

announced its intention to begin offering World cotton contracts beginning in the fourth quarter of 2015. To determine actual commercial differences in value for various grades above or below the basis grade in the settlement of this new World cotton futures contract, AMS was asked by these same stakeholders to collect and publish cotton spot market price information relevant to the World cotton contract. Therefore, AMS is amending § 27.94 to designate the same bona fide cotton spot markets for the World cotton futures contract as have been designated for the No. 2 cotton futures contract.

### **Summary of Comments**

A proposed rule was published in the **Federal Register** on December 16, 2014, with a comment period of December 16, 2014 through January 16, 2015 (79 FR 74654). No comments were received by AMS.

The U.S. cotton industry and ICE requested that AMS, Cotton and Tobacco Program to collect and publish cotton spot market price information relevant to the World cotton contract prior to the offering of this new futures contract, which is scheduled for the fourth quarter of 2015.

### **List of Subjects in 7 CFR Part 27**

Commodity futures, Cotton.

For the reasons set forth in the preamble, 7 CFR part 27 is amended as follows:

### **PART 27—[Amended]**

- 1. The authority citation for 7 CFR part 27 continues to read as follows:

**Authority:** 7 U.S.C. 15b, 7 U.S.C. 473b, 7 U.S.C. 1622(g).

- 2. In § 27.94, paragraph (a) is revised to read as follows:

#### **§ 27.94 Spot markets for contract settlement purposes.**

\* \* \* \* \*

(a) For cotton delivered in settlement of any Cotton No. 2 or World Cotton contract on the Intercontinental Exchange (ICE); the spot markets are Southeastern, North and South Delta, Eastern Texas and Oklahoma, West Texas, and Desert Southwest.

\* \* \* \* \*

Dated: October 19, 2015.

**Rex A. Barnes,**

*Associate Administrator, Agricultural Marketing Service.*

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## **DEPARTMENT OF AGRICULTURE**

### **Farm Service Agency**

#### **7 CFR Part 789**

#### **RIN 0560-AH68**

### **Agriculture Priorities and Allocations System**

**AGENCY:** Farm Service Agency, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Farm Service Agency (FSA) is establishing the regulation for the Agriculture Priorities and Allocations System (APAS). Food is a critical commodity essential to the national defense (including civil emergency preparedness and response). To avoid civilian hardship during national defense emergencies, it may be necessary to regulate the production, processing, storage, and wholesale distribution of food. Through the APAS rule, the U.S. Department of Agriculture (USDA) will respond to requests to place priority ratings on contracts or orders (establishing priority on which contracts or orders are filled first) for agriculture commodities up through the wholesale levels, including agriculture production equipment, and allocate resources, as specified in the Defense Production Act (DPA) of 1950, as amended, if the necessity arises. FSA is implementing this rule as a way to redirect the agriculture commodities and resources to areas of hardship or potential hardship due to national emergencies. In most cases, there is likely to be no economic impact in filling priority orders because it would generally just be changing the timing in which orders are completed.

**DATES:** Effective December 21, 2015.

#### **FOR FURTHER INFORMATION CONTACT:**

Robert Haughton, telephone (202) 702-0135. Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

#### **SUPPLEMENTARY INFORMATION:**

#### **Executive Summary**

APAS is a USDA program that supports not only national defense needs (such as food for combat rations), but also emergency preparedness initiatives by addressing essential civilian needs (food and food resources) through the placing of priorities on contracts for items and services or allocating resources, as necessary. Although a specific Presidential disaster designation is not required, the ability

to prioritize or allocate items or services can be triggered by a determination by the President or designated entities that this action is necessary or appropriate to promote national defense including the imminent need for emergency preparedness. Under DPA (50 U.S.C. App. 2061 to 2170, 2171, and 2172), the term “national defense” includes emergency preparedness, response, and critical infrastructure protection and restoration. Authority for priorities and allocations is specified in DPA and further defined in Executive Order 13603, “National Defense Resources Preparedness,” dated March 16, 2012. Executive Order 13603 replaced Executive Order 12919 (referenced in the proposed rule) and further defined jurisdictional areas and national defense preparedness roles and responsibilities for specific Departments. Executive Order 13603 did not change the intent of DPA as it applies to USDA’s functions in national defense, including emergency preparedness; instead it gave additional jurisdiction to USDA for livestock, veterinary, and plant health resources.

For the final rule, only those sections in the “Supplementary Information” part of the proposed rule preamble that required modifications due to Executive Order 13603 or for other reasons are further discussed in the “Supplementary Information” section of this final rule. A more thorough explanation along with examples of APAS applicability was provided in the proposed rule that was published on May 19, 2011 (76 FR 29084–29106). References in those examples to Executive Order 12919 should be read to mean Executive Order 13603. Also contained in this summary are descriptions of comments received and responses developed on the proposed rule. We are not reiterating the “Section by Section Discussion of Rule” section of the proposed rule preamble in this document. Any changes to those sections are discussed in this document.

#### **Jurisdiction**

Title I of DPA and Executive Order 13603 authorize jurisdictional areas for each Department that is involved in national defense including emergency preparedness. USDA has jurisdiction for items that fall under the categories of:

(1) Food resources (including potable water packaged in commercially marketable containers) and food resource facilities;

(2) Livestock resources, veterinary resources, and plant health resources; and

(3) Domestic distribution of farm equipment and commercial fertilizer.

USDA cannot use its DPA authority for items or services not in its

jurisdiction. Those persons<sup>1</sup> in need of items or services that do not fall under the jurisdiction of USDA will request priorities or allocations assistance from the applicable resource agency.<sup>2</sup> USDA will direct the requesters to the appropriate resource agency if the request comes to USDA.

USDA intends to work with other resource agencies to address instances where USDA does not have jurisdiction for all of the items necessary to complete the order. For example, if an order for the delivery of milk needs to be prioritized, USDA would have jurisdiction over the milk as a food resource, but it would not have jurisdiction over the truck or fuel for the vehicle. Therefore, USDA intends to work with the other resource agencies to receive delegations to prioritize contracts or orders for other items or services necessary for use in support of programs approved for use by USDA (see next section). Until such delegations are received, USDA will follow the procedure described in the previous paragraph.

USDA also plans to provide delegations to other resource agencies to ensure they can respond timely to emergency events.

#### **APAS Programs Approved for Use by USDA**

USDA has three approved programs for priorities and allocations support under section 202 of Executive Order 13603. Items or services for which USDA may provide priorities or allocations support must fall under one of the following programs:

(1) Food and food resources (civilian): Programs involving food and food resources processing and storage in support of emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, 42 U.S.C. 5195–5197h).

(2) Agriculture and food critical infrastructure protection and restoration (civilian): Programs to protect or restore the agriculture and food system from terrorist attacks, major disasters, and other emergencies.

(3) Military food rations: Programs to provide the Department of Defense with food resources for combat rations.

For all other requests for items under USDA's jurisdiction that are not covered

by these three programs, USDA will request concurrence from the Secretary of Homeland Security before placing a priority rating on the items.

#### **Scope**

APAS covers only those government and private entities that have national defense, or emergency preparedness, response, and recovery responsibilities. This small realm strictly limits the participants eligible to request assistance through APAS. Also, the vendors that supply agriculture related items (food, food resources) and in the quantity that is expected to be requested is inherently limited in scope. Only a limited number of vendors are able to produce or deliver the large quantities of items required for emergency preparedness activities that would fall under the authority of Title I of DPA. For example, for preparations in advance of Hurricane Ike hitting the Texas Coast in 2008, one Federal agency considered requesting 1 million meals-ready-to-eat. In this example, it is clear that there would be limited companies that would be able to quickly supply 1 million meals-ready-to-eat. This is a representative example of the type of needs for which a priority rating would be requested through APAS. As a result, this program has a very limited customer base of large manufacturers and suppliers as well as those Government and public agencies (for example, the Red Cross), having national defense, or emergency preparedness, response, and recovery responsibilities.

Government organizations may request priority ratings through APAS to ensure that they are able to obtain critical resources during or in anticipation of an emergency to lessen the effects of the hazard on civilian populations.

As an example of how the Department of Commerce (DOC) has needed to use its Defense Priorities and Allocations System (DPAS) (15 CFR part 700), during the aftermath of Hurricane Katrina, after the request was endorsed by the Federal Emergency Management Agency (FEMA), DOC authorized a railroad to place a priority rated order with Company X for equipment to repair the damages to the railroad system supporting commodity movements in and around the New Orleans area. This rated order allowed the vendor responsible for repairing the railroad infrastructure around the New Orleans area to complete repairs in the fastest time possible. This allowed the response organizations to quickly receive items in bulk quantities needed to support the mass care and housing of

those displaced by the hurricane and its aftermath. When the railroad placed the rated order for equipment, Company X was required to fill the railroad's order first, before any other orders, unless Company X had a legal basis for rejecting the rated order. In addition, all customers currently under contract obligations from Company X would not have breach-of-contract cause of action against Company X if their orders could not be filled by the original agreed-to time due to unplanned delays due to filling the rated order.

#### **DPA Priorities and Allocations Authority**

Section 101 of DPA (50 U.S.C. App. 2071) establishes the broad authority for the President to require the acceptance and priority performance of contracts or orders (other than contracts of employment) to support or promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense. This is commonly referred to as "priorities and allocations" authority. Through Executive Order 13603 the President delegated the DPA section 101 priorities and allocations authority to the following agency heads:

- The Secretary of Agriculture with respect to food resources (including potable water packaged in commercially marketable containers), food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer.
- The Secretary of Energy with respect to all forms of energy.
- The Secretary of Health and Human Services with respect to health resources.
- The Secretary of Transportation with respect to all forms of civil transportation.
- The Secretary of Defense with respect to water resources.
- The Secretary of Commerce with respect to all other materials, services, and facilities, including construction materials.

