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county (the county that was the subject of that determination) and the counties contiguous to that county.

(3) *USDA quarantine*. Any quarantine imposed by the Secretary of Agriculture under the Plant Protection Act or the animal quarantine laws, as defined in section 2509 of the Food, Agriculture, Conservation, and Trade Act of 1990, automatically authorizes EM for production and physical losses resulting from the quarantine in a primary county (the county in which the quarantine was in force) and (where the quarantine effects extend beyond that county) the counties contiguous to that primary county.

(4) *Presidential declaration*. Whenever the President declares a Major Disaster Declaration or an Emergency Declaration, FSA will make EM available to eligible applicants in declared and contiguous counties, provided:

(i) The Presidential declaration is not solely for Category A or Category B Public Assistance or Hazard Mitigation Grant Assistance, and

(ii) The Presidential Major Disaster declaration is for losses due to severe, general disaster conditions including but not limited to conditions such as flood, hurricane, or earthquake.

(b) [Reserved]

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*AUTHORITY:* 7 U.S.C. 4501 and 1531; 16 U.S.C. 3801, note; 19 U.S.C. 2497; Title III, Pub. L. 109-234, 120 Stat. 474; Title IX, Pub. L. 110-28, 121 Stat. 211; Sec. 748, Pub. L. 111-80, 123 Stat. 2131; Title I, Pub. L. 115-123, 132 Stat. 65; Title I, Pub. L. 116-20, 133 Stat. 871; Division B, Title VII, Pub. L. 116-94, 133 Stat. 2658; Title I, Pub. L. 117-43, 135 Stat. 356; and Division N, Title I, Pub. L. 117-328.

**Subpart A—Dairy Indemnity Payment Program**

*AUTHORITY:* 7 U.S.C. 450j-1.

*SOURCE:* 43 FR 10535, Mar. 14, 1978, unless otherwise noted.

**PROGRAM OPERATIONS****§ 760.1 Administration.**

This indemnity payment program will be carried out by FSA under the direction and supervision of the Deputy Administrator. In the field, the program will be administered by the State and county committees.

**§ 760.2 Definitions.**

For purposes of this subject, the following terms shall have the meanings specified:

*Affected farmer* means a person who produces whole milk which is removed from the commercial market any time from:

(1) Pursuant to the direction of a public agency because of the detection of pesticide residues in such whole milk by tests made by a public agency or under a testing program deemed adequate for the purpose by a public agency, or

(2) Pursuant to the direction of a public agency because of the detection of other residues of chemicals or toxic substances residues, or contamination from nuclear radiation or fallout in such whole milk by tests made by a public agency or under a testing program deemed adequate for the purpose by a public agency.

*Affected manufacturer* means a person who manufactures dairy products which are removed from the commercial market pursuant to the direction of a public agency because of the detection of pesticide residue in such dairy products by tests made by a public agency or under a testing program deemed adequate for the purpose by a public agency.

*Application period* means any period during which an affected farmer's whole milk is removed from the commercial market pursuant to direction of a public agency for a reason specified in paragraph (k) of this section and for which application for payment is made.

*Base period* means the calendar month or 4-week period immediately preceding removal of milk from the market.

*Chemicals or Toxic Substances* means any chemical substance or mixture as defined in the Toxic Substances Control Act (15 U.S.C. 2602).

*Commercial market* means (1) the market to which the affected farmer normally delivers his whole milk and from which it was removed because of detection therein of a residue of a violating substance(s) or (2) the market to which the affected manufacturer normally delivers his dairy products and from

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which they were removed because of detection therein of pesticide residue.

*Contaminated milk* means milk containing elevated levels of any violating substance that may affect public health based on tests made by the applicable public agency and resulting in the removal of the milk from the commercial market.

*County committee* means the FSA county committee.

*Depopulation* means, consistent with the American Veterinary Medical Association (AVMA)<sup>1</sup> definition, the rapid destruction of a population of cows with as much consideration given to the welfare of the animals as practicable.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, FSA.

*FSA* means the Farm Service Agency, U.S. Department of Agriculture.

*Milk handler* means the marketing agency to or through which the affected dairy farmer marketed his whole milk at the time he was directed by the public agency to remove his whole milk from the commercial market.

*Not marketable* means no commercial market is available for affected cows to be slaughtered, processed, and marketed through the food chain system as determined by the Deputy Administrator.

*Nuclear Radiation or Fallout* means contamination from nuclear radiation or fallout from any source.

*Pay period* means (1) in the case of an affected farmer who markets his whole milk through a milk handler, the period used by the milk handler in settling with the affected farmer for his whole milk, usually biweekly or monthly, or (2) in the case of an affected farmer whose commercial market consists of direct retail sales to consumers, a calendar month.

*Payment subject to refund* means a payment which is made by a milk handler to an affected farmer, and which such farmer is obligated to refund to the milk handler.

<sup>1</sup>The AVMA Guidelines for the Depopulation of Animals is available at: <https://www.avma.org/sites/default/files/resources/AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf>.

*Person* means an individual, partnership, association, corporation, trust, estate, or other legal entity.

*Pesticide* means an economic poison which was registered pursuant to the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 135 through 135k), and approved for use by the Federal Government.

*Public agency* means any Federal, State or local public regulatory agency.

*Removed from the commercial market* means (1) produced and destroyed or fed to livestock, (2) produced and delivered to a handler who destroyed it or disposed of it as salvage (such as separating whole milk, destroying the fat, and drying the skim milk), or (3) produced and otherwise diverted to other than the commercial market.

*Same loss* means the event or trigger that caused the milk to be removed from the commercial market. For example, if milk is contaminated, the original cause of the contamination was the trigger and any loss related to that contamination would be considered the same loss.

*Secretary* means the Secretary of Agriculture of the United States or any officer or employee of the U.S. Department of Agriculture to whom he has delegated, or to whom he may hereafter delegate, authority to act in his stead.

*State committee* means the FSA State committee.

*Violating substance* means one or more of the following, as defined in this section: Pesticide, chemicals or toxic substances, or nuclear radiation or fallout.

*Whole milk* means milk as it is produced by cows.

[43 FR 10535, Mar. 14, 1978, as amended by Amdt. 1, 44 FR 36360, July 22, 1979; 52 FR 17935, May 13, 1987; 53 FR 44001, Nov. 1, 1988; 56 FR 1358, Jan. 14, 1991; 61 FR 18485, Apr. 26, 1996; 71 FR 27190, May 10, 2006; 84 FR 28176, June 18, 2019; 86 FR 70702, Dec. 13, 2021]

**Farm Service Agency, USDA****§ 760.5****PAYMENTS TO DAIRY FARMERS FOR MILK****§ 760.3 Indemnity payments on milk.**

(a) The amount of an indemnity payment for milk, including, but not limited to organic milk, made to an affected farmer who is determined by the county committee to be in compliance with all the terms and conditions of this subpart will be in the amount of the fair market value of the farmer's normal marketings for the application period, as determined in accordance with §§ 760.4 and 760.5, less:

(1) Any amount the affected farmer received for whole milk marketed during the application period; and

(2) Any payment not subject to refund that the affected farmer received from a milk handler with respect to milk removed from the commercial market during the application period.

(b) The eligible period for Dairy Indemnity Payment Program (DIPP) benefits for milk for the same loss is limited to 3 calendar months from when the first claim for milk benefits is approved. Upon written request from an affected farmer on the milk indemnity form authorized by the Deputy Administrator, the Deputy Administrator may authorize, at the Deputy Administrator's discretion, additional months of benefits for the affected farmer for milk due to extenuating circumstances, which may include allowing additional time for public agency approval of a removal plan for cow indemnification and confirmation of site disposal for affected cows. Additionally, the Deputy Administrator has discretion to approve additional months based on issues that are beyond the control of the affected farmer who is seeking cow indemnification, as well as when the affected farmer is following a plan to reduce chemical residues in milk, cows, and heifers to marketable levels.

[86 FR 70703, Dec. 13, 2021]

**§ 760.4 Normal marketings of milk.**

(a) The county committee shall determine the affected farmer's normal marketings which, for the purposes of this subpart, shall be the sum of the quantities of whole milk which such farmer would have sold in the commercial market in each of the pay periods

in the application period but for the removal of his whole milk from the commercial market because of the detection of a residue of a violating substance.

(b) Normal marketings for each pay period are based on the average daily production during the base period.

(c) Normal marketings determined in paragraph (b) of this section are adjusted for any change in the daily average number of cows milked during each pay period the milk is off the market compared with the average number of cows milked daily during the base period.

(d) If only a portion of a pay period falls within the application period, normal marketings for such pay period shall be reduced so that they represent only that part of such pay period which is within the application period.

[43 FR 10535, Mar. 14, 1978, as amended by Amdt. 1, 44 FR 36360, July 22, 1979]

**§ 760.5 Fair market value of milk.**

(a) The county committee shall determine the fair market value of the affected farmer's normal marketings, which, for the purposes of this subpart, shall be the sum of the net proceeds such farmer would have received for his normal marketings in each of the pay periods in the application period.

(b) The county committee shall determine the net proceeds the affected farmer would have received in each of the pay periods in the application period (1) in the case of an affected farmer who markets his whole milk through a milk handler, by multiplying the affected farmer's normal marketings for each such pay period by the average net price per hundred-weight of whole milk paid during the pay period by such farmer's milk handler in the same area for whole milk similar in quality and butterfat test to that marketed by the affected farmer in the base period used to determine his normal marketings, or (2) in the case of an affected farmer whose commercial market consists of direct retail sales to consumers, by multiplying the affected farmer's normal marketings for each such pay period by the average net price per hundredweight of whole milk, as determined by the county committee, which other producers in the

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same area who marketed their whole milk through milk handlers received for whole milk similar in quality and butterfat test to that marketed by the affected farmer during the base period used to determine his normal marketings.

(c) In determining the net price for whole milk, the county committee shall deduct from the gross price therefor any transportation, administrative, and other costs of marketing which it determines are normally incurred by the affected farmer but which were not incurred because of the removal of his whole milk from the commercial market.

### § 760.6 Information to be furnished.

The affected farmer shall furnish to the county committee complete and accurate information sufficient to enable the county committee or the Deputy Administrator to make the determinations required in this subpart. Such information shall include, but is not limited to:

(a) A copy of the notice from, or other evidence of action by, the public agency which resulted in the removal of the affected farmer's whole milk from the commercial market.

(b) The specific name of the violating substance causing the removal of his whole milk from the commercial market, if not included in the notice or other evidence of action furnished under paragraph (a) of this section.

(c) The quantity and butterfat test of whole milk produced and marketed during the base period. This information must be a certified statement from the affected farmer's milk handler or any other evidence the county committee accepts as an accurate record of milk production and butterfat tests during the base period.

(d) The average number of cows milked during the base period and during each pay period in the application.

(e) If the affected farmer markets his whole milk through a milk handler, a statement from the milk handler showing, for each pay period in the application period, the average price per hundred-weight of whole milk similar in quality to that marketed by the affected farmer during the base period used to determine his normal mar-

ketings. If the milk handler has information as to the transportation, administrative, and other costs of marketing which are normally incurred by producers who market through the milk handler but which the affected farmer did not incur because of removal of his whole milk from the market, the average price stated by the milk handler shall be the average gross price paid producers less any such costs. If the milk handler does not have such information, the affected farmer shall furnish a statement setting forth such costs, if any.

(f) The amount of proceeds, if any, received by the affected farmer from the marketing of whole milk produced during the application period.

(g) The amount of any payments not subject to refund made to the affected farmer by the milk handler with respect to the whole milk produced during the application period and remove from the commercial market.

(h) To the extent that such information is available to the affected farmer, the name of any pesticide, chemical, or toxic substance used on the farm within 24 months prior to the application period, the use made of the pesticide, chemical, or toxic substance, the approximate date of such use, and the name of the manufacturer and the registration number, if any, on the label on the container of the pesticide, chemical, or toxic substance.

(i) To the extent possible, the source of the pesticide, chemical, or toxic substance that caused the contamination of the whole milk, the results of any laboratory tests on the feed supply, and the monthly milk testing results that detail the chemical residue levels.

(j) Such other information as the county committee may request to enable the county committee or the Deputy Administrator to make the determinations required in this subpart.

[43 FR 10535, Mar. 14, 1978, as amended by Amdt. 1, 44 FR 36360, June 22, 1979; 86 FR 70703, Dec. 13, 2021]

### § 760.7 Conditions required for milk or cow indemnity.

(a) An indemnity payment for milk or cows (dairy cows including, but not limited to, bred and open heifers) may

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be made under this subpart to an affected farmer under the conditions in this section.

(b) If the pesticide, chemical, or toxic substance, in the contaminated milk was used by the affected farmer, the affected farmer must establish that each of the conditions in this section are met:

(1) That the pesticide, chemical, or toxic substance, when used, was registered (if applicable) and approved for use as provided in § 760.2(f);

(2) That the contaminated milk was not the result of the affected farmer's failure to use the pesticide, chemical, or toxic substance, according to the directions and limitations stated on the label; and

(3) That the contaminated milk was not otherwise the affected farmer's fault.

(c) If the violating substance in the contaminated milk was not used by the affected farmer, the affected farmer must establish that each of the conditions in this section are met:

(1) The affected farmer did not know or have reason to believe that any purchased feed contained a violating substance;

(2) None of the milk was produced by dairy cattle that the affected farmer knew, or had reason to know at the time they were acquired, had elevated levels of a violating substance; and

(3) The contaminated milk was not otherwise the affected farmer's fault.

(d) The affected farmer has adopted recommended practices and taken action to eliminate or reduce chemical residues of violating substances from the milk as soon as practicable following the initial discovery of the contaminated milk.

[86 FR 70703, Dec. 13, 2021]

**§ 760.8 Application for payments for milk.**

The affected farmer or his legal representative, as provided in §§ 760.25 and 760.29, must sign and file an application for payment on a form which is approved for that purpose by the Deputy Administrator. The form must be filed with the county FSA office for the county where the farm headquarters are located no later than December 31 following the end of the fiscal year in

which the loss occurred, or such later date as the Deputy Administrator may specify. The application for payment shall cover application periods of at least 28 days, except that, if the entire application period, or the last application period, is shorter than 28 days, applications for payment may be filed for such shorter period. The application for payment shall be accompanied by the information required by § 760.6 as well as any other information which will enable the county committee to determine whether the making of an indemnity payment is precluded for any of the reasons set forth in § 760.7. Such information shall be submitted on forms approved for the purpose by the Deputy Administrator.

[43 FR 10535, Mar. 14, 1978, as amended at 51 FR 12986, Apr. 17, 1986; 52 FR 17935, May 13, 1987]

**§ 760.9 Payments for the same loss.**

(a) No indemnity payment shall be made for contaminated milk resulting from residues of chemicals or toxic substances if, within 30 days after receiving a complete application, the Deputy Administrator determines that other legal recourse is available to the farmer. An application shall not be deemed complete unless it contains all information necessary to make a determination as to whether other legal recourse is available to the farmer. However, notwithstanding such a determination, the Deputy Administrator may reopen the case at a later date and make a new determination on the merits of the case as may be just and equitable.

(b) In the event that a farmer receives an indemnity payment under this subpart, and such farmer is later compensated for the same loss by the person (or the representative or successor in interest of such person) responsible for such loss, the indemnity payment shall be refunded by the farmer to the Department of Agriculture: *Provided*, That the amount of such refund shall not exceed the amount of other compensation received by the farmer.

(c) For any affected farmer that exceeded 3 months of milk indemnity payments before December 13, 2021 no further payments for milk indemnity

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will be made for the same loss except as provided in § 760.3(b) and the affected farmer may apply for cow indemnity as specified in this subpart.

(d) An affected farmer that has an approved application for cow indemnity is no longer eligible for milk indemnity payments for the same loss.

(e) Cows purchased or bred after the initial discovery of the milk contamination are not eligible for DIPP benefits due to the same loss.

[Amdt. 1, 44 FR 36361, June 22, 1979, as amended at 84 FR 28176, June 18, 2019; 86 FR 70703, Dec. 13, 2021]

### § 760.10 Indemnity payments for cows.

(a) The Deputy Administrator for Farm Programs (DAFP) will determine eligibility for DIPP indemnification based on if the cows of the affected farmer are likely to be not marketable for 3 months or longer [from the date the affected farmer submits an application for cow indemnification per § 760.13]. The Deputy Administrator will review the following factors in making that determination:

(1) Milk testing results;

(2) Non marketability of affected cows through commercial marketing facilities;

(3) Type and source of chemical residues impacting the milk and animal tissues; and

(4) Projected duration for chemical residue reduction including the actions taken by the affected farmer to reduce the chemical residues to marketable levels since the affected cows were discovered.

(b) See § 760.11 for indemnity payment eligibility for bred and open heifers.

(c) Affected farmers applying for indemnification of cows, including heifers, must develop a removal plan both to permanently remove the affected cows by depopulating the cows.

(1) The removal plan for affected cows for which an affected farmer applies for indemnification under DIPP must be approved by the applicable public agency where the cows are located and must be in accordance with any applicable Environmental Protection Agency (EPA) and public agency depopulation and animal disposal requirements and guidelines, including contaminant disposal requirements, in

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the State where the affected cows are located.

(2) The approved removal plan must be submitted with the application for indemnification.

(d) The amount of an indemnity payment for cows to an affected farmer who is determined by the Deputy Administrator to be eligible for indemnification and by the county committee to be in compliance with all the terms and conditions of this subpart will be based on the national average fair market value of the cows. DIPP cow indemnification will be based on the 100 percent value of the Livestock Indemnity Program (LIP) rates as applicable for the calendar year for milk indemnification established for dairy cows, per head. For example, for a 100-cow farm: 100 cows multiplied by \$1,300 (2021 LIP rate based on 100 percent value of average cow) = \$130,000 payment.

(e) For any cow indemnification payment under this section or § 760.11, the affected farmer has the option to receive 50 percent of calculated payment in advance after application approval with the remaining fifty percent paid after the affected cows have been depopulated and removed. Otherwise, the affected farmer may choose to receive 100 percent of payment after cows have been depopulated and removed. Documented records of depopulation and removal of affected cows must be provided to FSA to the satisfaction of the county committee, before the final payment will be made.

(f) Upon written request from an affected farmer on a form authorized by the Deputy Administrator, the Deputy Administrator may approve, at the Deputy Administrator's discretion, indemnification of additional affected cows as specified in paragraphs (f)(1) through (3) of this section.

(1) The affected cows were depopulated or died above normal mortality rates for cows between approval of the affected farmer's application for the first month of milk indemnity and public agency approval of the affected farmer's removal plan for cow indemnification. Normal mortality rates established annually by the FSA State

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committee for their state for the following cow and heifer weight groups will be used:

(i) Dairy, nonadult less than 400 pounds;

(ii) Dairy, nonadult 400 pounds or more; and

(iii) Dairy, adult cow.

(2) This request may include both cows that were included in applications for milk indemnity and heifers that were affected from the same loss.

(3) An affected farmer making such a request must submit the information specified in § 760.12(c).

(g) Affected cows that are marketed as cull or for breeding are not eligible for indemnification.

[86 FR 70703, Dec. 13, 2021]

**§ 760.11 Indemnity payments for bred and open heifers.**

(a) Bred (young dairy female in gestation) and open (young dairy female not in gestation) heifers that contain elevated levels of chemical residues as the result of the same loss may be eligible for indemnification through DIPP. For affected bred and open heifers participating affected farmers may receive indemnification if the farmer's dairy cows were determined to be likely not marketable for three months or longer according to § 760.10(a) and the Deputy Administrator determines the bred and open heifers to be eligible under paragraph (b) of this section. Except as provided in this section or otherwise stated in this subpart, the provisions in this subpart for cow indemnity apply equally to bred and open heifers, for example the removal requirements in § 760.10(b).

(b) The county committee will make the recommendation to the Deputy Administrator to determine if eligible bred and open heifers that have been affected by the same loss will likely be not marketable for 3 months or longer from the date the affected farmer submits an application for cow indemnification per § 760.13 because of elevated levels of chemical residues that will pass through milk once lactating. Affected farmers must provide the information specified in § 760.12(a) and (b) for the county committee to make a recommendation of eligibility to the Deputy Administrator. The Deputy Ad-

ministrator will take into consideration the recommendation of the county committee in making its eligibility determination.

(c) The amount of the cow indemnity for bred and open heifers will be based on the national average fair market value of the non-adult heifers. DIPP bred and open heifer indemnification will be based on the 100 percent value of the Livestock Indemnity Program (LIP) rates as applicable for the calendar year of milk indemnification established for non-adult dairy, by weight range, per head. For example, for an affected farmer with 40 bred or open heifers at different weight ranges: 10 bred heifers at 800 pounds or more multiplied by \$986.13 (\$9861.30), 10 bred or open heifers at 400 to 799 pounds multiplied by \$650.00 (\$6500.00), 10 open heifers at 250 to 399 pounds multiplied by \$325.00 (\$3250.00), and 10 open heifers 250 pounds or less multiplied by \$57.65 (\$576.50) = \$20,187.80 payment.

[86 FR 70704, Dec. 13, 2021]

**§ 760.12 Information to be furnished for payment on dairy cows, and bred and open heifers.**

(a) To apply for DIPP for affected cows, the affected farmer must provide the county committee complete and accurate information to enable the Deputy Administrator to make the determinations required in this subpart in addition to providing the information requested in § 760.6(a), (b), (h), and (i), if not previously provided to FSA in a milk indemnity application. The information specified in this section must be submitted as part of the cow indemnity application and includes, but is not limited to, the following items:

(1) An inventory of all dairy cows as of the date of application including lactating cows, bred heifers, and open heifers on the farm;

(2) A detailed description and timeline of how, where, and when cows will be depopulated and permanently removed from the farm (the removal plan);

(3) Documentation of public agency approval of the removal plan for cow depopulation and cow and contaminant

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disposal in accordance with any applicable EPA and public agency disposal requirements and guidelines;

(4) Documentation from 2 separate commercial markets stating that such market declined to accept the affected cows through a cull cow market, slaughter facility, or processing facility due to elevated levels of chemical residues;

(5) Documentation of any projected timelines for reducing chemical residues, any actions the affected farmer has taken to reduce chemical residues to marketable levels including any documents verifying steps undertaken, and any professional assistance obtained, including, discussion of strategy with the public agencies; and

(6) Any other documentation that may support the determination that the affected cows or milk from such cows is likely to be not marketable for longer than 3 months; and other documentation as requested or determined to be necessary by the county committee or the Deputy Administrator.

(b) To apply for DIPP for bred and open heifers the affected farmer must provide the information specified in paragraph (a) of this section and: veterinarian records, blood test results, and other testing information requested by the county committee for the recommendation specified in § 760.11(b) and eligibility for indemnification.

(c) To request consideration for indemnification of affected cows and heifers under § 760.10(e), the affected farmer must submit the information specified in paragraphs (c)(1) and (2) of this section to provide an accounting of affected cows and heifers that were depopulated or died above normal mortality rates for cows between approval of the affected farmer's application for the first month of milk indemnity and the public agency approval of the affected farmer's removal plan for cow indemnification.

(1) Herd health record documenting cow and heifer deaths; and

(2) Farm inventory or other record identifying the loss of dairy cows and heifers.

(d) The affected farmer certifies at application that once the cow indemnity application is approved, the af-

fected farmer will dry off all lactating cows in a reasonable timeframe and discontinue milking.

[86 FR 70704, Dec. 13, 2021]

**§ 760.13 Application for payment of cows.**

(a) Any affected farmer may apply for cow indemnity under §§ 760.10 and 760.11. To apply for DIPP for affected cows, the affected farmer must sign and file an application for payment on a form that is approved for that purpose by the Deputy Administrator and provide the information described in § 760.12.

(b) The form must be filed with the FSA county office for the county where the farm headquarters is located by December 31 following the fiscal year end in which the affected farmer's milk was removed from the commercial market, except that affected farmers that have received 3 months of milk indemnity payments prior to December 13, 2021, must file the form within 120 days after December 13, 2021. Upon written request from an affected farmer and at Deputy Administrator's discretion, the deadline for that affected farmer may be extended.

[86 FR 70705, Dec. 13, 2021]

**PAYMENTS TO MANUFACTURERS  
AFFECTED BY PESTICIDES****§ 760.20 Payments to manufacturers of dairy products.**

An indemnity payment may be made to the affected manufacturer who is determined by the Deputy Administrator to be in compliance with all the terms and conditions of this subpart in the amount of the fair market value of the product removed from the commercial market because of pesticide residues, less any amount the manufacturer receives for the product in the form of salvage.

NOTE: Manufacturers are not eligible for payment when dairy products are contaminated by chemicals, toxic substances (other than pesticides) or nuclear radiation or fallout.

[43 FR 10535, Mar. 14, 1978, as amended at 47 FR 24689, June 8, 1982]

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The affected manufacturer, or his legal representatives, shall file an application for payment with the Deputy Administrator, FSA, Washington, D.C., through the county office serving the county where the contaminated product is located. The application for payment may be in the form of a letter or memorandum. Such letter or memorandum, however, must be accompanied by acceptable documentation to support such application for payment.

**§ 760.22 Information to be furnished by manufacturer.**

The affected manufacturer shall furnish the Deputy Administrator, through the county committee, complete and accurate information sufficient to enable him to make the determination as to the manufacturer's eligibility to receive an indemnity payment. Such information shall include, but is not limited to:

(a) A copy of the notice or other evidence of action by the public agency which resulted in the product being removed from the commercial market.

(b) The name of the pesticide causing the removal of the product from the commercial market and, to the extent possible, the source of the pesticide.

(c) A record of the quantity of milk or butterfat used to produce the product for which an indemnity payment is requested.

(d) The identity of any pesticide used by the affected manufacturer.

(e) Such other information as the Deputy Administrator may request to enable him to make the determinations required in this subpart.

**§ 760.23 Other requirements for manufacturers.**

An indemnity payment may be made under this subpart to an affected manufacturer only under the following conditions:

(a) If the pesticide contaminating the product was used by the affected manufacturer, he establishes each of the following: (1) That the pesticide, when used, was registered and recommended for such use as provided in § 760.2(f); (2) that the contamination of his product was not the result of his failure to use

the pesticide in accordance with the directions and limitations stated on the label of the pesticide; and (3) that the contamination of his product was not otherwise his fault.

(b) If the pesticide contaminating the product was not used by the affected manufacturer: (1) He did not know or have reason to believe that the milk from which the product was processed contained a harmful level of pesticide residue, and (2) the contamination of his product was not otherwise his fault.

(c) In the event that a manufacturer receives an indemnity payment under this subpart, and such manufacturer is later compensated for the same loss by the person (or the representative or successor in interest of such person) responsible for such loss, the indemnity payment shall be refunded by the manufacturer to the Department of Agriculture: *Provided*, That the amount of such refund shall not exceed the amount of other compensation received by the manufacturer.

[43 FR 10355, Mar. 14, 1978, as amended at 47 FR 24689, June 8, 1982; 51 FR 12987, Apr. 17, 1986; 52 FR 17935, May 13, 1987]

**GENERAL PROVISIONS****§ 760.24 Limitation of authority.**

(a) County executive directors and State and county committees do not have authority to modify or waive any of the provisions of the regulations in this subpart.

(b) The State committee may take any action authorized or required by the regulations in this subpart to be taken by the county committee when such action has not been taken by the county committee. The State committee may also:

(1) Correct, or require a county committee to correct, any action taken by such county committee which is not in accordance with the regulations in this subpart, or (2) require a county committee to withhold taking any action which is not in accordance with the regulations in this subpart.

(c) No delegation herein to a State or county committee shall preclude the Deputy Administrator or his designee from determining any question arising under the regulations in this subpart

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or from reversing or modifying any determination made by a State or county committee.

### § 760.25 Estates and trusts; minors.

(a) A receiver of an insolvent debtor's estate and the trustee of a trust estate shall, for the purpose of this subpart, be considered to represent an insolvent affected farmer or manufacturer and the beneficiaries of a trust, respectively, and the production of the receiver or trustee shall be considered to be the production of the person or manufacturer he represents. Program documents executed by any such person will be accepted only if they are legally valid and such person has the authority to sign the applicable documents.

(b) An affected dairy farmer or manufacturer who is a minor shall be eligible for indemnity payments only if he meets one of the following requirements:

(1) The right of majority has been conferred on him by court proceedings or by statute;

(2) A guardian has been appointed to manage his property and the applicable program documents are signed by the guardian; or

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

### § 760.26 Appeals.

The appeal regulations issued by the Administrator, FSA, part 780 of this chapter, shall be applicable to appeals by dairy farmers or manufacturers from determinations made pursuant to the regulations in this subpart.

### § 760.27 Setoffs.

(a) If the affected farmer or manufacturer is indebted to any agency of the United States and such indebtedness is listed on the county debt record, indemnity payments due the affected farmer or manufacturer under the regulations in this part shall be applied, as provided in the Secretary's setoff regulations, part 13 of this title, to such indebtedness.

(b) Compliance with the provisions of this section shall not deprive the affected farmer or manufacturer of any right he would otherwise have to con-

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test the justness of the indebtedness involved in the setoff action, either by administrative appeal or by legal action.

### § 760.28 Overdisbursement.

If the indemnity payment disbursed to an affected farmer or to a manufacturer exceeds the amount authorized under the regulations in this subpart, the affected farmer or manufacturer shall be personally liable for repayment of the amount of such excess.

### § 760.29 Death, incompetency, or disappearance.

In the case of the death, incompetency, or disappearance of any affected farmer or manufacturer who would otherwise receive an indemnity payment, such payment may be made to the person or persons specified in the regulations contained in part 707 of this chapter. The person requesting such payment shall file Form FSA-325, "Application for Payment of Amounts Due Persons Who Have Died, Disappeared, or Have Been Declared Incompetent," as provided in that part.

[43 FR 10535, Mar. 14, 1978, as amended at 47 FR 24689, June 8, 1982]

### § 760.30 Records and inspection thereof.

(a) The affected farmer, as well as his milk handler and any other person who furnished information to such farmer or to the county committee for the purpose of enabling such farmer to receive a milk indemnity payment under this subpart, shall maintain any existing books, records, and accounts supporting any information so furnished for 3 years following the end of the year during which the application for payment was filed. The affected farmer, his milk handler, and any other person who furnishes such information to the affected farmer or to the county committee shall permit authorized representatives of the Department of Agriculture and the General Accounting Office, during regular business hours, to inspect, examine, and make copies of such books, records, and accounts.

(b) The affected manufacturer or any other person who furnishes information to the Deputy Administrator for the

purposes of enabling such manufacturer to receive an indemnity payment under this subpart shall maintain any books, records, and accounts supporting any information so furnished for 3 years following the end of the year during which the application for payment was filed. The affected manufacturer or any other person who furnishes such information to the Deputy Administrator shall permit authorized representatives of the Department of Agriculture and the General Accounting Office, during regular business hours, to inspect, examine, and make copies of such books, records, and accounts.

**§ 760.31 Assignment.**

No assignment shall be made of any indemnity payment due or to come due under the regulations in this subpart. Any assignment or attempted assignment of any indemnity payment due or to come due under this subpart shall be null and void.

**§ 760.32 Instructions and forms.**

The Deputy Administrator shall cause to be prepared such forms and instructions as are necessary for carrying out the regulations in this subpart. Affected farmers and manufacturers may obtain information necessary to make application for a dairy indemnity payment from the county FSA office. Form FSA-373—Application for Indemnity Payment, is available at the county ASC office.

[43 FR 10535, Mar. 14, 1978, as amended at 47 FR 24689, June 8, 1982]

**§ 760.33 Availability of funds.**

(a) Payment of indemnity claims will be contingent upon the availability of FSA funds to pay such claims. Claims will be, to the extent practicable within funding limits, paid from available funds, on a first-come, first-paid basis, based on the date FSA approves the application, until funds available in that fiscal year have been expended.

(b) DIPP claims received in a fiscal year after all available funds have been expended will not receive payment for such claims.

[75 FR 41367, July 16, 2010]

**Subpart B—General Provisions for Supplemental Agricultural Disaster Assistance Programs**

SOURCE: 74 FR 31571, July 2, 2009, unless otherwise noted.

**§ 760.101 Applicability.**

(a) This subpart establishes general conditions for this subpart and subparts C through H of this part and applies only to those subparts. Subparts C through H cover the following programs provided for in the “2008 Farm Bill” (Pub. L. 110-246):

- (1) Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP);
- (2) Livestock Forage Disaster Program (LFP);
- (3) Livestock Indemnity Payments Program (LIP);
- (4) Supplemental Revenue Assistance Payments Program (SURE); and
- (5) Tree Assistance Program (TAP).

(b) To be eligible for payments under these programs, participants must comply with all provisions under this subpart and the relevant particular subpart for that program. All other provisions of law also apply.

**§ 760.102 Administration of ELAP, LFP, LIP, SURE, and TAP.**

(a) The programs in subparts C through H of this part will be administered under the general supervision and direction of the Administrator, Farm Service Agency (FSA), and the Deputy Administrator for Farm Programs, FSA (who is referred to as the “Deputy Administrator” in this part).

(b) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this part as amended or supplemented, except as specified in paragraph (e) of this section.

(c) The State FSA committee will take any action required by the regulations of this part that the county FSA committee has not taken. The State FSA committee will also:

- (1) Correct, or require a county FSA committee to correct, any action taken by such county FSA committee that is not in accordance with the regulations of this part or

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

(d) No provision or delegation to a State or county FSA committee will preclude the Administrator, the Deputy Administrator for Farm Programs, or a designee or other such person, from determining any question arising under the programs of this part, or from reversing or modifying any determination made by a State or county FSA committee.

(e) The Deputy Administrator for Farm Programs may authorize State and county FSA committees to waive or modify non-statutory deadlines, or other program requirements of this part in cases where lateness or failure to meet such requirements does not adversely affect operation of the programs in this part. Participants have no right to seek an exception under this provision. The Deputy Administrator's refusal to consider cases or circumstances or decision not to exercise this discretionary authority under this provision will not be considered an adverse decision and is not appealable.

