance, Environmental protection, Natural resources, Reporting and recordkeeping requirements, Soil conservation, Water resources.

■ Accordingly, 7 CFR part 701 is revised to read as follows:

PART 701—EMERGENCY CONSERVATION PROGRAM AND CERTAIN RELATED PROGRAMS PREVIOUSLY ADMINISTERED UNDER THIS PART

Sec.

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- 701.41 Cost-share assistance not subject to claims.
- 701.42 Assignments.
- 701.43 Information collection requirements.
- 701.44 Agricultural Conservation Program (ACP) contracts.
- 701.45 Forestry Incentives Program (FIP) contracts.

Authority: Pub. L. 95-334, 92 Stat. 420, 16 U.S.C. 2201 *et. seq.*

§ 701.1 Administration.

(a) Subject to the availability of funds, this part provides the terms, conditions and requirements of the Emergency Conservation Program (ECP) administered by the Farm Service Agency (FSA).

(b) ECP is administered by the Administrator, FSA through the Deputy Administrator, FSA, and shall be carried out in the field by State and county FSA committees (State and county committees), subject to the availability of funds. Except as otherwise provided in this rule, discretionary determinations to be made under this rule will be made by the Deputy Administrator. Matters committed to the discretion of the Deputy Administrator shall be considered in all cases to be

permissive powers and no person shall, under any circumstances, be considered to be entitled to an exercise of such power in their favor.

(c) State and county committees, and representatives and employees, do not have authority to modify or waive any regulations in this part.

(d) The State committee may take any action authorized or required of the county committee by this part, but which the county committee has not taken, such as:

(1) Correct or require a county committee to correct any action taken by such county committee that is not in accordance with this part; or

(2) Require a county committee to withhold taking any action that is not in accordance with this part.

(e) No provision or delegation herein to a State or county committee shall preclude the Administrator, FSA, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

(f) The Deputy Administrator may authorize State and county committees to waive or modify deadlines and other requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the program.

(g) The Deputy Administrator may limit the authority of state and county committees to approve cost share in excess of specified amounts.

(h) Data furnished by the applicants will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, the failure to provide data could result in program benefits being withheld or denied.

(i) FSA may consult with any other USDA agency for such assistance as is determined by FSA to be necessary to implement the ECP. FSA is responsible for the technical aspects of ECP but may enter into a Memorandum of Agreement with another party to provide technical assistance. If this limitation results in significant hardship to producers in a county the State committee may request in writing that the Deputy Administrator waive this requirement for that county.

(j) The provisions in this part shall not create an entitlement in any person to any ECP cost share or claim or any particular notice or form or procedure.

(k) Additional terms and conditions may be set forth in the application or the forms participants will be required to sign for participation in the ECP.

§ 701.2 Definitions.

(a) The terms defined in part 718 of this chapter shall be applicable to this part and all documents issued in accordance with this part, except as otherwise provided in this section.

(b) The following definitions shall apply to this part:

Agricultural producer means an owner, operator, or tenant of a farm or ranch used to produce for food or fiber, crops (including but not limited to, grain or row crops; seed crops; vegetables or fruits; hay forage or pasture; orchards or vineyards; flowers or bulbs; or field grown ornamentals) or livestock (including but not limited to, dairy or beef cattle; poultry; swine; sheep or goats; fish or other animals raised by aquaculture; other livestock or fowl) for commercial production. Producers of animals raised for recreational uses only are not considered agricultural producers.

Annual agricultural production means production of crops for food or fiber in a commercial operation that occurs on an annual basis under normal conditions.

Applicant means a person who has submitted to FSA a request to participate in the ECP.

Cost-share payment means the payment made by FSA to assist a program participant under this part to establish practices required to address qualifying damage suffered in connection with a qualifying disaster.

Deputy Administrator means the Deputy Administrator for Farm Programs, FSA, the ECP Program Manager, or designee.

Farmland means land devoted to agricultural production, including land used for aquaculture, or other land as may be determined by the Deputy Administrator.

Program year means the applicable Federal fiscal year.

§ 701.3 Scope.

(a) FSA will provide cost-share assistance to farmers and ranchers to rehabilitate farmland damaged by wind erosion, floods, hurricanes, or other natural disasters as determined by the Deputy Administrator, and to carry out emergency water conservation measures during periods of severe drought.

(b) The objective of the ECP is to make cost-share assistance available to eligible participants on eligible land for certain practices, to rehabilitate farmland damaged by floods, hurricanes, wind erosion, or other natural disasters, and for the installation of water conservation measures during periods of severe drought.