Since the initial enactment, Congress has continued to reauthorize DPA. On September 30, 2009, Congress enacted the Defense Production Act Reauthorization (DPAR) of 2009 (Pub. L. 111–67). A significant difference in that reauthorization was the requirement for Departments other than DOC to initiate rulemaking to implement their responsibilities under DPA. Specifically, section 101(d) of DPA (50 U.S.C. App. 2071(d)), as added by DPAR, directed the head of each Federal agency to issue final rules that establish standards and procedures to use the authority of section 101 to promote the national defense under both emergency and nonemergency

<sup>1</sup> The term "person" as used here refers to the requester of the priority rating. A person includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof, or any Federal agency.

<sup>2</sup> The term "resource agency" as used here refers to any Federal agency that is delegated priorities and allocations authority as specified in § 789.2 of this final rule.

conditions and, as appropriate and to the extent necessary, consult with the heads of other Federal agencies to develop a consistent and unified Federal Priorities and Allocations System (FPAS).

DPA was extended again through September 30, 2019, by Pub. L. 113–172 (Sept. 26, 2014). In the most recent reauthorization, Congress retained the requirement in section 101(d) (50 U.S.C. App. 2071(d)) to issue final rules but also added a requirement to annually review and update those regulations whenever appropriate.

FEMA in the Department of Homeland Security (DHS) is responsible for coordinating priorities and allocations rulemaking efforts among the six Federal agencies that have been delegated DPA section 101 authority (referred to as “resource agencies”) to ensure consistency and uniformity of rule language and provisions across resource agency jurisdictions. Together, the priorities and allocations system regulations of each resource agency will constitute FPAS.

USDA is working with FEMA and the other Departments that have DPA authority to have common rules for the implementation of priorities and allocations. Those Departments are in various stages of developing and publishing their own rules covering the jurisdictional areas outlined in Executive Order 13603. DOC published a final rule revising its DPAS regulation on August 14, 2014 (79 FR 47560). The Department of Energy published the rule for the Energy Priorities and Allocations System on June 9, 2011 (76 FR 33615); the Department of Transportation published the rule for the Transportation Priorities and Allocations System on October 1, 2012 (77 FR 59793); and the Department of Health and Human Services published the rule for the Health Resources Priority and Allocations System on July 17, 2015 (80 FR 42408–42423).

Within USDA, authority to administer APAS has been delegated to the FSA Administrator. FSA will manage APAS for all USDA.

This rule establishes APAS, one-part of the FPAS, to implement USDA’s administration of its delegated authority under DPA section 101 and other related statutes such as the priorities provisions of the Military Selective Service Act<sup>3</sup> (50 U.S.C. App. 468) (see Executive Order 12742, “National Security Industrial Responsiveness,”

<sup>3</sup> References to the Military Selective Service Act apply to those required deliveries to the Government exclusively for the use of the armed forces or for the use of the Atomic Energy Commission.

dated Jan. 8, 1991). APAS is consistent with the existing DPAS regulation (15 CFR part 700) implemented by DOC to provide continuity with long-established priorities system procedures and to make use of a proven foundation for a consistent and unified FPAS, as appropriate and to the extent practicable.<sup>4</sup>

#### APAS Description

APAS provides guidance and procedures for use of DPA priorities and allocations authority with respect to the resource areas delegated by the President to the Secretary of Agriculture as specified in Executive Order 13603: Food resources; food resource facilities; livestock, veterinary, and plant health resources; and the domestic distribution of farm equipment and commercial fertilizer. As specified in Executive Order 13603, section 202, priorities and allocations may be used only to support programs that have been determined in writing “as necessary or appropriate to promote the national defense” by:

- (a) The Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense, space, and directly related activities;
- (b) The Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; or
- (c) The Secretary of Homeland Security, with respect to all other national defense programs, including civil defense and continuity of Government.

Under DPA, the term “national defense” specifically includes emergency preparedness activities conducted pursuant to title VI of the Stafford Act.<sup>5</sup> The Stafford Act, in section 602(b) of title VI, also cross-references DPA by stating that “[t]he terms ‘national defense’ and ‘defense’, as used in [DPA], includes [sic] emergency preparedness activities conducted pursuant to this title.” (See 42 U.S.C. 5195a(b).) Emergency preparedness activities include a broad range of measures to be taken in preparation for, during, and in response to natural disasters or accidental or

<sup>4</sup> DPAS regulations provided the starting point for development of the common rule language discussed above.

<sup>5</sup> The term “national defense” is defined in section 702(14) of DPA as “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the [Stafford Act] and critical infrastructure protection and restoration.” See 50 U.S.C. App. 2152(14).

man-caused events (that is, hazards).<sup>6</sup> Priority ratings are expected to be used most for:

- (1) Preparedness, including actions taken before an event occurs to lessen the severity of hardships to civilians,
- (2) Response, including actions taken immediately after the event happens, but before any recovery actions are taken, to relieve the effects on civilians; response includes both the anticipation of the event and the immediate response to it; and
- (3) Recovery, including actions taken to restore critical infrastructure and key resources to normal operations.

USDA expects the requests for priority ratings will predominately be from Federal government agencies, and the State and local governments with a responsibility in emergency preparedness. USDA expects that a request from a private entity will be for the purpose of fulfilling a government contract; however, USDA will act on other requests that are appropriate for the regulation.

According to Executive Order 13603 the priorities and allocations authority of DPA may be used by the Secretary of Agriculture only to support programs that have been determined in writing as necessary or appropriate to promote the national defense. USDA has coordinated with the Secretary of Homeland Security and the Secretary of Defense to identify and approve programs that will cover everything for which we expect to need to provide priorities and allocations as covered in this regulation.

USDA has two programs that have been approved by the Secretary of Homeland Security for priorities and allocations support pursuant to the authority of the Secretary of Homeland Security as currently reflected in section 202(c) of Executive Order 13603:

- (1) Food and food resources (civilian): Programs involving food and food resources processing and storage in support of emergency preparedness activities conducted pursuant to Title VI of the Stafford Act. Such programs involve activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to handle immediate emergency conditions that would be created by the hazard, and to

<sup>6</sup> The term “emergency preparedness” is defined in section 602(a) of the Stafford Act as “all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard.” (See 42 U.S.C. 5195a(a).) Section 602(a) also provides a non-exhaustive list of specific measures that constitute emergency preparedness.

make emergency repairs to, or the emergency restoration of, vital utilities and food resource facilities destroyed or damaged by the hazard.

(2) Agricultural and food critical infrastructure protection and restoration: Programs to protect or restore the agriculture and food system from terrorist attacks, major disasters, and other emergencies. In Homeland Security Presidential Directive HSPD-9, "Defense of United States Agriculture and Food," dated January 30, 2004, such programs involve activities and measures to:

- Identify and prioritize critical infrastructure and key resources in the agriculture and food system for establishing protection requirements;
- Develop awareness and early warning capabilities to recognize threats;
- Mitigate vulnerabilities at critical production and processing nodes;
- Enhance screening procedures for domestic and imported products; and
- Enhance response and recovery procedures.

These programs support the national defense by providing for essential civilian needs to ensure a viable food and agriculture sector during an emergency preparedness event or a military conflict. Both programs involve emergency preparedness activities and the maintenance and restoration of the critical infrastructure and key resources.

USDA has one program, Food Resources (combat rations), that has been approved by the Secretary of Defense for priorities and allocations support pursuant to the authority of the Secretary of Defense as currently reflected in section 202(a) of Executive Order 13603. USDA delegated implementation authority of the agricultural portion of DPA to DOC. DOC in turn delegated authority to the Department of Defense to administer a "priorities" program for combat rations to meet troop requirements (an agreement between DOC and USDA, dated January 28, 1991, and approved by FEMA on February 1, 1991). USDA is rescinding the delegation of authority with DOC and delegating authority directly to the Department of Defense to administer the combat rations programs.

The approved programs are listed in Schedule I of the APAS regulation (see Schedule I at the end of this document for a complete list of approved programs).

Before USDA can exercise its priorities or allocations authority for any requirements not covered under the approved programs, as specified in section 202 of Executive Order 13603, the Secretaries of Defense, Energy, or Homeland Security, as appropriate,

would have to concur, in writing, with USDA that use of priorities or allocations authority by USDA would be necessary or appropriate to promote the national defense.

Commodities covered under the APAS regulation include those items required for production of agriculture commodities (including fertilizer, agriculture seed, and livestock feed), raw and processed agriculture products for wholesale distribution, and agriculture production equipment.

### Priorities and Allocations

APAS has two principal components: Priorities and allocations.

#### Priorities

In the "priorities" component of APAS, certain contracts between the government and private parties, or contracts between private parties, would be required to be given priority (priority rating) over other respective contracts to ensure timely delivery of an item needed for an "approved program." "Approved program" is defined in 7 CFR 789.8 as a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, as specified in section 202 of Executive Order 13603. As stated above, certain USDA programs have been approved by the Secretary of Homeland Security and by the Secretary of Defense as necessary or appropriate to promote the national defense. Other programs could be approved in the future.

#### Use of Priority Ratings

If you (as a vendor) receive a rated order, you must give it preferential treatment as required by subpart C, §§ 789.10 through 789.18 (see the proposed rule for the section by section discussion of the regulation). This means that you must accept and fill rated orders for items that you normally supply and consistent with regularly established terms of sale (see § 789.13(a)). Failure to comply with the provisions of the rated order may result in legal actions and fines against the recipient of the rated order. However, certain grounds for mandatory rejection or optional rejection of the rated order may apply (see § 789.13(b) and (c)). Rated orders must be accepted or rejected within specified time frames (see §§ 789.13(d) and 789.13(e)).

All rated orders must be scheduled in a manner and to the extent possible to ensure timely delivery by the required delivery date contained in each order (see § 789.14(a)).

The existence of previously accepted unrated orders or contracts or lower rated orders is not sufficient reason for rejecting a rated order. In fact, you (as a supplier or vendor) are required to displace or defer lower rated or unrated orders if they conflict with your performance against a higher rated order (see § 789.14(b)). When you receive multiple rated orders for specific goods or services and the orders have the same rating level and scheduled date, you must give precedence to the conflicting order in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person must give precedence to those orders that have the earliest receipt dates (see § 789.14(c)).