#### § 760.103 Eligible producer.

(a) In general, the term "eligible producer" means, in addition to other requirements as may apply, an individual or entity described in paragraph (b) of this section that, as determined by the Secretary, assumes the production and market risks associated with the agricultural production of crops or livestock on a farm either as the owner of the farm, when there is no contract grower, or a contract grower of the livestock when there is a contract grower.

(b) To be eligible for benefits, an individual or entity must be a:

- (1) Citizen of the United States;
- (2) Resident alien; for purposes of this part, resident alien means "lawful alien" as defined in 7 CFR part 1400;
- (3) Partnership of citizens of the United States; or
- (4) Corporation, limited liability corporation, or other farm organizational structure organized under State law.

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#### § 760.104 Risk management purchase requirements.

(a) To be eligible for program payments under:

(1) ELAP, SURE, and TAP, eligible producers for any commodity at any location for which the producer seeks benefits must have for every commodity on every farm in which the producer has an interest for the relevant program year:

(i) In the case of an "insurable commodity," (which for this part means a commodity for which the Deputy Administrator determines catastrophic coverage is available from the USDA Risk Management Agency (RMA)) obtained catastrophic coverage or better under a policy or plan of insurance administered by RMA under the Federal Crop Insurance Act (FCIA) (7 U.S.C. 1501-1524), except that this obligation will not include crop insurance pilot programs so designated by RMA or to forage crops intended for grazing, and

(ii) In the case of a "noninsurable commodity," (which is any commodity for which, as to the particular production in question, is not an "insurable commodity," but for which coverage is available under the Noninsured Crop Disaster Assistance Program (NAP) operated under 7 CFR part 1437), have obtained NAP coverage by filing the proper paperwork and fee within the relevant deadlines, except that this requirement will not include forage on grazing land.

(2) LFP, with respect to those grazing lands incurring losses for which assistance is being requested, eligible livestock producers must have:

(i) Obtained a policy or plan of insurance for the forage crop under FCIA, or

(ii) Filed the required paperwork and paid the administrative fee by the applicable State filing deadline for NAP coverage for that grazing land.

(b) Producers who did not purchase a policy or plan of insurance administered by RMA in accordance with FCIA (7 U.S.C. 1501-1524), or NAP coverage for their applicable crops, will not be eligible for assistance under ELAP, LFP, SURE, and TAP, as provided in paragraph (a) of this section unless the producer is one of the classes of farmers for which an exemption under § 760.107 apply, is exempt under the

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“buy-in” provisions of this subpart, or is granted relief from that requirement by the Deputy Administrator under some other provision of this part.

(c) Producers who have obtained insurance by a written agreement as specified in § 400.652(d) of this title even though that production would not normally be considered an “insurable commodity” under the rules of this subpart, will be considered to have met the risk management purchase requirement of this subpart with respect to such production. The commodity to which the agreement applies will be considered for purposes of this subpart to be an “insurable commodity.”

(d) Producers by an administrative process who were granted NAP coverage for the relevant period as a form of relief in an administrative proceeding, or who were awarded NAP coverage for the relevant period through an appeal through the National Appeals Division (NAD), will be considered as having met the NAP eligibility criteria of this section for that crop as long as the applicable NAP service fee has been paid.

(e) The risk management purchase requirement for programs specified under this part will be determined based on the initial intended use of a crop at the time a policy or plan of insurance or NAP coverage was purchased and as reported on the acreage report.

[74 FR 31571, July 2, 2009, as amended at 74 FR 46673, Sept. 11, 2009]

**§ 760.105 Waiver for certain crop years; buy-in.**

(a) For the 2008 crop year, the insurance or NAP purchase requirements of § 760.104 (this is referred to as the “purchase” requirement) will be waived for eligible producers for losses during the 2008 crop year if the eligible producer paid a fee (buy-in fee) equal to the applicable NAP service fee or catastrophic risk protection plan fee to the Secretary by September 16, 2008. Payment of a buy-in fee under this section is for the sole purpose of becoming eligible for participation in ELAP, LFP, SURE, and TAP. Payment of a buy-in fee does not provide any actual insurance or NAP coverage or assistance.

(b) For the 2009 crop year, the purchase requirement will be waived for purchases where the closing date for coverage occurred prior to August 14, 2008, so long as the buy-in fee set by the Secretary of Agriculture was paid by January 12, 2009.

(c) Any producer of 2008 commodities who is otherwise ineligible because of the purchase requirement and who did not meet the conditions of paragraph (a) of this section may still be covered for ELAP, SURE, or TAP assistance if the producer paid the applicable fee described in paragraph (d) of this section no later than May 18, 2009, provided that in the case of each:

(1) Insurable commodity, excluding grazing land, the eligible producers on the farm agree to obtain a policy or plan of insurance under FCIA (7 U.S.C. 1501–1524), excluding a crop insurance pilot program under that subtitle, for the next insurance year for which crop insurance is available to the eligible producers on the farm at a level of coverage equal to 70 percent or more of the recorded or appraised average yield indemnified at 100 percent of the expected market price, or an equivalent coverage, and

(2) Noninsurable commodity, the eligible producers on the farm must agree to file the required paperwork, and pay the administrative fee by the applicable State filing deadline, for NAP for the next year for which a policy is available.

(d) For producers seeking eligibility under paragraph (c) of this section, the applicable buy-in fee for the 2008 crop year was the catastrophic risk protection plan fee or the applicable NAP service fee in effect prior to NAP service fee adjustments specified in the 2008 Farm Bill.

**§ 760.106 Equitable relief.**

(a) The Secretary may provide equitable relief on a case-by-case basis for the purchase requirement to eligible participants that:

(1) Are otherwise ineligible or provide evidence, satisfactory to FSA, that the failure to meet the requirements of § 760.104 for one or more eligible crops on the farm was unintentional and not because of any fault of

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the participant, as determined by the Secretary, or

(2) Failed to meet the requirements of § 760.104 due to the enactment of the 2008 Farm Bill after the:

(i) Applicable sales closing date for a policy or plan of insurance in accordance with the FCIA (7 U.S.C. 1501–1524) or

(ii) Application closing date for NAP.

(b) Equitable relief will not be granted to participants in instances of:

(1) A scheme or device that had the effect or intent of defeating the purposes of a program of insurance, NAP, or any other program administered under this part or elsewhere in this title,

(2) An intentional decision to not meet the purchase or buy-in requirements,

(3) Producers against whom sanctions have been imposed by RMA or FSA prohibiting the purchase of coverage or prohibiting the receipt of payments otherwise payable under this part,

(4) Violations of highly erodible land and wetland conservation provisions of 7 CFR part 12,

(5) Producers who are ineligible under any provisions of law, including regulations, relating to controlled substances (see for example 7 CFR 718.6), or

(6) A producer's debarment by a federal agency from receiving any federal government payment if such debarment included payments of the type involved in this matter.

(c) In general, no relief that is discretionary will be allowed except upon a finding by the Deputy Administrator or the Deputy Administrator's designee that the person seeking the relief acted in good faith as determined in accordance with such rules and procedures as may be set by the Deputy Administrator.

[74 FR 31571, July 2, 2009, as amended at 76 FR 54075, Aug. 31, 2011]

## § 760.107 Socially disadvantaged, limited resource, or beginning farmer or rancher.

(a) Risk management purchase requirements, as provided in § 760.104, will be waived for a participant who, as specified in paragraphs (b)(1) through (3) of this section, is eligible to be con-

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sidered a "socially disadvantaged farmer or rancher," a "limited resource farmer or rancher," or a "beginning farmer or rancher."

(b) To qualify for this section as a "socially disadvantaged farmer or rancher," "limited resource farmer or rancher," or "beginning farmer or rancher," participants must meet eligibility criteria as follows:

(1) A "socially disadvantaged farmer or rancher" is, for this section, a farmer or rancher who is a member of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. Gender is not included as a covered group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

(i) American Indians or Alaskan Natives,

(ii) Asians or Asian-Americans,

(iii) Blacks or African Americans,

(iv) Native Hawaiians or other Pacific Islanders, and

(v) Hispanics.

(2) A "limited resource farmer or rancher" means for this section a producer who is both:

(i) A producer whose direct or indirect gross farm sales do not exceed \$100,000 in both of the two calendar years that precede the calendar year that corresponds to the relevant program year, adjusted upwards for any general inflation since fiscal year 2004, inflation as measured using the Prices Paid by Farmer Index compiled by the National Agricultural Statistics Service (NASS), and

(ii) A producer whose total household income is at or below the national poverty level for a family of four, or less than 50 percent of the county median household income for the same two calendar years referenced in paragraph (b)(2)(i) of this section, as determined annually using Commerce Department data. (Limited resource farmer or rancher status can be determined using a Web site available through the Limited Resource Farmer and Rancher Online Self Determination Tool through

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the National Resource and Conservation Service at <http://www.lfptool.sc.egov.usda.gov/tool.asp>.)

(3) A “beginning farmer or rancher” means for this section a person or legal entity who for a program year both:

(i) Has never previously operated a farm or ranch, or who has not operated a farm or ranch in the previous 10 years, applicable to all members (shareholders, partners, beneficiaries, etc., as fits the circumstances) of an entity, and

(ii) Will have or has had for the relevant period materially and substantially participated in the operation of a farm or ranch.

(c) If a legal entity requests to be considered a “socially disadvantaged,” “limited resource,” or “beginning” farmer or rancher, at least 50 percent of the persons in the entity must in their individual capacities meet the definition as provided in paragraphs (b)(1) through (3) of this section and it must be clearly demonstrated that the entity was not formed for the purposes of avoiding the purchase requirements or formed after the deadline for the purchase requirement.

[74 FR 31571, July 2, 2009, as amended at 76 FR 54075, Aug. 31, 2011]

**§ 760.108 Payment limitation.**

(a) For 2008, no person, as defined and determined under the provisions in part 1400 of this title in effect for 2008 may receive more than:

(1) \$100,000 total for the 2008 program year under ELAP, LFP, LIP, and SURE combined or

(2) \$100,000 for the 2008 program year under TAP.

(b) For 2009 and subsequent program years, no person or legal entity, excluding a joint venture or general partnership, as determined by the rules in part 1400 of this title may receive, directly or indirectly, more than:

(1) \$100,000 per program year total under ELAP, LFP, LIP, and SURE combined; or

(2) \$100,000 per program year under TAP.

(c) The Deputy Administrator may take such actions as needed, whether or not specifically provided for, to avoid a duplication of benefits under the multiple programs provided for in

this part, or duplication of benefits received in other programs, and may impose such cross-program payment limitations as may be consistent with the intent of this part.

(1) FSA will review ELAP payments after the funding factor as specified in § 760.208 is determined to be 100 percent. FSA will ensure that total ELAP payments provided to a participant in a year, together with any amount provided to the same participant for the same loss as a result of any Federal crop insurance program, the Non-insured Crop Disaster Assistance Program, or any other Federal disaster program, plus the value of the commodity that was not lost, is not more than 95 percent of the value of the commodity in the absence of the loss, as estimated by FSA.

(2) [Reserved]

(d) In applying the limitation on average adjusted gross income (AGI) for 2008, an individual or entity is ineligible for payment under ELAP, LFP, LIP, SURE, and TAP if the individual's or entity's average adjusted gross income (AGI) exceeds \$2.5 million for 2007, 2006, and 2005 under the provisions in part 1400 of this title in effect for 2008.

(e) For 2009 through 2011, the average AGI limitation provisions in part 1400 of this title relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, with certain levels of average adjusted gross income (AGI) will apply under this subpart and will apply to each applicant for ELAP, LFP, LIP, SURE, and TAP. Specifically, for 2009 through 2011, a person or legal entity with an average adjusted gross non-farm income, as defined in § 1404.3 of this title, that exceeds \$500,000 will not be eligible to receive benefits under this part.

(f) The direct attribution provisions in part 1400 of this title apply to ELAP, LFP, LIP, SURE, and TAP for 2009 and subsequent years. Under those rules, any payment to any legal entity will also be considered for payment limitation purposes to be a payment to persons or legal entities with an interest in the legal entity or in a sub-entity. If

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any such interested person or legal entity is over the payment limitation because of direct payment or their indirect interests or a combination thereof, then the payment to the actual payee will be reduced commensurate with the amount of the interest of the interested person in the payee. Likewise, by the same method, if anyone with a direct or indirect interest in a legal entity or sub-entity of a payee entity exceeds the AGI levels that would allow a participant to directly receive a payment under this part, then the payment to the actual payee will be reduced commensurately with that interest. For all purposes under this section, unless otherwise specified in part 1400 of this title, the AGI figure that will be relevant for a person or legal entity will be an average AGI for the three taxable years that precede the most immediately preceding complete taxable year, as determined by CCC.

[74 FR 31571, July 2, 2009, as amended at 74 FR 46673, Sept. 11, 2009]

### § 760.109 Misrepresentation and scheme or device.

(a) A participant who is determined to have deliberately misrepresented any fact affecting a program determination made in accordance with this part, or otherwise used a scheme or device with the intent to receive benefits for which the participant would not otherwise be entitled, will not be entitled to program payments and must refund all such payments received, plus interest as determined in accordance with part 792 of this chapter. The participant will also be denied program benefits for the immediately subsequent period of at least 2 crop years, and up to 5 crop years. Interest will run from the date of the original disbursement by FSA.

(b) A participant will refund to FSA all program payments, plus interest, as determined in accordance with part 792 of this chapter, provided however, that in any case it will run from the date of the original disbursement, received by such participant with respect to all contracts or applications, as may be applicable, if the participant is determined to have knowingly done any of the following:

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- (1) Adopted any scheme or device that tends to defeat the purpose of the program,
- (2) Made any fraudulent representation, or
- (3) Misrepresented any fact affecting a program determination.

### § 760.110 Appeals.

(a) *Appeals.* Appeal regulations set forth at parts 11 and 780 of this title apply to this part.

(b) *Determinations not eligible for administrative review or appeal.* FSA determinations that are not in response to a specific individual participant's application are not to be construed to be individual program eligibility determinations or adverse decisions and are, therefore, not subject to administrative review or appeal under parts 11 or 780 of this title. Such determinations include, but are not limited to, application periods, deadlines, coverage periods, crop years, fees, prices, general statutory or regulatory provisions that apply to similarly situated participants, national average payment prices, regions, crop definition, average yields, and payment factors established by FSA for any of the programs for which this subpart applies or similar matters requiring FSA determinations.

### § 760.111 Offsets, assignments, and debt settlement.

(a) Any payment to any participant under this part will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in part 792 of this title apply to payments made under this part.

(b) Any participant entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 1404 of this title.

### § 760.112 Records and inspections.

(a) Any participant receiving payments under any program in ELAP, LFP, LIP, SURE, or TAP, or any other legal entity or person who provides information for the purposes of enabling

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a participant to receive a payment under ELAP, LFP, LIP, SURE, or TAP, must:

(1) Maintain any books, records, and accounts supporting the information for 3 years following the end of the year during which the request for payment was submitted, and

(2) Allow authorized representatives of USDA and the Government Accountability Office, during regular business hours, to inspect, examine, and make copies of such books or records, and to enter the farm and to inspect and verify all applicable livestock and acreage in which the participant has an interest for the purpose of confirming the accuracy of information provided by or for the participant.

(b) [Reserved]

**§ 760.113 Refunds; joint and several liability.**

(a) In the event that the participant fails to comply with any term, requirement, or condition for payment or assistance arising under ELAP, LFP, LIP, SURE, or TAP and if any refund of a payment to FSA will otherwise become due in connection with this part, the participant must refund to FSA all payments made in regard to such matter, together with interest and late-payment charges as provided for in part 792 of this chapter provided that interest will in all cases run from the date of the original disbursement.

(b) All persons with a financial interest in an operation or in an application for payment will be jointly and severally liable for any refund, including related charges, that is determined to be due FSA for any reason under this part.

**§ 760.114 Minors.**

A minor child is eligible to apply for program benefits under ELAP, LFP, LIP, SURE, or TAP if all the eligibility requirements are met and the provision for minor children in part 1400 of this title are met.

**§ 760.115 Deceased individuals or dissolved entities.**

(a) Payments may be made for eligible losses suffered by an eligible participant who is now a deceased individual or is a dissolved entity if a representa-

tive, who currently has authority to enter into a contract, on behalf of the participant, signs the application for payment.

(b) Legal documents showing proof of authority to sign for the deceased individual or dissolved entity must be provided.

(c) If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

**§ 760.116 Miscellaneous.**

(a) As a condition to receive benefits under ELAP, LFP, LIP, SURE, or TAP, a participant must have been in compliance with the provisions of parts 12 and 718 of this title, and must not otherwise be precluded from receiving benefits under those provisions or under any law.

(b) Rules of the Commodity Credit Corporation that are cited in this part will be applied to this subpart in the same manner as if the programs covered in this subpart were programs funded by the Commodity Credit Corporation.

**Subpart C—Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program**

SOURCE: 74 FR 46673, Sept. 11, 2009, unless otherwise noted.

**§ 760.201 Applicability.**

(a) This subpart establishes the terms and conditions under which the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP) will be administered.

(b) Eligible producers of livestock, honeybees, and farm-raised fish will be compensated to reduce eligible losses that occurred in the calendar year for which the producer requests benefits. The eligible loss must have been a direct result of eligible adverse weather or eligible loss conditions as determined by the Deputy Administrator, including, but not limited to, blizzards,

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wildfires, disease, and insect infestation. ELAP does not cover losses that are covered under LFP, LIP, or SURE.

### § 760.202 Definitions.

The following definitions apply to this subpart and to the administration of ELAP. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Adult beef bull* means a male beef breed bovine animal that was used for breeding purposes that was at least 2 years old before the beginning date of the eligible adverse weather or eligible loss condition.

*Adult beef cow* means a female beef breed bovine animal that had delivered one or more offspring before the beginning date of the eligible adverse weather or eligible loss condition. A first-time bred beef heifer is also considered an adult beef cow if it was pregnant on or by the beginning date of the eligible adverse weather or eligible loss condition.

*Adult buffalo and beefalo bull* means a male animal of those breeds that was used for breeding purposes and was at least 2 years old before the beginning date of the eligible adverse weather or eligible loss condition.

*Adult buffalo and beefalo cow* means a female animal of those breeds that had delivered one or more offspring before the beginning date of the eligible adverse weather or eligible loss condition. A first-time bred buffalo or beefalo heifer is also considered an adult buffalo or beefalo cow if it was pregnant by the beginning date of the eligible adverse weather or eligible loss condition.

*Adult dairy bull* means a male dairy breed bovine animal that was used primarily for breeding dairy cows and was at least 2 years old by the beginning date of the eligible adverse weather or eligible loss condition.

*Adult dairy cow* means a female bovine dairy breed animal used for the purpose of providing milk for human consumption that had delivered one or more offspring by the beginning date of the eligible adverse weather or eligible loss condition. A first-time bred dairy heifer is also considered an adult dairy cow if it was pregnant by the beginning

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date of the eligible adverse weather or eligible loss condition.

*Agricultural operation* means a farming operation.

*Application* means FSA form used to apply for either the emergency loss assistance for livestock or emergency loss assistance for farm-raised fish or honeybees.

*Aquatic species* means any species of aquatic organism grown as food for human consumption, fish raised as feed for fish that are consumed by humans, or ornamental fish propagated and reared in an aquatic medium by a commercial operator on private property in water in a controlled environment. Catfish and crawfish are both defined as aquatic species for ELAP. However, aquatic species do not include reptiles or amphibians.

*Bait fish* means small fish caught for use as bait to attract large predatory fish. For ELAP, it also must meet the definition of aquatic species and not be raised as food for fish; provided, however, that only bait fish produced in a controlled environment can generate claims under ELAP.

*Buck* means a male goat.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer.

*Contract* means, with respect to contracts for the handling of livestock, a written agreement between a livestock owner and another individual or entity setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock or livestock products.

*Controlled environment* means an environment in which everything that can practicably be controlled by the participant with structures, facilities, and growing media (including, but not limited to, water and nutrients) was in fact controlled by the participant at the time of the eligible adverse weather or eligible loss condition.

*County committee or county office* means the respective FSA committee or office.

*Deputy Administrator* or DAFP means the Deputy Administrator for Farm Programs, Farm Service Agency, U.S. Department of Agriculture or the designee.

*Eligible adverse weather or eligible loss condition* means any disease, adverse weather, or other loss condition as determined by the Deputy Administrator. The eligible adverse weather or eligible loss condition would have resulted in agricultural losses not covered by other programs in this part for which the Deputy Administrator determines financial assistance needs to be provided to producers. The disease, adverse weather, or other conditions may include, but are not limited to, blizzards, wildfires, water shortages, and other factors. Specific eligible adverse weather and eligible loss conditions may vary based on the type of loss. Identification of eligible adverse weather and eligible loss conditions will include locations (National, State, or county-level) and start and end dates.

*Equine animal* means a domesticated horse, mule, or donkey.

*Ewe* means a female sheep.

*Farming operation* means a business enterprise engaged in producing agricultural products.

*Farm-raised fish* means any aquatic species that is propagated and reared in a controlled environment.

*FSA* means the Farm Service Agency.

*Game or sport fish* means fish pursued for sport by recreational anglers; provided, however, that only game or sport fish produced in a controlled environment can generate claims under ELAP.

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats. Goats are further delineated into categories by sex (bucks and nannies) and age (kids).

*Kid* means a goat less than 1 year old.

*Lamb* means a sheep less than 1 year old.

*Livestock owner*, for death loss purposes, means one having legal ownership of the livestock for which benefits are being requested on the day such livestock died due to an eligible adverse weather or eligible loss condition. For all other purposes of loss under ELAP, "livestock owner" means one having legal ownership of the livestock for which benefits are being requested during the 60 days prior to the beginning date of the eligible adverse weather or eligible loss condition.

*Nanny* means a female goat.

*Non-adult beef cattle* means a beef breed bovine animal that does not meet the definition of adult beef cow or bull. Non-adult beef cattle are further delineated by weight categories of either less than 400 pounds or 400 pounds or more at the time they died. For a loss other than death, means a bovine animal less than 2 years old that weighed 500 pounds or more on or before the beginning date of the eligible adverse weather or eligible loss condition.

*Non-adult buffalo or beefalo* means an animal of those breeds that does not meet the definition of adult buffalo or beefalo cow or bull. Non-adult buffalo or beefalo are further delineated by weight categories of either less than 400 pounds or 400 pounds or more at the time of death. For a loss other than death, means an animal of those breeds that is less than 2 years old that weighed 500 pounds or more on or before the beginning date of the eligible adverse weather or eligible loss condition.

*Non-adult dairy cattle* means a bovine dairy breed animal used for the purpose of providing milk for human consumption that does not meet the definition of adult dairy cow or bull. Non-adult dairy cattle are further delineated by weight categories of either less than 400 pounds or 400 pounds or more at the time they died. For a loss other than death, means a bovine dairy breed animal used for the purpose of providing milk for human consumption that is less than 2 years old that weighed 500 pounds or more on or before the beginning date of the eligible adverse weather or eligible loss condition.

*Normal grazing period*, with respect to a county, means the normal grazing period during the calendar year with respect to each specific type of grazing land or pastureland in the county.

*Normal mortality* means the numerical amount, computed by a percentage, as established for the area by the FSA State Committee, of expected livestock deaths, by category, that normally occur during a calendar year for a producer.

*Poultry* means domesticated chickens, turkeys, ducks, and geese. Poultry are further delineated into categories

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by sex, age, and purpose of production as determined by FSA.

*Ram* means a male sheep.

*Secretary* means the Secretary of Agriculture or a designee of the Secretary.

*Sheep* means a domesticated, ruminant mammal of the genus *Ovis*. Sheep are further defined by sex (rams and ewes) and age (lambs) for purposes of dividing into categories for loss calculations.

*State committee, State office, county committee, or county office* means the respective FSA committee or office.

*Swine* means a domesticated omnivorous pig, hog, or boar. Swine for purposes of dividing into categories for loss calculations are further delineated into categories by sex and weight as determined by FSA.

*United States* means all 50 States of the United States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, and the District of Columbia.

**§ 760.203 Eligible losses, adverse weather, and other loss conditions.**

(a) An eligible loss covered under this subpart is a loss that an eligible producer or contract grower of livestock, honeybees, or farm-raised fish incurs due to an eligible adverse weather or eligible loss condition, as determined by the Deputy Administrator, (including, but not limited to, blizzards and wildfires).

(b) A loss covered under LFP, LIP, or SURE is not eligible for ELAP.

(c) To be eligible, the loss must have occurred:

(1) During the calendar year for which payment is being requested and

(2) Due to an eligible adverse weather event or loss condition that occurred on or after January 1, 2008, and before October 1, 2011.

(d) For a livestock feed loss to be considered an eligible loss, the livestock feed loss must be one of the following:

(1) Loss of purchased forage or feedstuffs that was intended for use as feed for the participant's eligible livestock that was physically located in the county where the eligible adverse weather or eligible loss condition occurred on the beginning date of the eli-

gible adverse weather or eligible loss condition. The loss must be due to an eligible adverse weather or eligible loss condition, as determined by the Deputy Administrator, including, but not limited to, blizzard, flood, hurricane, tidal surge, tornado, volcanic eruption, wildfire on non-Federal land, or lightning;

(2) Loss of mechanically harvested forage or feedstuffs intended for use as feed for the participant's eligible livestock that was physically located in the county where the eligible adverse weather or eligible loss condition occurred on the beginning date of the eligible adverse weather or eligible loss condition. The loss must have occurred after harvest due to an eligible adverse weather or eligible loss condition, as determined by the Deputy Administrator, including, but not limited to, blizzard, flood, hurricane, tidal surge, tornado, volcanic eruption, wildfire on non-Federal land, or lightning;

(3) A loss resulting from the additional cost incurred for providing or transporting livestock feed to eligible livestock due to an eligible adverse weather or eligible loss condition as determined by the Deputy Administrator, including, but not limited to, costs associated with equipment rental fees for hay lifts and snow removal. The additional costs incurred must have been incurred for losses suffered in the county where the eligible adverse weather or eligible loss condition occurred;

(4) A loss resulting from the additional cost of purchasing additional livestock feed, above normal quantities, required to maintain the eligible livestock during an eligible adverse weather or eligible loss condition, until additional livestock feed becomes available, as determined by the Deputy Administrator. To be eligible, the additional feed purchased above normal quantities must be feed that is fed to maintain livestock in the county where the eligible adverse weather or eligible loss condition occurred.

(e) For a grazing loss to be considered eligible, the grazing loss must have been incurred on eligible grazing lands physically located in the county where the eligible adverse weather or eligible loss condition occurred. The grazing loss must be due to an eligible adverse

weather or eligible loss condition, as determined by the Deputy Administrator, including, but not limited to, flood, freeze, hurricane, hail, tidal surge, volcanic eruption, and wildfire on non-Federal land. The grazing loss will not be eligible if it is due to an adverse weather condition covered by LFP as specified in subpart D, such as drought or wildfire on federally managed land where the producer is prohibited by the Federal agency from grazing the normally permitted livestock on the managed rangeland due to a fire.

(f) For a loss due to livestock death to be considered eligible, the livestock death must have occurred in the county where the eligible loss condition occurred. The livestock death must be due to an eligible loss condition determined as eligible by the Deputy Administrator and not related to an eligible adverse weather event as specified in Subpart E for LIP.

(g) For honeybee or farm-raised fish feed losses to be considered eligible, the honeybee or farm-raised fish feed producer must have incurred the loss in the county where the eligible adverse weather or eligible loss condition occurred. The honeybee or farm-raised fish feed losses must be for feed that was intended as feed for the honeybees or farm-raised fish that was damaged or destroyed due to an eligible adverse weather or eligible loss condition, as determined by the Deputy Administrator, including, but not limited to, earthquake, excessive wind, flood, hurricane, tidal surge, tornado, volcanic eruption, and wildfire.

(h) For honeybee colony or honeybee hive losses to be considered eligible, the honeybee colony or honeybee hive producer must have incurred the loss in the county where the eligible adverse weather or eligible loss condition occurred. The honeybee colony or honeybee hive losses must be due to an eligible adverse weather or eligible loss condition, as determined by the Deputy Administrator, including, but not limited to, earthquake, excessive wind, flood, hurricane, tornado, volcanic eruption, and wildfire. To be eligible for a loss of honeybees due to colony collapse disorder, the eligible honeybee producer must provide acceptable doc-

umentation to support that the loss was due to colony collapse disorder. Except for 2008 and 2009 honeybee losses, acceptable documentation must include an acceptable colony collapse disorder certification by an independent third party as determined by the Deputy Administrator, plus any other documentation requested by FSA. For 2008 and 2009 honeybee losses such an independent certification is not required in all cases, but rather a self-certification by the honeybee producer as determined acceptable by the Deputy Administrator may be allowed in addition to whatever other documentation might be requested.

(i) For a death loss for bait fish or game fish to be considered eligible, the producer must have incurred the loss in the county where the eligible adverse weather or eligible loss condition occurred. The bait fish or game fish death must be due to an eligible adverse weather or eligible loss condition as determined by the Deputy Administrator including, but not limited to, an earthquake, flood, hurricane, tidal surge, tornado, and volcanic eruption.

[74 FR 46673, Sept. 11, 2009, as amended at 75 FR 19188, Apr. 14, 2010; 76 FR 54075, Aug. 31, 2010]

**§ 760.204 Eligible livestock, honeybees, and farm-raised fish.**

(a) To be considered eligible livestock for livestock feed losses and grazing losses, livestock must meet all the following conditions:

(1) Be alpacas, adult or non-adult dairy cattle, adult or non-adult beef cattle, adult or non-adult buffalo, adult or non-adult beefalo, deer, elk, emus, equine, goats, llamas, poultry, reindeer, sheep, or swine;

(2) Be livestock that would normally have been grazing the eligible grazing land or pastureland during the normal grazing period for the specific type of grazing land or pastureland for the county;

(3) Be livestock that is owned, cash-leased, purchased, under contract for purchase, or been raised by a contract grower or an eligible livestock producer, during the 60 days prior to the beginning date of the eligible adverse weather or eligible loss condition;

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(4) Be livestock that has been maintained for commercial use as part of the producer's farming operation on the beginning date of the eligible adverse weather or eligible loss condition;

(5) Be livestock that has not been produced and maintained for reasons other than commercial use as part of a farming operation; and

(6) Be livestock that was not in a feedlot, on the beginning date of the eligible adverse weather or eligible loss condition, as a part of the normal business operation of the producer, as determined by the Deputy Administrator.

(b) The eligible livestock types for feed losses and grazing losses are:

- (1) Adult beef cows or bulls,
- (2) Adult buffalo or beefalo cows or bulls,
- (3) Adult dairy cows or bulls,
- (4) Alpacas,
- (5) Deer,
- (6) Elk,
- (7) Emus,
- (8) Equine,
- (9) Goats,
- (10) Llamas,
- (11) Non-adult beef cattle,
- (12) Non-adult buffalo or beefalo,
- (13) Non-adult dairy cattle,
- (14) Poultry,
- (15) Reindeer,
- (16) Sheep, and
- (17) Swine;

(c) Ineligible livestock for feed losses and grazing losses include, but are not limited to:

(1) Livestock that were or would have been in a feedlot, on the beginning date of the eligible adverse weather or eligible loss condition, as a part of the normal business operation of the producer, as determined by FSA;

- (2) Yaks;
- (3) Ostriches;

(4) All beef and dairy cattle, and buffalo and beefalo that weighed less than 500 pounds on the beginning date of the eligible adverse weather or eligible loss condition;

(5) Any wild free roaming livestock, including horses and deer;

(6) Livestock produced or maintained for reasons other than commercial use as part of a farming operation, including, but not limited to, livestock pro-

duced or maintained exclusively for recreational purposes, such as:

- (i) Roping,
- (ii) Hunting,
- (iii) Show,
- (iv) Pleasure,
- (v) Use as pets, or
- (vi) Consumption by owner.

(d) For death losses for livestock owners to be eligible, the livestock must meet all of the following conditions:

(1) Be alpacas, adult or non-adult dairy cattle, beef cattle, beefalo, buffalo, deer, elk, emus, equine, goats, llamas, poultry, reindeer, sheep, or swine, and meet all the conditions in paragraph (f) of this section.

(2) Be one of the following categories of animals for which calculations of eligibility for payments will be calculated separately for each producer with respect to each category:

- (i) Adult beef bulls;
- (ii) Adult beef cows;
- (iii) Adult buffalo or beefalo bulls;
- (iv) Adult buffalo or beefalo cows;
- (v) Adult dairy bulls;
- (vi) Adult dairy cows;
- (vii) Alpacas;
- (viii) Chickens, broilers, pullets;
- (ix) Chickens, chicks;
- (x) Chickens, layers, roasters;
- (xi) Deer;
- (xii) Ducks;
- (xiii) Ducks, ducklings;
- (xiv) Elk;
- (xv) Emus;
- (xvi) Equine;
- (xvii) Geese, goose;
- (xviii) Geese, gosling;
- (xix) Goats, bucks;
- (xx) Goats, nannies;
- (xxi) Goats, kids;
- (xxii) Llamas;
- (xxiii) Non-adult beef cattle;
- (xxiv) Non-adult buffalo or beefalo;
- (xxv) Non-adult dairy cattle;
- (xxvi) Reindeer;
- (xxvii) Sheep, ewes;
- (xxviii) Sheep, lambs;
- (xxix) Sheep, rams;
- (xxx) Swine, feeder pigs under 50 pounds;
- (xxxi) Swine, sows, boars, barrows, gilts 50 to 150 pounds;
- (xxxii) Swine, sows, boars, barrows, gilts over 150 pounds;
- (xxxiii) Turkeys, poult;

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(xxxiv) Turkeys, toms, fryers, and roasters.

(e) Under ELAP, "contract growers" will only be deemed to include producers of livestock, other than feedlots, whose income is dependent on the actual weight gain and survival of the livestock. For death losses for contract growers to be eligible, the livestock must meet all of the following conditions:

(1) Be poultry or swine, as defined in § 760.202, and meet all the conditions in paragraph (f) of this section.