(c) Payments may also be made under this part for:

(1) Emergency water conservation or water enhancement measures (including measures to assist confined livestock) during periods of severe drought; and

(2) Floodplain easements for runoff and other emergency measures that the Deputy Administrator determines is necessary to safeguard life and property from floods, drought, and the products of erosion on any watershed whenever fire, flood, or other natural occurrence is causing or has caused, a sudden impairment of the watershed.

(d) Payments under this part are subject to the availability of appropriated funds and any limitations that may otherwise be provided for by Congress.

§ 701.4 Producer eligibility.

(a) To be eligible to participate in the ECP the Deputy Administrator must determine that a person is an agricultural producer with an interest in the land affected by the natural disaster, and that person must be liable for or have paid the expense that is the subject of the cost share. The applicant must be a landowner or user in the area where the qualifying event has occurred, and must be a party who will incur the expense that is the subject of the cost share.

(b) Federal agencies and States, including all agencies and political subdivisions of a State, are ineligible to participate in the ECP.

(c) All producer eligibility is subject to the availability of funds and an application may be denied for any reason.

§ 701.5 Land eligibility.

(a) For land to be eligible, the Deputy Administrator must determine that land that is the subject of the cost share:

(1) Will have new conservation problems caused as a result of a natural disaster that, if not treated, would:

(i) Impair or endanger the land;

(ii) Materially affect the productive capacity of the land;

(iii) Represent unusual damage that, except for wind erosion, is not of the type likely to recur frequently in the same area; and

(iv) Be so costly to repair that Federal assistance is or will be required to return the land to productive agricultural use. Conservation problems existing prior to the disaster are not eligible for cost-share assistance.

(2) Be physically located in a county in which the ECP has been implemented; and

(3) Be one of the following:

(i) Land expected to have annual agricultural production,

(ii) A field windbreak or a farmstead shelterbelt on which the ECP practice to be implemented involves removing debris that interferes with normal farming operations on the farm and correcting damage caused by the disaster; or

(iii) A farm access road on which debris interfering with the normal farming operation needs to be removed.

(b) Land is ineligible for cost share if the Deputy Administrator determines that it is, as applicable:

(1) Owned or controlled by the United States;

(2) Owned or controlled by States, including State agencies or other political subdivisions of a State;

(3) Protected by a levee or dike that was not effectively and properly functioning prior to the disaster, or is protected, or intended to be protected, by a levee or dike not built to U.S. Army Corps of Engineers, NRCS, or comparable standards;

(4) Adjacent to water impoundment reservoirs that are subject to inundation when the reservoir is filled to capacity;

(5) Land on which levees or dikes are located;

(6) Subject to frequent damage or susceptible to severe damage according to paragraph (c) of this section;

(7) Subject to flowage or flood easements and inundation when water is released in normal operations;

(8) Between any levee or dike and a stream, river, or body of water, including land between two or more levees or dikes;

(9) Located in an old or new channel of a stream, creek, river or other similar body of water, except that land located within or on the banks of an irrigation canal may be eligible if the Deputy Administrator determines that the canal is not a channel subject to flooding;

(10) In greenhouses or other confined areas, including but not limited to, land in corrals, milking parlors, barn lots, or feeding areas;

(11) Land on which poor farming practices, such as failure to farm on the contour, have materially contributed to damaging the land;

(12) Unless otherwise provided for, not considered to be in annual agricultural production, such as land devoted to stream banks, channels, levees, dikes, native woodland areas, roads, and recreational uses; or

(13) Devoted to trees including, but not limited to, timber production.

(c) To determine the likely frequency of damage and of the susceptibility of the land to severe damage under paragraph (b)(6) of this section, FSA will consider all relevant factors, including, but not limited to, the

location of the land, the history of damage to the land, and whether the land was or could have been protected by a functioning levee or dike built to U. S. Army Corps of Engineers, NRCS, or comparable standards. Further, in making such determinations, information may be obtained and used from the Federal Emergency Management Agency or any other Federal, State (including State agencies or political subdivisions), or other entity or individual providing information regarding, for example, flood susceptibility for the land, soil surveys, aerial photographs, or flood plain data or other relevant information.

§§ 701.6–701.9 [Reserved]

§ 701.10 Qualifying minimum cost of restoration.