To ensure that contracts and orders for authorized programs are completed in a timely fashion, you (as a supplier or vendor) must place, as necessary, a priority rating on all the contracts and orders you issue with suppliers for items needed to fill rated orders you have received (see § 789.15). This requirement ensures that priority treatment will be afforded your orders by your suppliers and from vendor to vendor throughout the supply chain. Other requirements apply to changes or cancellations of priority ratings and rated orders (see § 789.16) and use of rated orders for certain items (see § 789.17).

You may place a priority rating on your contracts or orders only if you are in receipt of a rated order or if you have been otherwise explicitly authorized to do so by USDA or a delegate agency (see § 789.18 for other limitations on placing rated orders).

#### Allocations

An "allocation" is defined in § 789.8 as the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense. As specified in the allocations component of the APAS regulation (see subpart E, §§ 789.30 through 789.37), USDA has the authority to allocate specified items to promote the national defense.

Allocations authority would be used only when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities (see

§ 789.30(a)). Under no circumstances would allocations be used to ration materials or services at the retail level (see § 789.30(a)). Allocations orders would be distributed equitably among the suppliers of the resource(s) being allocated and would not require any person to relinquish a disproportionate share of the civilian market (see § 789.30(b)).

Additionally, as specified in DPA section 101(b) and section 201(e) of Executive Order 13603, USDA may not use an allocation to control the general distribution of a material in the civilian market unless:

- The Secretary has made a written finding that such material is a scarce and critical material essential to the national defense and the requirements of the national defense for such material cannot otherwise be met without a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;
- The Secretary has submitted the finding for the President's approval through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism; and
- The President has approved the finding (see § 789.33).

DOC has extensive experience using its priorities authority (under its DPAS regulation), but has not used its allocations authority in more than 50 years. Much like DPAS, APAS is expected to primarily be used for prioritizing contracts and to a much lesser extent for making allocations. However, USDA is including allocations in the regulation to have the option ready, if needed. The allocations standards and procedures provide strong assurance that allocations would only be used in situations where the circumstances justify such orders.

For example, in a situation where dairy operations are brought to a standstill due to a detected presence of Foot and Mouth disease. The output of milk produced in the United States is curtailed by 80 percent as a result of reduced herd numbers in response to the outbreak. Prices for processed and unprocessed milk would skyrocket. In such an example, when USDA determines that allocating milk commodities to processors or wholesalers is necessary to promote the national defense, namely, as an emergency response action under Title VI of the Stafford Act (which is an approved program by the Secretary of Homeland Security under section 202(c) of Executive Order 13603). Because allocating this commodity would involve controlling its general distribution in the market, USDA then

makes the required finding as specified in DPA section 101(b) for allocating this food commodity and forwards that finding to the President through the National Security Advisor. After Presidential concurrence with the determination, per Executive Order 13603, USDA may allocate this commodity on a pre-determined basis to processors or wholesalers. The purpose of this allocation would be to control the distribution of milk to ensure civilian hardships are minimized. USDA would allocate existing and new milk sources to redistribute milk products in a way that ensures previously established priorities for this food product (for example, school food programs and nutritional programs for mothers and infant children to continue to provide some level of resources for those already enrolled in such programs) are met and would continue implementing allocation policies until USDA determines that this food source shortfall no longer meets the requirements for allocation programs.

#### **Proposed Rule Comments**

FSA's proposed rule had a 60-day comment period that ended on July 18, 2011. This final rule addresses the comments received on the proposed rule; and makes minor revisions to address the public comments and the recently published Executive Order 13603. As explained above, Executive Order 13603 added new categories to USDA's jurisdiction. These additional categories did not require substantive changes to the regulation; therefore, additional comments are not being requested.

FSA received two comments; one comment was from a pet food association and the other comment was submitted jointly by a grain and feed association (representing all sectors of the grain and feed industry—not limited to food) and a trade association. The comments raised the same set of concerns about APAS, including concerns on how APAS will be initiated or triggered, and how APAS will affect the agricultural sectors in potential cases of market disturbances or disruptions. The following summarizes each issue raised by the commenters and FSA's response to each issue.

**Comment:** Improper use of APAS authority poses a risk of undermining the United States' hard-fought reputation as a reliable supplier of agricultural products to domestic and foreign markets.

**Response:** APAS authority is granted to USDA by DPA and Executive Order 13603. APAS provides the ability to expedite the provision of agricultural

resources to areas affected by a disaster, and is only authorized for times when the normal market channels cannot provide the resources to the disaster areas in a timely manner. If normal market channels are capable of providing the resources, APAS will not be used to expedite delivery of the resources. Further, with respect to allocations, FSA expects that the allocations section of this regulation would be used only in worst case scenarios, relying first on priorities authority to respond to emergency conditions. This is evident by the fact that DOC has the same allocations authority under DPA and has not used the allocations authority in over 50 years. Additionally, even if allocations orders were issued, the regulation has strict parameters in place. As stated in § 789.30(b), allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market. As a result, FSA expects that if APAS were used in the event of an emergency, domestic and foreign markets would not be adversely affected, including the United States' ability to readily supply agricultural products to domestic and foreign markets. Therefore, no change was made to the regulation in response to this comment.

**Comment:** USDA should fully investigate whether it has sufficient existing authority under the Commodity Credit Corporation (CCC) Charter Act or other laws to execute orders to prioritize and reallocate the distribution of food resources.

**Response:** The CCC Charter Act (15 U.S.C. 714–714p) was established with the intent to stabilize commodity market prices for agricultural producers during volatile economic periods through price support and disaster programs. The intent of the CCC Charter Act was never to provide immediate food and food resource assistance to a civilian population that has been impacted by a disaster. As a result, the CCC has no jurisdiction in this area of national defense and emergency preparedness. Therefore, no change was made to the regulation in response to this comment.

**Comment:** Craft language in the regulation itself specifying the triggering events(s) under which USDA would activate APAS, and more clearly define the 'national defense' aspects of APAS, differentiating those from a limited regional or local natural disaster for which the ability to respond effectively already exists.

**Response:** The term “national defense” is defined in DPA. In implementing DPA, Executive Order 13603 also uses that definition. The Federal Departments that collaborated on developing a priorities and allocations common regulation use the definition found in Executive Order 13603 in their respective regulation. FEMA and other Federal agencies responsible for emergency response and recovery by law cannot enter a disaster impacted zone unless specific protocols have been met. The protocols are to ensure that first response is the responsibility of State, local, and Tribal authorities, and only when those State, local, and Tribal authorities are overwhelmed and national security is at risk, then the Federal agencies begin to play a role. If the disaster or event is of such a magnitude that the State, local, and Tribal authorities cannot meet the needs of the public, then APAS could be used by Federal Departments with response functions to request priority ratings to support the efforts of first responders in national defense (including emergency preparedness) initiatives. Under DPA and Executive Order 13603, Federal Departments do not need a Stafford Act declaration to use their priorities and allocations authorities. Therefore, no change was made to the regulation in response to this comment.

**Comment:** The proposed regulation, if finalized, should vest in the President the sole power to activate the use of APAS’s priority-ranking and allocations-order authority. Further, the Secretary of Agriculture should have sole power to authorize the actual issuance of any order under APAS.

**Response:** Executive Order 13603 delegates the President’s priorities and allocations authorities under DPA to the heads of specific Federal agencies. This includes the authority to require acceptance and priority performance of contracts or orders to promote the national defense over performance of any other contracts or orders, as well as authority to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense. Subject to the Executive Order’s limitation that the priorities and allocations authority be used only to support programs that have been determined in writing (by the Secretaries of Defense, Energy, or Homeland Security, depending on the activity) as necessary or appropriate to promote the national defense, the agency heads have broad discretion in determining the circumstances in which the priorities or allocations authority will be used. The President has

delegated these authorities to the Secretary of Agriculture in Executive Order 13603 with respect to certain resource areas (and previously in Executive Order 12919). The Secretary of Agriculture has re-delegated DPA authority to the FSA Administrator through the Under Secretary for Farm and Foreign Agricultural Services (see 7 CFR 2.16(a)(6); 2.42(a)(5)). Therefore, no change was made to the regulation in response to this comment; however, minor changes were made in this rule as a result of the release of Executive Order 13603 to include a revised definition of “food resources.”

**Comment:** The proposed rule dismisses and fails to accurately assess the economic cost of APAS to the agriculture industry and other sectors, including transporters, if USDA uses its authority to issue orders that circumvent existing commercial and governmental contracts.

**Response:** As noted above, there is a limited group of participants eligible for participation in the APAS program; therefore, there were limited data available to analyze the economic costs. DOC’s use of DPAS, which has been used for similar priority ratings using its delegation of authority from the Secretary of Agriculture, has not resulted in known economic hardships to participants involved in the agricultural industry and other sectors. USDA and other Federal agencies will not use APAS to circumvent existing commercial and government contracts. Instead, they will use APAS to speed up delivery of items under contract or increase amounts procured under contract. Therefore, no change was made to the regulation in response to this comment.

**Comment:** As proposed, APAS requires that parties accept or reject priority orders received in response to emergency preparedness conditions within 6 to 12 hours, as opposed to the 15 days generally provided under the DPAS. Such a requirement may be unreasonably short to make such a management-level decision.

**Response:** The requirement for acceptance or rejection of a rated order for certain emergency preparedness conditions within 6 hours (where the order is issued in response to a hazard that has occurred) or the greater of 12 hours or the time specified in the order (where the order is issued to prepare for an imminent hazard) was based on the principle that food and drinking water are critical elements to sustain human life and any delays after this timeframe can cause life-threatening hardships. The 15 days requirement for DO-rated orders pertains to other conditions,

when time is not as critical to provide food resources to the population. If a vendor cannot meet the requirement of the 6 to 12 hours to accept a rated order, it must reject the order on the basis that it cannot meet the required timeframe. Vendors should not accept rated orders if they are unsure of their capacity to fill the order. Therefore, no change was made to the regulation in response to this comment.

**Comment:** The FSA Administrator should not be authorized to reject a request for an informal hearing to appeal a rated order, particularly since the agency would continue to require that contract performance under the order not be stayed pending the outcome of the appeal.