(2) Be one of the following categories of animals for which calculations of eligibility for payments will be calculated separately for each contract grower with respect to each category:

- (i) Chickens, broilers, pullets;
- (ii) Chickens, layers, roasters;
- (iii) Geese, goose;
- (iv) Swine, boars, sows;
- (v) Swine, feeder pigs;
- (vi) Swine, lightweight barrows, gilts;
- (vii) Swine, sows, boars, barrows, gilts; and
- (viii) Turkeys, toms, fryers, and roasters.

(f) For livestock death losses to be considered eligible livestock for the purpose of generating payments under this subpart, livestock must meet all of the following conditions:

(1) They must have died:

(i) On or after the beginning date of the eligible loss condition; and

(ii) On or after January 1, 2008, and no later than 60 calendar days from the ending date of the eligible loss condition, but before November 30, 2011; and

(iii) As a direct result of an eligible loss condition that occurs on or after January 1, 2008, and before October 1, 2011; and

(iv) In the calendar year for which payment is being requested; and

(2) Been maintained for commercial use as part of a farming operation on the day the livestock died; and

(3) Before dying, not have been produced or maintained for reasons other than commercial use as part of a farming operation, such non-eligible uses being understood to include, but not be limited to, any uses of wild free roaming animals or use of the animals for

recreational purposes, such as pleasure, hunting, roping, pets, or for show.

(g) For honeybee losses to be eligible, the honeybee colony must meet the following conditions:

(1) Been maintained for the purpose of producing honey or pollination for commercial use in a farming operation on the beginning date of the eligible adverse weather or eligible loss condition;

(2) Been physically located in the county where the eligible adverse weather or eligible loss condition occurred on the beginning date of the eligible adverse weather or eligible loss condition;

(3) Been a honeybee colony in which the participant has a risk in the honey production or pollination farming operation on the beginning date of the eligible adverse weather or eligible loss condition;

(4) Been a honeybee colony for which the producer had an eligible loss of a honeybee colony, honeybee hive, or honeybee feed; the feed must have been intended as feed for honeybees.

(h) For fish to be eligible to generate payments under ELAP, the fish must be produced in a controlled environment so to be considered "farm raised fish" as defined in this subpart, and the farm-raised fish must:

(1) For feed losses:

(i) Be an aquatic species that is propagated and reared in a controlled environment;

(ii) Be maintained and harvested for commercial use as part of a farming operation; and

(iii) Be physically located in the county where the eligible adverse weather or eligible loss condition occurred on the beginning date of the eligible adverse weather or eligible loss condition.

(2) For death losses:

(i) Be bait fish or game fish that are propagated and reared in a controlled environment;

(ii) Been maintained for commercial use as part of a farming operation; and

(iii) Been physically located in the county where the eligible loss adverse

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weather or eligible loss condition occurred on the beginning date of the eligible adverse weather or eligible loss condition.

[74 FR 46673, Sept. 11, 2009, as amended at 76 FR 54075, Aug. 31, 2011]

### § 760.205 Eligible producers, owners, and contract growers.

(a) To be considered an eligible livestock producer for livestock feed losses and to receive payments, the participant must have owned, cash-leased, purchased, entered into a contract to purchase, or been a contract grower of eligible livestock during the 60 days prior to the beginning date of the eligible adverse weather or eligible loss condition and must have had a loss that is determined to be eligible as specified in § 760.203(d), and the producer's eligible livestock must have been livestock that would normally have been grazing the eligible grazing land or pastureland during the normal grazing period for the specific type of grazing land or pastureland for the county as specified in paragraph (b)(1)(i) or (ii) of this section.

(b) To be considered an eligible livestock producer for grazing losses and to receive payments, the participant must have:

(1) Owned, cash-leased, purchased, entered into a contract to purchase, or been a contract grower of eligible livestock during the 60 days prior to the beginning date of the eligible adverse weather or eligible loss condition, must have had a loss that is determined to be eligible as specified in § 760.203(e), and the loss must have occurred on land that is:

(i) Native or improved pastureland with permanent vegetative cover or

(ii) Planted to a crop planted specifically for the purpose of providing grazing for covered livestock;

(2) Have had eligible livestock that would normally have been grazing the eligible grazing land or pastureland during the normal grazing period for the specific type of grazing land or pastureland for the county as specified in paragraph (b)(1)(i) or (ii) of this section;

(3) Provided for the eligible livestock pastureland or grazing land, including cash leased pastureland or grazing land

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for covered livestock that is physically located in the county where the eligible adverse weather or loss condition occurred during the normal grazing period for the county.

(c) For livestock death losses to be eligible the producer must have had a loss that is determined to be eligible as specified in § 760.203(f) and in addition to other eligibility rules that may apply to be eligible as a:

(1) Livestock owner for the payment with respect to the death of an animal under this subpart, the applicant must have had legal ownership of the livestock on the day the livestock died and under conditions in which no contract grower could have been eligible for ELAP payment with respect to the animal. Eligible types of animal categories for which losses can be calculated for an owner are specified in § 760.204(d).

(2) Contract grower for ELAP payment with respect to the death of an animal, the animal must be in one of the categories specified in § 760.204(e), and the contract grower must have had:

(i) A written agreement with the owner of eligible livestock setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock;

(ii) Control of the eligible livestock on the day the livestock died; and

(iii) A risk of loss in the animal.

(d) To be considered an eligible honeybee producer, a participant must have an interest and risk in an eligible honeybee colony, as specified in § 760.204(g), for the purpose of producing honey or pollination for commercial use as part of a farming operation and must have had a loss that is determined to be eligible as specified in § 760.203(g) or (h).

(e) To be considered an eligible farm-raised fish producer for feed loss purposes, the participant must have produced eligible farm-raised fish, as specified in § 760.204(h)(1), with the intent to harvest for commercial use as part of a farming operation and must have had a loss that is determined to be eligible as specified in § 760.203(g);

(f) A producer seeking payments must not be ineligible under the restrictions applicable to foreign persons

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contained in § 760.103(b) and must meet all other requirements of subpart B and other applicable USDA regulations.

**§ 760.206 Notice of loss and application process.**

(a) To apply for ELAP, the participant that suffered eligible livestock, honeybee, or farm-raised fish losses must submit, to the FSA administrative county office that maintains the participant's farm records for the agricultural operation, the following:

(1) A notice of loss to FSA as specified in § 760.207(a).

(2) A completed application as specified in § 760.207(b) for one or both of the following:

(i) For livestock feed, grazing and death losses, the participant must submit a completed Emergency Loss Assistance for Livestock Application;

(ii) For honeybee feed, honeybee colony, honeybee hive, or farm-raised fish feed or death losses, the participant must submit a completed Emergency Loss Assistance for Farm-Raised Fish or Honeybees Application;

(3) A report of acreage;

(4) A copy of the participant's grower contract, if the participant is a contract grower; and

(5) Other supporting documents required for FSA to determine eligibility of the participant, livestock, and loss.

(b) For livestock, honeybee, or farm-raised fish feed losses, participant must provide verifiable documentation of:

(1) Purchased feed intended as feed for livestock, honeybees, or farm-raised fish that was lost, or additional feed purchased above normal quantities to sustain livestock, honeybees, and farm-raised fish for a short period of time until additional feed becomes available, due to an eligible adverse weather or eligible loss condition. To be considered acceptable documentation, the participant must provide original feed receipts and each feed receipt must include the date of feed purchase, name, address, and telephone number of feed vendor, type and quantity of feed purchased, cost of feed purchased, and signature of feed vendor if the vendor does not have a license to conduct this type of transaction.

(2) Harvested feed intended as feed for livestock, honeybees, or farm-

raised fish that was lost due to an eligible adverse weather or eligible loss condition. Documentation may include, but is not limited to, weight tickets, truck scale tickets, contemporaneous diaries used to verify that the crop was stored with the intent to feed the crop to livestock, honeybees, or farm-raised fish, and custom harvest documents that clearly identify the amount of feed produced from the applicable acreage. Documentation must clearly identify the acreage from which the feed was produced.

(c) For eligible honeybee colony and honeybee hive losses and eligible farm-raised fish losses, the participant must also provide documentation of inventory on the beginning date of the eligible adverse weather or loss condition and the ending inventory. Documentation may include, but is not limited to, any combination of the following:

- (1) A report of acreage,
- (2) Loan records,
- (3) Private insurance documents,
- (4) Property tax records,
- (5) Sales and purchase receipts,
- (6) State colony registration documentation, and

(7) Chattel inspections.

(d) For the loss of honeybee colonies due to colony collapse disorder, the participant must also provide acceptable documentation or certification that the loss of the honeybee colony was due to colony collapse disorder. Except for 2008 and 2009 honeybee colony losses, acceptable documentation must include an independent third party certification determined acceptable by the Deputy Administrator, plus such additional information and documentation as may be requested. For 2008 and 2009 honeybee colony losses a self-certification may be accepted by FSA together with any additional information demanded by FSA as determined appropriate by the Deputy Administrator.

(e) For livestock death losses, the participant must provide evidence of loss, current physical location of livestock in inventory, and physical location of claimed livestock at the time of death. The participant must provide:

(1) Documentation listing the quantity and kind of livestock that died as

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a direct result of the eligible loss condition during the calendar year for which payment is being requested, which must include: Purchase records, veterinarian records, bank or other loan papers, rendering truck receipts, Federal Emergency Management Agency records, National Guard records, written contracts, production records, Internal Revenue Service records, property tax records, private insurance documents, or other similar verifiable documents as determined by FSA.

(2) Adequate proof that the death of the eligible livestock occurred as a direct result of an eligible loss condition in the calendar year for which payment is requested.

(3) If adequate verifiable proof of death documentation is not available, the participant must provide reliable records, in conjunction with verifiable beginning and ending inventory records, as proof of death. Reliable records may include: Contemporaneous producer records, dairy herd improvement records, brand inspection records, vaccination records, pictures, and other similar reliable documents, as determined by FSA.

(4) Certification of livestock deaths by third parties will be acceptable for eligibility determination only if verifiable proof of death records or reliable proof of death records in conjunction with verifiable beginning and ending inventory records are not available and both of the following conditions are met:

(i) The livestock owner or livestock contract grower, as applicable, certifies in writing:

(A) That there is no other verifiable or reliable documentation of death available;

(B) The number of livestock, by category as determined by FSA, was in inventory at the time the applicable loss condition occurred;

(C) The physical location of the livestock, by category, in inventory when the deaths occurred; and

(D) Any other details required for FSA to determine the certification acceptable; and

(ii) The third party is an independent source who is not affiliated with the farming operation such as a hired hand and is not a "family member," defined

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as a person to whom a member in the farming operation or their spouse is related as a lineal ancestor, lineal descendant, sibling, spouse, or otherwise by marriage, and provides their telephone number, address, and a written statement containing specific details about:

(A) Their knowledge of the livestock deaths;

(B) Their affiliation with the livestock owner;

(C) The accuracy of the deaths claimed by the livestock owner or contract grower including, but not limited to, the number and kind or type of the participant's livestock that died because of the eligible loss condition; and

(D) Any other information required for FSA to determine the certification acceptable.

(f) FSA will use the data furnished by the participant and the third party to determine eligibility for program payment. Furnishing the data is voluntary; however, without all required data program, payment will not be approved or provided.

[74 FR 46673, Sept. 11, 2009, as amended at 75 FR 19188, Apr. 14, 2010]

**§ 760.207 Notice of loss and application period.**

(a) In addition to submitting an application for payment at the appropriate time, the participant that suffered eligible livestock, honeybee, or farm-raised fish losses that create or could create a claim for benefits must:

(1) For losses during calendar year 2008 and in calendar year 2009 prior to September 11, 2009, provide a notice of loss to FSA no later than December 10, 2009;

(2) For losses on or after September 11, 2009, the participant must provide a notice of loss to FSA within the earlier of:

(i) 30 calendar days of when the loss is apparent to the participant or

(ii) 30 calendar days after the end of the calendar year in which the loss occurred.

(3) The participant must submit the notice of loss required in paragraphs (a)(1) and (a)(2) of this section to the administrative FSA county office

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(b) In addition to the notices of loss required in paragraph (a) of this section, a participant must also submit a completed application for payment no later than:

(1) 30 calendar days after the end of the calendar year in which the loss occurred or

(2) December 10, 2009 for losses that occurred during 2008.

**§ 760.208 Availability of funds.**

By law, "up to" \$50 million per year for the years in question may be approved for use by the Secretary and accordingly, within that cap, the only funds that will be considered available to pay claims will be that amount approved by the Secretary. Nothing in these regulations will limit the ability of the Secretary to restrict the availability of funds for the program as permitted by the relevant legislation. Payments will not be made for claims arising out of a particular year until, for all claims for that year, the time for applying for a payment has passed. In the event that, within the limits of the funding made available by the Secretary within the statutory cap, approval of eligible applications would result in expenditures in excess of the amount available, FSA will prorate the available funds by a national factor to reduce the total expected payments to the amount made available by the Secretary. FSA will make payments based on the factor for the national rate determined by FSA. FSA will prorate the payments in such manner as it determines appropriate and reasonable. Claims that are unpaid or prorated for a calendar year for any reason will not be carried forward for payment under other funds for later years or otherwise, but will be considered, as to any unpaid amount, void and nonpayable.

**§ 760.209 Livestock payment calculations.**

(a) Payments for an eligible livestock producer will be calculated based on losses for no more than 90 days during the calendar year. Payment calculations for feed losses will be based on 60 percent of the producer's actual cost for:

(1) Livestock feed that was purchased forage or feedstuffs intended for use as

feed for the participant's eligible livestock that was physically damaged or destroyed due to the direct result of an eligible adverse weather or eligible loss condition, as provided in § 760.203(d)(1);

(2) Livestock feed that was mechanically harvested forage or feedstuffs intended for use as feed for the participant's eligible livestock that was physically damaged or destroyed after harvest due to the direct result of an eligible adverse weather or eligible loss condition, as provided in § 760.203(d)(2);

(3) The additional cost incurred for providing or transporting livestock feed to eligible livestock due to an eligible adverse weather or eligible loss condition, as provided in § 760.203(d)(3); or

(4) The additional cost of purchasing additional livestock feed above normal, to maintain the eligible livestock during an eligible adverse weather or eligible loss condition until additional livestock feed becomes available, as provided in § 760.203(d)(4).

(b) Payments for an eligible livestock producer for grazing losses, except for losses due to wildfires on non-Federal land, will be calculated based on 60 percent of the lesser of:

(1) The total value of the feed cost for all covered livestock owned by the eligible livestock producer based on the number of days grazing was lost, not to exceed 90 days of daily feed cost for all covered livestock, or

(2) The total value of grazing lost for all eligible livestock based on the normal carrying capacity, as determined by the Secretary, of the eligible grazing land of the eligible livestock producer for the number of grazing days lost, not to exceed 90 days of lost grazing.

(c) The total value of feed cost to be used in the calculation for paragraph (b)(1) of this section is based on the number of days grazing was lost and equals the product obtained by multiplying:

(1) A payment quantity equal to the feed grain equivalent, as determined in paragraph (d) of this section;

(2) A payment rate equal to the corn price per pound, as determined in paragraph (e) of this section;

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(3) The number of all covered livestock owned by the eligible producer converted to an animal unit basis;

(4) The number of days grazing was lost, not to exceed 90 calendar days during the normal grazing period for the specific type of grazing land; and

(5) The producer's ownership share in the livestock.

(d) The feed grain equivalent to be used in the calculation for paragraph (c)(1) of this section equals, in the case of:

(1) An adult beef cow, 15.7 pounds of corn per day or

(2) Any other type or weight of livestock, an amount determined by the Secretary that represents the average number of pounds of corn per day necessary to feed that specific type of livestock.

(e) The corn price per pound to be used in the calculation for paragraph (c)(2) of this section equals the quotient obtained by dividing:

(1) The higher of:

(i) The national average corn price per bushel of corn for the 12-month period immediately preceding March 1 of the calendar year for which payments are calculated; or

(ii) The national average corn price per bushel of corn for the 24-month period immediately preceding March 1 of the calendar year for which payments are calculated; by

(2) 56.

(f) The total value of grazing lost to be used in the calculation for paragraph (b)(2) of this section equals the product obtained by multiplying:

(1) A payment quantity equal to the feed grain equivalent of 15.7 pounds of corn per day;

(2) A payment rate equal to the corn price per pound, as determined in paragraph (e) of this section;

(3) The number of animal units the eligible livestock producer's grazing land or pastureland can sustain during the normal grazing period in the county for the specific type of grazing land or pastureland, in the absence of an eligible adverse weather or eligible loss condition, determined by dividing the:

(i) Number of eligible grazing land or pastureland acres of the specific type of grazing land or pastureland by

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(ii) The normal carrying capacity of the specific type of eligible grazing land or pastureland; and

(4) The number of days grazing was lost, not to exceed 90 calendar days during the normal grazing period for the specific type of grazing land.

(g) Payments for an eligible livestock producer for grazing losses due to a wildfire on non-Federal land will be calculated by multiplying:

(1) The result of dividing:

(i) The number of acres of grazing land or pastureland acres affected by the fire by

(ii) The normal carrying capacity of the specific type of eligible grazing land or pastureland; times

(2) The daily value of grazing as calculated by FSA under this section; times

(3) The number of days grazing was lost due to fire, not to exceed 180 calendar days; times

(4) 50 percent.

(h) Payments for an eligible livestock producer for eligible livestock death losses due to an eligible loss condition will be based on the following:

(1) Payments will be calculated by multiplying:

(i) The national payment rate for each livestock category times

(ii) The number of eligible livestock that died in each category as a result of an eligible loss condition in excess of normal mortality, as determined in paragraph (d)(2) of this section;

(2) Normal mortality for each livestock category as determined by FSA on a statewide basis using local data sources including, but not limited to, State livestock organizations and the Cooperative Extension Service for the State.

(3) National payment rates to be used in the calculation for paragraph (b)(1) of this section for eligible livestock owners and eligible livestock contract growers are:

(i) A national payment rate for eligible livestock owners that is based on 75 percent of the average fair market value of the applicable livestock as computed using nationwide prices for the previous calendar year unless some other price is approved by the Deputy Administrator.

(ii) A national payment rate for eligible livestock contract growers that is based on 75 percent of the relevant average income loss sustained by the contract grower, with respect to the dead livestock.

(i) Payments calculated in this section are subject to the adjustments and limits provided for in this part.

**§ 760.210 Honeybee payment calculations.**

(a) An eligible honeybee producer may receive payments for honeybee feed losses due to an eligible adverse weather or loss condition, as provided in § 760.203(g), based on 60 percent of the producer's actual cost for honeybee feed that was:

(1) Damaged or destroyed due to an eligible adverse weather or eligible loss condition and

(2) Intended as feed for an eligible honeybee colony, as provided in § 760.204(g);

(b) An eligible honeybee producer may receive payments for honeybee colony losses due to an eligible adverse weather or eligible loss condition, as provided in § 760.203(h), based on 60 percent of the average fair market value for the number of honeybee colonies that were damaged or destroyed due to an eligible adverse weather or eligible loss condition, as computed using nationwide prices unless some other price data is approved for use by the Deputy Administrator, for losses in excess of normal honeybee mortality, as determined by the Deputy Administrator.

(c) An eligible honeybee producer may receive payments for honeybee hive losses due to an eligible adverse weather or eligible loss condition, as provided in § 760.203(h), based on 60 percent of the average fair market value for the number of honeybee hives that were damaged or destroyed due to an eligible adverse weather or eligible loss condition, as computed using nationwide prices unless some other price data is approved for use by the Deputy Administrator.

(d) Payments calculated in this section are subject to the adjustments and limits provided for in this part.

[74 FR 46673, Sept. 11, 2009, as amended at 75 FR 19188, Apr. 14, 2010]

**§ 760.211 Farm-raised fish payment calculations.**

(a) An eligible farm-raised fish producer may receive payments for fish feed losses due to an eligible adverse weather or eligible loss condition, as provided in § 760.203(g), based on 60 percent of the producer's actual replacement cost for the fish feed that was:

(1) Damaged or destroyed due to an eligible adverse weather or eligible loss condition and

(2) Intended as feed for the eligible farm-raised fish, as provided in § 760.204(h)(1).

(b) An eligible producer of farm-raised game or sport fish may receive payments for death losses of farm-raised fish due to an eligible adverse weather or eligible loss condition, as provided in § 760.203(i), based on 60 percent of the average fair market value of the game fish or sport fish that died as a direct result of an eligible adverse weather or eligible loss condition, as computed using nationwide prices unless some other price data is approved for use by the Deputy Administrator.

(c) Payments calculated in this section or elsewhere with respect to ELAP are subject to the adjustments and limits provided for in this part and are also subject to the payment limitations and average adjusted gross income limitations that are contained in subpart B.

[74 FR 46673, Sept. 11, 2009, as amended at 75 FR 19189, Apr. 14, 2010]

**Subpart D—Livestock Forage Disaster Program**

SOURCE: 74 FR 46680, Sept. 11, 2009, unless otherwise noted.

**§ 760.301 Applicability.**

(a) This subpart establishes the terms and conditions under which the Livestock Forage Disaster Program (LFP) will be administered.

(b) Eligible livestock producers will be compensated for eligible grazing losses for covered livestock that occur due to a qualifying drought or fire that occurs:

(1) On or after January 1, 2008, and before October 1, 2011, and

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(2) In the calendar year for which benefits are being requested.

### § 760.302 Definitions.

The following definitions apply to this subpart and to the administration of LFP. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Adult beef bull* means a male beef breed bovine animal that was at least 2 years old and used for breeding purposes on or before the beginning date of a qualifying drought or fire.

*Adult beef cow* means a female beef breed bovine animal that had delivered one or more offspring. A first-time bred beef heifer is also considered an adult beef cow if it was pregnant on or before the beginning date of a qualifying drought or fire.

*Adult buffalo and beefalo bull* means a male animal of those breeds that was at least 2 years old and used for breeding purposes on or before the beginning date of a qualifying drought or fire.

*Adult buffalo and beefalo cow* means a female animal of those breeds that had delivered one or more offspring. A first-time bred buffalo or beefalo heifer is also considered an adult buffalo or beefalo cow if it was pregnant on or before the beginning date of a qualifying drought or fire.

*Adult dairy bull* means a male dairy breed bovine animal at least 2 years old used primarily for breeding dairy cows on or before the beginning date of a qualifying drought or fire.

*Adult dairy cow* means a female dairy breed bovine animal used for the purpose of providing milk for human consumption that had delivered one or more offspring. A first-time bred dairy heifer is also considered an adult dairy cow if it was pregnant on or before the beginning date of a qualifying drought or fire.

*Agricultural operation* means a farming operation.

*Application* means the "Livestock Forage Disaster Program" form.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible livestock producer.

*Contract* means, with respect to contracts for the handling of livestock, a

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written agreement between a livestock owner and another individual or entity setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock or livestock products.

*Covered livestock* means livestock of an eligible livestock producer that, during the 60 days prior to the beginning date of a qualifying drought or fire, the eligible livestock producer owned, leased, purchased, entered into a contract to purchase, was a contract grower of, or sold or otherwise disposed of due to a qualifying drought during the current production year. It includes livestock that the producer otherwise disposed of due to drought in one or both of the two production years immediately preceding the current production year as determined by the Secretary. Notwithstanding the foregoing portions of this definition, covered livestock for "contract growers" will not include livestock in feedlots. "Contract growers" under LFP will only include producers of livestock not in feedlots whose income is dependent on the actual weight gain and survival of the livestock.

*Equine animal* means a domesticated horse, mule, or donkey.

*Farming operation* means a business enterprise engaged in producing agricultural products.

*Federal Agency* means, with respect to the control of grazing land, an agency of the Federal government that manages rangeland on which livestock is generally permitted to graze. For the purposes of this section, it includes, but is not limited to, the U.S. Department of the Interior (DOI) Bureau of Indian Affairs (BIA), DOI Bureau of Land Management (BLM), and USDA Forest Service (FS).

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats.

*Non-adult beef cattle* means a beef breed bovine animal that weighed 500 pounds or more on or before the beginning date of a qualifying drought or fire but that does not meet the definition of adult beef cow or bull.

*Non-adult buffalo or beefalo* means an animal of those breeds that weighed 500 pounds or more on or before the beginning date of a qualifying drought or

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fire, but does not meet the definition of adult buffalo or beefalo cow or bull.

*Non-adult dairy cattle* means a bovine animal, of a breed used for the purpose of providing milk for human consumption, that weighed 500 pounds or more on or before the beginning date of a qualifying drought or fire, but that does not meet the definition of adult dairy cow or bull.

*Normal carrying capacity* means, with respect to each type of grazing land or pastureland in a county, the normal carrying capacity that would be expected from the grazing land or pastureland for livestock during the normal grazing period in the county, in the absence of a drought or fire that diminishes the production of the grazing land or pastureland.

*Normal grazing period* means, with respect to a county, the normal grazing period during the calendar year with respect to each specific type of grazing land or pastureland in the county served by the applicable county committee.

*Owner* means one who had legal ownership of the livestock for which benefits are being requested during the 60 days prior to the beginning of a qualifying drought or fire.

*Poultry* means a domesticated chicken, turkey, duck, or goose. Poultry are further delineated by sex, age, and purpose of production, as determined by FSA.

*Sheep* means a domesticated, ruminant mammal of the genus *Ovis*.

*Swine* means a domesticated omnivorous pig, hog, or boar. Swine are further delineated by sex and weight, as determined by FSA.

*U.S. Drought Monitor* is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at <http://www.drought.unl.edu/dm/monitor.html>.

**§ 760.303 Eligible livestock producer.**

(a) To be considered an eligible livestock producer, the eligible producer on a farm must:

(1) During the 60 days prior to the beginning date of a qualifying drought or fire, own, cash or share lease, or be a contract grower of covered livestock or

(2) Provide pastureland or grazing land for covered livestock, including cash-leased pastureland or grazing land, that is:

(i) Physically located in a county affected by a qualifying drought during the normal grazing period for the county or

(ii) Rangeland managed by a Federal agency for which the otherwise eligible livestock producer is prohibited by the Federal agency from grazing the normal permitted livestock due to a qualifying fire.

(b) The eligible livestock producer must have certified that the livestock producer has suffered a grazing loss due to a qualifying drought or fire to be eligible for LFP payments.

(c) An eligible livestock producer does not include any owner, cash or share lessee, or contract grower of livestock that rents or leases pastureland or grazing land owned by another person on a rate-of-gain basis. (That is, where the lease or rental agreement calls for payment based in whole or in part on the amount of weight gained by the animals that use the pastureland or grazing land.)

(d) A producer seeking payment must not be ineligible for payments under the restrictions applicable to foreign persons contained in § 760.103(b) and must meet all other requirements of subpart B and other applicable USDA regulations.

(e) If a contract grower is an eligible livestock producer for covered livestock, the owner of that livestock is not eligible for payment.

**§ 760.304 Covered livestock.**

(a) To be considered covered livestock for LFP payments, livestock must meet all the following conditions:

(1) Be adult or non-adult beef cattle, adult or non-adult beefalo, adult or non-adult buffalo, adult or non-adult dairy cattle, alpacas, deer, elk, emus,

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equine, goats, llamas, poultry, reindeer, sheep, or swine;

(2) Be livestock that would normally have been grazing the eligible grazing land or pastureland in the county:

(i) During the normal grazing period for the specific type of grazing land or pastureland for the county or

(ii) When the Federal agency prohibited the eligible livestock producer from using the managed rangeland for grazing due to a fire;

(3) Be livestock that the eligible livestock producer:

(i) During the 60 days prior to the beginning date of a qualifying drought or fire;

(A) Owned,

(B) Leased,

(C) Purchased,

(D) Entered into a contract to purchase, or

(E) Was a contract grower of; or

(ii) Sold or otherwise disposed of due to qualifying drought during:

(A) The current production year or

(B) 1 or both of the 2 production years immediately preceding the current production year;

(4) Been maintained for commercial use as part of the producer's farming operation on the beginning date of the qualifying drought or fire;

(5) Not have been produced and maintained for reasons other than commercial use as part of a farming operation. Such excluded uses include, but are not limited to, any uses of wild free roaming animals or use of the animals for recreational purposes, such as pleasure, roping, hunting, pets, or for show; and

(6) Not have been livestock that were or would have been in a feedlot, on the beginning date of the qualifying drought or fire, as a part of the normal business operation of the eligible livestock producer, as determined by the Secretary.

(b) The covered livestock categories are:

(1) Adult beef cows or bulls,

(2) Adult buffalo or beefalo cows or bulls,

(3) Adult dairy cows or bulls,

(4) Alpacas,

(5) Deer,

(6) Elk,

(7) Emu,

(8) Equine,

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(9) Goats,

(10) Llamas,

(11) Non-adult beef cattle,

(12) Non-adult buffalo or beefalo,

(13) Non-adult dairy cattle,

(14) Poultry,

(15) Reindeer,

(16) Sheep, and

(17) Swine.

(c) Livestock that are not covered include, but are not limited to:

(1) Livestock that were or would have been in a feedlot, on the beginning date of the qualifying drought or fire, as a part of the normal business operation of the eligible livestock producer, as determined by the Secretary;

(2) Yaks;

(3) Ostriches;

(4) All beef and dairy cattle, and buffalo and beefalo that weighed less than 500 pounds on the beginning date of the qualifying drought or fire;

(5) Any wild free roaming livestock, including horses and deer; and

(6) Livestock produced or maintained for reasons other than commercial use as part of a farming operation, including, but not limited to, livestock produced or maintained for recreational purposes, such as:

(i) Roping,

(ii) Hunting,

(iii) Show,

(iv) Pleasure,

(v) Use as pets, or

(vi) Consumption by owner.

[74 FR 46680, Sept. 11, 2009, as amended at 75 FR 19189, Apr. 14, 2010]

**§ 760.305 Eligible grazing losses.**

(a) A grazing loss due to drought is eligible for LFP only if the grazing loss for the covered livestock occurs on land that:

(1) Is native or improved pastureland with permanent vegetative cover or

(2) Is planted to a crop planted specifically for the purpose of providing grazing for covered livestock; and

(3) Is grazing land or pastureland that is owned or leased by the eligible livestock producer that is physically located in a county that is, during the normal grazing period for the specific type of grazing land or pastureland for the county, rated by the U.S. Drought Monitor as having a:

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(i) D2 (severe drought) intensity in any area of the county for at least 8 consecutive weeks during the normal grazing period for the specific type of grazing land or pastureland for the county, as determined by the Secretary, or

(ii) D3 (extreme drought) or D4 (exceptional drought) intensity in any area of the county at any time during the normal grazing period for the specific type of grazing land or pastureland for the county, as determined by the Secretary. (As specified elsewhere in this subpart, the amount of potential payment eligibility will be higher than under (a)(3)(i) of this section where the D4 trigger applies or where the D3 condition as determined by the Secretary lasts at least 4 weeks during the normal grazing period for the specific type of grazing land or pastureland for the county.)

(b) A grazing loss is not eligible for LFP if the grazing loss due to drought on land used for haying or grazing under the Conservation Reserve Program established under subchapter B of chapter 1 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831–3835a).

(c) A fire qualifies for LFP only if:

(1) The grazing loss occurs on rangeland that is managed by a Federal agency and

(2) The eligible livestock producer is prohibited by the Federal agency from grazing the normal permitted livestock on the managed rangeland due to a fire.

(d) An eligible livestock producer may be eligible for LFP payments only on those grazing lands incurring losses for which the livestock producer:

(1) Meets the risk management purchase requirements specified in § 760.104; or

(2) Does not meet the risk management purchase requirements specified in § 760.104 because the risk management purchase requirement is waived according to §§ 760.105, 760.106, or 760.107.

**§ 760.306 Application for payment.**

(a) To apply for LFP, the participant that suffered eligible grazing losses:

(1) During 2008, must submit a completed application for payment and re-

quired supporting documentation to the administrative FSA county office no later than December 10, 2009 or

(2) During 2009 and later years, must submit a completed application for payment and required supporting documentation to the administrative FSA county office no later than 30 calendar days after the end of the calendar year in which the grazing loss occurred.

(b) A participant must also provide a copy of the grower contract, if a contract grower, and other supporting documents required for determining eligibility as an applicant at the time the participant submits the completed application for payment. Supporting documents must include:

(1) Evidence of loss,

(2) Current physical location of livestock in inventory,

(3) Evidence of meeting risk management purchase requirements as specified in subpart B,

(4) Evidence that grazing land or pastureland is owned or leased,

(5) A report of acreage according to part 718 of this chapter for the grazing lands incurring losses for which assistance is being requested under this subpart;

(6) Adequate proof, as determined by FSA that the grazing loss:

(i) Was for the covered livestock;

(ii) If the loss of grazing occurred as the result of a fire that the:

(A) Loss was due to a fire and

(B) Participant was prohibited by the Federal agency from grazing the normal permitted livestock on the managed rangeland due to a fire;

(iii) Occurred on or after January 1, 2008, and before October 1, 2011; and

(iv) Occurred in the calendar year for which payments are being requested;

(7) Adequate proof, absent an appropriate waiver (if there is a waiver, it itself must be documented by the producer), as determined by FSA, that the participant had obtained, for the grazing land incurring the losses for which assistance is being requested, one or both of the following:

(i) A policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524); or

(ii) Filed the required paperwork, and paid the administrative fee by the applicable State filing deadline, for the

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noninsured crop disaster assistance program;

(8) Any other supporting documentation as determined by FSA to be necessary to make a determination of eligibility of the participant. Supporting documents include, but are not limited to: Verifiable purchase and sales records; grower contracts; veterinarian records; bank or other loan papers; rendering truck receipts; Federal Emergency Management Records; National Guard records; written contracts; production records; private insurance documents; sales records; and similar documents determined acceptable to FSA.

(c) Data furnished by the participant will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without all required data, program benefits will not be approved or provided.

**§ 760.307 Payment calculation.**

(a) An eligible livestock producer will be eligible to receive payments for grazing losses for qualifying drought as specified in § 760.305(a) equal to one, two, or three times the monthly payment rate specified in paragraphs (e) or (f) of this section. Total LFP payments to an eligible livestock producer in a calendar year for grazing losses due to qualifying drought will not exceed three monthly payments for the same livestock. Payments calculated in this section or elsewhere with respect to LFP are subject to the adjustments and limits provided for in this part and are also subject to the payment limitations and average adjusted gross income provisions that are contained in subpart B. Payment may only be made to the extent that eligibility is specifically provided for in this subpart. Hence, with respect to drought, payments will be made only as a "one month" payment, a "two month" payment, or a "three month" payment based on the provisions of paragraphs (b), (c), and (d) of this section.