(a) To qualify for assistance under § 701.3(a), the eligible damage must be so costly that Federal assistance is or will be required to return the land to productive agricultural use or to provide emergency water for livestock.

(b) The Deputy Administrator shall establish the minimum qualifying cost of restoration. Each affected State may be allowed to establish a higher minimum qualifying cost of restoration.

(c) A producer may request a waiver of the qualifying minimum cost of restoration. The waiver request shall document how failure to grant the waiver will result in environmental damage or hardship to the producer and how the waiver will accomplish the goals of the program. Denial of a request for a waiver is not subject to appeal.

§ 701.11 Prohibition on duplicate payments.

(a) *Duplicate payments.* Participants are not eligible to receive funding under the ECP for land on which the participant has or will receive funding under:

(1) The Wetland Reserve Program (WRP) provided for in 7 CFR part 1467;

(2) The Emergency Wetland Reserve Program (EWRP) provided for in 7 CFR part 623;

(3) The Emergency Watershed Protection Program (EWP) provided for in 7 CFR part 624; or

(4) Any other program that covers the same or similar expenses so as to create duplicate payments, or, in effect, a higher rate of cost share than is allowed under this part.

(b) *Refund.* Participants who receive any duplicate funds, payments, or benefits shall refund any ECP payments received.

§ 701.12 Eligible ECP practices.

(a) Cost-share assistance may be offered for ECP practices to replace or restore farmland, fences, or conservation structures to a condition similar to that existing before the natural disaster. No relief under this part shall be allowed to address conservation problems existing before the disaster.

(b) The practice or practices made available when the ECP is implemented shall be only those practices authorized by FSA for which cost-share assistance is essential to permit accomplishment of the program goals.

(c) Cost-share assistance may be provided for permanent vegetative cover, including establishment of the cover where needed, only in conjunction with eligible structures or installations where cover is needed to prevent erosion and/or siltation or to accomplish some other ECP purpose.

(d) Practice specifications shall represent the minimum levels of performance needed to address the ECP need.

§ 701.13 Submitting requests.

(a) Subject to the availability of funds, the Deputy Administrator shall provide for an enrollment period for submitting ECP cost-share requests.

(b) Requests may be accepted after the announced enrollment period, if such acceptance is approved by the Deputy Administrator and is in accordance with the purposes of the program.

§ 701.14 Onsite inspections.

An onsite inspection must be made before approval of any request for ECP assistance.

§ 701.15 Starting practices before cost-share request is submitted; non-entitlement to payment; payment subject to the availability of funds.

(a) Subject to paragraphs (b) and (c) of this section, costs will not be shared for practices or components of practices that are started before a request for cost share under this part is submitted with the applicable county FSA office.

(b) Costs may be shared for drought and non-drought ECP practices or components of practices that are started before a request is submitted with the county FSA office, only if:

(1) Considered and approved on a case-by-case basis in accordance with instructions of the Deputy Administrator;

(2) The disaster that is the basis of a claim for cost-share assistance created a situation that required the producer to take immediate action to prevent further losses;

(3) The Deputy Administrator determines that the request for

assistance was filed within a reasonable amount of time after the start of the enrollment period; and

(4) The practice was started no more than 60 days before the ECP designation was approved for the applicable county office.

(c) Any action taken prior to approval of a claim is taken at the producer's own risk.

(d) An application for relief may be denied for any reason.

(e) All payments under this part are subject to the availability of funds.

§ 701.16 Practice approval.

(a) Requests shall be prioritized before approval based on factors deemed appropriate by FSA, which include, but are not limited to:

- (1) Type and degree of damage;
- (2) Type of practices needed to address the problem;
- (3) Availability of funds;
- (4) Availability of technical assistance;
- (5) Environmental concerns;
- (6) Safety factors; or
- (7) Welfare of eligible livestock.

(b) Requests for cost-share assistance may be approved if:

- (1) Funds are available; and
- (2) The requested practice is determined eligible.

§§ 701.17–701–20 [Reserved]

§ 701.21 Filing payment application.

Cost-share assistance is conditioned upon the availability of funds and the performance of the practice in compliance with all applicable specifications and program regulations.

(a) *Completion of practice.* After completion of the approved practice, the participant must certify completion and request payment by the payment request deadline. FSA will provide the participant with a form or another manner to be used to request payment.

(b) *Proof of completion.* Participants shall submit to FSA, at the local county office, the information needed to establish the extent of the performance of approved practices and compliance with applicable program provisions.