**Response:** Due to the nature of this regulation and the potential life and death situations that warrant use of priority ratings, we cannot grant every request for an informal hearing during an appeal. The FSA Administrator will address each request on a case by case basis. Therefore, no change was made to the regulation in response to this comment.

**Comment:** If USDA proceeds to finalize an APAS rule, it needs to reexamine and improve upon the proposed language currently found in § 789.70, which provides legal protection to private-sector companies that find it necessary to cancel or delay their performance on other commercial contracts so they can fulfill any APAS-related orders prioritized by USDA.

**Response:** The text of 7 CFR 789.70 restates the liability protection provisions of DPA (50 U.S.C. app. 2157). USDA believes that the DPA liability protection from damages or penalties for actions resulting directly or indirectly from compliance with APAS extends to legal actions brought by private parties and covers not only the vendor(s) receiving a rated order or subject to an allocations order, but also to other vendors whose contracts are affected as a result of the other vendor’s compliance with the rated order or allocation. Therefore, no change was made to the regulation in response to this comment.

### Other Rule Changes

As explained above, the jurisdiction delegated by the President to the Secretary of Agriculture as specified in Executive Order 13603 was expanded to include livestock, veterinary, and plant health resources, in addition to the previous delegations for food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer. Therefore, nondiscretionary changes were made

throughout the regulation to include livestock, veterinary, and plant health resources in the following places:

- § 789.1, “Purpose;”
- Section 789.2, “Priorities and Allocations Authority,” which summarizes the delegations of priorities and allocations authority; and
- Section 789.8, “Definitions.”

USDA’s Animal and Plant Health Inspection Service developed the definitions that were added for the new jurisdiction for livestock, veterinary, and plant health resources. These new definitions are:

- “Animal” means any member of the animal kingdom (except a human).<sup>7</sup>
- “Livestock” means all farm-raised animals.<sup>8</sup>
- “Livestock resources” means materials, facilities, vehicles, health supplies, services, and equipment required for the production and distribution of livestock.
- “Plant health resources” means biological products, materials, facilities, vehicles, supplies, services, and equipment required to prevent the impairment of, improve, or restore plant health conditions.
- “Veterinary resources” means drugs, biological products, medical devices, materials, facilities, vehicles, health supplies, services, and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the health conditions of the animal population.

Executive Order 13603 modifies the following definitions: “Civil transportation,” “energy,” “food resources,” “food resource facilities,” “health resources,” and “water resources.” The most significant changes are in the definitions of “food resources” and “water resources,” which establish that the jurisdiction for potable water packaged in commercially marketable containers belongs to the Secretary of Agriculture. All other modifications clarify existing definitions.

In addition, several non-substantive changes were made for consistency with the related regulations being implemented by other agencies. For example, minor edits were made to this rule to parallel edits made to the final DPA rule published by the Department of Transportation on October 1, 2012 (77 FR 59793–59818). The nature of all of these changes was minor clarifying changes, for example:

- Updated the Executive Order number from 12919 to 13603 and updated the citation,

<sup>7</sup> Definition of “animal” from the Animal Health Protection Act (Pub. L. 107–171, Title X, Subtitle E).

<sup>8</sup> Definition of “livestock” from the Animal Health Protection Act (Pub. L. 107–171, Title X, Subtitle E).

• Updated the references to the authorizing jurisdictions throughout for consistency with the changes made by Executive Order 13603,

• Revised the definitions for “civil transportation,” “energy,” “food resources,” “food resource facilities,” “health resources,” and “water resources” for consistency with Executive Order 13603,

• Removed, to avoid confusion, the reference to the Federal Priorities and Allocations System because it is only the concept of the combination of all of the priorities and allocations rules being implemented by each of the agencies required to implement DPA,

• Added a citation to the DOC regulation, and

- Updated titles for clearances required for the President’s approval, and
- Corrected minor typographical errors.

#### Executive Order 12866

The Office of Management and Budget (OMB) designated this rule as significant under Executive Order 12866, “Regulatory Planning and Review,” and has reviewed this rule. A summary of the cost benefit analysis is provided below; the cost benefit analysis is available at [www.regulations.gov](http://www.regulations.gov) with the supporting materials for this rule.

#### Summary of Cost Benefit Analysis

DPA requires the head of each Federal agency to which the President delegates authority to prioritize contracts and orders to meet the needs of national defense. In Executive Order 13603 the President delegated DPA authority with respect to food resources; food resource facilities; livestock, veterinary, and plant health resources; and the domestic distribution of farm equipment and commercial fertilizer to the Secretary of Agriculture. To implement DPA, FSA is implementing the APAS regulation, which is modeled after DPAS.

Food is essential to national defense including civil emergency response. APAS is designed to use the DPA authority to help ensure that food is available when and where it is needed most, such as after a hurricane or an earthquake. The authority under DPA extends beyond emergency conditions to also cover nonemergency conditions. Under DPA, USDA may develop plans and programs to expedite and expand the supply of critical resources from the private sector for the production, processing, storage, and distribution of agricultural commodities to promote national defense and to prevent civilian hardship in the food marketplace. In addition, DPA enables USDA to further support domestic emergency preparedness, response, and recovery activities, critical infrastructure

protection and restoration, and homeland security activities.

The impact of APAS on private companies receiving priority orders is expected to vary depending on economic factors. In most cases, there is likely to be no economic impact in filling priority orders because it would generally just be changing the timing in which orders are completed. No data were provided by the commenters to change this analysis, anecdotally, the comments stated that “manufacturing and distribution processes . . . would be altered by allocation orders . . . will have a negative economic impact.”

APAS is expected to primarily be used for prioritizing contracts and to a lesser extent for determining allocations. USDA does not expect any program outlays under APAS for prioritizing contracts and potentially determining allocations. USDA will likely incur administrative expenses associated with assessing priorities and allocations requests and providing oversight for approved requests. The administrative expenses are expected to be marginal as APAS will presumably be administered using existing USDA personnel.

APAS is expected to have an overall positive impact on the U.S. public and industry by maintaining and restoring the production, processing, storage, and distribution of agricultural commodities during times of both emergency and nonemergency conditions to promote national defense and to prevent civilian hardship in the food marketplace. While USDA has not yet administered APAS under DPA authority, the continued use of the Department of Commerce’s DPAS by the Department of Defense proves the usefulness of a priorities and allocations system.

As discussed above, FSA received one comment about the analysis, as follows:

Comment: The proposed rule dismisses and fails to accurately assess the economic cost of APAS to the agriculture industry and other sectors, including transporters, if USDA uses its authority to issue orders that circumvent existing commercial and governmental contracts.

Response: As noted above, there are a limited group of participants eligible for participation in the APAS program; therefore, there were limited data available to analyze the economic costs. DOC’s use of DPAS, which has been used for similar priority ratings using its delegation of authority from the Secretary of Agriculture, has not resulted in any known economic hardships to participants involved in the agricultural industry and other sectors. USDA and other Federal

agencies will not use APAS to circumvent existing commercial and government contracts. Instead, they will use APAS to speed up delivery of items under contract or increase procurement of items under contract. Therefore, no change was made to the analysis in response to this comment.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. FSA has determined that this rule will not have a significant impact on a substantial number of small entities for the reasons explained below. Consequently, FSA has not prepared a regulatory flexibility analysis.

Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (August 2008 Edition), has a maximum annual revenue of \$33.5 million and a maximum of 1,500 employees (for some business categories, these numbers are lower). Due to the scope of this rule and for consistency with DPAS and other regulations implementing DPA, these general size standards were used for this analysis. The range of small business size standards varies. For example, SBA classifies a small business for Food Manufacturing as one that has a maximum annual revenue of \$750,000 and for Crop or Animal Production a maximum of 500 employees. Due to the wide variety of businesses that could be involved in APAS, and that the potential impacts are expected to be minor, the more narrow categories were not used for this analysis. A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

This rule establishes criteria under which USDA (or agencies to which

USDA delegates authority) will authorize prioritization of certain orders or contracts as well as criteria under which USDA would issue orders allocating resources or production facilities. Because the rule affects commercial transactions, USDA believes that small organizations and small governmental jurisdictions are unlikely to be affected by this rule. However, FSA has no basis on which to estimate the number of small businesses that are likely to be affected by this rule.

FSA believes that any impact that this rule might have on small businesses would be minor. The rule has two principal components: Prioritization and allocation. Prioritization is the process that is, by far, more likely to be used. Under prioritization, USDA designates certain orders, which may be placed by Government or by private entities, and assigned under one of two possible priority levels. Once so designated, such orders are referred to as "rated orders." The recipient of a rated order must give it priority over an unrated order. The recipient of a rated order with a higher priority rating must give that order priority over any rated orders with the lower priority rating and over unrated orders as necessary to meet the delivery requirements of each rated order. A recipient of a rated order may place more than one order at the same priority level with suppliers and subcontractors for supplies and services necessary to fulfill the recipient's rated order and the suppliers and subcontractors must treat the request from the rated order recipient as a rated order with the same priority level as the original rated order. The rule does not require recipients to fulfill rated orders if the price or terms of sale are not consistent with the price or terms of sale of similar non-rated orders. The rule provides a defense from any liability for damages or penalties for actions or inactions made in compliance with the rule.

Although rated orders could require a recipient to fill one order prior to filling another, they would not require a reduction in the total volume of orders nor would they require the recipient to reduce prices or provide rated orders with more favorable terms than a similar non-rated order. Under these circumstances, the economic effects on the rated order recipient of substituting one order for another are likely to be mutually offsetting, resulting in no net loss.

Allocations could be used to control the general distribution of materials or services in the civilian market. Specific allocations actions that FSA might take are set-asides, allocations directives,

and allotments. Any allocations actions would be used only in extraordinary circumstances. As required by section 101(b) of DPA (50 U.S.C. App. 2071) and by section 201(e) of Executive Order 13603, allocations may be implemented only if the Secretary of Agriculture made, and the President approved, a finding: (1) That the material [or service] is a scarce and critical material [or service] essential to the national defense, and (2) that the requirements of the national defense for such material [or service] cannot otherwise be met without creating a significant dislocation of the normal distribution of such material [or service] in the civilian market to such a degree as to create appreciable hardship.