(b) To be eligible to receive a one month payment, that is a payment equal to the monthly feed cost as determined under paragraph (g) of this section, the eligible livestock producer must own or lease grazing land or pastureland that is physically located in a county that is rated by the U.S.

Drought Monitor as having at least a D2 severe drought (intensity) in any area of the county for at least 8 consecutive weeks during the normal grazing period for the specific type of grazing land or pastureland in the county.

(c) To be eligible to receive a two month payment, that is a payment equal to twice the monthly feed cost as determined under paragraph (g) of this section, the eligible livestock producer must own or lease grazing land or pastureland that is physically located in a county that is rated by the U.S. Drought Monitor as having at least a D3 (extreme drought) intensity in any area of the county at any time during the normal grazing period for the specific type of grazing land or pastureland for the county.

(d) To be eligible to receive a three month payment, that is a payment equal to three times the monthly feed cost as determined under paragraph (g) of this section, the eligible livestock producer must own or lease grazing land or pastureland that is physically located in a county that is rated by the U.S. Drought Monitor as having at least a D3 (extreme drought) intensity in any area of the county for at least 4 weeks during the normal grazing period for the specific type of grazing land or pastureland for the county, or is rated as having a D4 (exceptional drought) intensity in any area of the county at any time during the normal grazing period for the specific type of grazing land or pastureland for the county.

(e) The monthly payment rate for LFP for grazing losses due to a qualifying drought, except as provided in paragraph (f) of this section, will be equal to 60 percent of the lesser of:

(1) The monthly feed cost for all covered livestock owned or leased by the eligible livestock producer, as determined in paragraph (g) of this section or

(2) The monthly feed cost calculated by using the normal carrying capacity of the eligible grazing land of the eligible livestock producer, as determined in paragraph (j) of this section.

(f) In the case of an eligible livestock producer that sold or otherwise disposed of covered livestock due to a qualifying drought in 1 or both of the 2

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production years immediately preceding the current production year, the payment rate is 80 percent of the monthly payment rate calculated in paragraph (e) of this section.

(g) The monthly feed cost for covered livestock equals the product obtained by multiplying:

(1) 30 days;

(2) A payment quantity equal to the amount referred to in paragraph (h) of this section as the "feed grain equivalent", as determined under paragraph (h) of this section; and

(3) A payment rate equal to the corn price per pound, as determined in paragraph (i) of this section.

(h) The feed grain equivalent equals, in the case of:

(1) An adult beef cow, 15.7 pounds of corn per day or

(2) In the case of any other type or weight of covered livestock, an amount determined by the Secretary that represents the average number of pounds of corn per day necessary to feed that specific type of livestock.

(i) The corn price per pound equals the quotient obtained by dividing:

(1) The higher of:

(i) The national average corn price per bushel for the 12-month period immediately preceding March 1 of the calendar year for which LFP payment is calculated or

(ii) The national average corn price per bushel for the 24-month period immediately preceding March 1 of the calendar year for which LFP payment is calculated

(2) By 56.

(j) The monthly feed cost using the normal carrying capacity of the eligible grazing land equals the product obtained by multiplying:

(1) 30 days;

(2) A payment quantity equal to the feed grain equivalent of 15.7 pounds of corn per day;

(3) A payment rate equal to the corn price per pound, as determined in paragraph (i) of this section; and

(4) The number of animal units the eligible livestock producer's grazing land or pastureland can sustain during the normal grazing period in the county for the specific type of grazing land or pastureland, in the absence of a

drought or fire, determined by dividing the:

(i) Number of eligible grazing land or pastureland acres of the specific type of grazing land or pastureland by

(ii) The normal carrying capacity of the specific type of eligible grazing land or pastureland as determined under this subpart.

(k) An eligible livestock producer will be eligible to receive payments for grazing losses due to a fire as specified in § 760.305(c):

(1) For the period, subject to paragraph (1)(2) of this section:

(i) Beginning on the date on which the Federal Agency prohibits the eligible livestock producer from using the managed rangeland for grazing and

(ii) Ending on the earlier of the last day of the Federal lease of the eligible livestock producer or the day that would make the period a 180 day period and

(2) For grazing losses that occur on not more than 180 days per calendar year.

(3) For 50 percent of the monthly feed cost, as determined under § 760.308(g), pro-rated to a daily rate, for the total number of livestock covered by the Federal lease of the eligible livestock producer.

**Subpart E—Livestock Indemnity Program**

SOURCE: 74 FR 31575, July 2, 2009, unless otherwise noted.

**§ 760.401 Applicability.**

(a) This subpart establishes the terms and conditions under which the Livestock Indemnity Program (LIP) will be administered under Titles XII and XV of the 2008 Farm Bill (Pub. L. 110-246).

(b) Eligible livestock owners and contract growers will be compensated in accordance with § 760.406 for eligible livestock deaths in excess of normal mortality that occurred in the calendar year for which benefits are being requested as a direct result of an eligible adverse weather event. An "eligible adverse weather event" is one, as determined by the Secretary, occurring in the program year that could and did,

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even when normal preventative or corrective measures were taken and good farming practices were followed, directly result in the death of livestock. Because feed can be purchased or otherwise obtained in the event of a drought, drought is not an eligible adverse weather event except when anthrax, resulting from drought, causes the death of eligible livestock.

### § 760.402 Definitions.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Adult beef bull* means a male beef breed bovine animal that was at least 2 years old and used for breeding purposes before it died.

*Adult beef cow* means a female beef breed bovine animal that had delivered one or more offspring before dying. A first-time bred beef heifer is also considered an adult beef cow if it was pregnant at the time it died.

*Adult buffalo and beefalo bull* means a male animal of those breeds that was at least 2 years old and used for breeding purposes before it died.

*Adult buffalo and beefalo cow* means a female animal of those breeds that had delivered one or more offspring before dying. A first-time bred buffalo or beefalo heifer is also considered an adult buffalo or beefalo cow if it was pregnant at the time it died.

*Adult dairy bull* means a male dairy breed bovine animal at least 2 years old used primarily for breeding dairy cows before it died.

*Adult dairy cow* means a female bovine dairy breed animal used for the purpose of providing milk for human consumption that had delivered one or more offspring before dying. A first-time bred dairy heifer is also considered an adult dairy cow if it was pregnant at the time it died.

*Adverse weather* means damaging weather events, including, but not limited to, hurricanes, floods, blizzards, disease, wildfires, extreme heat, and extreme cold.

*Agricultural operation* means a farming operation.

*Application* means the "Livestock Indemnity Program" form.

*Buck* means a male goat.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer.

*Contract* means, with respect to contracts for the handling of livestock, a written agreement between a livestock owner and another individual or entity setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock or livestock products.

*Deputy Administrator* or DAFP means the Deputy Administrator for Farm Programs, Farm Service Agency, U.S. Department of Agriculture or the designee.

*Equine animal* means a domesticated horse, mule, or donkey.

*Ewe* means a female sheep.

*Farming operation* means a business enterprise engaged in producing agricultural products.

*FSA* means the Farm Service Agency.

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats. Goats are further defined by sex (bucks and nannies) and age (kids).

*Kid* means a goat less than 1 year old.

*Lamb* means a sheep less than 1 year old.

*Livestock owner* means one having legal ownership of the livestock for which benefits are being requested on the day such livestock died.

*Nanny* means a female goat.

*Non-adult beef cattle* means a beef breed bovine animal that does not meet the definition of adult beef cow or bull. Non-adult beef cattle are further delineated by weight categories of either less than 400 pounds or 400 pounds or more at the time they died.

*Non-adult buffalo or beefalo* means an animal of those breeds that does not meet the definition of adult buffalo or beefalo cow or bull. Non-adult buffalo or beefalo are further delineated by weight categories of either less than 400 pounds or 400 pounds or more at the time of death.

*Non-adult dairy cattle* means a dairy breed bovine animal, of a breed used for the purpose of providing milk for human consumption, that does not meet the definition of adult dairy cow

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or bull. Non-adult dairy cattle are further delineated by weight categories of either less than 400 pounds or 400 pounds or more at the time they died.

*Normal mortality* means the numerical amount, computed by a percentage, as established for the area by the FSA State Committee, of expected livestock deaths, by category, that normally occur during a calendar year for a producer.

*Poultry* means domesticated chickens, turkeys, ducks, and geese. Poultry are further delineated by sex, age, and purpose of production as determined by FSA.

*Ram* means a male sheep.

*Secretary* means the Secretary of Agriculture or a designee of the Secretary.

*Sheep* means a domesticated, ruminant mammal of the genus *Ovis*. Sheep are further defined by sex (rams and ewes) and age (lambs) for purposes of dividing into categories for loss calculations.

*State committee, State office, county committee, or county office* means the respective FSA committee or office.

*Swine* means a domesticated omnivorous pig, hog, or boar. Swine for purposes of dividing into categories for loss calculations are further delineated by sex and weight as determined by FSA.

*United States* means all fifty States of the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and the District of Columbia.

**§ 760.403 Eligible owners and contract growers.**

(a) In addition to other eligibility rules that may apply, to be eligible as a:

(1) Livestock owner for benefits with respect to the death of an animal under this subpart, the applicant must have had legal ownership of the eligible livestock on the day the livestock died and under conditions in which no contract grower could have been eligible for benefits with respect to the animal. Eligible types of animal categories for which losses can be calculated for an owner are specified in § 760.404(a).

(2) Contract grower for benefits with respect to the death of an animal, the animal must be in one of the categories

specified on § 760.404(b), and the contract grower must have had

(i) A written agreement with the owner of eligible livestock setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock;

(ii) Control of the eligible livestock on the day the livestock died; and

(iii) A risk of loss in the animal.

(b) A producer seeking payment must not be ineligible under the restrictions applicable to foreign persons contained in § 760.103(b) and must meet all other requirements of subpart B and other applicable USDA regulations.

**§ 760.404 Eligible livestock.**

(a) To be considered eligible livestock for livestock owners, the kind of livestock must be alpacas, adult or non-adult dairy cattle, beef cattle, buffalo, beefalo, elk, emus, equine, llamas, sheep, goats, swine, poultry, deer, or reindeer and meet all the conditions in paragraph (c) of this section.

(b) To be considered eligible livestock for contract growers, the kind of livestock must be poultry or swine as defined in § 760.402 and meet all the conditions in paragraph (c) of this section.

(c) To be considered eligible livestock for the purpose of generating payments under this subpart, livestock must meet all of the following conditions:

(1) Died as a direct result of an eligible adverse weather event that occurred on or after January 1, 2008, and before October 1, 2011;

(2) Died no later than 60 calendar days from the ending date of the applicable adverse weather event, but before November 30, 2011;

(3) Died in the calendar year for which benefits are being requested;

(4) Been maintained for commercial use as part of a farming operation on the day they died; and

(5) Before dying, not have been produced or maintained for reasons other than commercial use as part of a farming operation, such non-eligible uses being understood to include, but not be limited to, any uses of wild, free roaming animals or use of the animals for recreational purposes, such as pleasure, hunting, roping, pets, or for show.

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(d) The following categories of animals owned by a livestock owner are eligible livestock and calculations of eligibility for payments will be calculated separately for each producer with respect to each category:

- (1) Adult beef bulls;
- (2) Adult beef cows;
- (3) Adult buffalo or beefalo bulls;
- (4) Adult buffalo or beefalo cows;
- (5) Adult dairy bulls;
- (6) Adult dairy cows;
- (7) Alpacas;
- (8) Chickens, broilers, pullets;
- (9) Chickens, chicks;
- (10) Chickens, layers, roasters;
- (11) Deer;
- (12) Ducks;
- (13) Ducks, ducklings;
- (14) Elk;
- (15) Emus;
- (16) Equine;
- (17) Geese, goose;
- (18) Geese, gosling;
- (19) Goats, bucks;
- (20) Goats, nannies;
- (21) Goats, kids;
- (22) Llamas;
- (23) Non-adult beef cattle;
- (24) Non-adult buffalo or beefalo;
- (25) Non-adult dairy cattle;
- (26) Reindeer;
- (27) Sheep, ewes;
- (28) Sheep, lambs;
- (29) Sheep, rams;
- (30) Swine, feeder pigs under 50 pounds;
- (31) Swine, sows, boars, barrows, gilts 50 to 150 pounds;
- (32) Swine, sows, boars, barrows, gilts over 150 pounds;
- (33) Turkeys, poult;
- (34) Turkeys, toms, fryers, and roasters.

(e) The following categories of animals are eligible livestock for contract growers and calculations of eligibility for payments will be calculated separately for each producer with respect to each category:

- (1) Chickens, broilers, pullets;
- (2) Chickens, layers, roasters;
- (3) Geese, goose;
- (4) Swine, boars, sows;
- (5) Swine, feeder pigs;
- (6) Swine, lightweight barrows, gilts;
- (7) Swine, sows, boars, barrows, gilts; and

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(8) Turkeys, toms, fryers, and roasters.

[74 FR 31575, July 2, 2009, as amended at 76 FR 54075, Aug. 31, 2011]

### § 760.405 Application process.

(a) In addition to submitting an application for payment at the appropriate time, a producer or contract grower that suffered livestock losses that create or could create a claim for benefits must:

(1) For losses during 2008 and losses in 2009, prior to July 13, 2009, provide a notice of loss to FSA no later than September 13, 2009.

(2) For losses on or after July 13, 2009, provide a notice of loss to FSA within the earlier of:

(i) 30 calendar days of when the loss of livestock is apparent to the participant or

(ii) 30 calendar days after the end of the calendar year in which the loss of livestock occurred.

(3) The participant must submit the notice of loss required in paragraphs (a)(1) and (a)(2) to the FSA administrative county office that maintains the participant's farm records for the agricultural operation.

(b) In addition to the notices of loss required in paragraph (a) of this section, a participant must also submit a completed application for payment no later than

(1) 30 calendar days after the end of the calendar year in which the loss of livestock occurred or

(2) September 13, 2009 for losses during 2008.

(c) Applicants must submit supporting documentation with their application. For contract growers, the information must include a copy of the grower contract and other documents establishing their status. In addition, for all applicants, including contract growers, supporting documents must show:

- (1) Evidence of loss,
- (2) Current physical location of livestock in inventory,
- (3) Physical location of claimed livestock at the time of death, and
- (4) Inventory numbers and other inventory information necessary to establish actual mortality as required by FSA.

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(d) The participant must provide adequate proof that the death of the eligible livestock occurred as a direct result of an eligible adverse weather event in the calendar year for which benefits are requested. The quantity and kind of livestock that died as a direct result of the eligible adverse weather event during the calendar year for which benefits are being requested may be documented by: purchase records; veterinarian records; bank or other loan papers; rendering-plant truck receipts; Federal Emergency Management Agency records; National Guard records; written contracts; production records; Internal Revenue Service records; property tax records; private insurance documents; and other similar verifiable documents as determined by FSA.

(e) If adequate verifiable proof of death documentation is not available, the participant may provide reliable records, in conjunction with verifiable beginning and ending inventory records, as proof of death. Reliable records may include contemporaneous producer records, dairy herd improvement records, brand inspection records, vaccination records, pictures, and other similar reliable documents as determined by FSA.

(f) Certification of livestock deaths by third parties may be accepted only if verifiable proof of death records or reliable proof of death records in conjunction with verifiable beginning and ending inventory records are not available and both of the following conditions are met:

(1) The livestock owner or livestock contract grower, as applicable, certifies in writing:

(i) That there is no other verifiable or reliable documentation of death available;

(ii) The number of livestock, by category identified in this subpart and by FSA were in inventory at the time the applicable adverse weather event occurred;

(iii) The physical location of the livestock, by category, in inventory when the deaths occurred; and

(iv) Other details required for FSA to determine the certification acceptable; and

(2) The third party is an independent source who is not affiliated with the farming operation such as a hired hand and is not a "family member," defined as a person whom a member in the farming operation or their spouse is related as lineal ancestor, lineal descendant, sibling, spouse, and provides their telephone number, address, and a written statement containing specific details about:

(i) Their knowledge of the livestock deaths;

(ii) Their affiliation with the livestock owner;

(iii) The accuracy of the deaths claimed by the livestock owner or contract grower including, but not limited to, the number and kind or type of the participant's livestock that died because of the eligible adverse weather event; and

(iv) Other information required by FSA to determine the certification acceptable.

(g) Data furnished by the participant and the third party will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without all required data program benefits will not be approved or provided.

**§ 760.406 Payment calculation.**

(a) Under this subpart, separate payment rates for eligible livestock owners and eligible livestock contract growers are specified in paragraphs (b) and (c) of this section, respectively. Payments for LIP are calculated by multiplying the national payment rate for each livestock category by the number of eligible livestock in excess of normal mortality in each category that died as a result of an eligible adverse weather event. Normal mortality for each livestock category will be determined by FSA on a State-by-State basis using local data sources including, but not limited to, State livestock organizations and the Cooperative Extension Service for the State. Adjustments will be applied as specified in paragraph (d) of this section.

(b) The LIP national payment rate for eligible livestock owners is based on 75 percent of the average fair market value of the applicable livestock as computed using nationwide prices for

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the previous calendar year unless some other price is approved by the Deputy Administrator.

(c) The LIP national payment rate for eligible livestock contract growers is based on 75 percent of the average income loss sustained by the contract grower with respect to the dead livestock.

(d) The LIP payment calculated for eligible livestock contract growers will be reduced by the amount the participant received from the party who contracted with the producer to raise the livestock for the loss of income from the dead livestock.

### Subpart F—Tree Assistance Program

SOURCE: 75 FR 25108, May 7, 2010, unless otherwise noted.

#### § 760.500 Applicability.

(a) This subpart establishes the terms and conditions under which the Tree Assistance Program (TAP) will be administered under Titles XII and XV of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246, the 2008 Farm Bill).

(b) Eligible orchardists and nursery tree growers will be compensated as specified in § 760.506 for eligible tree, bush, and vine losses in excess of 15 percent mortality, or, where applicable, 15 percent damage, adjusted for normal mortality and normal damage, that occurred in the calendar year for which benefits are being requested and as a direct result of a natural disaster.

#### § 760.501 Administration.

The program will be administered as specified in § 760.102 and in this subpart.

#### § 760.502 Definitions.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Bush* means, a low, branching, woody plant, from which at maturity of the bush, an annual fruit or vegetable crop is produced for commercial purposes, such as a blueberry bush. The definition does not cover plants that produce

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a bush after the normal crop is harvested such as asparagus.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer.

*County committee* means the respective FSA committee.

*County office* means the FSA or U.S. Department of Agriculture (USDA) Service Center that is responsible for servicing the farm on which the trees, bushes, or vines are located.

*Cutting* means a piece of a vine which was planted in the ground to propagate a new vine for the commercial production of fruit, such as grapes, kiwi fruit, passion fruit, or similar fruit.

*Deputy Administrator* or DAFFP means the Deputy Administrator for Farm Programs, FSA, USDA, or the designee.

*Eligible nursery tree grower* means a person or legal entity that produces nursery, ornamental, fruit, nut, or Christmas trees for commercial sale.

*Eligible orchardist* means a person or legal entity that produces annual crops from trees, bushes, or vines for commercial purposes.

*FSA* means the Farm Service Agency.

*Lost* means, with respect to the extent of damage to a tree or other plant, that the plant is destroyed or the damage is such that it would, as determined by FSA, be more cost effective to replace the tree or other plant than to leave it in its deteriorated, low-producing state.

*Natural disaster* means plant disease, insect infestation, drought, fire, freeze, flood, earthquake, lightning, or other natural occurrence of such magnitude or severity so as to be considered disastrous, as determined by the Deputy Administrator.

*Normal damage* means the percentage, as established for the area by the FSA State Committee, of trees, bushes, or vines in the individual stand that would normally be damaged during a calendar year for a producer.

*Normal mortality* means percentage, as established for the area by the FSA State Committee, of expected lost trees, bushes, or vines in the individual stand that normally occurs during a calendar year for a producer. This term refers to the number of whole trees,

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bushes, or vines that are destroyed or damaged beyond rehabilitation. Mortality does not include partial damage such as lost tree limbs.

*Seedling* means an immature tree, bush, or vine that was planted in the ground or other growing medium to grow a new tree, bush, or vine for commercial purposes.

*Stand* means a contiguous acreage of the same type of trees (including Christmas trees, ornamental trees, nursery trees, and potted trees), bushes (including shrubs), or vines.

*State committee* means the respective FSA committee.

*Tree* means a tall, woody plant having comparatively great height, and a single trunk from which an annual crop is produced for commercial purposes, such as a maple tree for syrup, papaya tree, or orchard tree. Trees used for pulp or timber are not considered eligible trees under this subpart.

*Vine* means a perennial plant grown under normal conditions from which an annual fruit crop is produced for commercial market for human consumption, such as grape, kiwi, or passion fruit, and that has a flexible stem supported by climbing, twining, or creeping along a surface. Perennials that are normally propagated as annuals such as tomato plants, biennials such as the plants that produce strawberries, and annuals such as pumpkins, squash, cucumbers, watermelon, and other melons, are excluded from the term vine in this subpart.

**§ 760.503 Eligible losses.**

(a) To be considered an eligible loss under this subpart:

(1) Eligible trees, bushes, or vines must have been lost or damaged as a result of natural disaster as determined by the Deputy Administrator;

(2) The individual stand must have sustained a mortality loss or damage, as the case may be, loss in excess of 15 percent after adjustment for normal mortality or damage;

(3) The loss could not have been prevented through reasonable and available measures; and

(4) The trees, bushes, or vines, in the absence of a natural disaster, would not normally have required rehabilita-

tion or replanting within the 12-month period following the loss.

(b) The damage or loss must be visible and obvious to the county committee representative. If the damage is no longer visible, the county committee may accept other evidence of the loss as it determines is reasonable.

(c) The county committee may require information from a qualified expert, as determined by the county committee, to determine extent of loss in the case of plant disease or insect infestation.

(d) The Deputy Administrator will determine the types of trees, bushes, and vines that are eligible.

(e) An individual stand that did not sustain a sufficient loss as specified in paragraph (a)(2) of this section is not eligible for payment, regardless of the amount of loss sustained.

**§ 760.504 Eligible orchardists and nursery tree growers.**

(a) To be eligible for TAP payments, the eligible orchardist or nursery tree grower must:

(1) Have planted, or be considered to have planted (by purchase prior to the loss of existing stock planted for commercial purposes) trees, bushes, or vines for commercial purposes, or have a production history, for commercial purposes, of planted or existing trees, bushes, or vines;

(2) Have suffered eligible losses of eligible trees, bushes, or vines occurring between January 1, 2008, and September 30, 2011, as a result of a natural disaster or related condition;

(3) Meet the risk management purchase requirement as specified in § 760.104 or the waiver requirements in § 760.105 or § 760.107; and

(4) Have continuously owned the stand from the time of the disaster until the time that the TAP application is submitted.

(b) A new owner of an orchard or nursery who does not meet the requirements of paragraph (a) of this section may receive TAP payments approved for the previous owner of the orchard or nursery and not paid to the previous owner, if the previous owner of the orchard or nursery agrees to the succession in writing and if the new owner:

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- (1) Acquires ownership of trees, bushes, or vines for which benefits have been approved;
- (2) Agrees to complete all approved practices that the original owner has not completed; and
- (3) Otherwise meets and assumes full responsibility for all provisions of this part, including refund of payments made to the previous owner, if applicable.
- (c) A producer seeking payment must not be ineligible under the restrictions applicable to citizenship and foreign corporations contained in § 760.103(b) and must meet all other requirements of subpart B of this part.
- (d) Federal, State, and local governments and agencies and political subdivisions thereof are not eligible for payment under this subpart.

### § 760.505 Application.

- (a) To apply for TAP, a producer that suffered eligible tree, bush, or vine losses that occurred:
  - (1) During calendar years 2008, 2009, or 2010, prior to May 7, 2010, must provide an application for payment and supporting documentation to FSA no later than July 6, 2010.
  - (2) On or after May 7, 2010, must provide an application for payment and supporting documentation to FSA within 90 calendar days of the disaster event or date when the loss of trees, bushes, or vines is apparent to the producer.
- (b) The producer must submit the application for payment within the time specified in paragraph (a) of this section to the FSA administrative county office that maintains the producer's farm records for the agricultural operation.
- (c) A complete application includes all of the following:
  - (1) A completed application form provided by FSA;
  - (2) An acreage report for the farming operation as specified in part 718, subpart B, of this chapter;
  - (3) Subject to verification and a loss amount determined appropriate by the county committee, a written estimate of the number of trees, bushes, or vines lost or damaged that is certified by the producer or a qualified expert, includ-

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ing the number of acres on which the loss occurred; and

(4) Sufficient evidence of the loss to allow the county committee to calculate whether an eligible loss occurred.

(d) Before requests for payment will be approved, the county committee:

(1) Must make an eligibility determination based on a complete application for assistance;

(2) Must verify actual qualifying losses and the number of acres involved by on-site visual inspection of the land and the trees, bushes, or vines;

(3) May request additional information and may consider all relevant information in making its determination; and

(4) Must verify actual costs to complete the practices, as documented by the producer.

### § 760.506 Payment calculations.

(a) Payment to an eligible orchardist or nursery tree grower for the cost of replanting or rehabilitating trees, bushes, or vines damaged or lost due to a natural disaster, in excess of 15 percent damage or mortality (adjusted for normal damage or mortality), will be calculated as follows:

(1) For the cost of planting seedlings or cuttings, to replace lost trees, bushes, or vines, the lesser of:

(i) 70 percent of the actual cost of the practice, or

(ii) The amount calculated using rates established by the Deputy Administrator for the practice.

(2) For the cost of pruning, removal, and other costs incurred for salvaging damaged trees, bushes, or vines, or in the case of mortality, to prepare the land to replant trees, bushes, or vines, the lesser of:

(i) 50 percent of the actual cost of the practice, or

(ii) The amount calculated using rates established by the Deputy Administrator for the practice.

(b) An orchardist or nursery tree grower that did not plant the trees, bushes, or vines, but has a production history for commercial purposes on planted or existing trees and lost the trees, bushes, or vines as a result of a natural disaster, in excess of 15 percent

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damage or mortality (adjusted for normal damage or mortality), will be eligible for the salvage, pruning, and land preparation payment calculation as specified in paragraph (a)(2) of this section. To be eligible for the replanting payment calculation as specified in paragraph (a)(1) of this section, the orchardist or nursery grower who did not plant the stock must be a new owner who meets all of the requirements of § 760.504(b) or be considered the owner of the trees under provisions appearing elsewhere in this subpart.

(c) Eligible costs for payment calculation include costs for:

(1) Seedlings or cuttings, for tree, bush, or vine replanting;

(2) Site preparation and debris handling within normal horticultural practices for the type of stand being re-established, and necessary to ensure successful plant survival;

(3) Pruning, removal, and other costs incurred to salvage damaged trees, bushes, or vines, or, in the case of tree mortality, to prepare the land to re-plant trees, bushes, or vines;

(4) Chemicals and nutrients necessary for successful establishment;

(5) Labor to plant seedlings or cuttings as determined reasonable by the county committee; and

(6) Labor used to transplant existing seedlings established through natural regeneration into a productive tree stand.

(d) The following costs are not eligible:

(1) Costs for fencing, irrigation, irrigation equipment, protection of seedlings from wildlife, general improvements, re-establishing structures, and windscreens.

(2) Any other costs not listed in paragraphs (c)(1) through (c)(6) of this section, unless specifically determined eligible by the Deputy Administrator.

(e) Producers must provide the county committee documentation of actual costs to complete the practices, such as receipts for labor costs, equipment rental, and purchases of seedlings or cuttings.

(f) When lost stands are replanted, the types planted may be different from those originally planted. The alternative types will be eligible for payment if the new types have the same

general end use, as determined and approved by the county committee. Payments for alternative types will be based on the lesser of rates established to plant the types actually lost or the cost to establish the alternative used. If the type of plantings, seedlings, or cuttings differs significantly from the types lost, the costs may not be approved for payment.

(g) When lost stands are replanted, the types planted may be planted on the same farm in a different location than the lost stand. To be eligible for payment, site preparation costs for the new location must not exceed the cost to re-establish the original stand in the original location.

(h) Eligible orchardists or nursery tree growers may elect not to replant the entire eligible stand. If so, the county committee will calculate payment based on the number of qualifying trees, bushes, or vines actually replanted.

(i) If a practice, such as site preparation, is needed to both replant and rehabilitate trees, bushes, or vines, the producer must document the expenses attributable to replanting versus rehabilitation. The county committee will determine whether the documentation of expenses detailing the amounts attributable to replanting versus rehabilitation is acceptable. In the event that the county committee determines the documentation does not include acceptable detail of cost allocation, the county committee will pro-rate payment based on physical inspection of the loss, damage, replanting, and rehabilitation.

(j) The cumulative total quantity of acres planted to trees, bushes, or vines for which a producer may receive payment under this part for losses that occurred between January 1, 2008, and September 30, 2011, will not exceed 500 acres.

**§ 760.507 Obligations of a participant.**

(a) Eligible orchardists and nursery tree growers must execute all required documents and complete the TAP-funded practice within 12 months of application approval.

(b) Eligible orchardist or nursery tree growers must allow representatives of FSA to visit the site for the purposes

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of certifying compliance with TAP requirements.

(c) Producers who do not meet all applicable requirements and obligations will not be eligible for payment.

### Subpart G—Supplemental Revenue Assistance Payments Program

SOURCE: 74 FR 68490, Dec. 28, 2009, unless otherwise noted.

#### § 760.601 Applicability.

(a) This subpart specifies the terms and conditions of the Supplemental Revenue Assistance Payments Program (SURE).

(b) Assistance in the form of SURE payments is available for crop losses occurring in the crop year 2008 through September 30, 2011, caused by disaster as determined by the Secretary. Crop losses must have occurred in crop year 2008 or subsequent crop years due to an eligible disaster event that occurs on or before September 30, 2011.

(c) SURE provides disaster assistance to eligible participants on farms in:

(1) Disaster counties designated by the Secretary, which also includes counties contiguous to such declared disaster counties, if the participant incurred actual production losses of at least 10 percent to at least one crop of economic significance on the farm; and

(2) Any county, if the participant incurred eligible total crop losses of greater than or equal to 50 percent of the normal production on the farm, as measured by revenue, including a loss of at least 10 percent to at least one crop of economic significance on the farm.

(d) Subject to the provisions in subpart B of this part, SURE payments will be issued on 60 percent of the difference between the SURE guarantee and total farm revenue, calculated using the National Average Market Price as specified in this subpart.

[74 FR 68490, Dec. 28, 2009, as amended at 76 FR 54075, Aug. 31, 2011]

#### § 760.602 Definitions.

(a) The following definitions apply to all determinations made under this subpart.

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(b) The terms defined in parts 718, 1400, and 1437 of this title and subpart B of this part will be applicable, except where those definitions conflict with the definitions set forth in this section. In the event that a definition in any of those parts conflicts with the definitions set forth in this subpart, the definitions in this subpart apply. Any additional conflicts will be resolved by the Deputy Administrator.

*Actual crop acreage* means all acreage for each crop planted or intended to be planted on the farm.

*Actual production history yield* means the average of the actual production history yields for each insurable or noninsurable crop as calculated under the Federal Crop Insurance Act (FCIA) (7 U.S.C. 1501-1524) or Noninsured Crop Disaster Assistance Program (NAP) as set forth in part 1437 of this title, respectively. FSA will use the actual production history yield data provided for crop insurance or NAP, if available, in the SURE payment calculation.

*Actual production on the farm* means, unless the Deputy Administrator determines that the context requires otherwise, the sum obtained by adding:

(1) For each insurable crop on the farm, excluding value loss crops, the product obtained by multiplying:

(i) 100 percent of the per unit price for the crop used to calculate a crop insurance indemnity for the applicable crop insurance if a crop insurance indemnity is triggered. If a price is not available, then the price is 100 percent of the NAP established price for the crop, times

(ii) The relevant per unit quantity of the crop produced on the farm, adjusted for quality losses, plus

(2) For each noninsurable crop on the farm, excluding value loss crops, the product obtained by multiplying:

(i) 100 percent of the per unit NAP established price for the crop, times

(ii) The relevant per unit quantity of the crop produced on the farm, adjusted for quality losses, plus

(3) For value loss crops, the value of inventory immediately after the disaster.

*Adjusted actual production history yield* means a yield that will not be less than the participant's actual production history yield for a year and:

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(1) In the case of an eligible participant on a farm that has at least 4 years of actual production history for an insurable crop that are established other than pursuant to section 508(g)(4)(B) of FCIA, the average of the production history for the eligible participant without regard to any yields established under that section;

(2) In the case of an eligible participant on a farm that has less than 4 years of actual production history for an insurable crop, of which one or more were established pursuant to section 508(g)(4)(B) of FCIA, the average of the production history for the eligible participant as calculated without including the lowest of the yields established pursuant to section 508(g)(4)(B) of FCIA; or

(3) In all other cases, the actual production history yield of the eligible participant on a farm.

*Adjusted NAP yield* means a yield that will not be less than the participant's actual production history yield for NAP for a year and:

(1) In the case of an eligible participant on a farm that has at least 4 years of actual production history under NAP that are not replacement yields, the average of the production history without regard to any replacement yields;

(2) In the case of an eligible participant on a farm that has less than 4 years of actual production history under NAP that are not replacement yields, the average of the production history without including the lowest of replacement yields; or

(3) In all other cases, the actual production history yield of the eligible participant on the farm under NAP.

*Administrative fee* means a fixed fee payable by a participant for NAP or crop insurance coverage, including buy-in fees, based on the number of covered crops under NAP or insurance under FCIA.

*Appraised production* means production determined by FSA, or an insurance provider approved by FCIC, that was unharvested, but which was determined to reflect the crop's yield potential at the time of appraisal. An appraisal may be provided in terms of a potential value of the crop.