(c) *Payment request deadline.* The time limits for submission of information shall be determined by the Deputy Administrator. The payment request deadline for each ECP practice will be provided in the agreement after the application is approved. Time limits may be extended where failure to submit required information within the applicable time limits is due to reasons beyond the control of the participant.

§ 701.22 Eligibility to file for cost-share assistance.

Any eligible participant, as defined in this part, who paid part of the cost of an approved practice may file an application for cost-share payment.

§ 701.23 Eligible costs.

(a) Cost-share assistance may be authorized for all reasonable costs incurred in the completion of the practice, up to the maximums provided in §§ 701.26 and 701.27.

(b) Eligible costs shall be limited as follows:

(1) Costs for use of personal equipment shall be limited to those incurred beyond the normal operation of the farm or ranch.

(2) Costs for personal labor shall be limited to personal labor not normally required in the operation of the farm or ranch.

(3) Costs for the use of personal equipment and labor must be less than that charged for such equipment and labor by commercial contractors regularly employed in such areas.

(4) Costs shall not exceed those needed to achieve the minimum performance necessary to resolve the problem being corrected by the practice. Any costs above those levels shall not be considered to be eligible costs for purposes of calculations made under this part.

(c) Costs shall not exceed the practice specifications in § 701.12(d) for cost-share calculations.

(d) The gross amount on which the cost-share eligibility may be computed will not include any costs that were reimbursed by a third party including, but not limited to, an insurance indemnity payment.

(e) Total cost-share payments from all sources shall not exceed the total of eligible costs of the practice to the applicant.

§ 701.24 Dividing cost-share among more than one participant.

(a) For qualifying cost-share assistance under this part, the cost shall be credited to the participant who personally performed the practice or who paid to have it performed by a third party. If a payment or credit was made by one participant to another potential participant, paragraph (c) of this section shall apply.

(b) If more than one participant contributed to the performance of the practice, the cost-share assistance for the practice shall be divided among those eligible participants in the proportion they contributed to the performance of the practice. FSA may determine what proportion was

contributed by each participant by considering the value of the labor, equipment, or material contributed by each participant and any other factors deemed relevant toward performance.

(c) Allowance by a participant of a credit to another participant through adjustment in rent, cash or other consideration, may be considered as a cost of a practice to the paying party only if FSA determines that such credit is directly related to the practice. An applicant who was fully reimbursed shall be considered as not having contributed to the practice performance.

§ 701.25 Practices carried out with aid from ineligible persons.

Any assistance provided by someone other than the eligible participant, including assistance from a State or Federal agency, shall be deducted from the participant's total costs incurred for the practice for the purpose of computing ECP cost shares. If unusual conditions exist, the Deputy Administrator may waive deduction of such contributions upon a request from the State committee and demonstration of the need for such a waiver.

§ 701.26 Maximum cost-share percentage.

(a) In addition to other restrictions that may be applied by FSA, an ECP participant shall not receive more than 75 percent of the lesser of the participant's total actual cost or of the total allowable costs, as determined by this part, to perform the practice.

(b) However, notwithstanding paragraph (a) of this section, a qualified limited resource producer that participates in the ECP may receive no more than 90 percent of the participant's actual cost to perform the practice or 90 percent of the total allowable costs for the practice as determined under this part.

(c) In addition to other limitations that apply, in no case shall the ECP payment exceed 50 percent of what the Deputy Administrator has determined is the agricultural value of the affected land.

§ 701.27 Maximum ECP payments per person.

A person, as defined in part 1400 of this title, is limited to a maximum cost-share of \$200,000 per person, per disaster.

§§ 701.28–701.30 [Reserved]**§ 701.31 Maintenance and proper use of practices.**

(a) Each participant receiving cost-share assistance is responsible for the required maintenance and proper use of the practice. Some practices have an

established life span or minimum period of time during which they are expected to function as a conservation practice with proper maintenance. Cost-share assistance shall not be authorized for normal upkeep or maintenance of any practice.

(b) If a practice is not properly maintained for the established life span, the participant may be required to refund all or part of cost-share assistance received. The Deputy Administrator will determine what constitutes failure to maintain a practice and the amount that must be refunded.

§ 701.32 Failure to comply with program provisions.

Costs may be shared for performance actually rendered even though the minimum requirements otherwise established for a practice have not been satisfied if a reasonable effort was made to satisfy the minimum requirements and if the practice, as performed, will adequately address the need for the practice.

§ 701.33 Death, incompetency, or disappearance.