Any allocations actions would also have to comply with section 701(e) of DPA (50 U.S.C. app. sec. 2151(e)), which provides that small business be included. To the extent practicable, a fair share of the material, including services, will be provided to small business in proportion to the share received by such business concerns under normal conditions. Although FSA cannot determine precisely the number of small entities that would be affected by this rule, FSA believes that the overall impact on such entities would not be significant. In most instances, rated contracts would be in addition to other (unrated) contracts and would not reduce the total amount of business the firm receives. Because allocations can be imposed only after a determination by the President, and there have been no allocations actions under DPA authority in more than 50 years, allocations are expected to be a rare occurrence. Therefore, estimating the impact of an allocation, should one occur, is difficult. FSA believes that the requirement for a Presidential determination and the provisions of section 701 of the DPA provide reasonable assurance that any impact on small business will not be significant.

Therefore, for the reasons set forth above, FSA certifies that this action would not have a significant impact on a substantial number of small entities.

### **Environmental Review**

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500 through 1508), and the FSA regulation for compliance with NEPA (7 CFR part 799). The provisions of this rule are specifically related to acquisition and are considered solely

administrative in nature. Therefore, FSA has determined that NEPA does not apply to this rule and no environmental assessment or environmental impact statement will be prepared.

#### **Executive Order 12372**

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. This rule does not provide Federal financial assistance, direct Federal development, grants, or cooperative agreements. Therefore, this program is not subject to Executive Order 12372.

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” This rule would not preempt State and or local laws, and regulations, or policies unless they present an irreconcilable conflict with this rule. Before any judicial action may be brought concerning the provisions of this rule, appeal provisions of 7 CFR parts 11 and 780 would need to be exhausted.

#### **Executive Order 13132**

This final rule has been reviewed under Executive Order 13132, “Federalism.” The policies contained in this rule do not have any substantial direct effect on States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

#### **Executive Order 13175**

This final rule has been reviewed for compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The policies contained in this rule do not have Tribal implications that preempt Tribal law. FSA continues to consult with Tribal officials to have a meaningful consultation and collaboration on the development and strengthening of FSA regulations.

#### **Unfunded Mandates**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L.

104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, or tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local, or tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates as defined by Title II of UMRA for State, local, or tribal governments or for the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), FSA described the new information collection activities in the request for public comment in the proposed rule. No comments related to the Paperwork Reduction Act were received, and no change to the information collection was required. The currently approved information collection is covered under OMB control number 0560–0280.

#### **E-Government Act Compliance**

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

#### **List of Subjects in 7 CFR Part 789**

Administrative practice and procedure, Business and industry, Government contracts, National defense, Reporting and recordkeeping requirements.

- For the reasons discussed in the preamble, FSA adds 7 CFR part 789 to read as follows:

### **PART 789—AGRICULTURE PRIORITIES AND ALLOCATIONS SYSTEM (APAS)**

#### **Subpart A—General**

Sec.

- 789.1 Purpose.
- 789.2 Priorities and allocations authority.
- 789.3 Program eligibility.

#### **Subpart B—Definitions**

- 789.8 Definitions.

#### **Subpart C—Placement of Rated Orders**

- 789.10 Delegations of authority.
- 789.11 Priority ratings.
- 789.12 Elements of a rated order.
- 789.13 Acceptance and rejection of rated orders.
- 789.14 Preferential scheduling.
- 789.15 Extension of priority ratings.
- 789.16 Changes or cancellations of priority ratings and rated orders.
- 789.17 Use of rated orders.
- 789.18 Limitations on placing rated orders.

#### **Subpart D—Special Priorities Assistance**

- 789.20 General provisions.
- 789.21 Requests for priority rating authority.
- 789.22 Examples of assistance.
- 789.23 Criteria for assistance.
- 789.24 Instances where assistance must not be provided.

#### **Subpart E—Allocations Actions**

- 789.30 Policy.
- 789.31 General procedures.
- 789.32 Precedence over priority rated orders.
- 789.33 Controlling the general distribution of a material in the civilian market.
- 789.34 Types of allocations orders.
- 789.35 Elements of an allocations order.
- 789.36 Mandatory acceptance of allocations orders.
- 789.37 Changes or cancellations of allocations orders.

#### **Subpart F—Official Actions**

- 789.40 General provisions.
- 789.41 Rating authorizations.
- 789.42 Directives.
- 789.43 Letters of understanding.

#### **Subpart G—Compliance**

- 789.50 General provisions.
- 789.51 Audits and investigations.
- 789.52 Compulsory process.
- 789.53 Notification of failure to comply.
- 789.54 Violations, penalties, and remedies.
- 789.55 Compliance conflicts.

#### **Subpart H—Adjustments, Exceptions, and Appeals**

- 789.60 Adjustments or exceptions.
- 789.61 Appeals.

#### **Subpart I—Miscellaneous Provisions**

- 789.70 Protection against claims.
- 789.71 Records and reports.
- 789.72 Applicability of this part and official actions.
- 789.73 Communications.

Schedule I to Part 789—Approved Programs and Delegate Agencies

**Authority:** 50 U.S.C. App. 2061–2170, 2171, and 2172; 42 U.S.C. 5195–5197h.

#### **Subpart A—General**

##### **§ 789.1 Purpose.**

This part provides guidance and procedures for use of the Defense Production Act priorities and allocations authority by the United States Department of Agriculture (USDA) with respect to food resources,

food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer in this part. (The guidance and procedures in this part are consistent with the guidance and procedures provided in other regulations issued under Executive Order 13603. Guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to other types of resources are as follows: For all forms of energy, refer to the Department of Energy's Energy Priorities and Allocations System (EPAS) regulation in 10 CFR part 217; for all forms of civil transportation, refer to the Department of Transportation's Transportation Priorities and Allocations System (TPAS) regulation in 49 CFR part 33; for water resources, refer to the Department of Defense; for health resources, refer to the Department of Health and Human Services' Health Resources Priorities and Allocations System in 45 CFR part 101; and for all other materials, services, and facilities, including construction materials, refer to the Department of Commerce's Defense Priorities and Allocations System (DPAS) regulation in 15 CFR part 700.)

#### **§ 789.2 Priorities and allocations authority.**

(a) Section 201 of Executive Order 13603 (3 CFR, 2012 Comp., p. 225) delegates the President's authority under section 101 of the Defense Production Act to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to the following agencies. Essentially, this allows the following agencies to place priority on the performance of contracts for items and materials under their jurisdiction as required for national defense initiatives including emergency preparedness activities:

- (1) The Secretary of Agriculture with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer;
- (2) The Secretary of Energy with respect to all forms of energy;
- (3) The Secretary of Health and Human Services with respect to health resources;
- (4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and  
 (6) The Secretary of Commerce with respect to all other materials, services, and facilities, including construction materials.

(b) Section 202 of Executive Order 13603 specifies that the priorities and allocations authority may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense by:

(1) The Secretary of Defense with respect to military production and construction, military assistance to foreign nations, military use of civil transportation, stockpiles managed by the Department of Defense, space, and directly related activities;

(2) The Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; or

(3) The Secretary of Homeland Security with respect to all other national defense programs, including civil defense and continuity of Government.

#### **§ 789.3 Program eligibility.**

Certain programs that promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to Title VI of the Stafford Act and critical infrastructure protection and restoration.

#### **Subpart B—Definitions**

##### **§ 789.8 Definitions.**

*Allocations* means the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

*Allocations order* means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

*Allotment* means an official action that specifies the maximum quantity for a specific use of a material, service, or facility authorized to promote the national defense.

*Animal* means any member of the animal kingdom (except a human).

*APAS* means the Agriculture Priorities and Allocations System established by this part.

*Applicant* means the person applying for assistance under APAS. (See definition of "person.")

*Approved program* means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, as specified in section 202 of Executive Order 13603.

*Civil transportation* includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. "Civil transportation" also includes direction, control, and coordination of civil transportation capacity regardless of ownership. "Civil transportation" does not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly.

*Construction* means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products that are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

*Critical infrastructure* means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

*Defense Production Act* means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 to 2170, 2171, and 2172).

*Delegate agency* means a government agency authorized by delegation from USDA to place priority ratings on contracts or orders needed to support approved programs.

*Directive* means an official action that requires a person to take or refrain from taking certain actions in accordance with the provisions.

*Emergency preparedness* means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions that would be created by the hazard, and to make emergency repairs to, or the emergency restoration of, vital utilities

and facilities destroyed or damaged by the hazard. Emergency preparedness includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the non-military evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

**Energy** means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquefaction and coal gasification), solar, wind, other types of renewable energy, atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

**Facilities** includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

**Farm equipment** means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

**Feed** is a nutritionally adequate manufactured food for animals (livestock and poultry raised for agriculture production); and by specific formula is compounded to be fed as the sole ration and is capable of maintaining life and promoting production without

any additional substance being consumed except water.

**Fertilizer** means any product or combination of products that contain one or more of the elements—nitrogen, phosphorus, and potassium—for use as a plant nutrient.

**Food resources** means all commodities and products (simple, mixed, or compound), or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products suitable for sale for human or animal consumption. Food resources also means potable water packaged in commercially marketable containers, all starches, sugars, vegetable and animal or marine fats and oils, seed, cotton, hemp, and flax fiber, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

**Food resource facilities** means plants, machinery, vehicles (including on-farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, and for the domestic distribution of farm equipment and fertilizer (excluding transportation for that distribution).

**Hazard** means an emergency or disaster resulting from a natural disaster; or from an accidental or man-caused event.

**Health resources** means drugs, biological products, medical devices, materials, facilities, health supplies, services, and equipment required to diagnose, mitigate, or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.

**Homeland security** includes efforts:

- (1) To prevent terrorist attacks within the United States;
- (2) To reduce the vulnerability of the United States to terrorism;
- (3) To minimize damage from a terrorist attack in the United States; and
- (4) To recover from a terrorist attack in the United States.