*Aquaculture* means the reproduction and rearing of aquatic species as specified in part 1437 of this title in controlled or selected environments.

*Brownout* means a disruption of electrical or other similar power source for any reason. A brownout, although it may indirectly have an adverse effect on crops, is not a disaster for the purposes of this subpart and losses caused by a brownout will not be considered a qualifying loss.

*Catastrophic risk protection* (CAT) means the minimum level of coverage offered by the Risk Management Agency (RMA) for crop insurance. CAT is further specified in parts 402 and 1437 of this title.

*Counter-cyclical program payment yield* means the weighted average payment yield established under part 1412, subpart C of this title.

*County expected yield* means an estimated yield, expressed in a specific unit of measure equal to the average of the most recent five years of official county yields established by FSA, excluding the years with the highest and lowest yields, respectively.

*Crop insurance indemnity* means, for the purpose of this subpart, the net payment to a participant excluding the value of the premium for crop losses covered under crop insurance administered in accordance with FCIA by RMA.

*Crop of economic significance* means any crop, as defined in this subpart that contributed, or, if the crop is not successfully produced, would have contributed or is expected to contribute, 5 percent or more of the total expected revenue from all of a participant's crops on a farm.

*Crop year* means as determined by the Deputy Administrator for a commodity on a nationwide basis the calendar year in which the crop is normally harvested or, where more than one calendar year is involved, the calendar year in which the majority of the crop would have been harvested. For crops on which catastrophic risk protection, as defined in this section, is available, the crop year will be as defined as in such coverage. Crop year determinations by the Deputy Administrator will be final in all cases and, because these are matters of general applicability,

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will not be considered by the Farm Service Agency to be subject to administrative appeal.

*Determined acreage or determined production* means the amount of acres or production for a farm established by a representative of FSA by use of appropriate means such as official acreage, digitizing and planimetering areas on the photograph or other photographic image, or computations from scaled dimensions or ground measurements. In the case of production, any production established by a representative of FSA through audit, review, measurement, appraisal, or other acceptable means of determining production, as determined by FSA.

*Disaster* means damaging weather, including drought, excessive moisture, hail, freeze, tornado, hurricane, typhoon, excessive wind, excessive heat, weather-related saltwater intrusion, weather-related irrigation water rationing, or any combination thereof and adverse natural occurrences such as earthquakes or volcanic eruptions. Disaster includes a related condition that occurs as a result of the damaging weather or adverse natural occurrence and exacerbates the condition of the crop, such as disease and insect infestation. It does not include brownouts or power failures.

*Disaster county* means a county included in the geographic area covered by a qualifying natural disaster designation under section 321(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961(a)) and for SURE, the term "disaster county" also includes a county contiguous to a county declared a disaster by the Secretary; however, farms not in a disaster county may qualify under SURE where for the relevant period, as determined under this subpart, the actual production on a farm is less than 50 percent of the normal production on the farm.

*Double-cropping* means, as determined by the Deputy Administrator on a regional basis, planting for harvest a crop of a different commodity on the same acres in cycle with another crop in a 12-month period in an area where such double-cropping is considered normal, or could be considered to be normal, for all growers and under normal

growing conditions and normal agricultural practices for the region and being able to repeat the same cycle in the following 12-month period.

*Farm* means, for the purposes of determining SURE eligibility, the entirety of all crop acreage in all counties that a producer planted or intended to be planted for harvest for normal commercial sale or on-farm livestock feeding, including native and improved grassland intended for haying. In the case of aquaculture, except for species for which an Aquaculture Grant Program payment was received, the term "farm" includes all acreage used for all aquatic species being produced in all counties that the producer intended to harvest for normal commercial sale. In the case of honey, the term "farm" means all bees and beehives in all counties that the participant intended to be harvested for a honey crop for normal commercial sale.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation operated and managed by USDA RMA.

*FSA* means the Farm Service Agency.

*Harvested* means:

(1) For insurable crops, harvested is as defined according to the applicable crop insurance policy administered in accordance with FCIA by RMA;

(2) For NAP-covered single harvest crops, a mature crop that has been removed from the field, either by hand or mechanically;

(3) For noninsurable crops with potential multiple harvests in one year or one crop harvested over multiple years, that the participant has, by hand or mechanically, removed at least one mature crop from the field during the crop year; or

(4) For mechanically harvested noninsurable crops, that the mature crop has been removed from the field and placed in or on a truck or other conveyance, except hay is considered harvested when in the bale, whether removed from the field or not. Grazing of land will not be considered harvested for the purpose of determining an unharvested or prevented planting payment factor.

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*Initial crop* means a first crop planted for which assistance is provided under this subpart.

*Insurable crop* means an agricultural commodity (excluding livestock) for which the participant on a farm is eligible to obtain a policy or plan of crop insurance administered in accordance with FCIA by RMA. Such a crop for which the participant purchased insurance from RMA is referred to as an insured crop.

*Insurance is available* means when crop information is contained in RMA's county actuarial documents for a particular crop and a policy or plan of insurance administered in accordance with FCIA by RMA. If the Adjusted Gross Revenue Plan of crop insurance was the only plan of insurance available for the crop in the county in the applicable crop year, insurance is considered not available for that crop. If an AGR plan or a pilot plan was the only plan available, producers are not required to purchase it to meet the risk management purchase requirement, but it will satisfy the risk management purchase requirement. In that case, the other ways to meet the requirement would be, if all the requirements of this subpart are met, a buy-in or NAP.

*Intended use* means the original use for which a crop or a commodity is grown and produced.

*Marketing year* means the 12 months immediately following the established final harvest date of the crop of a commodity, as determined by the Deputy Administrator, and not an individual participant's final harvest date. FSA will use the marketing year determined by NASS, when available.

*Maximum average loss level* means the maximum level of crop loss that will be used in calculating SURE payments for a participant without reliable or verifiable production records as defined in this section. Loss levels are expressed in either a percent of loss or a yield per acre, and reflect the amount of production that a participant should have produced considering the eligible disaster conditions in the area or county, as determined by the FSA county committee in accordance with instructions issued by the Deputy Administrator.

*Multi-use crop* means a crop intended for more than one use during the calendar year such as grass harvested for seed, hay, or grazing.

*Multiple planting* means the planting for harvest of the same crop in more than one planting period in a crop year on the same or different acreage. This is also sometimes referred in this rule as multiple cropping.

*NAMP* means the national average market price determined in accordance with §§ 760.640 and 760.641.

*NASS* is the USDA National Agricultural Statistics Service.

*Noninsurable crop* means a commercially produced crop for which the eligible participants on a farm may obtain coverage under NAP.

*Noninsured Crop Disaster Assistance Program or NAP* means the FSA program carried out under 7 U.S.C. 7333, as specified in part 1437 of this title.

*Normal production on the farm* means, for purposes of the revenue calculations of this subpart, the sum of the expected revenue for all crops on the farm. It is stated in terms of revenue, because different crops may have different units of measure.

*Planted acreage* means land in which seed, plants, or trees have been placed, appropriate for the crop and planting method, at a correct depth, into a seed bed that has been properly prepared for the planting method and production practice normal to the area, as determined by the FSA county committee.

*Prevented planting* means the inability to plant an eligible crop with proper equipment during the planting period as a result of a disaster, as determined by FSA. All prevented planted cropland must meet conditions provided in § 718.103 of this chapter. Additionally, all insured crops must satisfy the provisions of prevented planting provided in § 457.8 of this title.

*Price election* means, for an insured crop, the crop insurance price elected by the participant multiplied by the percentage of price elected by the participant.

*Production* means quantity of a crop or commodity produced on the farm expressed in a specific unit of measure including, but not limited to, bushels or

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pounds and used to determine the normal production on a farm. Normal production for the whole farm is stated in terms of revenue, because different crops may have different units of measure.

*Qualifying loss* means a 10 percent loss of at least one crop of economic significance due to disaster and on a farm that is either:

(1) Located in a disaster county (a county for which a Secretarial disaster designation has been issued or in a county contiguous to a county that has received a Secretarial disaster designation), or

(2) If not located in any disaster county or county contiguous to such a county, but has an overall loss greater than or equal to 50 percent of normal production on the farm (expected revenue for all crops on the farm) due to disaster.

*Qualifying natural disaster designation* means a natural disaster designated by the Secretary for production losses under section 321(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961(a)).

*Related condition* means, with respect to a disaster, a condition that causes deterioration of a crop such as insect infestation, plant disease, or aflatoxin that is accelerated or exacerbated as a result of damaging weather, as determined by the Deputy Administrator.

*Reliable production records* means evidence provided by the participant to the FSA county office that FSA determines is adequate to substantiate the amount of production reported when verifiable records are not available, including copies of receipts, ledgers of income, income statements, deposit slips, register tapes, invoices for custom harvesting, records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries. When the term "acceptable production records" is used in this rule, it may be either reliable or verifiable production records, as defined in this section.

*Reported acreage or production* means information obtained from the participant or the participant's agent, on a form prescribed by FSA or through insurance records.

*RMA* means the Risk Management Agency.

*Salvage value* means the dollar amount or equivalent for the quantity of the commodity that cannot be marketed or sold in any recognized market for the crop.

*Secretary* means the Secretary of Agriculture.

*State* means a State; the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

*Subsequent crop* means any crop planted after an initial crop, on the same land, during the same crop year.

*SURE* means the Supplemental Revenue Assistance Payments Program.

*Unit of measure* means:

(1) For all insurable crops, the FCIC established unit of measure;

(2) For all noninsurable crops, if available, the established unit of measure used for the NAP price and yield;

(3) For aquatic species, a standard unit of measure such as gallons, pounds, inches or pieces, established by the FSA State committee for all aquatic species or varieties;

(4) For turfgrass sod, a square yard;

(5) For maple sap, a gallon; and

(6) For all other crops, the smallest unit of measure that lends itself to the greatest level of accuracy, as determined by the FSA State committee.

*USDA* means United States Department of Agriculture.

*Value loss crop* has the meaning specified in part 1437, subpart D of this title. Unless otherwise announced by FSA, value loss crops for SURE include aquaculture, floriculture, ornamental nursery, Christmas trees, mushrooms, ginseng, and turfgrass sod.

*Verifiable production records* mean evidence that is used to substantiate the amount of production reported and that can be verified by FSA through an independent source.

*Volunteer stand* means plants that grow from seed residue or are indigenous or are not planted. Volunteer plants may sprout from seeds left behind during a harvest of a previous crop; be unintentionally introduced to land by wind, birds, or fish; or be inadvertently mixed into a crop's growing medium.

**Farm Service Agency, USDA****§ 760.610****§ 760.610 Participant eligibility.**

(a) In addition to meeting the eligibility requirements of § 760.103, a participant must meet all of the following conditions:

(1) All insurable crops on the participant's farm must be covered by crop insurance administered by RMA in accordance with FCIA, and all non-insured crops must be covered under NAP, as specified in § 760.104, unless the participant meets the requirements in either § 760.105 or § 760.107. At the discretion of FSA, the equitable relief provisions in § 760.106 may apply.

(2) Crop losses must have occurred in crop year 2008 or subsequent crop years due to an eligible disaster event that occurred on or before September 30, 2011.

(i) For insured crops, the coverage period, as defined in the insurance policy, must have begun on or before September 30, 2011;

(ii) For NAP crops, the coverage period must have begun on or before September 30, 2011; and

(iii) The final planting date for that crop according to the Federal crop insurance or NAP policy must have been on or before September 30, 2011.

(3) A qualifying loss as defined in § 760.602 must have occurred.

(4) The participant must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of part 12 of this title, for 2008 and subsequent crop years through September 30, 2011, as applicable, and must not otherwise be barred from receiving benefits or payments under part 12 of this title or any other law.

(5) The participant must not be ineligible or otherwise barred from the requisite risk management insurance programs or NAP because of past violations where those insurance programs or NAP would otherwise be available absent such violations.

(6) The participant must have an entitlement to an ownership share of the crop and also assume production and market risks associated with the production of the crop. In the event the crop was planted but not produced, participants must have an ownership share of the crop that would have been produced.

(i) Any verbal or written contract that precludes the grower from having an ownership share renders the grower ineligible for payments under this subpart.

(ii) Growers growing eligible crops under contract are not eligible participants under this subpart unless the grower has an ownership share of the crop.

(b) In the event that a producer is determined not to be an eligible producer of a crop in accordance with this section, such crop will be disregarded in determining the producer's production or eligibility for payments under this subpart. However, any insurance, farm program, or NAP payments received by the producer on such crop will count as farm revenue if that producer is an eligible participant as a producer of other crops.

(c) Participants may not receive payments with respect to volunteer stands of crops. Volunteer stands will not be considered in either the calculation of revenue or of the SURE guarantee.

(d) A deceased applicant or an applicant that is a dissolved entity that suffered losses prior to the death or the dissolution that met all eligibility criteria prior to death or dissolution may be eligible for payments for such losses if an authorized representative signs the application for payment. Proof of authority to sign for the deceased participant or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment. Eligibility of such participant will be determined, as it is for other participants, based upon ownership share and risk in producing the crop.

(e) Participants receiving payments under the Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP) as specified in subpart C of this part are not eligible to receive payments under SURE for the same loss.

(f) Participants with a farming interest in multiple counties who apply for SURE payment based on a Secretarial disaster designation must have a 10

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percent loss of a crop of economic significance located in at least one disaster county, as defined in this subpart, to be eligible for SURE.

[74 FR 68490, Dec. 28, 2009, as amended at 76 FR 54075, Aug. 31, 2011]

### § 760.611 Qualifying losses, eligible causes and types of loss.

(a) Eligible causes of loss are disasters which cause types of losses where the crop could not be planted or where crop production was adversely affected in quantity, quality, or both. A qualifying loss, as defined in this subpart, must be the result of a disaster.

(b) A loss will not be considered a qualifying loss if any of the following apply:

(1) The cause of the loss was not the result of disaster;

(2) The cause of loss was due to poor management decisions or poor farming practices, as determined by the FSA county committee on a case-by-case basis;

(3) The cause of loss was due to failure of the participant to re-seed or re-plant to the same crop in a county where it is customary to re-seed or re-plant after a loss before the final planting date;

(4) The cause of loss was due to water contained or released by any governmental, public, or private dam or reservoir project if an easement exists on the acreage affected by the containment or release of the water;

(5) The cause of loss was due to conditions or events occurring outside of the applicable crop year growing season; or

(6) The cause of loss was due to a brownout.

(c) The following types of loss, regardless of whether they were the result of a disaster, are not qualifying losses:

(1) Losses to crops not intended for harvest in the applicable crop year;

(2) Losses of by-products resulting from processing or harvesting a crop, such as, but not limited to, cotton seed, peanut shells, wheat or oat straw, or corn stalks or stovers;

(3) Losses to home gardens; or to a crop subject to a de minimis election according to § 760.613;

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(4) Losses of crops that were grazed or, if prevented from being planted, had the intended use of grazing; or

(5) Losses of first year seeding for forage production, or immature fruit crops.

(d) The following losses of ornamental nursery stock are not a qualifying loss:

(1) Losses caused by a failure of power supply or brownout as defined in § 760.602;

(2) Losses caused by the inability to market nursery stock as a result of quarantine, boycott, or refusal of a buyer to accept production;

(3) Losses caused by fires that are not the result of disaster;

(4) Losses affecting crops where weeds and other forms of undergrowth in the vicinity of nursery stock have not been controlled; or

(5) Losses caused by the collapse or failure of buildings or structures.

(e) The following losses for honey, where the honey production by colonies or bees was diminished, are not a qualifying loss:

(1) Losses caused by the unavailability of equipment or the collapse or failure of equipment or apparatus used in the honey operation;

(2) Losses caused by improper storage of honey;

(3) Losses caused by bee feeding;

(4) Losses caused by the application of chemicals;

(5) Losses caused by theft or fire not caused by a natural condition including, but not limited to, arson or vandalism;

(6) Losses caused by the movement of bees by the participant or any other legal entity or person;

(7) Losses caused by disease or pest infestation of the colonies, unless approved by the Secretary;

(8) Losses of income from pollinators; or

(9) Losses of equipment or facilities.

### § 760.613 De minimis exception.

(a) Participants seeking the de minimis exception to the risk management purchase requirements of this subpart, must certify:

(1) That a specific crop on the farm is not a crop of economic significance on the farm; or

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(2) That the administrative fee required for the purchase of NAP coverage for a crop exceeds 10 percent of the value of that coverage.

(b) To be eligible for a de minimis exception to the risk management purchase requirement in § 760.104, the participant must elect such exception at the same time the participant files the application for payment and the certification of interests, as specified in § 760.620, and specify the crop or crops for which the participant is requesting such exception.

(c) FSA will not consider the value of any crop elected under paragraph (b) of this section in calculating both the SURE guarantee and the total farm revenue.

(d) All provisions of this subpart apply in the event a participant does not obtain an exception according to this section.

**§ 760.614 Lack of access.**

In addition to other provisions for eligibility provided for in this part, the Deputy Administrator may provide assistance to participants who suffered 2008 production losses that meet the lack of access provisions in 19 U.S.C. 2497(g)(7)(F), where deemed appropriate, and consistent with the statutory provision. Such a determination to exercise that authority, and the terms on which to exercise that authority, will be considered to be a determination of general effect, not a "relief" determination, and will not be considered by the Farm Service Agency to be appealable administratively either within FSA or before the National Appeals Division.

**§ 760.620 Time and method of application and certification of interests.**

(a) Each producer interested in obtaining a SURE payment must file an application for payment and provide an accurate certification of interests. The application will be on a form prescribed by FSA and will require information or certifications from the producer regarding any other assistance, payment, or grant benefit the producer has received for any of the producer's crops or interests on a farm as defined in this subpart; regardless of whether the crop or interest is covered in the

farm's SURE guarantee according to § 760.631. The producer's certification of interests will help FSA establish whether the producer is an eligible participant.

(b) Eligible participants with a qualifying loss as defined in this subpart must submit an application for payment and certification of interests by March 1 of the calendar year that is two years after the relevant corresponding calendar year for the crop year which benefits are sought to be eligible for payment (for example, the final date to submit an application for a SURE payment for the 2009 crop year will be March 1, 2011). Producers who do not submit the application by that date will not be eligible for payment.

(c) To the extent available and practicable, FSA will assist participants with information regarding their interests in a farm, as of the date of certification, based on information already available to FSA from various sources. However, the participant is solely responsible for providing an accurate certification from which FSA can determine the participant's farm interests for the purposes of this program. As determined appropriate by FSA, failure of a participant to provide an accurate certification of interests as part of the application may render the participant ineligible for any assistance under SURE.

(d) To elect a de minimis exception to the risk management purchase requirement for a crop or crops, the participant must meet the requirements specified in § 760.613. When electing a de minimis exception, the participant must specify the crops for which the exception is requested and provide the certification and supporting documentation for that exception at the time the application and certification of interests is filed with FSA.

**§ 760.621 Requirement to report acreage and production.**

(a) As a condition of eligibility for payment under this subpart, participants must submit an accurate and timely report of all cropland, non-cropland, prevented planting, and subsequent crop acreage and production for the farm in all counties.

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(b) Acreage and production reports that have been submitted to FSA for NAP or to RMA for crop insurance purposes may satisfy the requirement of paragraph (a) of this section provided that the participant's certification of interests submitted as required by § 760.620 corresponds to the report requirements in paragraph (a) of this section, as determined by the FSA county committee.

(c) Reports of production submitted for NAP or FCIA purposes must satisfy the requirements of NAP or FCIA, as applicable. In all other cases, in order for production reports or appraisals to be considered acceptable for SURE, production reports and appraisals must meet the requirements set forth in part 1437 of this title.

(d) In any case where production reports or an appraisal is not acceptable, maximum loss provisions apply as specified in § 760.637.

### § 760.622 Incorrect or false producer production evidence.

(a) If production evidence, including but not limited to acreage and production reports, provided by a participant is false or incorrect, as determined by the FSA county committee at any time after an application for payment is made, the FSA county committee will determine whether:

(1) The participant submitting the production evidence acted in good faith or took action to defeat the purposes of the program, such that the information provided was intentionally false or incorrect.

(2) The same false, incorrect, or unacceptable production evidence was submitted for payment(s) under crop insurance or NAP, and if so, for NAP covered crops, make any NAP program adjustments according to § 1437.15 of this title.

(b) If the FSA county committee determines that the production evidence submitted is false, incorrect, or unacceptable, and the participant who submitted the evidence did not act in good faith or took action to defeat the purposes of the program, the provisions of § 760.109, including a denial of future program benefits, will apply. The Deputy Administrator may take further action, including, but not limited to,

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making further payment reductions or requiring refunds or taking other legal action.

(c) If the FSA county committee determines that the production evidence is false, incorrect, or unacceptable, but the participant who submitted the evidence acted in good faith, payment may be adjusted and a refund may be required.

### § 760.631 SURE guarantee calculation.

(a) Except as otherwise provided in this part, the SURE guarantee for a farm is the sum obtained by adding the dollar amounts calculated in paragraphs (a)(1) through (a)(3) of this section.

(1) For each insurable crop on the farm except for value loss crops, 115 percent of the product obtained by multiplying together:

(i) The price election. If a price election was not made or a participant is eligible as specified in §§ 760.105, 760.106, or 760.107, then the percentage of price will be 55 percent of the NAP established price;

(ii) The payment acres determined according to § 760.632;

(iii) The SURE yield as calculated according to § 760.638; and

(iv) The coverage level elected by the participant. If a coverage level was not elected or a participant is eligible as specified in § 760.105, § 760.106, or § 760.107, a coverage level of 50 percent will be used in the calculation.

(2) For each noninsurable crop on a farm except for value loss crops, 120 percent of the product obtained by multiplying:

(i) 100 percent of the NAP established price for the crop;

(ii) The payment acres determined according to § 760.632;

(iii) The SURE yield calculated according to § 760.638; and

(iv) 50 percent.

(3) The guarantee for value loss crops as calculated according to § 760.634.

(4) In the case of an insurable crop for which crop insurance provides for an adjustment in the guarantee liability, or indemnity, such as in the case of prevented planting, that adjustment will be used in determining the guarantee for the insurable crop.

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(5) In the case of a noninsurable crop for which NAP provides for an adjustment in the level of assistance, such as in the case of unharvested crops, that adjustment will be used for determining the guarantee for the noninsurable crop.

(b) Those participants who are eligible according to § 760.105, § 760.106, or § 760.107 who do not have crop insurance or NAP coverage will have their SURE guarantee calculated based on catastrophic risk protection or NAP coverage available for those crops.

(c) FSA will not include in the SURE guarantee the value of any crop that has a de minimis exception, according to § 760.613.

(d) For crops where coverage may exist under both crop insurance and NAP, such as for pasture, rangeland, and forage, adjustments to the guarantee will be the product obtained by multiplying the county expected yield for that crop times:

(1) 115 percent;

(2) 100 percent of the NAP established price;

(3) The payment acres determined according to § 760.632;

(4) The SURE yield calculated according to § 760.638; and

(5) The coverage level elected by the participant.

(e) Participants who do not have a SURE yield as specified in § 760.638 will have a yield determined for them by the Deputy Administrator.

(f) The SURE guarantee may not be greater than 90 percent of the sum of the expected revenue for each of the crops on a farm, as determined by the Deputy Administrator.

**§ 760.632 Payment acres.**

(a) Payment acres as calculated in this section are used in determining both total farm revenue and the SURE guarantee for a farm. Payment acreage will be calculated using the lesser of the reported or determined acres shown to have been planted or prevented from being planted to a crop.

(b) Initial crop acreage will be the payment acreage for SURE, unless the provisions for subsequent crops in this section are met. Subsequently planted or prevented planted acre acreage is considered acreage for SURE only if

the provisions of this section are met. All plantings of an annual or biennial crop are considered the same as a planting of an initial crop in tropical regions as defined in part 1437, subpart F, of this title.

(c) In cases where there is double cropped acreage, each crop may be included in the acreage for SURE only if the specific crops are either insured crops eligible for double cropping according to RMA or approved by the FSA State committee as eligible double cropping practices in accordance with procedures approved by the Deputy Administrator.

(d) Except for insured crops, participants with double cropped acreage not meeting the criteria in paragraph (c) of this section may have such acreage included in the acreage for SURE on more than one crop only if the participant submits verifiable records establishing a history of carrying out a successful double cropping practice on the specific crops for which payment is requested.

(e) Participants having multiple plantings may have each planting included in the SURE guarantee only if the planting meets the requirements of part 1437 of this title and all other provisions of this subpart are satisfied.

(f) Provisions of part 718 of this title specifying what is considered prevented planting and how it must be documented and reported will apply to this payment acreage for SURE.

(g) Subject to the provisions of this subpart, the FSA county committee will:

(1) Use the most accurate data available when determining planted and prevented planted acres; and

(2) Disregard acreage of a crop produced on land that is not eligible for crop insurance or NAP.

(h) For any crop acreage for which crop insurance or NAP coverage is canceled, those acres will no longer be considered the initial crop and will, therefore, no longer be eligible for SURE.

(i) Notwithstanding any other provisions of these or other applicable regulations that relate to tolerance in part 718 of this title, if a farm has a crop that has both FSA and RMA acreage for insured crops, payment acres for the SURE guarantee calculation will

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be based on acres for which an indemnity was received if RMA acres do not differ from FSA acres by more than the larger of 5 percent or 10 acres not to exceed 50 acres. If the difference between FSA and RMA acres is more than the larger of 5 percent or 10 acres not to exceed 50 acres, then the payment acres for the SURE guarantee will be calculated using RMA acres. In that case, the participant will be notified of the discrepancy and that refunds of unearned payments may be required after FSA and RMA reconcile acreage data.

### § 760.633 2008 SURE guarantee calculation.

(a) For a participant who is eligible due to the 2008 buy-in waiver for risk management purchase under the provisions of § 760.105(c), the SURE guarantee for their farm for the 2008 crop will be calculated according to § 760.631, or according to § 760.634 for value loss crops, with the exception that the:

(1) Price election in § 760.631(a)(1)(i) is 100 percent of the NAP established price for the crop;

(2) Coverage level in § 760.631(a)(1)(iv) is 70 percent; and

(3) The percent specified in § 760.631(a)(2)(iv) is 70 percent instead of 50 percent; and

(4) Coverage level used in § 760.634(a)(1)(ii) is 70 percent; and

(5) The percent specified in § 760.634(a)(2)(ii) is 70 percent instead of 50 percent.

(b) For those 2008 crops that meet the requirements of §§ 760.104, 760.105(a), 760.106, or 760.107, the SURE guarantee will be the higher of:

(1) The guarantee calculated according to § 760.631, or according to § 760.634 for value loss crops, with the exception that the percent specified in §§ 760.631(a)(1) and 760.634(a)(1) will be 120 percent instead of 115 percent;

(2) The guarantee calculated according to § 760.631, or according to § 760.634 for value loss crops, will be used with the exception that the:

(i) Price election in § 760.631(a)(1)(i) is 100 percent of the NAP established price for the crop; and

(ii) Coverage level in §§ 760.631(a)(1)(iv) and 760.634(a)(1)(ii) will be 70 percent; and

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(iii) The percent specified in §§ 760.631(a)(2)(iv) and 760.634(a)(2)(ii) will be 70 percent instead of 50 percent.

### § 760.634 SURE guarantee for value loss crops.

(a) The SURE guarantee for value loss crops will be the sum of the amounts calculated in paragraphs (a)(1) and (a)(2) of this section, except as otherwise specified.

(1) For each insurable crop on the farm, 115 percent of the product obtained by multiplying:

(i) The value of inventory immediately prior to disaster, and

(ii) The coverage level elected by the participant. If a coverage level was not elected or a participant is eligible as specified in §§ 760.106 or 760.107, a coverage level of 27.5 percent will be used in the calculation.

(2) For each noninsurable crop on the farm, 120 percent of the product obtained by multiplying:

(i) The value of inventory immediately prior to a disaster, and

(ii) 50 percent.

(b) Aquaculture participants who received assistance under the Aquaculture Grant Program (Pub. L. 111-5) will not be eligible for SURE assistance on those species for which a grant benefit was received under the Aquaculture Grant Program for feed losses associated with that species.

(c) In the case of an insurable value loss crop for which crop insurance provides for an adjustment in the guarantee, liability, or indemnity, such as in the case of inventory exceeding peak inventory value, the adjustment will be used in determining the SURE guarantee for the insurable crop.

(d) In the case of a noninsurable value loss crop for which NAP provides for an adjustment in the level of assistance, such as in the case of unharvested field grown inventory, the adjustment will be used in determining the SURE guarantee for the noninsurable crop.

### § 760.635 Total farm revenue.

(a) For the purpose of SURE payment calculation, total farm revenue will equal the sum obtained by adding the amounts calculated in paragraphs (a)(1) through (a)(12) of this section.

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(1) The estimated actual value for each crop produced on a farm, except for value loss crops, which equals the product obtained by multiplying:

(i) The actual production of the payment acres for each crop on a farm for purposes of determining losses under FCIA or NAP; and

(ii) NAMP, as calculated for the marketing year as specified in § 760.640 and as adjusted if required as specified in § 760.641.

(2) The estimated actual value for each value loss crop produced on a farm that equals the value of inventory immediately after disaster.

(3) 15 percent of the amount of any direct payments made to the participant under part 1412 of this title.

(4) The total amount of any counter-cyclical and average crop revenue election payments made to the participant under part 1412 of this title.

(5) The total amount of any loan deficiency payments, marketing loan gains, and marketing certificate gains made to the participant under parts 1421 and 1434 of this title.

(6) The amount of payments for prevented planting.

(7) The amount of crop insurance indemnities.

(8) The amount of NAP payments received.

(9) The value of any guaranteed payments made to a participant in lieu of production pursuant to an agreement or contract, if the crop is included in the SURE guarantee.

(10) Salvage value for any crops salvaged.

(11) The value of any other disaster assistance payments provided by the Federal Government for the same loss for which the eligible participant applied for SURE.

(12) For crops for which the eligible participant received a waiver under the provisions of § 760.105(c) or obtained relief according to § 760.106, the value determined by FSA based on what the participant would have received, irrespective of any other provision, if NAP or crop insurance coverage had been obtained.

(b) Sale of plant parts or by-products, such as straw, will not be counted as farm revenue.

(c) For value loss crops:

(1) Other inventory on hand or marketed at some time other than immediately prior to and immediately after the disaster event are irrelevant for revenue purposes and will not be counted as revenue for SURE.

(2) Revenue will not be adjusted for market loss.

(3) Quality losses will not be considered in determining revenue.

(4) In no case will market price declines in value loss crops, due to any cause, be considered in the calculation of payments for those crops.

**§ 760.636 Expected revenue.**

The expected revenue for each crop on a farm is:

(a) For each insurable crop, except value loss crops, the product obtained by multiplying:

(1) The SURE yield as specified in § 760.638;

(2) The payment acres as specified in § 760.632; and

(3) 100 percent of the price for the crop used to calculate a crop insurance indemnity for an applicable policy of insurance if a crop insurance indemnity is triggered. If a price is not available, then the price is 100 percent of the NAP established price for the crop, and

(b) For each noninsurable crop, except value loss crops, the product obtained by multiplying

(1) The SURE yield as specified in § 760.638;

(2) The payment acres as specified in § 760.632; and

(3) 100 percent of the NAP price.

(c) For each value loss crop, the value of inventory immediately prior to the disaster.

**§ 760.637 Determination of production.**

(a) Except for value loss crops, production for the purposes of this part includes all harvested, appraised, and assigned production for the payment acres determined according to § 760.632.

(b) The FSA county committee will use the best available data to determine production, including RMA and NAP loss records and yields for insured and noninsured crops.

(c) The production of any eligible crop harvested more than once in a

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crop year will include the total harvested production from all harvests.

(d) Crop production losses occurring in tropical regions, as defined in part 1437, subpart F of this chapter, will be based on a crop year beginning on January 1 and ending on December 31 of the same calendar year. All crop harvests in tropical regions that take place between those dates will be considered a single crop.

(e) Any record of an appraisal of crop production conducted by RMA or FSA through a certified loss adjustor will be used if available. Unharvested appraised production will be included in the calculation of revenue under SURE. If the unharvested appraised crop is subsequently harvested for the original intended use, the larger of the actual or appraised production will be used to determine payment.

(1) If no appraisal is available, the participant is required to submit verifiable or reliable production evidence.

(2) If the participant does not have verifiable or reliable production evidence, the FSA county committee will use the higher of the participant's crop certification or the maximum average loss level to determine the participant's crop production losses.

(f) Production will be adjusted based on a whole grain equivalent, as established by FSA, for all crops with an intended use of grain, but harvested as silage, cabbage, or hay, cracked, rolled, or crimped.

(g) For crops sold in a market that is not a recognized market for that crop and has no established county expected yield and NAMP, the quantity of such crops will not be considered production; rather, 100 percent of the salvage value will be included in the revenue calculation.

(h) Production from different counties that is commingled on the farm before it was a matter of record and cannot be separated by using records or other means acceptable to FSA will have the NAMP prorated to each respective county by FSA. Commingled production may be attributed to the applicable county, if the participant made the location of production of a crop a matter of record before commin-

gling, if the participant does either of the following:

(1) Provides copies of verifiable documents showing that production of the crop was purchased, acquired, or otherwise obtained from the farm in that county; or

(2) Had the farm's production in that county measured in a manner acceptable to the FSA county committee.

(i) The FSA county committee will assign production for the purpose of NAMP for the farm if the FSA county committee determines that the participant failed to provide verifiable or reliable production records.

(j) If RMA loss records are not available, or if the FSA county committee determines that the RMA loss records as reported by the insured participant appear to be questionable or incomplete, or if the FSA county committee makes inquiry, then participants are responsible for:

(1) Retaining and providing, when required, the best available verifiable and reliable production records available for the crops;

(2) Summarizing all the production evidence;

(3) Accounting for the total amount of production for the crop on a farm, whether or not records reflect this production;

(4) Providing the information in a manner that can be easily understood by the FSA county committee; and

(5) Providing supporting documentation if the FSA county committee has reason to question the disaster event or that all production has been taken into account.