In case of death, incompetency, or disappearance of any participant, any cost-share payment due shall be paid to the successor, as determined in accordance with part 707 of this chapter.

§ 701.34 Appeals.

Part 11 of this title and part 780 of this chapter apply to determinations made under this part.

§ 701.35 Compliance with regulatory measures.

Participants who perform practices shall be responsible for obtaining the authorities, permits, rights, easements, or other approvals necessary to the performance and maintenance of the practices according to applicable laws and regulations. The ECP participant shall be wholly responsible for any actions taken with respect to the project and shall, in addition, be responsible for returning and refunding any ECP cost shares made, where the purpose of the project cannot be accomplished because of the applicants' lack of clearances or other problems.

§ 701.36 Schemes and devices and claims avoidances.

(a) If FSA determines that a participant has taken any action designed to defeat, or has the effect of defeating, the purposes of this program, the participant shall be required to refund all or part of any of the program payments otherwise due or paid that participant or related person for that

particular disaster. These actions include, but are not limited to, failure to properly maintain or deliberately destroying a practice and providing false or misleading information related to practices, costs, or arrangements between entities or individuals that would have an effect on "person" determinations made under this part.

(b) All or any part of cost-share assistance that otherwise would be due any participant may be withheld, or required to be refunded, if the participant has adopted, or participated in, any scheme or device designed to evade the maximum cost-share limitation that applies to the ECP or to evade any other requirement or provision of the program or this part.

(c) If FSA determines that a participant has employed any scheme or device to deprive any other person of cost-share assistance, or engaged in any actions to receive payments under this part that also were designed to avoid claims of the United States or its instrumentalities or agents against that party, related parties, or third parties, the participant shall refund all or part of any of those program payments paid to that participant for the project.

(d) For purposes of this section, a scheme or device can include, but is not limited to, instances of coercion, fraud, or misrepresentation regarding the claim for ECP assistance and the facts and circumstances surrounding such claim.

(e) A participant who has knowingly supplied false information or filed a false claim shall be ineligible for cost-share assistance related to the disaster for which the false information was filed, or for any period of time FSA deems appropriate. False information or a false claim includes, but is not limited to, a request for payment for a practice

not carried out, a false billing, or a billing for practices that do not meet required specifications.

§ 701.37 Loss of control of the property during the practice life span.

In the event of voluntary or involuntary loss of control of the land by the ECP cost-share recipient during the practice life-span, if the person acquiring control elects not to become a successor to the ECP agreement and the practice is not maintained, each participant who received cost-share assistance for the practice may be jointly and severally liable for refunding any ECP cost-share assistance related to that practice. The practice life span, for purposes of this section, includes any maintenance period that is essential to its success.

§§ 701.38–701.40 [Reserved]

§ 701.41 Cost-share assistance not subject to claims.

Any cost-share assistance or portion thereof due any participant under this part shall be allowed without regard to questions of title under State law, and without regard to any claim or lien against any crop or property, or proceeds thereof, except liens and other claims of the United States or its instrumentalities. The regulations governing offsets and withholdings at parts 792 and 1403 of this title shall be applicable to this program and the provisions most favorable to a collection of the debt shall control.

§ 701.42 Assignments.

Participants may assign ECP cost-share assistance payments, in whole or in part, according to part 1404 of this title.

§ 701.43 Information collection requirements.

Information collection requirements contained in this part have been approved by the Office of Management and Budget under the provisions at 44 U.S.C. Chapter 35 and have been assigned OMB Number 0560–0082.

§ 701.44 Agricultural Conservation Program (ACP) contracts.

Contracts for ACP that are, or were, administered under this part or similar contracts executed in connection with the Interim Environmental Quality Incentives Program, shall, unless the Deputy Administrator determines otherwise, be administered under, and be subject to, the regulations for ACP contracts and the ACP program that were contained in the 7 CFR, parts 700 to 899, edition revised as of January 1, 1998, and under the terms of the agreements that were entered into with participants.

§ 701.45 Forestry Incentives Program (FIP) contracts.

The regulations governing the FIP as of July 31, 2002, and contained in the 7 CFR, parts 700 to 899, edition revised as of January 1, 2002, shall continue to apply to FIP contracts in effect as of that date, except as provided in accord with a delegation of the administration of that program and such delegation and actions taken thereunder shall apply to any other FIP matters as may be at issue or in dispute.

Signed in Washington, DC on February 5, 2004.

James R. Little,

Administrator, Farm Service Agency.

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