**Industrial resources** means all materials, services, and facilities, including construction materials, but not including: Food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer; all forms of energy; health resources; all forms of civil transportation; and water resources.

**Item** means any raw, in process, or manufactured material, article,

commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

**Letter of understanding** means an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (USDA, the Department of Commerce (if applicable), a delegate agency (if applicable), the supplier, and the customer).

**Livestock** means all farm-raised animals.

**Livestock resources** means materials, facilities, vehicles, health supplies, services, and equipment required for the production and distribution of livestock.

**Maintenance and repair and operating supplies (MRO)** means:

(1) **Maintenance** is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) **Repair** is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) **Operating supplies** are any resources carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals, and other expendable items.

(4) **MRO** does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items that are still in working condition with items of a new or different kind, quality, or design.

**Materials** includes:

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items.

**National defense** means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted

pursuant to Title VI of the Stafford Act and critical infrastructure protection and restoration.

*Official action* means an action taken by USDA or another resource agency under the authority of the Defense Production Act, Executive Order 13603, or this part. Such actions include the issuance of rating authorizations, directives, set-asides, allotments, letters of understanding, demands for information, inspection authorizations, and administrative subpoenas.

*Person* includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof, or any Federal agency.

*Plant health resources* means biological products, materials, facilities, vehicles, supplies, services, and equipment required to prevent the impairment of, improve, or restore plant health conditions.

*Rated order* means a prime contract, a subcontract, or a purchase order in support of an approved program issued as specified in the provisions of this part. Persons may request an order (contract) be rated in response to a need that is defined in this part. However, an order does not become rated until the request is approved by USDA. USDA will assign a rating priority for each rating request approved that designates the priority of that order over other orders that have similar order specifics.

*Resource agency* means any agency that is delegated priorities and allocations authority as specified in § 789.2.

*Secretary* means the Secretary of Agriculture.

*Seed* is used with its commonly understood meaning and includes all seed grown for and customarily sold to users for planting for the production of agriculture crops.

*Services* includes any effort that is needed for or incidental to:

(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

*Set-aside* means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

*Stafford Act* means the Robert T. Stafford Disaster Relief and Emergency

Assistance Act, as amended (42 U.S.C. 5195–5197h).

*USDA* means the U.S. Department of Agriculture.

*Veterinary resources* means drugs, biological products, medical devices, materials, facilities, vehicles, health supplies, services, and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the health conditions of the animal population.

*Water resources* means all usable water, from all sources, within the jurisdiction of the United States, that can be managed, controlled, and allocated to meet emergency requirements, except water resources does not include usable water that qualifies as food resources.

## Subpart C—Placement of Rated Orders

### § 789.10 Delegations of authority.

(a) [Reserved]

(b) Within USDA, authority to administer APAS has been delegated to the Administrator, Farm Service Agency, through the Under Secretary for Farm and Foreign Agricultural Services. (See §§ 2.16(a)(6) and 2.42(a)(5) of this title.) The Farm Service Agency Administrator will coordinate APAS implementation and administration through the Director, USDA Office of Homeland Security and Emergency Coordination, as delegated by the Assistant Secretary for Administration. (See §§ 2.24(a)(8)(ii)(A) and 2.24(a)(8)(v); 2.95(b)(1)(i) and 2.95(b)(4) of this title.)

### § 789.11 Priority ratings.

(a) *Levels of priority.* Priority levels designate differences between orders based on national defense including emergency preparedness requirements.

(1) There are two levels of priority established by APAS, identified by the rating symbols “DO” and “DX.”

(2) All DO-rated orders have equal priority with each other and take precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see § 789.14(c).)

(3) In addition, a directive regarding priority treatment for a given item issued by the resource agency with priorities jurisdiction for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the directive. (For more information on directives, see § 789.42.)

(b) *Program identification symbols.*

Program identification symbols indicate which approved program is being

supported by a rated order. The list of currently approved programs and their identification symbols are listed in Schedule I. For example, P1 identifies a program involving food and food resources processing and storage. Program identification symbols, in themselves, do not connote any priority. Additional programs may be approved under the procedures of Executive Order 13603 at any time.

(c) *Priority ratings.* A priority rating consists of the rating symbol DO or DX followed by the program identification symbol, such as P1 or P2. Thus, a contract for the supply of livestock feed will contain a DO-P1 or DX-P1 priority rating.

### § 789.12 Elements of a rated order.

(a) Each rated order must include:

(1) The appropriate priority rating (for example, DO-P1 for food and food resources processing and storage);

(2) A required delivery date or dates. The words “immediately” or “as soon as possible” do not constitute a delivery date. Some purchase orders, such as a “requirements contract,” “basic ordering agreement,” “prime vendor contract,” or similar procurement document, bearing a priority rating may contain no specific delivery date or dates if it provides for the furnishing of items or services from time-to-time or within a stated period against specific purchase orders, such as calls, requisitions, and delivery orders.

Specific purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(3) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature or use of the name certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(4) A statement as follows:

(i) A statement that reads:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Agriculture Priorities and Allocations System regulation in 7 CFR part 789.

(ii) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the

statement specified in paragraph (a)(4)(i) of this section:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within six (6) hours after receipt of the order if the order is issued in response to a hazard that has occurred; or within the greater of twelve (12) hours or the time specified in the order, if the order is issued to prepare for an imminent hazard, in accordance with 7 CFR 789.13(e).

(b) [Reserved]

#### **§ 789.13 Acceptance and rejection of rated orders.**

(a) *Mandatory acceptance.* A person must accept a rated order in accordance with the following requirements:

(1) Except as otherwise specified in this section, a person must accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person must not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) *Mandatory rejection.* Unless otherwise directed by USDA for a rated order involving food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, or the domestic distribution of farm equipment and commercial fertilizer:

(1) A person must not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection in this section.

(2) A person must not accept a DO-rated order for delivery on a date that would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person must not accept a DX-rated order for delivery on a date that would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders that can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15

before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(5) A person must reject the rated order if the person is prohibited by Federal law from meeting the terms of the order.

(c) *Optional rejection.* Unless otherwise directed by USDA for a rated order involving food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, or the domestic distribution of farm equipment and commercial fertilizer, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for 2 years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past 2 years;

(4) If the person placing the rated order, other than the Federal Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of USDA, issued under the authority of the Defense Production Act or another relevant law.

(d) *Customer notification requirements.* A person in receipt of a rated order is required to provide to the customer placing the order written or electronic notification of acceptance or rejection of the order.

(1) Except as provided in paragraph (e) of this section, a person must accept or reject a rated order in writing or electronically within fifteen (15) working days after receipt of a DO-rated order and within ten (10) working days after receipt of a DX-rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons

for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or electronic confirmation must be provided within 5 working days.

(e) *Exception for emergency preparedness conditions.* If the rated order is placed for the purpose of emergency preparedness and includes the additional statement as specified in § 789.12(a)(4)(ii), a person must accept or reject a rated order and send the acceptance or rejection in writing or in an electronic format:

(1) Within 6 hours after receipt of the order if the order is issued in response to a hazard that has occurred; or

(2) Within the greater of 12 hours or the time specified in the order, if the order is issued to prepare for an imminent hazard.

#### **§ 789.14 Preferential scheduling.**

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX-rated order.)

(c) For conflicting rated orders:

(1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person must give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person must give precedence to

those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts as specified in this section, the person should promptly seek special priorities assistance as provided in §§ 789.20 through 789.24. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as specified in §§ 789.20 through 789.24. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 789.13(d)(2).

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 789.17(b).

#### **§ 789.15 Extension of priority ratings.**

(a) A person must use rated orders as necessary with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by USDA.

(b) The priority rating must be included as necessary on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

#### **§ 789.16 Changes or cancellations of priority ratings and rated orders.**

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of USDA; or  
(2) Written notification from the person who placed the rated order.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's original production or delivery schedule constitutes a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 789.13.

(d) The following amendments do not constitute a new rated order:

(1) A change in shipping destination;  
(2) A reduction in the total amount of the order;

(3) An increase in the total amount of the order that has a negligible impact upon deliveries;

(4) A minor variation in size or design; or

(5) A change that is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

#### **§ 789.17 Use of rated orders.**

(a) A person must use rated orders as necessary to obtain:

(1) Items that will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating must not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol P4 must be used (that is DO-P4).

(c) A person may combine DX- and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol P4 (that is DO-P4 or DX-P4).

(d) For combining rated and unrated orders:

(1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 789.12, are included on the order with the statement required in § 789.12(a)(4)(i) modified to read:

This purchase order contains rated order quantities certified for national defense use, and you are required to follow all the provisions of the Agriculture Priorities and Allocations System regulation in 7 CFR part 789 only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 789.13 and give preferential treatment only to the rated quantities as required by this part. This part must not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception as specified in § 789.60.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than \$75,000 or one-half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulation (FAR) (see 48 CFR 2.101) or in other authorized acquisition regulatory or management systems) whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

#### **§ 789.18 Limitations on placing rated orders.**

(a) *General limitations.* Rated orders may be placed only by persons with the proper authority for items and services that are needed to support approved programs.

(1) A person must not place a DO- or DX-rated order unless authorized by USDA to do so under this part.

(2) Rated orders must not be used to obtain:

(i) Delivery on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders must not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as specifically authorized by USDA (see § 789.21(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by USDA or as otherwise permitted by this part;

(v) Any of the following items unless specific priority rating authority has been obtained from USDA or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment. For information on requesting priority rating authority, see § 789.21; or

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(b) *Jurisdictional limitations.* (1) Unless authorized by the resource agency with jurisdiction (see § 789.10), the provisions of this part are not applicable to the following resources:

(i) All forms of energy (Resource agency with jurisdiction—Department of Energy);

(ii) Health resources (Resource agency with jurisdiction—Department of Health and Human Services);

(iii) All forms of civil transportation (Resource agency with jurisdiction—Department of Transportation);

(iv) Water resources (Resource agency with jurisdiction—Department of Defense, U.S. Army Corps of Engineers);

(v) All materials, services, and facilities, including construction materials for which the authority has not been delegated to other agencies under Executive Order 13603 (Resource agency with jurisdiction—Department of Commerce); and

(2) The priorities and allocations authority in this part may not be applied to communications services subject to Executive Order 13618 of July 6, 2012 (3 CFR, 2012 Comp., p. 273).