(k) The participant must supply verifiable or reliable production records to substantiate production to the FSA county committee. If the eligible crop was sold or otherwise disposed of through commercial channels, acceptable production records include: Commercial receipts; settlement sheets; warehouse ledger sheets or load summaries; or appraisal information from a loss adjuster acceptable to FSA. If the eligible crop was farm-stored, sold, fed to livestock, or disposed of by means other than commercial channels, acceptable production records for these purposes include: Truck scale tickets; appraisal information from a

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loss adjuster acceptable to FSA; contemporaneous reliable diaries; or other documentary evidence, such as contemporaneous reliable measurements. Determinations of reliability with respect to this paragraph will take into account, as appropriate, the ability of the agency to verify the evidence as well as the similarity of the evidence to reports or data received by FSA for the crop or similar crops. Other factors deemed relevant may also be taken into account.

(l) If no verifiable or reliable production records are available, the FSA county committee will use the higher of the participant's certification or the maximum average loss level to determine production.

(m) Participants must provide all records for any production of a crop that is grown with an arrangement, agreement, or contract for guaranteed payment.

(n) FSA may verify the production evidence submitted with records on file at the warehouse, gin, or other entity that received or may have received the reported production.

**§ 760.638 Determination of SURE yield.**

(a) Except for value loss crops as specified in § 760.634, a SURE yield will be determined for each crop, type, and intended use on a farm, using the higher of the participant's weighted:

(1) Adjusted actual production history yield as determined in paragraph (b) of this section; or

(2) Counter-cyclical yield as determined in paragraph (c) of this section.

(b) The adjusted actual production history yield, as defined in § 760.602, will be weighted by the applicable crop year total planted and prevented planted acres, by crop, type, and intended use for each county. RMA data will be used for calculating the SURE yield for insured crops.

(c) The counter-cyclical yield for a crop on a SURE farm will be weighted in such manner as FSA deems fit taking into account a desire for a consistent system and FSA's ability to make timely yield determinations.

(d) Participants who do not purchase crop insurance or NAP coverage, but who are otherwise eligible for payment,

will have a SURE yield determined by the FSA county committee as follows:

(1) A weighted yield, based on planted and prevented planted acres, the location county, crop type, and intended use, will be determined at 65 percent of the county expected yield for each crop.

(2) The SURE yield will be the higher of the yield calculated using the method in paragraph (d)(1) of this section or 65 percent of the weighted counter-cyclical yield as determined in paragraph (c) of this section.

(e) For those participants with crop insurance but without an adjusted actual production history yield, a SURE yield will be determined by the applicable FSA county committee. This paragraph will apply in the case where the insurance policy does not require an actual production history yield, or where a participant has no production history.

[74 FR 68490, Dec. 28, 2009, as amended at 75 FR 19189, Apr. 14, 2010]

**§ 760.640 National average market price.**

(a) The Deputy Administrator will establish the National Average Market Price (NAMP) using the best sources available, as determined by the Deputy Administrator, which may include, but are not limited to, data from NASS, Cooperative Extension Service, Agricultural Marketing Service, crop insurance, and NAP.

(b) NAMP may be adjusted by the FSA State committee, in accordance with instructions issued by the Deputy Administrator and as specified in § 760.641, to recognize average quality loss factors that are reflected in the market by county or part of a county.

(c) With respect to a crop for which an eligible participant on a farm receives assistance under NAP, the NAMP will not exceed the price of the crop established under NAP.

(d) To the extent practicable, the NAMP will be established on a harvested basis without the inclusion of transportation, storage, processing, marketing, or other post-harvest expenses, as determined by FSA.

(e) NAMP may be adjusted by the FSA State committee, as authorized by The Deputy Administrator, to reflect

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regional variations in price consistent with those prices established under the FCIA or NAP.

### § 760.641 **Adjustments made to NAMP to reflect loss of quality.**

(a) The Deputy Administrator will authorize FSA county committees, with FSA State committee concurrence, to adjust NAMP for a county or part of a county:

(1) To reflect the average quality discounts applied to the local or regional market price of a crop due to a reduction in the intrinsic characteristics of the production resulting from adverse weather, as determined annually by the State office of the FSA; or

(2) To account for a crop for which the value is reduced due to excess moisture resulting from a disaster related condition.

(3) For adjustments specified in paragraphs (a)(1) and (a)(2) of this section, an adjustment factor that represents the regional or local price received for the crop in the county will be calculated by the FSA State committee. The adjustment factor will be based on the average actual market price compared to NAMP.

(b) For adjustments made under paragraph (a) of this section, participants must provide verifiable evidence of actual or appraised production, clearly indicating an average loss of value caused by poor quality or excessive moisture that meets or exceeds the quality adjustment for the county or part of a county established in paragraph (a)(3) of this section to be eligible to receive the quality-adjusted NAMP as part of their SURE payment calculation. In order to be considered at all for the purpose of quality adjustments, the verifiable evidence of production must itself detail the extent of the quality loss for a specific quantity. With regard to test evidence, in addition to meeting all the requirements of this section, tests must have been completed by January 1 of the year following harvest.

### § 760.650 **Calculating SURE.**

(a) Subject to the provision of this subpart, SURE payments for crop losses in crop year 2008 and subsequent crop years will be calculated as the

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amount equal to 60 percent of the difference between:

(1) The SURE guarantee, as specified in § 760.631, § 760.633 or § 760.634 of this subpart, and

(2) The total farm revenue, as specified in § 760.635.

(b) In addition to the other provisions of this subpart and subpart B of this part, SURE payments may be adjusted downward as necessary to insure compliance with the payment limitations in subpart B and to insure that payments do not exceed the maximum amount specified in § 760.108(a)(1) or (b)(1) or otherwise exceed the perceived intent of 19 U.S.C. 2497(j). Such adjustments can include, but are not limited to, adjustments to insure that there is no duplication of benefits as specified in § 760.108(c).

## **Subpart H—Crop Assistance Program**

AUTHORITY: 7 U.S.C. 612c.

SOURCE: 75 FR 65428, Oct. 25, 2010, unless otherwise noted.

### § 760.701 **Applicability.**

(a) This subpart specifies the eligibility requirements and payment calculations for the Crop Assistance Program (CAP), which will be administered using funds authorized by Section 32 of the Agricultural Adjustment Act of 1935 (7 U.S.C. 612c, as amended).

(b) CAP, within the limits of the funds made available by the Secretary for this program, is intended to help re-establish purchasing power to producers of long grain rice, medium or short grain rice, upland cotton, soybeans, and sweet potatoes who suffered a five percent or greater loss in the 2009 crop year due to disaster.

(c) Only producers who have a share in a farm located in a disaster county (a county that is the primary county that is the subject of a Secretarial disaster designation for 2009 crop year due to excessive moisture and related conditions, as determined by FSA) are eligible for CAP benefits.

### § 760.702 **Definitions.**

The following definitions apply to CAP. The definitions in parts 718, 760,

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and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Acceptable production records* means verifiable or reliable production records deemed acceptable by FSA.

*Application* means the CAP application form.

*Application period* means the 45-day period established by the Deputy Administrator for producers on farms in disaster counties to apply for CAP that ends December 9, 2010.

*Approved yield* means the amount of production per acre, computed in accordance with FCIC's Actual Production History (APH) Program at part 400, subpart G of this title or, for crops not included under part 400, subpart G of this title, the yield used to determine the guarantee. For crops covered under NAP, the approved yield is established according to part 1437 of this title.

*Considered planted* means acreage approved as prevented planted or failed in accordance with § 718.103 of this chapter.

*Crop* means the reported or determined 2009 crop year planted and considered planted acres of long grain rice, medium or short grain rice, upland cotton, soybean, or sweet potatoes as reflected on 2009 crop year form FSA-578, Report of Acreage, for a producer in a disaster county as of October 22, 2010. Subsequent crops, replacement crops, reseeded crops, and replanted crops are not eligible crops under this part and no revision of the Report of Acreage that would increase an eligibility for payment will be permitted to produce that effect.

*Crop year* means for 2009:

(1) For insurable crops, the crop year as defined according to the applicable crop insurance policy;

(2) For NAP covered crops, the crop year as provided in part 1437 of this title.

*Disaster* means excessive moisture or related condition, resulting from any of the following: flood, flash flooding, excessive rain, moisture, humidity, severe storms, thunderstorms, ground saturation or standing water, hail, winter storms, ice storms, snow, blizzard, hurricane, typhoons, tropical storms, and cold wet weather. A disaster does

not include brownouts or power failures.

*Disaster county* means a county included in the geographic area covered by a qualifying natural disaster designation under section 321(a) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961(a)). For CAP, the term "disaster county" is limited to those primary counties declared a disaster by the Secretary for excessive moisture or a related condition, which are limited to designations based on any of the following: flood, flash flooding, excessive rain, moisture, humidity, severe storms, thunderstorms, ground saturation or standing water, hail, winter storms, ice storms, snow, blizzard, hurricane, typhoons, tropical storms, and cold wet weather.

*Expected production* means, for a producer on a farm who attempts to determine what the producer might produce for an eligible crop on a farm, the historic yield multiplied by the producer's share of planted and considered planted acres of the crop for the farm. Expected production may be used to assist producers in determining whether the producer has a crop or crops that suffered a qualifying loss of five percent and to determine whether that crop is eligible for CAP benefits.

*Historic yield* means, for a producer on a farm, the higher of the county average yield or the producer's approved yields for eligible crops on the farm.

(1) An insured producer's yield will be the higher of the county average yield listed or the approved federal crop insurance APH, for the disaster year.

(2) A NAP producer's yield will be the higher of the county average yield or NAP approved yield for the disaster year.

*Replacement crop* means the planting or approved prevented planting of any crop for harvest following the failed planting or prevented planting of a crop of long grain rice, medium or short grain rice, upland cotton, soybeans, or sweet potatoes not in a recognized double-cropping sequence. Replacement crops are not eligible for CAP.

*Reseeded or replanted crop* means the second planting of a crop of long grain

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rice, medium or short grain rice, upland cotton, soybeans, or sweet potatoes on the same acreage after the first planting of that same crop that failed.

### § 760.703 Producer eligibility requirements.

(a) A producer must meet all of the requirements in this subpart to be eligible for a CAP payment.

(b) To be eligible, a producer must be an individual or entity who is entitled to an ownership share of an eligible crop and who has the production and market risks associated with the agricultural production of the crop on a farm. An eligible producer must be a:

(1) Citizen of the United States;

(2) Resident alien, which for purposes of this subpart means "lawful alien" as defined in 7 CFR part 1400;

(3) Partnership of citizens of the United States; or

(4) Corporation, limited liability corporation, or other farm organizational structure organized under State law.

(c) To be eligible, a producer must have:

(1) Produced a 2009 crop year planted or considered planted long grain rice, medium or short grain rice, upland cotton, soybean, or sweet potato crop in a 2009 eligible disaster county, and

(2) Suffered a five percent or greater loss in an eligible disaster county in 2009. A list of the disaster counties for CAP is available on the FSA Web site and at FSA county offices.

### § 760.704 Time and method of application.

(a) To request a CAP payment, the producer must submit a CAP application on the form designated by FSA to the FSA county office responsible for administration of the farm.

(b) Producers submitting an application for a crop must certify that they suffered a five percent or greater loss of the crop on the farm in a disaster county and that they have documentation to support that certification as required in § 760.713.

(c) Once submitted by a producer, the application is considered to contain information and certifications of and pertaining to the producer's crop and farm regardless of who entered the information on the application.

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(d) Producers requesting benefits under CAP must certify the accuracy and truthfulness of the information provided in the application as well as with any documentation that may be provided with the application or documentation that will be provided to FSA in substantiation of the application. All certifications and information are subject to verification by FSA.

(e) Producers applying for CAP must certify that they have an eligible ownership share interest in the 2009 crop acreage that sustained a five percent or greater loss. The determination and certification by a producer that a crop suffered the requisite five percent or greater farm crop loss is the expected quantity of production of the crop less the actual production of the crop.

(f) In the event that the producer does not submit documentation in response to any request of FSA to support the producer's application or documentation furnished does not show a crop loss of at least five percent as claimed, the application for that crop will be disapproved in its entirety. For quantity losses, producers need to apply a standard similar to the historic yield provisions used under previous ad hoc disaster programs. Those provisions provided that a historic yield was the higher of a county average yield or a producer's approved yield. Thus, if an applicant is determining whether a farm has a crop that suffered a loss of five percent or greater on the farm's planted and considered planted acreage, the applicant could compare the amount successfully produced in 2009 from those planted and considered planted acres to what the participant expected to produce from that acreage using either the county average yield (which may be obtained from FSA by request) or based on analysis of approved actual production history yields that may exist for producers of the crop on the farm.

(g) Unless otherwise determined necessary by FSA, producers will not be required to submit documentation of farm crop production or loss at time of application. FSA's decision not to require proof, documentation, or evidence in support of any application at

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time of application is not to be construed as a determination of a producer's eligibility.

(h) Producers who apply are required to retain documentation in support of their application for three years after the date of application in accordance with § 760.713.

(i) The application submitted in accordance with this section is not considered valid and complete for issuance of payment under this part unless FSA determines all the applicable eligibility provisions have been satisfied and the producer has submitted all the required forms. In addition to the completed, certified application form, if the information for the following forms or certifications is not on file in the FSA county office or is not current for 2009, the producer must also submit:

- (1) Farm operating plan for individual or legal entity;
- (2) Average adjusted gross income statement for 2009; and
- (3) Highly erodible land conservation (HELIC) and wetland conservation certification.

(j) Application approval and payment by FSA does not relieve a producer from having to submit any form, records, or documentation required, but not filed at the time of application or payment, according to paragraph (h) of this section.

**§ 760.705 Payment rates and calculation of payments.**

(a) CAP payments will be calculated by multiplying the total number of reported or determined acres of an eligible crop by the per acre payment rate for that crop. Payment rates are as follows:

- (1) Long grain rice, \$31.93 per acre;
- (2) Medium or short grain rice, \$52.46 per acre;
- (3) Upland cotton, \$17.70 per acre;
- (4) Soybeans, \$15.62 per acre; and
- (5) Sweet potatoes, \$155.41 per acre.

(b) Payments will be calculated based on the 2009 crop year reported or determined planted or considered planted acres of an eligible crop on a farm in a disaster county as reflected on a form FSA-578, Report of Acreage, on file in FSA as of October 22, 2010.

**§ 760.706 Availability of funds.**

(a) Payments specified in this subpart are subject to the availability of funds. The total available program funds are \$550 million. In order to keep payments within available funds, the Deputy Administrator may pro-rate payments, to the extent the Deputy Administrator determines that necessary.

(b) Funds for CAP are being made available only for the 2009 crop year reported and determined eligible crop acreage in disaster counties as reflected on a form FSA-578, Report of Acreage, as of October 22, 2010.

**§ 760.707 Proof of loss.**

(a) All certifications, applications, and documentation are subject to spot check and verification by FSA. Producers must submit documentation to FSA if and when FSA requests documentation to substantiate any certified application.

(b) Producers are responsible for retaining or providing, when required, verifiable or reliable production or loss records available for the crop. Producers are also responsible for summarizing all the production or loss evidence and providing the information in a manner that can be understood by the county committee.

(c) Any producer receiving payment under this subpart agrees to maintain any books, records, and accounts supporting any information or certification made according to this part for 3 years after the end of the year following application.

(d) Producers receiving payments or any other person who furnishes such information to FSA must permit FSA or authorized representatives of USDA and the General Accounting Office during regular business hours to inspect, examine, and to allow such persons to make copies of such books, records or other items for the purpose of confirming the accuracy of the information provided by the producer.

**§ 760.708 Miscellaneous provisions and limitations.**

- (a) A person ineligible under § 1437.15(c) of this title concerning violations of the Noninsured Crop Disaster Assistance Program for the 2009 crop

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year is ineligible for benefits under this subpart.

(b) A person ineligible under § 400.458 of this title for the 2009 crop year concerning violations of crop insurance regulations is ineligible for CAP.

(c) In the event that any request for CAP payment resulted from erroneous information or a miscalculation, the payment will be recalculated and the producer must refund any excess to FSA with interest to be calculated from the date of the disbursement to the producer. If for whatever reason the producer signing a CAP application overstates the loss level of the crop when the actual loss level determined by FSA for the crop is less than the level claimed, or where the CAP payment would exceed the producer's actual loss, the application will be disapproved for the crop and the full CAP payment for that crop will be required to be refunded with interest from date of disbursement. The CAP payment cannot exceed the producer's actual loss.

(d) The liability of anyone for any penalty or sanction under or in connection with this subpart, or for any refund to FSA or related charge is in addition to any other liability of such person under any civil or criminal fraud statute or any other provision of law including, but not limited to: 18 U.S.C. 286, 287, 371, 641, 651, 1001, and 1014; 15 U.S.C. 714; and 31 U.S.C. 3729.

(e) The regulations in parts 11 and 780 of this title apply to determinations under this subpart.

(f) Any payment to any person under this subpart will be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or its proceeds.

(g) Any payment made under this subpart will be considered farm revenue for 2009 for the Supplemental Revenue Assistance Payments Program.

(h) The average AGI limitation provisions in part 1400 of this title relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, with certain levels of average adjusted gross income (AGI) apply to each applicant for CAP. Specifically, a person or legal entity with an average adjusted gross non-farm income, as defined in § 1404.3 of

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this title, that exceeds \$500,000 is not eligible to receive CAP payments.

(i) No person or legal entity, excluding a joint venture or general partnership, as determined by the rules in part 1400 of this title may receive, directly or indirectly, more than \$100,000 in payments under this subpart.

(j) The direct attribution provisions in part 1400 of this title apply to CAP. Under those rules, any payment to any legal entity will also be considered for payment limitation purposes to be a payment to persons or legal entities with an interest in the legal entity or in a sub-entity. If any such interested person or legal entity is over the payment limitation because of direct payment or their indirect interests or a combination thereof, then the payment to the actual payee will be reduced commensurate with the amount of the interest of the interested person in the payee. Likewise, by the same method, if anyone with a direct or indirect interest in a legal entity or sub-entity of a payee entity exceeds the AGI levels that would allow a producer to directly receive a CAP payment, then the payment to the actual payee will be reduced commensurately with that interest. For CAP, unless otherwise specified in part 1400 of this title, the AGI amount will be that person's or legal entity's average AGI for the three taxable years that precede the 2008 taxable year (that is 2005, 2006, and 2007).

(k) For the purposes of the effect of lien on eligibility for Federal programs (28 U.S.C. 3201(e)), FSA waives the restriction on receipt of funds under CAP but only as to beneficiaries who, as a condition of such waiver, agree to apply the CAP payments to reduce the amount of the judgment lien.

(l) For CAP, producers are either eligible or ineligible. Therefore, the provisions of § 718.304 of this chapter, "Failure to Fully Comply," do not apply to this subpart.

(m) The regulations in subpart B apply to CAP. In addition to those regulations that specifically include subpart H or apply to this part, the following sections specifically apply to this subpart: §§ 760.113(a), 760.114, and 760.116(a).

**Farm Service Agency, USDA****§ 760.802****Subpart I—2005–2007 Crop Disaster Program**

SOURCE: 72 FR 72867, Dec. 21, 2007, unless otherwise noted.

**§ 760.800 Applicability.**

This part sets forth the terms and conditions for the 2005–2007 Crop Disaster Program (2005–2007 CDP). CDP makes emergency financial assistance available to producers who have incurred crop losses in quantity or quality for eligible 2005, 2006, or 2007 crop years due to disasters as determined by the Secretary under provisions of Title IX of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Pub. L. 110–28). However, to be eligible for assistance, the crop subject to the loss must have been planted or existed before February 28, 2007, or, in the case of prevented planting, would have been planted before February 28, 2007.

**§ 760.801 Administration.**

(a) The program will be administered under the general supervision of the Deputy Administrator for Farm Programs and will be carried out in the field by FSA State and county committees.

(b) State and county committees and representatives do not have the authority to modify or waive any of the provisions of this part.

(c) The State committee will take any action required by this part that has not been taken by a county committee. The State committee will also:

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

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

(d) No provision or delegation to a State or county committee will prevent the Deputy Administrator for Farm Programs from determining any question arising under the program or from reversing or modifying any determination made by a State or county committee.

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

**§ 760.802 Definitions.**

The following definitions apply to this part. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Actual production* means the total quantity of the crop appraised, harvested, or assigned, as determined by the FSA State or county committee in accordance with instructions issued by the Deputy Administrator for Farm Programs.

*Administrative fee* means an amount the producer must pay for Noninsured Crop Disaster Assistance Program (NAP) enrollment for non-insurable crops.

*Affected production* means, with respect to quality losses, the harvested production of an eligible crop that has a documented quality reduction of 25 percent or more on the verifiable production record.

*Appraised production* means production determined by FSA, or a company reinsured by the Federal Crop Insurance Corporation (FCIC), that was unharvested but was determined to reflect the crop's yield potential at the time of appraisal.

*Approved yield* means the amount of production per acre, computed in accordance with FCIC's Actual Production History (APH) Program at part 400, subpart G of this title or, for crops not included under part 400, subpart G of this title, the yield used to determine the guarantee. For crops covered under NAP, the approved yield is established according to part 1437 of this title. Only the approved yields based on production evidence submitted to FSA prior to May 25, 2007 will be used for purposes of the 2005–2007 CDP.

*Aquaculture* means a value loss crop for the reproduction and rearing of aquatic species in controlled or selected environments including, but not

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limited to, ocean ranching, except private ocean ranching of Pacific salmon for profit in those States where such ranching is prohibited by law.

*Aquaculture facility* means any land or structure including, but not limited to, a laboratory, concrete pond, hatchery, rearing pond, raceway, pen, incubator, or other equipment used in aquaculture.

*Aquaculture species* means any aquaculture species as defined in part 1437 of this title.

*Average market price* means the price or dollar equivalent on an appropriate basis for an eligible crop established by FSA, or CCC, or RMA, as applicable, for determining payment amounts. Such price will be based on historical data of the harvest basis excluding transportation, storage, processing, packing, marketing, or other post-harvesting expenses. Average market prices are generally applicable to all similarly situated participants and are not established in response to individual participants. Accordingly, the established average market prices are not appealable under parts 11 or 780 of this title.

*Catastrophic risk protection* means the minimum level of coverage offered by FCIC.

*CCC* means the Commodity Credit Corporation.

*Controlled environment* means, with respect to those crops for which a controlled environment is expected to be provided, including but not limited to ornamental nursery, aquaculture (including ornamental fish), and floriculture, an environment in which everything that can practicably be controlled with structures, facilities, growing media (including, but not limited to, water, soil, or nutrients) by the producer, is in fact controlled by the producer.

*Crop insurance* means an insurance policy reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended.

*Crop year* means:

- (1) For insured crops, the crop year as defined according to the applicable crop insurance policy;
- (2) For NAP covered crops, as provided in part 1437 of this title.

*Damaging weather* means drought, excessive moisture, hail, freeze, tornado, hurricane, typhoon, excessive wind, excessive heat, weather-related saltwater intrusion, weather-related irrigation water rationing, and earthquake and volcanic eruptions, or any combination. It also includes a related condition that occurs as a result of the damaging weather and exacerbates the condition of the crop, such as crop disease, and insect infestation.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, Farm Service Agency, U.S. Department of Agriculture or designee.

*Eligible crop* means a crop insured by FCIC as defined in part 400 of this title, or included under NAP as defined under part 1437 of this title for which insurance or NAP coverage was obtained timely for the year which CDP benefits are sought.

*End use* means the purpose for which the harvested crop is used, such as grain, hay, or seed.

*Expected production* means, for an agricultural unit, the historic yield multiplied by the number of planted or prevented acres of the crop for the unit.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation within USDA.

*Final planting date* means the latest date, established by the Risk Management Agency (RMA) for insured crops, by which the crop must initially be planted in order to be insured for the full production guarantee or amount of insurance per acre. For NAP covered crops, the final planting date is as provided in part 1437 of this title.

*Flood prevention* means:

- (1) For aquaculture species, placing the aquaculture facility in an area not prone to flood;
- (2) In the case of raceways, devices or structures designed for the control of water level; and
- (3) With respect to nursery crops, placing containerized stock in a raised area above expected flood level and providing draining facilities, such as drainage ditches or tile, gravel, cinder, or sand base.

*Good nursery growing practices* means utilizing flood prevention, growing media, fertilization to obtain expected production results, irrigation, insect

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and disease control, weed, rodent and wildlife control, and over winterization storage facilities.

*Ground water* means aqueous supply existing in an aquifer subsurface that is brought to the surface and made available for irrigation by mechanical means such as by pumps and irrigation wells.

*Growing media* means:

(1) For aquaculture species, media that provides nutrients necessary for the production of the aquaculture species and protects the aquaculture species from harmful species or chemicals or

(2) For nursery crops, a well-drained media with a minimum 20 percent air pore space and pH adjustment for the type of plant produced designed to prevent "root rot."

*Harvested* means:

(1) For insured crops, harvested as defined according to the applicable crop insurance policy;

(2) For NAP covered single harvest crops, that a crop has been removed from the field, either by hand or mechanically, or by grazing of livestock;

(3) For NAP covered crops with potential multiple harvests in 1 year or harvested over multiple years, that the producer has, by hand or mechanically, removed at least one mature crop from the field during the crop year;

(4) For mechanically-harvested NAP covered crops, that the crop has been removed from the field and placed in a truck or other conveyance, except hay is considered harvested when in the bale, whether removed from the field or not. Grazed land will not be considered harvested for the purpose of determining an unharvested or prevented planting payment factor. A crop that is intended for mechanical harvest, but subsequently grazed and not mechanically harvested, will have an unharvested factor applied.

*Historic yield* means, for a unit, the higher of the county average yield or the participant's approved yield.

(1) An insured participant's yield will be the higher of the county average yield listed or the approved federal crop insurance APH, for the disaster year.

(2) NAP participant's yield will be the higher of the county average or approved NAP APH for the disaster year.

*Insurable crop* means an agricultural crop (excluding livestock) for which the producer on a farm is eligible to obtain a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Marketing contract* means a legally binding written contract between a purchaser and grower for the purpose of marketing a crop.

*Market value* means:

(1) The price(s) designated in the marketing contract; or

(2) If not designated in a marketing contract, the rate established for quantity payments under § 760.811.

*Maximum average loss level* means the maximum average level of crop loss to be attributed to a participant without acceptable production records (verifiable or reliable). Loss levels are expressed in either a percent of loss or yield per acre, and are intended to reflect the amount of production that a participant would have been expected to make if not for the eligible disaster conditions in the area or county, as determined by the county committee in accordance with instructions issued by the Deputy Administrator.

*Multi-use crop* means a crop intended for more than one end use during the calendar year such as grass harvested for seed, hay, and grazing.

*Multiple cropping* means the planting of two or more different crops on the same acreage for harvest within the same crop year.

*Multiple planting* means the planting for harvest of the same crop in more than one planting period in a crop year on different acreage.

*NASS* means the National Agricultural Statistics Service.

*Net crop insurance indemnity* means the indemnity minus the producer paid premium.

*NAP covered* means a crop for which the participants obtained assistance under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333).

*Normal mortality* means the percentage of dead aquaculture species that would normally occur during the crop year.

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*Person* means person as defined in part 1400 of this title, and all rules with respect to the determination of a person found in that part are applicable to this part. However, the determinations made in this part in accordance with part 1400, subpart B, Person Determinations, of this title will also take into account any affiliation with any entity in which an individual or entity has an interest, regardless of whether or not such entities are considered to be actively engaged in farming.

*Planted acreage* means land in which seed, plants, or trees have been placed, appropriate for the crop and planting method, at a correct depth, into a seedbed that has been properly prepared for the planting method and production practice normal to the USDA plant hardiness zone as determined by the county committee.

*Prevented planting* means the inability to plant an eligible crop with proper equipment during the planting period as a result of an eligible cause of loss, as determined by FSA.

*Production* means quantity of the crop or commodity produced expressed in a specific unit of measure including, but not limited to, bushels or pounds.

*Rate* means price per unit of the crop or commodity.

*Recording county* means, for a producer with farming interests in only one county, the FSA county office in which the producer's farm is administratively located or, for a producer with farming interests that are administratively located in more than one county, the FSA county office designated by FSA to control the payments received by the producer.

*Related condition* means, with respect to a disaster, a condition that causes deterioration of a crop, such as insect infestation, plant disease, or aflatoxin, that is accelerated or exacerbated as a result of damaging weather, as determined in accordance with instructions issued by the Deputy Administrator.

*Reliable production records* means evidence provided by the participant that is used to substantiate the amount of production reported when verifiable records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, invoices for custom har-

vesting, and records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries that are determined acceptable by the county committee.

*Repeat crop* means, with respect to production, a commodity that is planted or prevented from being planted in more than one planting period on the same acreage in the same crop year.

*RMA* means the Risk Management Agency.

*Salvage value* means the dollar amount or equivalent for the quantity of the commodity that cannot be marketed or sold in any recognized market for the crop.

*Secondary use* means the harvesting of a crop for a use other than the intended use.

*Secondary use value* means the value determined by multiplying the quantity of secondary use times the FSA or CCC-established price for that use.

*State committee* means the FSA State committee.

*Surface irrigation water* means aqueous supply anticipated for irrigation of agricultural crops absent an eligible disaster condition impacting either the aquifer or watershed. Surface irrigation water may result from feral sources or from irrigation districts.

*Tropical crops* has the meaning assigned in part 1437 of this title.

*Tropical region* has the meaning assigned in part 1437 of this title.

*Unharvested factor* means a percentage established for a crop and applied in a payment formula to reduce the payment for reduced expenses incurred because commercial harvest was not performed. Unharvested factors are generally applicable to all similarly situated participants and are not established in response to individual participants. Accordingly established unharvested factors are not appealable under parts 11 and 780 of this title.

*Unit* means, unless otherwise determined by the Deputy Administrator, basic unit as defined in part 457 of this title that, for ornamental nursery production, includes all eligible plant species and sizes.

*Unit of measure* means:

(1) For all insured crops, the FCIC-established unit of measure;

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(2) For all NAP covered crops, the established unit of measure, if available, used for the 2005, 2006, or 2007 NAP price and yield;

(3) For aquaculture species, a standard unit of measure such as gallons, pounds, inches, or pieces, established by the State committee for all aquaculture species or varieties;

- (4) For turfgrass sod, a square yard;
- (5) For maple sap, a gallon;
- (6) For honey, pounds; and

(7) For all other crops, the smallest unit of measure that lends itself to the greatest level of accuracy with minimal use of fractions, as determined by the State committee.

*United States* means all 50 States of the United States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, and to the extent the Deputy Administrator determines it to be feasible and appropriate, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the former Trust Territory of the Pacific Islands, which include Palau, Federated States of Micronesia, and the Marshall Islands.

*USDA* means the United States Department of Agriculture.

*USDA Plant Hardiness Zone* means 11 regions or planting zones as defined by a 10 degree Fahrenheit difference in the average annual minimum temperature.

*Value loss crop* has the meaning assigned in part 1437 of this title.

*Verifiable production record* means:

(1) For quantity losses, evidence that is used to substantiate the amount of production reported and that can be verified by FSA through an independent source; or

(2) For quality losses, evidence that is used to substantiate the amount of production reported and that can be verified by FSA through an independent source including determined quality factors and the specific quantity covered by those factors.

*Yield* means unit of production, measured in bushels, pounds, or other unit of measure, per area of consideration, usually measured in acres.

**§ 760.803 Eligibility.**

(a) Participants will be eligible to receive disaster benefits under this part only if they incurred qualifying quan-

titry or quality losses for the 2005, 2006, or 2007 crops, as further specified in this part, as a result of damaging weather or any related condition. Participants may not receive benefits with respect to volunteer stands of crops.

(b) Payments may be made for losses suffered by an eligible participant who, at the time of application, is a deceased individual or is a dissolved entity if a representative, who currently has authority to enter into a contract for the participant, signs the 2005, 2006, or 2007 Crop Disaster Program application. Participants must provide proof of the authority to sign legal documents for the deceased individual or dissolved entity. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

(c) As a condition to receive benefits under this part, the Participant must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of part 12 of this title for the 2005, 2006, or 2007 crop year, as applicable, and must not otherwise be precluded from receiving benefits under parts 12 or 1400 of this title or any law.

**§ 760.804 Time and method of application.**

(a) The 2005, 2006, 2007 Crop Disaster Program application must be submitted on a completed FSA-840, or such other form designated for such application purpose by FSA, in the FSA county office in the participant's control county office before the close of business on a date that will be announced by the Deputy Administrator.

(b) Once signed by a participant, the application for benefits is considered to contain information and certifications of and pertaining to the participant regardless of who entered the information on the application.

(c) The participant requesting benefits under this program certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information is subject to verification by FSA.

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For example, as specified in § 760.818(f), the participant may be required to provide documentation to substantiate and validate quality standards and marketing contract prices. Refusal to allow FSA or any agency of the Department of Agriculture to verify any information provided will result in the participant's forfeiting eligibility under this program. Furnishing required information is voluntary; however without it, FSA is under no obligation to act on the application or approve benefits. Providing a false certification to the government is punishable by imprisonment, fines, and other penalties.

(d) FSA may require the participant to submit any additional information it deems necessary to implement or determine any eligibility provision of this part. For example, as specified in § 760.818(f), the participant may be required to provide documentation to substantiate and validate quality standards and marketing contract prices.

(e) The application submitted in accordance with paragraph (a) of this section is not considered valid and complete for issuance of payment under this part unless FSA determines all the applicable eligibility provisions have been satisfied and the participant has submitted all of following completed forms:

(1) If Item 16 on FSA-840 is answered "YES," FSA-840M, Crop Disaster Program for Multiple Crop—Same Acreage Certification;

(2) CCC-502, Farm Operating Plan for Payment Eligibility;

(3) CCC-526, Payment Eligibility Average Adjusted Gross Income Certification;

(4) AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification; and

(5) FSA-578, Report of Acreage.

(f) Application approval and payment by FSA does not relieve a participant from having to submit any form required, but not filed, according to paragraph (e) of this section.

### § 760.805 Limitations on payments and other benefits.

(a) A participant may receive benefits for crop losses for only one of the

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2005, 2006, or 2007 crop years as specified under this part.

(b) Payments will not be made under this part for grazing losses.

(c) Payments determined to be issued are considered due and payable not later than 60 days after a participant's application is completed with all information necessary for FSA to determine producer eligibility for benefits.

(d) FSA may divide and classify crops based on loss susceptibility, yield, and other factors.

(e) No person, as defined by part 1400 subpart B of this title, may receive more than a total of \$80,000 in disaster benefits under this part. In applying the \$80,000 per person payment limitation, regardless of whether 2005, 2006, or 2007 crop year benefits are at issue or sought, the most restrictive "person" determination for the participant in the years 2005, 2006, and 2007, will be used to limit benefits.

(f) No participant may receive disaster benefits under this part in an amount that exceeds 95 percent of the value of the expected production for the relevant period as determined by FSA. Accordingly, the sum of the value of the crop not lost, if any; the disaster payment received under this part; and any crop insurance payment or payments received under the NAP for losses to the same crop, cannot exceed 95 percent of what the crop's value would have been if there had been no loss.

(g) An individual or entity whose adjusted gross income is in excess of \$2.5 million, as defined by and determined under part 1400 subpart G of this title, is not eligible to receive disaster benefits under this part.

(h) Any participant in a county eligible for either of the following programs must complete a duplicate benefits certification. If the participant received a payment authorized by either of the following, the amount of that payment will be reduced from the calculated 2005-2007 CDP payment:

(1) The Hurricane Indemnity Program (subpart B of this part);

(2) The Hurricane Disaster Programs (subparts D, E, F, and G of part 1416 of this title);

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- (3) The 2005 Louisiana Sugarcane Hurricane Disaster Assistance Program; or
- (4) The 2005 Crop Florida Sugarcane Disaster Program.

**§ 760.806 Crop eligibility requirements.**

(a) A participant on a farm is eligible for assistance under this section with respect to losses to an insurable commodity or NAP if the participant:

(1) In the case of an insurable commodity, obtained a policy or plan of insurance under the Federal Crop Insurance Act for the crop incurring the losses; or

(2) In the case of a NAP covered crop, filed the required paperwork and paid the administrative fee by the applicable filing deadline, for the noninsurable commodity under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 for the crop incurring the losses.

(b) The reasons a participant either elected not to have coverage or did not have coverage mentioned in paragraphs (a)(1) or (2) of this section are not relevant to the determination of the participant's ineligibility under this section. In addition, such reasons for not having crop insurance coverage have no bearing for consideration under part 718, subpart D of this chapter.

**§ 760.807 Miscellaneous provisions.**

(a) A person is not eligible to receive disaster assistance under this part if it is determined by FSA that the person has:

(1) Adopted any scheme or other device that tends to defeat the purpose of this part;

(2) Made any fraudulent representation;

(3) Misrepresented any fact affecting a program determination;

(4) Is ineligible under § 1400.5 of this title; or

(5) Does not have entitlement to an ownership share of the crop.

(i) Growers growing eligible crops under contract for crop owners are not eligible unless the grower can be determined to have a share of the crop.

(ii) Any verbal or written contract that precludes the grower from having an ownership share renders the grower ineligible for benefits under this part.

(b) A person ineligible under § 1437.15(c) of this title for any year is likewise ineligible for benefits under this part for that year or years.

(c) A person ineligible under § 400.458 of this title for any year is likewise ineligible for benefits under this part for that year or years.

(d) All persons with a financial interest in the operation receiving benefits under this part are jointly and severally liable for any refund, including related charges, which is determined to be due FSA for any reason.

(e) In the event that any request for assistance or payment under this part resulted from erroneous information or a miscalculation, the assistance or payment will be recalculated and any excess refunded to FSA with interest to be calculated from the date of the disbursement to the producer.

(f) The liability of anyone for any penalty or sanction under or in connection with this part, or for any refund to FSA or related charge is in addition to any other liability of such person under any civil or criminal fraud statute or any other provision of law including, but not limited to: 18 U.S.C. 286, 287, 371, 641, 651, 1001, and 1014; 15 U.S.C. 714; and 31 U.S.C. 3729.

(g) The regulations in parts 11 and 780 of this title apply to determinations under this part.

(h) Any payment to any person will be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or its proceeds.

(i) For the purposes of the effect of lien on eligibility for Federal programs (28 U.S.C. 3201(e)), FSA waives the restriction on receipt of funds or benefits under this program but only as to beneficiaries who, as a condition of such waiver, agree to apply the benefits received under this part to reduce the amount of the judgment lien.

(j) Under this program, participants are either eligible or ineligible. Participants in general, do not render performance or need to comply. They either suffered eligible losses or they did not. Accordingly, the provisions of § 718.304 of this chapter do not apply to this part.

## § 760.808

### § 760.808 General provisions.

(a) For calculations of loss, the participant's existing unit structure will be used as the basis for the calculation established in accordance with:

- (1) For insured crops, part 457 of this title; or
- (2) For NAP covered crops, part 1437 of this title.

(b) County average yield for loss calculations will be the average of the 2001 through 2005 official county yields established by FSA, excluding the years with the highest and lowest yields, respectively.

(c) County committees will assign production or reduce the historic yield when the county committee determines:

- (1) An acceptable appraisal or record of harvested production does not exist;
- (2) The loss is due to an ineligible cause of loss or practices, soil type, climate, or other environmental factors that cause lower yields than those upon which the historic yield is based;
- (3) The participant has a contract providing a guaranteed payment for all or a portion of the crop; or
- (4) The crop was planted beyond the normal planting period for the crop.

(d) The county committee will establish a maximum average loss level that reflects the amount of production producers would have produced if not for the eligible damaging weather or related conditions in the area or county for the same crop. The maximum average loss level for the county will be expressed as either a percent of loss or yield per acre. The maximum average loss level will apply when:

(1) Unharvested acreage has not been appraised by FSA, or a company reinsured by FCIC; or

(2) Acceptable production records for harvested acres are not available from any source.

(e) Assignment of production or reduction in yield will apply for practices that result in lower yields than those for which the historic yield is based.

### § 760.809 Eligible damaging conditions.

(a) Except as provided in paragraphs (b) and (c) of this section, to be eligible for benefits under this part the loss of the crop, or reduction in quality, or prevented planting must be due to

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damaging weather or related conditions as defined in § 760.802.

(b) Benefits are not available under this part for any losses in quantity or quality, or prevented planting due to:

- (1) Poor farming practices;
- (2) Poor management decisions; or
- (3) Drifting herbicides.

(c) With the exception of paragraph (d) of this section, in all cases, the eligible damaging condition must have directly impacted the specific crop or crop acreage during its planting or growing period.

(d) If FSA has determined that there has been an eligible loss of surface irrigation water due to drought and such loss of surface irrigation water impacts eligible crop acreage, FSA may approve assistance to the extent permitted by section 760.814.

### § 760.810 Qualifying 2005, 2006, or 2007 quantity crop losses.

(a) To receive benefits under this part, the county committee must determine that because of eligible damaging weather or related condition specifically impacting the crop or crop acreage, the participant with respect to the 2005, 2006, or 2007 crop:

- (1) Was prevented from planting a crop;
- (2) Sustained a loss in excess of 35 percent of the expected production of a crop; or
- (3) Sustained a loss in excess of 35 percent of the value for value loss crops.

(b) Qualifying losses under this part do not include losses:

(1) For the 2007 crop, those acres planted, or in the case of prevented planting, would have been planted, on or after February 28, 2007;

(2) That are determined by FSA to be the result of poor management decisions, poor farming practices, or drifting herbicides;

(3) That are the result of the failure of the participant to re-seed or replant the same crop in the county where it is customary to re-seed or replant after a loss;

(4) That are not as a result of a damaging weather or a weather related condition specifically impacting the crop or crop acreage;

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(5) To crops not intended for harvest in crop year 2005, 2006, or 2007;

(6) Of by-products resulting from processing or harvesting a crop, such as cottonseed, peanut shells, wheat, or oat straw;

(7) To home gardens;

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

(9) If losses could be attributed to conditions occurring outside of the applicable crop year growing season.

(c) Qualifying losses under this part for nursery stock will not include losses:

(1) For the 2007 crop, that nursery inventory acquired on or after February 28, 2007;

(2) Caused by a failure of power supply or brownouts;

(3) Caused by the inability to market nursery stock as a result of lack of compliance with State and local commercial ordinances and laws, quarantine, boycott, or refusal of a buyer to accept production;

(4) Caused by fire unless directly related to an eligible natural disaster;

(5) Affecting crops where weeds and other forms of undergrowth in the vicinity of the nursery stock have not been controlled; or

(6) Caused by the collapse or failure of buildings or structures.

(d) Qualifying losses under this part for honey, where the honey production by colonies or bees was diminished, will not include losses:

(1) For the 2007 crop, for production from those bees acquired on or after February 28, 2007;

(2) Where the inability to extract was due to the unavailability of equipment, the collapse or failure of equipment, or apparatus used in the honey operation;

(3) Resulting from storage of honey after harvest;

(4) To honey production because of bee feeding;

(5) Caused by the application of chemicals;

(6) Caused by theft, fire, or vandalism;

(7) Caused by the movement of bees by the producer or any other person; or

(8) Due to disease or pest infestation of the colonies.

(e) Qualifying losses for other value loss crops, except nursery, will not include losses for the 2007 crop that were acquired on or after February 28, 2007.

(f) Loss calculations will take into account other conditions and adjustments provided for in this part.

**§ 760.811 Rates and yields; calculating payments.**

(a)(1) Payments made under this part to a participant for a loss of quantity on a unit with respect to yield-based crops are determined by multiplying the average market price times 42 percent, times the loss of production which exceeds 35 percent of the expected production, as determined by FSA, of the unit.

(2) Payments made under this part to a participant for a quantity loss on a unit with respect to value-based crops are determined by multiplying the payment rate established for the crop by FSA times the loss of value that exceeds 35 percent of the expected production value, as determined by FSA, of the unit.

(3) As determined by FSA, additional quality loss payments may be made using a 25 percent quality loss threshold. The quality loss threshold is determined according to § 760.817.

(b) Payment rates for the 2005, 2006, or 2007 year crop losses will be 42 percent of the average market price.

(c) Separate payment rates and yields for the same crop may be established by the State committee as authorized by the Deputy Administrator, when there is supporting data from NASS or other sources approved by FSA that show there is a significant difference in yield or value based on a distinct and separate end use of the crop. Despite potential differences in yield or values, separate rates or yields will not be established for crops with different cultural practices, such as those grown organically or hydroponically.

(d) Production from all end uses of a multi-use crop or all secondary uses for multiple market crops will be calculated separately and summarized together.

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(e) Each eligible participant's share of a disaster payment will be based on the participant's ownership entitlement share of the crop or crop proceeds, or, if no crop was produced, the share of the crop the participant would have received if the crop had been produced. If the participant has no ownership share of the crop, the participant is ineligible for assistance under this part.

(f) When calculating a payment for a unit loss:

(1) An unharvested payment factor will be applied to crop acreage planted but not harvested;

(2) A prevented planting factor will be applied to any prevented planted acreage eligible for payment; and

(3) Unharvested payment factors may be adjusted if costs normally associated with growing the crop are not incurred.

**§ 760.812 Production losses; participant responsibility.**

(a) Where available and determined accurate by FSA, RMA loss records will be used for insured crops.

(b) If RMA loss records are not available, or if the FSA county committee determines the RMA loss records are inaccurate or incomplete, or if the FSA county committee makes inquiry, participants are responsible for:

(1) Retaining or providing, when required, the best verifiable or reliable production records available for the crop;

(2) Summarizing all the production evidence;

(3) Accounting for the total amount of unit production for the crop, whether or not records reflect this production;

(4) Providing the information in a manner that can be easily understood by the county committee; and

(5) Providing supporting documentation if the county committee has reason to question the damaging weather event or question whether all production has been accounted for.

(c) In determining production under this section, the participant must supply verifiable or reliable production records to substantiate production to the county committee. If the eligible crop was sold or otherwise disposed of

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through commercial channels, production records include: commercial receipts; settlement sheets; warehouse ledger sheets; load summaries; or appraisal information from a loss adjuster acceptable to FSA. If the eligible crop was farm-stored, sold, fed to livestock, or disposed of in means other than commercial channels, production records for these purposes include: truck scale tickets; appraisal information from a loss adjuster acceptable to FSA; contemporaneous diaries; or other documentary evidence, such as contemporaneous measurements.

(d) Participants must provide all records for any production of a crop that is grown with an arrangement, agreement, or contract for guaranteed payment.

**§ 760.813 Determination of production.**

(a) Production under this part includes all harvested production, unharvested appraised production, and assigned production for the total planted acreage of the crop on the unit.

(b) The harvested production of eligible crop acreage harvested more than once in a crop year includes the total harvested production from all these harvests.

(c) If a crop is appraised and subsequently harvested as the intended use, the actual harvested production must be taken into account to determine benefits. FSA will analyze and determine whether a participant's evidence of actual production represents all that could or would have been harvested.

(d) For all crops eligible for loan deficiency payments or marketing assistance loans with an intended use of grain but harvested as silage, ensilage, cabbage, hay, cracked, rolled, or crimped, production will be adjusted based on a whole grain equivalent as established by FSA.

(e) For crops with an established yield and market price for multiple intended uses, a value will be calculated by FSA with respect to the intended use or uses for disaster purposes based on historical production and acreage evidence provided by the participant and FSA will determine the eligible acres for each use.

(f) For crops sold in a market that is not a recognized market for the crop

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with no established county average yield and average market price, 42 percent of the salvage value received will be deducted from the disaster payment.

(g) If a participant does not receive compensation based upon the quantity of the commodity delivered to a purchaser, but has an agreement or contract for guaranteed payment for production, the determination of the production will be the greater of the actual production or the guaranteed payment converted to production as determined by FSA.

(h) Production that is commingled between units before it was a matter of record or combination of record and cannot be separated by using records or other means acceptable to FSA will be prorated to each respective unit by FSA. Commingled production may be attributed to the applicable unit, if the participant made the unit production of a commodity a matter of record before commingling and does any of the following, as applicable:

(1) Provides copies of verifiable documents showing that production of the commodity was purchased, acquired, or otherwise obtained from beyond the unit;

(2) Had the production measured in a manner acceptable to the county committee; or

(3) Had the current year's production appraised in a manner acceptable to the county committee.

(i) The county committee will assign production for the unit when the county committee determines that:

(1) The participant has failed to provide adequate and acceptable production records;

(2) The loss to the crop is because of a disaster condition not covered by this part, or circumstances other than natural disaster, and there has not otherwise been an accounting of this ineligible cause of loss;

(3) The participant carries out a practice, such as multiple cropping, that generally results in lower yields than the established historic yields;

(4) The participant has a contract to receive a guaranteed payment for all or a portion of the crop;

(5) A crop was late-planted;

(6) Unharvested acreage was not timely appraised; or

(7) Other appropriate causes exist for such assignment as determined by the Deputy Administrator.

(j) For peanuts, the actual production is all peanuts harvested for nuts, regardless of their disposition or use, as adjusted for low quality.

(k) For tobacco, the actual production is the sum of the tobacco: marketed or available to be marketed; destroyed after harvest; and produced but unharvested, as determined by an appraisal.

**§ 760.814 Calculation of acreage for crop losses other than prevented planted.**

(a) Payment acreage of a crop is limited to the lesser of insured acreage or NAP covered acreage of the crop, as applicable, or actual acreage of the crop planted for harvest.

(b) In cases where there is a repeat crop or a multiple planted crop in more than one planting period, or if there is multiple cropped acreage meeting criteria established in paragraph (c) or (d) of this section, each of these crops may be considered separate crops if the county committee determines that all of the following conditions are met:

(1) Were planted with the intent to harvest;

(2) Were planted within the normal planting period for that crop;

(3) Meet all other eligibility provisions of this part including good farming practices; and

(4) Could reach maturity if each planting was harvested or would have been harvested.

(c) In cases where there is multiple-cropped acreage, each crop may be eligible for disaster assistance separately if both of the following conditions are met:

(1) The specific crops are approved by the State committee as eligible multiple-cropping practices in accordance with procedures approved by the Deputy Administrator and separately meet all requirements, including insurance or NAP requirements; and

(2) The farm containing the multiple-cropped acreage has a history of successful multiple cropping more than one crop on the same acreage in the same crop year, in the year previous to the disaster, or at least 2 of the 4 crop

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years immediately preceding the disaster crop year based on timely filed crop acreage reports.

(d) A participant with multiple-cropped acreage not meeting the criteria in paragraph (c) of this section may be eligible for disaster assistance on more than one crop if the participant has verifiable records establishing a history of carrying out a successful multiple-cropping practice on the specific crops for which assistance is requested. All required records acceptable to FSA as determined by the Deputy Administrator must be provided before payments are issued.

(e) A participant with multiple-cropped acreage not meeting the criteria in paragraphs (c) or (d) of this section must select the crop for which assistance will be requested. If more than one participant has an interest in the multiple cropped acreage, all participants must agree to the crop designated for payment by the end of the application period or no payment will be approved for any crop on the multiple-cropped acreage.

(f) Benefits under this part apply to irrigated crops where, in cases determined by the Deputy Administrator, acreage was affected by a lack of surface irrigation water due to drought or contamination of ground water or surface irrigation water due to saltwater intrusion. In no case is a loss of ground water, for any reason, an eligible cause of loss.

### § 760.815 Calculation of prevented planted acreage.

(a) When determining losses under this part, prevented planted acreage will be considered separately from planted acreage of the same crop.

(b) For insured crops, or NAP covered crops, as applicable, disaster payments under this part for prevented planted acreage will not be made unless RMA or FSA, as applicable, documentation indicates that the eligible participant received a prevented planting payment under either NAP or the RMA-administered program.

(c) The participant must prove, to the satisfaction of the county committee, an intent to plant the crop and that such crop could not be planted because of an eligible disaster. The coun-

ty committee must be able to determine the participant was prevented from planting the crop by an eligible disaster that:

(1) Prevented other producers from planting on acreage with similar characteristics in the surrounding area;

(2) Occurred after the previous planting period for the crop; and

(3) Unless otherwise approved by the Deputy Administrator, began no earlier than the planting season for that crop.

(d) Prevented planted disaster benefits under this part do not apply to:

(1) Acreage not insured or NAP covered;

(2) Any acreage on which a crop other than a cover crop was harvested, hayed, or grazed during the crop year;

(3) Any acreage for which a cash lease payment is received for the use of the acreage the same crop year, unless the county committee determines the lease was for haying and grazing rights only and was not a lease for use of the land;

(4) Acreage for which the participant or any other person received a prevented planted payment for any crop for the same acreage, excluding share arrangements;

(5) Acreage for which the participant cannot provide verifiable proof to the county committee that inputs such as seed, chemicals, and fertilizer were available to plant and produce a crop with the expectation of producing at least a normal yield; and

(6) Any other acreage for which, for whatever reason, there is cause to question whether the crop could have been planted for a successful and timely harvest, or for which prevented planting credit is not allowed under the provisions of this part.

(e) Prevented planting payments are not provided on acreage that had either a previous or subsequent crop planted in the same crop year on the acreage, unless the county committee determines that all of the following conditions are met:

(1) There is an established practice of planting two or more crops for harvest on the same acreage in the same crop year;

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(2) Both crops could have reached maturity if each planting was harvested or would have been harvested;

(3) Both the initial and subsequent planted crops were planted or prevented planting within the normal planting period for that crop;

(4) Both the initial and subsequent planted crops meet all other eligibility provisions of this part including good farming practices; and

(5) The specific crops meet the eligibility criteria for a separate crop designation as a repeat or approved multiple cropping practice set out in § 760.814.

(f)(1) Disaster benefits under this part do not apply to crops where the prevented planted acreage was affected by a disaster that was caused by drought unless on the final planting date or the late planting period for non-irrigated acreage, the area that was prevented from being planted had insufficient soil moisture for germination of seed and progress toward crop maturity because of a prolonged period of dry weather;

(2) Verifiable information collected by sources whose business or purpose is to record weather conditions, including, but not limited to, local weather reporting stations of the U.S. National Weather Service.

(g) Prevented planting benefits under this part apply to irrigated crops where adequate irrigation facilities were in place before the eligible disaster and the acreage was prevented from being planted due to a lack of water resulting from drought conditions or contamination by saltwater intrusion of an irrigation supply resulting from drought conditions.

(h) For NAP covered crops, prevented planting provisions apply according to part 718 of this chapter.

(i) Late-filed crop acreage reports for prevented planted acreage in previous years are not acceptable for CDP purposes.

**§ 760.816 Value loss crops.**

(a) Notwithstanding any other provisions of this part, this section applies to value loss crops and tropical crops. Unless otherwise specified, all the eligibility provisions of part 1437 of this

title apply to value loss crops and tropical crops under this part.

(b) For value loss crops, benefits under this part are calculated based on the loss of value at the time of the damaging weather or related condition, as determined by FSA.

(c) For tropical crops:

(1) CDP benefits for 2005 are calculated according to general provisions of part 1437, but not subpart F, of this title.

(2) CDP benefits for 2006 and 2007 are calculated according to part 1437, subpart F of this title.

**§ 760.817 Quality losses for 2005, 2006, and 2007 crops.**

(a) Subject to other provisions of this part, assistance will be made available to participants determined eligible under this section for crop quality losses of 25 percent or greater of the value that all affected production of the crop would have had if the crop had not suffered a quality loss.

(b) The amount of payment for a quality loss will be equal to 65 percent of the quantity of the crop affected by the quality loss, not to exceed expected production based on harvested acres, multiplied by 42 percent of the per unit average market value based on percentage of quality loss for the crop as determined by the Deputy Administrator.

(c) This section applies to all crops eligible for 2005, 2006, and 2007 crop disaster assistance under this part, with the exceptions of value loss crops, honey, and maple sap, and applies to crop production that has a reduced economic value due to the reduction in quality.

(d) Participants may not be compensated under this section to the extent that such participants have received assistance under other provisions of this part, attributable in whole or in part to diminished quality.

**§ 760.818 Marketing contracts.**

(a) A marketing contract must meet all of the conditions outlined in paragraphs (b), (c), and (d) of this section.

(b) A marketing contract, at a minimum, must meet all of the following conditions:

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- (1) Be a legal contract in the State where executed;
- (2) Specify the commodity under contract;
- (3) Specify crop year;
- (4) Be signed by both the participant, or legal representative, and the purchaser of the specified commodity;
- (5) Include a commitment to deliver the contracted quantity;
- (6) Include a commitment to purchase the contracted quantity that meets specified minimum quality standards and other criteria as specified;
- (7) Define a determinable quantity by containing either a:
  - (i) Specified production quantity or
  - (ii) A specified acreage for which production quantity can be calculated;
- (8) Define a determinable price by containing either a:
  - (i) Specified price or
  - (ii) Method to determine such a price;
- (9) Contain a relationship between the price and the quality using either:
  - (i) Specified quality standards or
  - (ii) A method to determine such quality standards from published third party data; and
- (10) Have been executed within 10 days after:
  - (i) End of insurance period for insured crops or
  - (ii) Normal harvest date for NAP covered crops as determined by FSA.
- (c) The purchaser of the commodity specified in the marketing contract must meet at least one of the following:
  - (1) Be a licensed commodity warehouseman;
  - (2) Be a business enterprise regularly engaged in the processing of a commodity, that possesses all licenses and permits for marketing the commodity required by the State in which it operates, and that possesses or has contracted for facilities with enough equipment to accept and process the commodity within a reasonable amount of time after harvest; or
  - (3) Is able to physically receive the harvested production.
- (d) In order for the commodity specified in the marketing contract to be considered sold pursuant to the marketing contract, the commodity must

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have been produced by the participant in the crop year specified in the contract, and at least one of the following conditions must be met:

- (1) Commodity was sold under the terms of the contract or
- (2) Participant attempted to deliver the commodity to the purchaser, but the commodity was rejected due to quality factors as specified in the contract.
- (e) The amount of payment for affected production, as determined in § 760.817(b), sold pursuant to one or more marketing contracts will take into consideration the marketing contract price as determined by FSA.

(f) County committees have the authority to require a participant to provide necessary documentation, which may include, but is not limited to, previous marketing contracts fulfilled, to substantiate and validate quality standards in paragraph (b)(9) of this section and marketing contract price received for the commodity for which crop quality loss assistance is requested. In cases where the county committee has reason to believe the participant lacks the capacity or history to fulfill the quality provisions of the marketing contract the county committee will require such documentation.

**§ 760.819 Misrepresentation, scheme, or device.**

- (a) A person is ineligible to receive assistance under this part if it is determined that such person has:
  - (1) Adopted any scheme or device that tends to defeat the purpose of this program;
  - (2) Made any fraudulent representation under this program;
  - (3) Misrepresented any fact affecting a program or person determination; or
  - (4) Has violated or been determined ineligible under § 1400.5 of this title.

**§ 760.820 Offsets, assignments, and debt settlement.**

- (a) Except as provided in paragraph (b) of this section, any payment to any person will be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds, in favor

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of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 1403 of this title apply to any payments made under this part.

(b) Any participant entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments found at part 1404 of this title.

(c) A debt or claim may be settled according to part 792 of this chapter.

**§ 760.821 Compliance with highly erodible land and wetland conservation.**

(a) The highly erodible land and wetland conservation provisions of part 12 of this title apply to the receipt of disaster assistance for 2005, 2006, and 2007 crop losses made available under this authority.

(b) Eligible participants must be in compliance with the highly erodible land and wetland conservation compliance provisions for the year for which financial assistance is requested.

**Subpart J—2005–2007 Livestock Indemnity Program**

SOURCE: 72 FR 72867, Dec. 21, 2007, unless otherwise noted.

**§ 760.900 Administration.**

(a) The regulations in this subpart specify the terms and conditions applicable to the 2005–2007 Livestock Indemnity Program (2005–2007 LIP), which will be administered under the general supervision and direction of the Administrator, FSA.

(b) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this subpart.

(c) The State FSA committee will take any action required by the regulations of this subpart that the county FSA committee has not taken. The State FSA committee will also:

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

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

(d) No delegation to a State or county FSA committee will preclude the Deputy Administrator for Farm Programs from determining any question arising under the program or from reversing or modifying any determination made by a State or county FSA committee.

**§ 760.901 Applicability.**

(a) This subpart establishes the terms and conditions under which the 2005–2007 LIP will be administered under Title IX of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Pub. L. 110–28) for eligible counties as specified in § 760.902(a).

(b) Eligible livestock owners and contract growers will be compensated in accordance with § 760.909 for eligible livestock deaths that occurred in eligible counties as a direct result of an eligible disaster event. Drought is not an eligible disaster event except when anthrax, as a related condition that occurs as a result of drought, results in the death of eligible livestock.

**§ 760.902 Eligible counties and disaster periods.**

Counties are eligible for agricultural assistance under the 2005–2007 LIP if they received a timely Presidential designation, a timely Secretarial declaration, or a qualifying Administrator's Physical Loss Notice (APLN) determination in a county otherwise the subject of a timely Presidential declaration, or are counties contiguous to such counties. Presidential designations and Secretarial declarations will be considered timely only if made after January 1, 2005, and before February 28, 2007. Eligible counties, disaster events, and disaster periods are listed at <http://disaster.fsa.usda.gov>.

**§ 760.903 Definitions.**

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Adult beef bull* means a male beef bovine animal that was at least 2 years old and used for breeding purposes before it died.

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*Adult beef cow* means a female beef bovine animal that had delivered one or more offspring before dying. A first-time bred beef heifer is also considered an adult beef cow if it was pregnant at the time it died.

*Adult buffalo and beefalo bull* means a male animal of those breeds that was at least 2 years old and used for breeding purposes before it died.

*Adult buffalo and beefalo cow* means a female animal of those breeds that had delivered one or more offspring before dying. A first-time bred buffalo or beefalo heifer is also considered an adult buffalo or beefalo cow if it was pregnant at the time it died.

*Adult dairy bull* means a male dairy breed bovine animal at least 2 years old used primarily for breeding dairy cows before it died.

*Adult dairy cow* means a female bovine animal used for the purpose of providing milk for human consumption that had delivered one or more offspring before dying. A first-time bred dairy heifer is also considered an adult dairy cow if it was pregnant at the time it died.

*Agricultural operation* means a farming operation.

*Application* means the “2005-2007 Livestock Indemnity Program” form.

*Application period* means the date established by the Deputy Administrator for Farm Programs for participants to apply for program benefits.

*Buck* means a male goat.

*Catfish* means catfish grown as food for human consumption by a commercial operator on private property in water in a controlled environment.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer to apply for program benefits.

*Contract* means, with respect to contracts for the handling of livestock, a written agreement between a livestock owner and another individual or entity setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock or livestock products.

*Controlled environment* means an environment in which everything that can practicably be controlled by the participant with structures, facilities, and

growing media (including, but not limited to, water and nutrients) and was in fact controlled by the participant at the time of the disaster.

*Crawfish* means crawfish grown as food for human consumption by a commercial operator on private property in water in a controlled environment.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, Farm Service Agency, U.S. Department of Agriculture or the designee.

*Doe* means a female goat.

*Equine animal* means a domesticated horse, mule, or donkey.

*Ewe* means a female sheep.

*Farming operation* means a business enterprise engaged in producing agricultural products.

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats. Goats are further defined by sex (bucks and does) and age (kids).

*Kid* means a goat less than 1 year old.

*Lamb* means a sheep less than 1 year old.

*Livestock owner* means one having legal ownership of the livestock for which benefits are being requested on the day such livestock died due to an eligible disaster.

*Non-adult beef cattle* means a bovine that does not meet the definition of adult beef cow or bull. Non-adult beef cattle are further delineated by weight categories of less than 400 pounds, and 400 pounds or more at the time they died.

*Non-adult buffalo or beefalo* means an animal of those breeds that does not meet the definition of adult buffalo/beefalo cow or bull. Non-adult buffalo or beefalo are further delineated by weight categories of less than 400 pounds, and 400 pounds or more at the time of death.

*Non-adult dairy cattle* means a bovine livestock, of a breed used for the purpose of providing milk for human consumption, that do not meet the definition of adult dairy cow or bull. Non-adult dairy cattle are further delineated by weight categories of less than 400 pounds, and 400 pounds or more at the time they died.

*Poultry* means domesticated chickens, turkeys, ducks, and geese. Poultry are further delineated by sex, age, and

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purpose of production as determined by FSA.

*Ram* means a male sheep.

*Sheep* means a domesticated, ruminant mammal of the genus *Ovis*. Sheep are further defined by sex (rams and ewes) and age (lambs).

*Swine* means a domesticated omnivorous pig, hog, and boar. Swine are further delineated by sex and weight as determined by FSA.

**§ 760.904 Limitations on payments and other benefits.**

(a) A participant may receive benefits for livestock losses for only one of the 2005, 2006, or 2007 calendar years as specified under this part.

(b) A "person" as determined under part 1400 of this title may receive no more than \$80,000 under this subpart. In applying the \$80,000 per person payment limitation, regardless of whether 2005, 2006, or 2007 calendar year benefits are at issue or sought, the most restrictive "person" determination for the participant in the years 2005, 2006, and 2007, will be used to limit benefits.

(c) The provisions of part 1400, subpart G, of this title relating to limits to payments for individuals or entities with certain levels of adjusted gross income apply to this program.

(d) As a condition to receive benefits under this subpart, a participant must have been in compliance with the provisions of parts 12 and 718 of this title and must not otherwise be precluded from receiving benefits under any law.

(e) An individual or entity determined to be a foreign person under part 1400 of this title is not eligible to receive benefits under this subpart.

**§ 760.905 Eligible owners and contract growers.**

(a) To be considered eligible, a livestock owner must have had legal ownership of the eligible livestock, as provided in § 760.906(a), on the day the livestock died.

(b) To be considered eligible, a contract grower on the day the livestock died must have had:

(1) A written agreement with the owner of eligible livestock setting the specific terms, conditions, and obligations of the parties involved regarding the production of livestock; and

(2) Control of the eligible livestock, as provided in § 760.906(b), on the day the livestock died.

**§ 760.906 Eligible livestock.**

(a) To be considered eligible livestock for livestock owners, livestock must be adult or non-adult dairy cattle, beef cattle, buffalo, beefalo, catfish, crawfish, equine, sheep, goats, swine, poultry, deer, or reindeer and meet all the conditions in paragraph (c) of this section.

(b) To be considered eligible livestock for contract growers, livestock must be poultry or swine as defined in § 760.903 and meet all the conditions in paragraph (c) of this section.

(c) To be considered eligible, livestock must meet all of the following conditions:

(1) Died in an eligible county as a direct result of an eligible disaster event;

(i) After January 1, 2005, but before February 28, 2007;

(ii) No later than 60 calendar days from the ending date of the applicable disaster period, but before February 28, 2007; and

(iii) In the calendar year for which benefits are being requested.

(2) The disaster event that caused the loss must be the same event for which a natural disaster was declared or designated.

(3) Been maintained for commercial use as part of a farming operation on the day they died; and

(4) Before dying, not have been produced or maintained for reasons other than commercial use as part of a farming operation, including, but not limited to, wild free roaming animals or animals used for recreational purposes, such as pleasure, hunting, roping, pets, or for show.

(d) In those counties in § 760.902, the following types of animals owned by a livestock owner are eligible livestock:

- (1) Adult beef bulls;
- (2) Adult beef cows;
- (3) Adult buffalo or beefalo bulls;
- (4) Adult buffalo or beefalo cows;
- (5) Adult dairy bulls;
- (6) Adult dairy cows;
- (7) Catfish;
- (8) Chickens, broilers, pullets;
- (9) Chickens, chicks;
- (10) Chickens, layers, roasters;

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- (11) Crawfish;
- (12) Deer;
- (13) Ducks;
- (14) Ducks, ducklings;
- (15) Equine;
- (16) Geese, goose;
- (17) Geese, gosling;
- (18) Goats, bucks;
- (19) Goats, does;
- (20) Goats, kids;
- (21) Non-adult beef cattle;
- (22) Non-adult buffalo/beefalo;
- (23) Non-adult dairy cattle;
- (24) Reindeer
- (25) Sheep, ewes;
- (26) Sheep, lambs;
- (27) Sheep, rams;
- (28) Swine, feeder pigs under 50 pounds;
- (29) Swine, sows, boars, barrows, gilts 50 to 150 pounds;
- (30) Swine, sows, boars, barrows, gilts over 150 pounds;
- (31) Turkeys, pouls; and
- (32) Turkeys, toms, fryers, and roasters.