## **Subpart D—Special Priorities Assistance**

### **§ 789.20 General provisions.**

(a) APAS is designed to be largely self-executing. However, if production or delivery problems arise, a person

should immediately contact the Farm Service Agency Administrator for special priorities assistance pursuant to §§ 789.20 through 789.24 and as directed by § 789.73. If the Farm Service Agency is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, USDA may forward the request to another resource agency, as appropriate, for action. Special priorities assistance is a service provided to alleviate problems.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form AD-2102 (OMB Control Number 0560-0280) to the Farm Service Agency as provided in paragraph (a) of this section. Form AD-2102 may be obtained from USDA by downloading the form and instructions from <http://forms.sc.egov.usda.gov/eForms/welcomeAction.do?Home> or by contacting the Administrator of the Farm Service Agency as specified in § 789.73. Either mail or fax the form to USDA, using the address or fax number shown on the form.

### **§ 789.21 Requests for priority rating authority.**

(a) *Rating authority for items or services not normally rated.* If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items or services.

(b) *Rating authority for production or construction equipment.* For a rated order for production or construction equipment not under the resource jurisdiction of USDA, follow the regulation in 15 CFR part 700.

(1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on Form BIS-999 (see 15 CFR 700.51). Form BIS-999 may be obtained from USDA as specified in § 789.20(c) or from the Department of Commerce as specified in 15 CFR 700.50.

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a

rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) For rating authority in advance of a rated prime contract:

(1) In certain cases and upon specific request, USDA, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from USDA. The person assumes any business risk associated with the placing of a rated order if the order has to be canceled in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from USDA and our use of that priority rating with our suppliers in no way commits USDA or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government will not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, USDA will consider, among other things, the following criteria:

(i) The probability that the prime contract will be awarded;

(ii) The impact of the resulting rated orders on suppliers and on other authorized programs;

(iii) Whether the contractor is the sole source;

(iv) Whether the item being produced has a long lead time; and

(v) The time period for which the rating is being requested.

(4) USDA may require periodic reports on the use of the rating authority granted through paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person will promptly notify each supplier who has received any rated order related to the advanced rating authority that the priority rating on the order is canceled.

### **§ 789.22 Examples of assistance.**

(a) While special priorities assistance may be provided for any reason in

support of this part, it is usually provided in situations in which:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

#### **§ 789.23 Criteria for assistance.**

(a) Requests for special priorities assistance should be timely (for example, the request has been submitted promptly and enough time exists for USDA to meaningfully resolve the problem), and must establish that:

(1) There is an urgent need for the item; and

(2) The applicant has made a reasonable effort to resolve the problem.

(b) [Reserved]

#### **§ 789.24 Instances in which assistance must not be provided.**

(a) Special priorities assistance is provided at the discretion of USDA when it is determined that such assistance is warranted to meet the objectives of this part. Examples in which assistance must not be provided include situations in which a person is attempting to:

(1) Secure a price advantage;

(2) Obtain delivery prior to the time required to fill a rated order;

(3) Gain competitive advantage;

(4) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(5) Overcome a supplier's regularly established terms of sale or conditions of doing business.

(b) [Reserved]

### **Subpart E—Allocations Actions**

#### **§ 789.30 Policy.**

(a) It is the policy of the Federal Government that the allocations authority under Title I of the Defense Production Act may:

(1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority

would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocations orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

#### **§ 789.31 General procedures.**

(a) When USDA plans to execute its allocations authority to address a supply problem within its resource jurisdiction, USDA will develop a plan that includes the following information:

(1) A copy of the written determination made in accordance with section 202 of Executive Order 13603, that the program or programs that would be supported by the allocations action are necessary or appropriate to promote the national defense;

(2) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocations action;

(3) A statement of the specific objective(s) of the allocations action;

(4) A list of the materials, services, or facilities to be allocated;

(5) A list of the sources of the materials, services, or facilities that will be subject to the allocations action;

(6) A detailed description of the provisions that will be included in the allocations orders, including the type(s) of allocations orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocations action (for example, anticipated start and end dates);

(7) An evaluation of the impact of the proposed allocations action on the civilian market; and

(8) Proposed actions, if any, to mitigate disruptions to civilian market operations.

(b) [Reserved]

#### **§ 789.32 Precedence over priority rated orders.**

If a conflict occurs between an allocations order and an unrelated rated order or priorities directive, the allocations order takes precedence.

#### **§ 789.33 Controlling the general distribution of a material in the civilian market.**

(a) No allocations by USDA may be used to control the general distribution of a material in the civilian market, unless the Secretary has:

(1) Made a written finding that:

(i) Such material is a scarce and critical material essential to the national defense; and

(ii) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

(2) Submitted the finding for the President's approval through the Assistant to the President and National Security Advisor and the Assistant to the President for Homeland Security and Counterterrorism; and

(3) The President has approved the finding.

(b) [Reserved]

#### **§ 789.34 Types of allocations orders.**

(a) The three types of allocations orders that may be used for allocations actions are:

(1) Set-asides;

(2) Directives; and

(3) Allotments.

(b) [Reserved]

#### **§ 789.35 Elements of an allocations order.**

(a) Each allocations order will include:

(1) A detailed description of the required allocations action(s);

(2) Specific start and end calendar dates for each required allocations action;

(3) The Secretary's written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary. The signature or use of the name certifies that the order is authorized as specified in this part and that the requirements of this part are being followed;

(4) A statement that reads: "This is an allocations order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of 7 CFR part 789;" and

(5) A current copy of the APAS regulation (7 CFR part 789).

(b) [Reserved]

#### **§ 789.36 Mandatory acceptance of allocations orders.**

(a) A person must accept every allocations order received that the person is capable of fulfilling, and must comply with such orders regardless of any rated order that the person may be in receipt of or other commitments involving the resource(s) covered by the allocations order.

(b) A person must not discriminate against an allocations order in any

manner such as by charging higher prices for resources covered by the order or by imposing terms and conditions for contracts and orders involving allocated resources(s) that differ from the person's terms and conditions for contracts and orders for the resource(s) prior to receiving the allocations order.

(c) If circumstances prevent a person from being able to accept an allocations order, the person must comply with the provisions specified in § 789.60 upon realization of the inability to accept the order.

#### **§ 789.37 Changes or cancellations of allocations orders.**

An allocations order may be changed or canceled by an official action of USDA.

### **Subpart F—Official Actions**

#### **§ 789.40 General provisions.**

(a) USDA may take specific official actions to implement the provisions of this part.

(b) Several of these official actions (rating authorizations, directives, and letters of understanding) are discussed in this subpart. Other official actions that pertain to compliance (administrative subpoenas, demands for information, and inspection authorizations) are discussed in § 789.51(c).

#### **§ 789.41 Rating authorizations.**

(a) A rating authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see section § 789.21.

#### **§ 789.42 Directives.**

(a) A directive is an official action that requires a person to take or refrain from taking certain actions in accordance with the provisions of the directive.

(b) A person must comply with each directive issued. However, a person may not use or extend a directive to obtain any items from a supplier, unless expressly authorized to do so in the directive.

(c) A priorities directive takes precedence over all DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive.

(d) An allocations directive takes precedence over all priorities directives, DX-rated orders, DO-rated orders, and

unrated orders previously or subsequently received, unless a contrary instruction appears in the directive.

#### **§ 789.43 Letters of understanding.**

(a) A letter of understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (USDA, the Department of Commerce (if applicable), a delegate agency (if applicable), the supplier, and the customer).

(b) A letter of understanding is not used to alter scheduling between rated orders, to authorize the use of priority ratings, to impose restrictions under this part, or to take other official actions. Rather, letters of understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

### **Subpart G—Compliance**

#### **§ 789.50 General provisions.**

(a) USDA may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or an official action. Such actions include administrative subpoenas, demands for information, and inspection authorizations.

(b) Any person who places or receives a rated order or an allocations order must comply with the provisions of this part.

(c) Willful violation of the provisions of Title I or section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of USDA, is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as specified in § 789.54.

#### **§ 789.51 Audits and investigations.**

(a) Audits and investigations are official examinations of books, records, documents, other writings, and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit, investigation, or other inquiry, USDA will:

(1) *Scope and purpose.* Define the scope and purpose in the official action given to the person under investigation; and

(2) *Information not available.* Have ascertained that the information sought

or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, USDA may issue the following documents that constitute official actions:

(1) *Administrative subpoenas.* An administrative subpoena requires a person to appear as a witness before an official designated by USDA to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable laws, this part, or official actions. An administrative subpoena may also require the production of books, papers, records, documents, and physical objects or property.

(2) *Demands for information.* A demand for information requires a person to furnish to a duly authorized representative of USDA any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) *Inspection authorizations.* An inspection authorization requires a person to permit a duly authorized representative of USDA to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act and other related laws, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the administrative subpoena or demand for information, a duly authorized official of USDA is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of USDA as to the content of the material.

(e) An administrative subpoena, demand for information, or inspection authorization will include the name, title, or official position of the person to be served, the evidence sought, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or

information are to be produced; or if property is to be inspected; the administrative subpoena, demand for information, or inspection authorization will describe the requirements.

(f) Service of documents will be made in the following manner:

(1) *In person.* Service of a demand for information or inspection authorization will be made personally, or by certified mail-return receipt requested at the person's last known address. Service of an administrative subpoena will be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) *Other than to the named individual.* Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document will be mailed to the person named in the document.

(3) *Delivering individual and documentation.* Any individual 18 years of age or over may serve an administrative subpoena, demand for information, or inspection authorization. When personal service is made, the individual making the service must prepare an affidavit specifying the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure will be stated on the original document.

#### **§ 789.52 Compulsory process.**

(a) If a person refuses to permit a duly authorized representative of USDA to have access to any premises or source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable laws, this part, or official actions, the USDA representative may seek compulsory process. Compulsory process is the institution of appropriate legal action, including ex parte application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of USDA, there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist that make such process desirable or necessary.

#### **§ 789.53 Notification of failure to comply.**

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, USDA may inform the person in writing when compliance with the requirements of the Defense Production Act and other applicable laws, this part, or an official action was not met.

(b) In cases in which USDA determines that failure to comply with the provisions of the Defense Production Act and other applicable laws, this part, or an official action was inadvertent, the person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act and other applicable laws, this part, or an official action.

#### **§ 789.54 Violations, penalties, and remedies.**

(a) Willful violation of the Defense Production Act, the priorities provisions of the Military Selective Service Act (50 U.S.C. App. 468), this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty provided by the Defense Production Act is a \$10,000 fine, or 1 year in prison, or both. The maximum penalty provided by the Military Selective Service Act is a \$50,000 fine, or 3 years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act and other applicable laws, this part, and official actions, certain actions as follows are prohibited:

(1) Soliciting, influencing, or permitting another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable laws, this part, or an official action.

(2) Conspiring or acting in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable laws, this part, or an official action.

(3) Delivering any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable laws, this part, or an official action. In such instances, the person must

immediately notify USDA that, in accordance with this provision, delivery has not been made.

#### **§ 789.55 Compliance conflicts.**

If compliance with any provision of the Defense Production Act and other applicable laws, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable laws, this part, or an official action, the person must immediately notify USDA for resolution of the conflict.

### **Subpart H—Adjustments, Exceptions, and Appeals**

#### **§ 789.60 Adjustments or exceptions.**

(a) A person may submit a request to the Farm Service Agency Deputy Administrator for Management, as directed in § 789.73, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official action is contrary to the intent of the Defense Production Act and other applicable laws, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception will not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Farm Service Agency Deputy Administrator for Management.

(d) A decision of the Farm Service Agency Deputy Administrator for Management under this section may be appealed to the Farm Service Agency Administrator. (For information on the appeal procedure, see § 789.61.)

#### **§ 789.61 Appeals.**

(a) Any person whose request for adjustment or exception has been denied by the Farm Service Agency Deputy Administrator for Management as specified in § 789.60, may appeal to the Farm Service Agency Administrator who will review and reconsider the denial.

(b) A person must submit the appeal in writing to the Farm Service Agency Administrator as follows:

(1) Except as provided in paragraph (b)(2) of this section, an appeal must be received by the Farm Service Agency Administrator no later than 45 days after receipt of a written notice of denial from the Farm Service Agency Deputy Administrator for Management. After the 45-day period, an appeal may be accepted at the discretion of the Farm Service Agency Administrator if the person shows good cause.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness (see § 789.13(e)), an appeal must be received by the Farm Service Agency Administrator no later than 15 days after receipt of a written notice of denial from the Farm Service Agency Deputy Administrator for Management.

(c) Contract performance under the order may not be stayed pending resolution of the appeal.

(d) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the appealed action and a full and precise statement of the reasons the decision should be modified or reversed.

(e) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Farm Service Agency Administrator.

(f) When a hearing is granted, the Farm Service Agency Administrator may designate an employee of the Farm Service Agency to conduct the hearing and to prepare a report. The hearing officer will determine all procedural questions and impose such time or other limitations deemed reasonable. If the hearing officer decides that a printed transcript is necessary, the transcript expenses must be paid by the appellant.

(g) When determining an appeal, the Farm Service Agency Administrator may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to USDA, or consult with any other person or group.

(h) The submission of an appeal under this section will not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is

granted in writing by the Farm Service Agency Administrator.

(i) The decision of the Farm Service Agency Administrator will be made within 5 days after receipt of the appeal, or within 1 day for appeals pertaining to emergency preparedness, and will be the final administrative action. The Administrator will issue a written statement of the reasons for the decision to the appellant.

#### **Subpart I—Miscellaneous Provisions**

##### **§ 789.70 Protection against claims.**

A person will not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, even if such provision or action is subsequently declared invalid by judicial or other competent authority.

##### **§ 789.71 Records and reports.**

(a) Persons are required to make and preserve for at least 3 years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of USDA as provided in § 789.51.

(d) In addition, persons must develop, maintain, and submit any other records and reports to USDA that may be required for the administration of the Defense Production Act and other applicable statutes, and this part.

(e) Section 705(d) of the Defense Production Act, as implemented by Executive Order 13603, provides that information obtained under that section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, will not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to USDA in connection with the enforcement or administration of the Defense Production Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Defense Production Act and will be

handled in accordance with applicable Federal law.

##### **§ 789.72 Applicability of this part and official actions.**

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any State, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules will not be construed to affect any administrative actions taken by USDA, or any outstanding contracts or orders placed based on any of the regulations, orders, schedules, or delegations of authority previously issued by USDA based on authority granted to the President in the Defense Production Act. Such actions, contracts, or orders will continue in full force and effect under this part unless modified or terminated by proper authority.

##### **§ 789.73 Communications.**

Except as otherwise provided, all communications concerning this part, including requests for copies of this part and explanatory information, requests for guidance or clarification, and submission of appeals as specified in § 789.61 will be addressed to the Administrator, Farm Service Agency, Room 4752, Mail Stop 0512, USDA, 1400 Independence Ave. SW., Washington, DC 20250–0512 or email: *FSA.EPD@wdc.usda.gov*. This address is also to be used for requests for adjustments or exceptions to the Farm Service Agency Deputy Administrator for Management as specified in § 789.60.

#### **SCHEDULE I TO PART 789— APPROVED PROGRAMS AND DELEGATE AGENCIES**

The programs listed in this schedule have been approved for priorities and allocations support under this part by the Department of Defense, Department of Energy, or Department of Homeland Security as required by section 202 of Executive Order 13603. They have equal preferential status. USDA has authorized the delegate agencies to use the authorities in this part in support of those programs assigned to them, as indicated below.

Program identification symbol	Approved program	Authorized delegate agency
Agriculture programs:		
P1 .....	Food and food resources (civilian) .....	USDA, Department of Homeland Security, Federal Emergency Management Agency
P2 .....	Agriculture and food critical infrastructure protection and restoration.	USDA
P3 .....	Food resources (combat rations) .....	Department of Defense <sup>1</sup>
P4 .....	Certain combined orders (see § 789.17) .....	USDA

<sup>1</sup> Department of Defense includes: The Office of the Secretary of Defense, the Military Departments, the Joint Staff, the Combatant Commands, the Defense Agencies, the Defense Field Activities, all other organizational entities in the Department of Defense, and for purpose of this part, the Central Intelligence Agency, and the National Aeronautics and Space Administration as Associated Agencies.

**Val Dolcini,**  
Administrator, Farm Service Agency.  
[FR Doc. 2015-26766 Filed 10-21-15; 8:45 am]  
**BILLING CODE 3410-05-P**

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1220

[Doc. No. AMS-LPS-15-0016]

### Soybean Promotion and Research: Amend the Order To Adjust Representation on the United Soybean Board

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule adjusts the number of members on the United Soybean Board (Board) to reflect changes in production levels that have occurred since the Board was last reapportioned in 2012. As required by the Soybean Promotion, Research, and Consumer Information Act (Act), membership on the Board is reviewed every 3 years and adjustments are made accordingly. This change will result in an increase in Board membership for three States, resulting in an increase in the total number of Board members from 70 to 73. These changes will be reflected in the Soybean Promotion and Research Order (Order) and will be effective for the 2016 appointment process.

**DATES:** Effective Date: October 23, 2015.

#### FOR FURTHER INFORMATION CONTACT:

James Brow; Research and Promotion Division, Livestock, Poultry, and Seed Program, Agricultural Marketing Service (AMS), USDA, Room 2096-S, STOP 0249, 1400 Independence Avenue SW., Washington, DC 20250-0249, telephone 202-720-0633, fax 202-720-1125, or email: [James.Brow@ams.usda.gov](mailto:James.Brow@ams.usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12866

The Office of Management and Budget has waived the review process required

by Executive Order 12866 for this action.

#### Executive Order 12988

This final rule was reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. This action would not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 1971 of the Act, a person subject to the Order may file a petition with the U.S. Department of Agriculture (USDA) stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order, is not in accordance with the law and request a modification of the Order or an exemption from the Order. The petitioner is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that district courts of the United States in any district in which such person is an inhabitant, or has their principal place of business, has jurisdiction to review USDA's ruling on the petition, if a complaint for this purpose is filed within 20 days after the date of the entry of the ruling.

#### Regulatory Flexibility Act

AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), because it only adjusts representation on the Board to reflect changes in production levels that have occurred since the Board was last reapportioned in 2012. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be disproportionately burdened. As such, these changes will not impose a significant impact on persons subject to the program.

There are an estimated 569,998 soybean producers and an estimated 10,000 first purchasers who collect the assessment, most of whom would be considered small businesses under the criteria established by the Small Business Administration (SBA) [13 CFR 121.201]. SBA defines small agricultural producers as those having annual receipts of less than \$750,000.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the reporting and recordkeeping requirements included in 7 CFR part 1220 were previously approved by OMB and were assigned control number 0581-0093.

#### Background and Proposed Changes

The Act (7 U.S.C. 6301–6311) provides for the establishment of a coordinated program of promotion and research designed to strengthen the soybean industry's position in the marketplace, and to maintain and expand domestic and foreign markets and uses for soybeans and soybean products. The program is financed by an assessment of 0.5 percent of the net market price of soybeans sold by producers. Pursuant to the Act, an Order was made effective July 9, 1991. The Order established an initial Board with 60 members. For purposes of establishing the Board, the United States was divided into 31 States and geographical units. Representation on the Board from each unit was determined by the level of production in each unit. The initial Board was appointed on July 11, 1991. The Board is comprised of soybean producers.

Section 1220.201(c) of the Order provides that at the end of each 3-year period, the Board shall review soybean production levels in the geographic units throughout the United States. The Board may recommend to the Secretary of Agriculture (Secretary) modification in the levels of production necessary for Board membership for each unit.

Section 1220.201(d) of the Order provides that at the end of each 3-year