(e) In those counties in § 760.902, the following types of animals are eligible livestock for contract growers:

- (1) Chickens, broilers, pullets;
- (2) Chickens, layers, roasters;
- (3) Geese, goose;
- (4) Swine, boars, sows;
- (5) Swine, feeder pigs;
- (6) Swine, lightweight barrows, gilts;
- (7) Swine, sows, boars, barrows, gilts; and
- (8) Turkeys, toms, fryers, and roasters.

**§ 760.907 Application process.**

(a) To apply for 2005–2007 LIP, submit a completed application to the administrative county FSA office that maintains the farm records for your agricultural operation, a copy of your grower contract, if you are a contract grower, and other supporting documents required for determining your eligibility as an applicant. Supporting documents must show:

- (1) Evidence of loss;
- (2) Current physical location of livestock in inventory, and
- (3) Physical location of claimed livestock at the time of death.

(b) The application must be filed during the application period announced by the Deputy Administrator.

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(c) A minor child is eligible to apply for program benefits if all eligibility requirements are met and one of the following conditions exists:

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

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

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

(d) The participant must provide adequate proof that the death of the eligible livestock occurred in an eligible county as a direct result of an eligible disaster event during the applicable disaster period. The quantity and kind of livestock that died as a direct result of the eligible disaster event may be documented by: purchase records; veterinarian records; bank or other loan papers; rendering truck receipts; Federal Emergency Management Agency records; National Guard records; written contracts; production records; Internal Revenue Service records; property tax records; private insurance documents; and other similar verifiable documents as determined by FSA.

(e) Certification of livestock deaths by third parties may be accepted only if both the following conditions are met:

(1) The livestock owner or livestock contract grower, as applicable, certifies in writing:

(i) That there is no other documentation of death available;

(ii) The number of livestock, by category determined by FSA, were in inventory at the time the applicable disaster event occurred; and

(iii) Other details required for FSA to determine the certification acceptable; and

(2) The third party provides their telephone number, address, and a written statement containing:

(i) Specific details about their knowledge of the livestock deaths;

(ii) Their affiliation with the livestock owner;

(iii) The accuracy of the deaths claimed by the livestock owner; and

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(iv) Other details required by FSA to determine the certification acceptable.

(f) Data furnished by the participant will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without all required data program benefits will not be approved or provided.

**§ 760.908 Deceased individuals or dissolved entities.**

(a) Payments may be made for eligible losses suffered by an eligible participant who is now a deceased individual or is a dissolved entity if a representative, who currently has authority to enter into a contract, on behalf of the participant, signs the application for payment.

(b) Legal documents showing proof of authority to sign for the deceased individual or dissolved entity must be provided.

(c) If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

**§ 760.909 Payment calculation.**

(a) Under this subpart separate payment rates are established for eligible livestock owners and eligible livestock contract growers in accordance with paragraphs (b) and (c) of this section. Payments for the 2005–2007 LIP are calculated by multiplying the national payment rate for each livestock category, as determined in paragraphs (b) and (c) of this section, by the number of eligible livestock in each category, as provided in § 760.906. Adjustments will be applied in accordance with paragraphs (d) and (e) of this section.

(b) The 2005–2007 LIP national payment rate for eligible livestock owners is based on 26 percent of the average fair market value of the livestock.

(c) The 2005–2007 LIP national payment rate for eligible livestock contract growers is based on 26 percent of the average income loss sustained by the contract grower with respect to the dead livestock.

(d) The 2005 payment calculated under 2005–2007 LIP for eligible live-

stock owners will be reduced by the amount the participant received under:

- (1) The Livestock Indemnity Program (subpart E of this part);
- (2) The Aquaculture Grant Program (subpart G of this part); and
- (3) The Livestock Indemnity Program II (part 1416, subpart C of this title).

(e) The 2005 payment calculated under 2005–2007 LIP for eligible livestock contract growers will be reduced by the amount the participant received:

- (1) Under the Livestock Indemnity Program (subpart E of this part);
- (2) For the loss of income from the dead livestock from the party who contracted with the producer to grow the livestock; and
- (3) Under the Livestock Indemnity Program II (part 1416, subpart C of this title).

**§ 760.910 Appeals.**

The appeal regulations set forth at parts 11 and 780 of this title apply to determinations made pursuant to this subpart.

**§ 760.911 Offsets, assignments, and debt settlement.**

(a) Any payment to any participant will be made without regard to questions of title under State law and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 792 of this chapter apply to payments made under this subpart.

(b) Any participant entitled to any payment may assign any payment in accordance with regulations governing the assignment of payments found at part 1404 of this title.

**§ 760.912 Records and inspections.**

Participants receiving payments under this subpart or any other person who furnishes information for the purposes of enabling such participant to receive a payment under this subpart must maintain any books, records, and accounts supporting any information so furnished for 3 years following the

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end of the year during which the application for payment was filed. Participants receiving payments or any other person who furnishes such information to FSA must allow authorized representatives of USDA and the General Accountability Office, during regular business hours, to inspect, examine, and make copies of such books or records, and to enter upon, inspect and verify all applicable livestock and acreage in which the participant has an interest for the purpose of confirming the accuracy of information provided by or for the participant.

### § 760.913 Refunds; joint and several liability.

In the event there is a failure to comply with any term, requirement, or condition for payment or assistance arising under this subpart, and if any refund of a payment to FSA will otherwise become due in connection with this subpart, all payments made in regard to such matter must be refunded to FSA together with interest and late-payment charges as provided for in part 792 of this chapter.

## Subpart K—General Provisions for 2005–2007 Livestock Compensation and Catfish Grant Programs

SOURCE: 72 FR 72881, Dec. 21, 2007, unless otherwise noted.

### § 760.1000 Applicability.

(a) This subpart establishes the terms and conditions under which the following programs will be administered under Title IX of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 for participants affected by eligible disaster events and located in counties that are eligible as specified in § 760.1001:

- (1) The 2005–2007 Livestock Compensation Program (2005–2007 LCP); and
- (2) The 2005–2007 Catfish Grant Program (2005–2007 CGP).

(b) Farm Service Agency (FSA) funds as are necessary for the programs in subparts L and M of this part are available under Title IX of the U.S. Troop Readiness, Veterans' Care, Katrina Re-

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covery, and Iraq Accountability Appropriations Act, 2007.

### § 760.1001 Eligible counties, disaster events, and disaster periods.

(a) Except as provided in this subpart, FSA will provide assistance under the programs listed in § 760.1000 to eligible participants who have suffered certain losses due to eligible disaster events in eligible disaster counties provided in paragraph (c) of this section.

(b) The "Disaster Period" is the time period in which losses occurred for the particular disaster that may be considered eligible for the programs under subparts L and M of this part. The start and end dates for each eligible disaster period are specified at <http://disaster.fsa.usda.gov>.

(c) Eligible counties are those primary counties declared by the Secretary or designated for the applicable loss by the President, including counties contiguous to those counties, between January 1, 2005, and February 28, 2007 (that is after January 1, 2005 and before February 28, 2007). The listing is provided at <http://disaster.fsa.usda.gov>. For counties where there was an otherwise timely Presidential declaration, but the declarations do not cover agricultural physical loss, the subject counties may still be eligible if the counties were the subject of an approved Administrator's Physical Loss Notice (APLN) when the APLN applies to a natural disaster timely designated by the President.

### § 760.1002 Definitions.

The following definitions apply to the programs in subpart L and M of this part. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Commercial use* means a use performed as part of the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer.

*Farming operation* means a business enterprise engaged in producing agricultural products.

**Farm Service Agency, USDA****§ 760.1101****§ 760.1003 Limitations on payments and other benefits.**

(a) A participant may receive benefits for eligible livestock feed losses, including additional feed costs, for only one of the 2005, 2006, or 2007 calendar years under 2005–2007 LCP, subpart L of this part, or under the CGP of subpart M of this part.

(b) As specified in § 760.1106(c), the payment under the 2005–2007 LCP may not exceed the smaller of the calculated payment in § 760.1106(a) or the value of the producer's eligible feed loss, increased feed costs, or forage or grazing loss.

(c) A person may receive no more than \$80,000 under 2005–2007 LCP, subpart L of this part. In applying the \$80,000 per person payment limitation, regardless of whether the 2005, 2006, or 2007 calendar year benefits are at issue or sought, the most restrictive “person” determination for the participant in the years 2005, 2006, and 2007, will be used to limit benefits. The rules and definitions of part 1400 of this title apply in construing who is a qualified separate “person” for purposes of this limit. All payment eligibility requirements of part 1400 as they apply to any other payments, also apply to payments under subpart L of this part.

(d) For payments under 2005–2007 CGP, a farming operation may receive no more than \$80,000, except for general partnerships and joint ventures, in which case assistance will not exceed \$80,000 times the number of eligible members of the general partnership or joint venture. This limit must be enforced by the state government administering the grant program.

(e) The provisions of part 1400, subpart G, of this title apply to these programs. That is the rules that limit the eligibility for benefits of those individuals or entities with an adjusted gross income greater than a certain limit will be applied in the same manner to payments under subparts L and M of this part.

(f) As a condition to receive benefits under subparts L and M of this part, a participant must have been in compliance with the provisions of parts 12 and 718 of this title for the calendar year for which benefits are being requested

and must not otherwise be precluded from receiving benefits under any law.

(g) An individual or entity determined to be a foreign person under part 1400 of this title is not eligible to receive benefits under subparts L and M of this part.

(h) In addition to limitations provided in subparts L and M of this part, participants cannot receive duplicate benefits under subparts L and M of this part for the same loss or any similar loss under:

(1) An agricultural disaster assistance provision contained in the announcement of the Secretary on January 26, 2006, or August 29, 2006;

(2) The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Pub. L. 109–234; 120 Stat. 418); or

(3) Any other disaster assistance program.

**Subpart L—2005–2007 Livestock Compensation Program**

SOURCE: 72 FR 72881, Dec. 21, 2007, unless otherwise noted.

**§ 760.1100 Applicability.**

This subpart sets forth the terms and conditions applicable to the 2005–2007 Livestock Compensation Program (LCP).

**§ 760.1101 Administration.**

(a) This program is administered under the general supervision of the Administrator, Farm Service Agency (FSA).

(b) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this subpart.

(c) The State FSA committee must take any action required by the regulations of this subpart that the county FSA committee has not taken. The State committee must also:

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

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

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(d) No provision or delegation to a State or county FSA committee will preclude the FSA Deputy Administrator for Farm Programs (Deputy Administrator), or a designee of such, from determining any question arising under the program or from reversing or modifying any determination made by a State or county FSA committee.

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

### § 760.1102 Definitions.

The following definitions apply to this subpart.

*Adult beef bull* means a male beef bovine animal that was at least 2 years old and used for breeding purposes on the beginning date of the disaster period.

*Adult beef cow* means a female beef bovine animal that had delivered one or more offspring before the disaster period. A first-time bred beef heifer is also considered an adult beef cow if it was pregnant on the beginning date of the disaster period.

*Adult buffalo and beefalo bull* means a male animal of those breeds that was at least 2 years old and used for breeding purposes on the beginning date of the disaster period.

*Adult buffalo and beefalo cow* means a female animal of those breeds that had delivered one or more offspring before the beginning date of the applicable disaster period. A first-time bred buffalo or beefalo heifer is also considered to be an adult buffalo or beefalo cow if it was pregnant on the beginning date of the disaster period.

*Adult dairy bull* means a male dairy bovine breed animal at least 2 years old used primarily for breeding dairy cows on the beginning date of the disaster period.

*Adult dairy cow* means a female bovine animal used for the purpose of providing milk for human consumption that had delivered one or more offspring before the beginning date of the applicable disaster period. A first-time bred dairy heifer is also considered an

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adult dairy cow if it was pregnant on the beginning date of the disaster period.

*Agricultural operation* means a farming operation.

*Application* means the “2005/2006/2007 Livestock Compensation Program” form.

*Application period* means the date established by the Deputy Administrator for Farm Programs for participants to apply for program benefits.

*Disaster period* means the applicable disaster period specified in § 760.1001.

*Equine animal* means a domesticated horse, mule, or donkey.

*Goat* means a domesticated, ruminant mammal of the genus *Capra*, including Angora goats.

*Non-adult beef cattle* means a bovine animal that weighed 500 pounds or more on the beginning date of the disaster period, but does not meet the definition of an adult beef cow or bull.

*Non-adult buffalo/beefalo* means an animal of those breeds that weighed 500 pounds or more on the beginning date of the disaster period, but does not meet the definition of an adult buffalo or beefalo cow or bull.

*Non-adult dairy cattle* means a bovine livestock, of a breed used for the purpose of providing milk for human consumption, that weighed 500 pounds or more on the beginning date of the disaster period, but does not meet the definition of an adult dairy cow or bull.

*Owner* means one who had legal ownership of the livestock for which benefits are being requested under this subpart on the beginning date of the applicable disaster period as set forth in § 760.1001.

*Poultry* means a domesticated chicken, turkey, duck, or goose. Poultry are further delineated by sex, age and purpose of production, as determined by FSA.

*Sheep* means a domesticated, ruminant mammal of the genus *Ovis*.

*Swine* means a domesticated omnivorous pig, hog, and boar. Swine are further delineated by sex and weight as determined by FSA.

### § 760.1103 Eligible livestock and producers.

(a) To be considered eligible livestock to generate benefits under this

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subpart, livestock must meet all the following conditions:

(1) Be adult or non-adult dairy cattle, beef cattle, buffalo, beefalo, equine, poultry, elk, reindeer, sheep, goats, swine, or deer;

(2) Been physically located in the eligible disaster county on the beginning date of the disaster period;

(3) Been maintained for commercial use as part of the producer's farming operation on the beginning date of the disaster period; and

(4) Not have been produced and maintained for reasons other than commercial use as part of a farming operation. Such excluded uses include, but are not limited to, wild free roaming animals or animals used for recreational purposes, such as pleasure, roping, hunting, pets, or for show.

(b) To be considered an eligible livestock producer, the participant's eligible livestock must have been located in the eligible disaster county on the beginning date of the disaster period. To be eligible, also, the livestock producer must have:

(1) Owned or cash-leased eligible livestock on the beginning date of the disaster period (provided that if there is a cash lease, only the cash lessee and not the owner will be eligible); and

(2) Suffered any of the following:

(i) A grazing loss on eligible grazing lands physically located in the eligible disaster county, where the forage was damaged or destroyed by an eligible disaster event, and intended for use as feed for the participant's eligible livestock;

(ii) A loss of feed from forage or feedstuffs physically located in the eligible disaster county, that was mechanically harvested and intended for use as feed for the participant's eligible livestock, that was damaged or destroyed after harvest as the result of an eligible disaster event;

(iii) A loss of feed from purchased forage or feedstuffs physically located in the eligible disaster county, intended for use as feed for the participant's eligible livestock, that was damaged or destroyed by an eligible disaster event; or

(iv) Increased feed costs incurred in the eligible disaster county, due to an

eligible disaster event, to feed the participant's eligible livestock.

(c) The eligible livestock categories are:

- (1) Adult beef cows or bulls;
- (2) Non-adult beef cattle;
- (3) Adult buffalo or beefalo cows or bulls;
- (4) Non-adult buffalo or beefalo;
- (5) Adult dairy cows or bulls;
- (6) Non-adult dairy cattle;
- (7) Goats;
- (8) Sheep;
- (9) Equine;
- (10) Reindeer;
- (11) Elk;
- (12) Poultry; and
- (13) Deer.

(d) Ineligible livestock include, but are not limited to, livestock:

(1) Livestock that were or would have been in a feedlot regardless of whether there was a disaster or where such livestock were in a feedlot as part of a participant's normal business operation, as determined by FSA;

- (2) Emus;
- (3) Yaks;
- (4) Ostriches;
- (5) Llamas;

(6) All beef and dairy cattle, and buffalo and beefalo that weighed less than 500 pounds on the beginning date of the disaster period;

(7) Any wild free roaming livestock, including horses and deer;

(8) Livestock produced or maintained for reasons other than commercial use as part of a farming operation, including, but not limited to, livestock produced or maintained for recreational purposes, such as:

- (i) Roping,
- (ii) Hunting,
- (iii) Show,
- (iv) Pleasure,
- (v) Use as pets, or
- (vi) Consumption by owner.

**§ 760.1104 Application for payment.**

(a) To apply for 2005–2007 LCP, an application and required supporting documentation must be submitted to the administrative county FSA office.

(b) The application must be filed during the application period announced by the Deputy Administrator for Farm Programs.

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(c) Payments may be made for eligible losses suffered by an eligible livestock producer who is now a deceased individual or is a dissolved entity if a representative who currently has authority to enter into a contract, on behalf of the livestock producer, signs the application for payment. Legal documents showing proof of authority to sign for the deceased individual or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment.

(d) Data furnished by the participant will be used to determine eligibility for program benefits. Furnishing the data is voluntary; however, without all required data program benefits will not be approved or provided.

(e) A minor child is eligible to apply for program benefits if all eligibility requirements are met and one of the following conditions exists:

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

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

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

**§ 760.1105 Application process.**

(a) Participants must submit to FSA:

(1) A completed application in accordance with § 760.1104;

(2) Adequate proof, as determined by FSA, that the feed lost:

(i) Was for the claimed eligible livestock;

(ii) Was lost as a direct result of an eligible disaster event during an eligible disaster period specified in § 760.1001;

(iii) Was lost after January 1, 2005, but before February 28, 2007; and

(iv) Occurred in the calendar year for which benefits are being requested; and

(3) Any other supporting documentation as determined by FSA to be necessary to make a determination of eligibility of the participant. Supporting

documents include, but are not limited to: verifiable purchase records; veterinarian records; bank or other loan papers; rendering truck receipts; Federal Emergency Management Agency records; National Guard records; written contracts; production records; Internal Revenue Service records; property tax records; private insurance documents; sales records, and similar documents determined acceptable by FSA.

(b) [Reserved]

**§ 760.1106 Payment calculation.**

(a) Preliminary, unadjusted LCP payments are calculated for a producer by multiplying the national payment rate for each livestock category, as provided in paragraph (c) of this section, by the number of eligible livestock for the producer in each category. The national payment rate represents the cost of the amount of corn needed to maintain the specific livestock for 30 days, as determined by FSA. As provided in subpart K of this part, a producer may receive benefits for only one of the three program years, 2005, 2006, or 2007. The producer must indicate which year has been chosen. Payments are available only with respect to disaster-related fees losses in the period from January 2, 2005 through February 27, 2007, in eligible counties for losses during the times specified for the disaster periods as specified in § 760.1001(b).

(b) The preliminary LCP payment calculated in accordance with paragraph (a) of this section:

(1) For 2005 LCP provided for under this subpart will be reduced by the amount the participant received for the specific livestock under the Feed Indemnity Program in accordance with subpart D of this part and LCP for the 2005 hurricanes under subpart B of part 1416 of this title; and

(2) For 2006 LCP under this subpart will be reduced by the amount the participant received for the same or similar loss under the Livestock Assistance Grant Program in accordance with subpart H of this part.

(c) Subject to such other limitations as may apply, including those in paragraph (b) of this section, the payment

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under the 2005–2007 LCP may not exceed for the relevant year chosen by the producer the smaller of either the:

- (1) Payment calculated in paragraph (a) of this section for that year; or
- (2) Value of the producer's eligible feed loss, increased feed costs, or forage or grazing loss as determined by FSA for that year.
- (d) The actual payment to the producer will be the amount provided for in paragraph (c) of this section subject to the adjustments and limits provided for in this section or in this part.

**§ 760.1107 Appeals.**

The appeal regulations in parts 11 and 780 of this title apply to determinations made under this subpart.

**§ 760.1108 Offsets, assignments, and debt settlement.**

(a) Any payment to any participant will be made without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in parts 792 and 1403 of this title apply to payments made under this subpart.

(b) Any participant entitled to any payment may assign any payments in accordance with regulations governing the assignment of payments in part 1404 of this chapter.

**§ 760.1109 Recordkeeping and inspections.**

Participants receiving payments under this subpart or any other person who furnishes information for the purposes of enabling the participant to receive a payment under this subpart must maintain any books, records, and accounts supporting that information for a minimum of 3 years following the end of the year during which the application for payment was filed. Participants receiving payments or any other person who furnishes the information to FSA must allow authorized representatives of USDA and the General Accounting Office, during regular business hours, and to enter upon, inspect, examine, and make copies of the books or records, and to inspect and verify all applicable livestock and acreage in which the participant has an interest

for the purpose of confirming the accuracy of the information provided by or for the participant.

**§ 760.1110 Refunds; joint and several liability.**

In the event there is a failure to comply with any term, requirement, or condition for payment or assistance arising under this subpart, and if any refund of a payment to FSA will otherwise become due in connection with this subpart, all payments made in regard to such matter must be refunded to FSA together with interest and late-payment charges as provided for in part 792 of this title, provided that interest will run from the date of the disbursement of the refund to the producer.

**Subpart M—2005–2007 Catfish Grant Program**

SOURCE: 72 FR 72881, Dec. 21, 2007, unless otherwise noted.

**§ 760.1200 Administration.**

FSA will administer a limited 2005–2007 CGP to provide assistance to catfish producers in eligible counties that suffered catfish feed and related losses between January 1, 2005, and February 28, 2007, that is after January 1, 2005, and before February 28, 2007. Under the 2005–2007 CGP, FSA will provide grants to State governments in those States that have catfish producers that are located in eligible counties and that have agreed to participate in the 2005–2007 CGP. The amount of each grant will be based on the total value of catfish feed and related losses suffered in eligible counties in the subject state. Each State must submit a work plan providing a summary of how the State will implement the 2005–2007 CGP.

**§ 760.1201 Application for payment.**

Application procedures for 2005–2007 CGP will be as determined by the State governments.

**§ 760.1202 Eligible producers.**

(a) To be considered an eligible catfish producer, an participant must:

- (1) Raise catfish in a controlled environment and be physically located in

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an eligible county on the beginning date of the disaster period;

(2) Maintain the catfish for commercial use as part of a farming operation;

(3) Have a risk in production of such catfish; and

(4) Have suffered one of the following types of losses relating to catfish feed as a direct result of the county's disaster event that occurred in that year:

(i) Physical loss of feed that was damaged or destroyed,

(ii) Cost to the extent allowed by FSA, associated with lost feeding days, or

(iii) Cost associated with increased feed prices.

(b) [Reserved]

### § 760.1203 Payment calculation.

(a) Producers must be paid for feed losses of higher costs only for one of the three years, 2005, 2006, or 2007, and the loss must be for eligible catfish feed losses in an eligible county, as determined pursuant to subpart K of this part. Further, the feed loss or higher costs must be caused by the disaster that caused the county to qualify as an eligible county. The loss, moreover, to qualify for payment, must have occurred during the allowable time period provided in this part, namely the period beginning on January 2, 2005 and ending February 27, 2007. The producer must pick the year of the benefits sought.

(b) Subject to all adjustments and limits provided for in this part the amount of assistance provided to each participant from the State will be equal to the smaller of:

(1) Depending on the year chosen by the producer, the value of the participant's 2005, 2006, or 2007 catfish feed and related losses as a direct result of an eligible disaster event, as determined by the State or

(2) Result of multiplying:

(i) Total tons of catfish feed purchased by the participant in depending on the year chosen by the producer 2005 (entire year), 2006 (entire year), or 2007 (through February 27, 2007, only), times,

(ii) Catfish feed payment rate for 2005, 2006, or 2007, as applicable, as set by FSA.

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(c) The catfish feed rate represents 61 percent of the normal cost of a ton of feed for a year divided by six to reflect the normal feeding price for catfish.

### Subpart N—Dairy Economic Loss Assistance Payment Program

SOURCE: 74 FR 67808, Dec. 21, 2009, unless otherwise noted.

#### § 760.1301 Administration.

(a) This subpart establishes, subject to the availability of funds, the terms and conditions under which the Dairy Economic Loss Assistance Payments (DELAP) program as authorized by section 10104 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171) will be administered with respect to funds appropriated under Section 748 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (2010 Agriculture Appropriations Bill, Pub. L. 111-80).

(b) The DELAP program will be administered under the general supervision of the Administrator, FSA, and the Deputy Administrator for Farm Programs, FSA (who is referred to as the "Deputy Administrator" in this part), and will be carried out by FSA's Price Support Division (PSD) and Kansas City Management Office (KCMO).

(c) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this subpart, except as provided in paragraph (d) of this section.

(d) The State committee will take any action required by the provisions of this subpart that has not been taken by the county committee. The State committee will also:

(1) Correct or require the county committee to correct any action taken by the county committee that is not in compliance with the provisions of this subpart.

(2) Require a county committee to not take an action or implement a decision that is not in compliance with the provisions of this subpart.

(e) No provision or delegation of this subpart to PSD, KCMO, a State committee, or a county committee will preclude the Administrator, FSA, or a

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designee, from determining any question arising under the program or from reversing or modifying any determination made by PSD, KCMO, a State committee, or a county committee.

(f) The Deputy Administrator may waive or modify non-statutory deadlines and other program requirements of this part in cases where lateness or failure to meet other requirements does not adversely affect the operation of the program. Participants have no right to seek an exception under this provision. The Deputy Administrator's refusal to consider cases or circumstances or decision not to exercise the discretionary authority of this provision will not be considered an adverse decision and is not appealable.

**§ 760.1302 Definitions and acronyms.**

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they may conflict with the definitions in this section.

*County office or FSA county office* means the FSA offices responsible for administering FSA programs in a specific areas, sometimes encompassing more than one county, in a State.

*Dairy operation* means any person or group of persons who, as a single unit, as determined by FSA, produce and market milk commercially produced from cows, and whose production facilities are located in the United States. In any case, however, dairy operation may be given by the agency the same meaning as the definition of dairy operation as found in part 1430 of this title for other dairy assistance programs.

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

*Deputy Administrator* means the Deputy Administrator for Farm programs (DAFP), FSA, or a designee.

*Eligible production* means milk from cows that was produced during February through July 2009, by a dairy producer in the United States and marketed commercially by a producer in a participating State.

*Farm Service Agency or FSA* means the Farm Service Agency of the USDA.

*Fiscal year or FY* means the year beginning October 1 and ending the following September 30. The fiscal year

will be designated for this subpart by year reference to the calendar year in which it ends. For example, FY 2009 is from October 1, 2008, through September 30, 2009 (inclusive).

*Marketed commercially* means sold to the market to which the dairy operation normally delivers whole milk and receives a monetary amount and in any case this term will be construed to allow the use of MILC records in making DELAP payments.

*Milk handler* means the marketing agency to or through which the dairy operation commercially markets whole milk.

*Milk marketing* means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use.

*Participating State* means each of the 50 States in the United States of America, the District of Columbia, and the Commonwealth of Puerto Rico, or any other territory or possession of the United States.

*Payment quantity* means the pounds of milk production for which an operation is eligible to be paid under this subpart.

*Producer* means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity, as defined in 7 CFR 1400.3, who is, or whose members are, a citizen of or legal resident alien in the United States, and who directly or indirectly, as determined by the Secretary, shares in the risk of producing milk, and who is entitled to a share of the commercial production available for marketing from the dairy operation. This term, and other terms in this subpart, will in any case be applied in a way that allows MILC records to be used to make DELAP payments.

*United States* means the 50 States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

*Verifiable production records* means evidence that is used to substantiate the amount of production marketed commercially by a dairy operation and its producers and that can be verified by FSA through an independent source.

**§ 760.1303****§ 760.1303 Requesting benefits.**

(a) If as a dairy operation or producer, your records are currently available in the FSA county office from previous participation in a fiscal year 2009 dairy program administered by FSA, you do not need to request benefits under this subpart to receive payments. FSA will make payments as specified in this subpart to eligible dairy producers based on production data maintained by the FSA county office for the months of February through July 2009.

(b) If records are not available in the FSA county office, dairy producers may request benefits. The request for benefits may be a letter or email; no specific form is required.

(1) Submit your request for DELAP to: Deputy Administrator for Farm Programs, FSA, USDA, STOP 0512, 1400 Independence Avenue, SW., Washington, DC 20250-0512; Attention: DELAP Program. Or you may send your request for DELAP via fax to (202) 690-1536 or e-mail to *Danielle.Cooke@wdc.usda.gov*.

(2) The complete request as described in this subpart must be received by FSA by the close of business on January 19, 2010.

(3) The complete request for benefits must include all of the following:

(i) The name and location of the dairy operation;

(ii) Contact information for the dairy operation, including telephone number;

(iii) Name, percentage share, and tax identification number for the entity or individual producer's receiving a share of the payment; and

(iv) Proof of production (acceptable documentation as specified in § 760.1305).

(4) Requests for benefits and related documents not provided to FSA as required by this subpart, will not be approved.

(5) If not already provided and available to FSA, the dairy producer or dairy operation must provide documentation to support:

(i) The amount (quantity in pounds) of milk produced by the dairy operation during the months of February 2009 through July 2009;

(ii) Percentage share of milk production during February through July 2009

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attributed to each producer in the dairy operation; and

(iii) Average adjusted gross income for each individual or entity with a share in the operation and any additional entities or individuals as needed to apply the adjusted gross income rules of these regulations.

(6) Each dairy producer requesting benefits under this subpart is responsible for providing accurate and truthful information and any supporting documentation. If the dairy operation provides the required information, each dairy producer who shares in the risk of a dairy operation's total production is responsible for the accuracy and truthfulness of the information submitted for the request for benefits before the request will be considered complete. Providing a false statement, request, or certification to the Government may be punishable by imprisonment, fines, other penalties, or sanctions.

(c) All information provided by the dairy producer or dairy operation is subject to verification, spot check, and audit by FSA. Further verification information may be obtained from the dairy operation's milk handler or marketing cooperative if necessary for FSA to verify provided information. Refusal to allow FSA or any other USDA agency to verify any information provided or the inability of FSA to verify such information will result in a determination of ineligibility for benefits under this subpart.

(d) Data furnished by dairy producers and dairy operations, subject to verification, will be used to determine eligibility for program benefits. Although participation in the DELAP program is voluntary, program benefits will not be provided unless a producer or operation furnishes all requested data or such data is already recorded at the FSA county office.

**§ 760.1304 Eligibility.**

(a) Payment under DELAP will only be made to producers, but the dairy "operation" must first qualify its production within limits provided for in this subpart in order to have the individuals or entities that qualify as "producers" receive payment subject to whatever additional limits (such as

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the adjusted gross income provisions of these regulations) apply. As needed the agency may construe the terms of this regulation in any manner needed to facilitate and expedite payments using existing data and records from other assistance programs. Further, those parties (State and local governments and their political subdivisions and related agencies) excluded from the MILC program will not be eligible for DELAP payments notwithstanding any other provision of these regulation. That said, to be eligible to receive payments under this subpart, a dairy producer in the United States must:

(1) Have produced milk in the United States and commercially marketed the milk produced any time during February 2009 through July 2009;

(2) Be a producer, as defined in § 760.1302;

(3) Provide FSA with proof of milk production commercially marketed by all dairy producers in the dairy operation during February 2009 through July 2009; and

(4) Submit an accurate and complete request for benefits as specified in § 760.1303, if production data is not available in the FSA county office.

(b) To be eligible to receive a payment, each producer in an eligible dairy operation must meet the average adjusted gross income eligibility requirements of 7 CFR part 1400. No person or entity will be eligible to receive any payment or direct or indirect benefit under this subpart if their annual average adjusted nonfarm income is over \$500,000 as determined under 7 CFR part 1400. In the case of indirect benefits, direct benefits to other parties will be reduced accordingly. This will mean that all of the attribution rules of part 1400 will apply. For example if Individual A is over the limit and owns 100 percent of Corporation C which had a 20 percent interest in Corporation B which had a 50 percent interest in milk producer Corporation A, the AGI of Individual A would result in a 10 percent (100 percent times 20 percent times 50 percent) loss in benefits to Corporation A. For DELAP, the relevant period for the annual average adjusted nonfarm income is 2005 through 2007.

(1) Individual dairy producers in a dairy operation that is an entity are only eligible for a payment based on their share of the dairy operation.

(2) No payment will be made to any other producer based on the share of any dairy producer who exceeds the income limit or who, because of the attribution rules, has their payment reduced.

**§ 760.1305 Proof of production.**

(a) Dairy producers requesting benefits must, as required by this subpart, provide adequate proof of the dairy operation's eligible production during the months of February through July 2009, if those records are not already available at the FSA county office. The dairy operation must also provide proof that the eligible production was also commercially marketed during the same period.

(b) To be eligible for payment, dairy producers marketing milk during February through July 2009 must provide any required supporting documents to assist FSA in verifying production. Supporting documentation may be provided by either the dairy producer or by the dairy operation for each of its producers. Examples of supporting documentation may include, but are not limited to: Milk marketing payment stubs, tank records, milk handler records, daily milk marketings, copies of any payments received as compensation from other sources, or any other documents available to confirm the production and production history of the dairy operation. Dairy operations and producers may also be required to allow FSA to examine the herd of cattle as production evidence. If supporting documentation requested is not presented to FSA, the request for benefits will be denied.

**§ 760.1306 Availability of funds.**

(a) Payments under this subpart are subject to the availability of funds. The total available program funds are \$290,000,000.

(b) FSA will prorate the available funds by a national factor to ensure payments do not exceed \$290,000,000. The payment will be made based on the national payment rate as determined

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by FSA. FSA will prorate the payments based on the amount of milk production eligible for payments in a fair and reasonable manner.

(c) A reserve will be created to handle new applications, appeals, and errors.

**§ 760.1307 Dairy operation payment quantity.**

(a) A dairy operation's payment quantity (the quantity of milk on which the "operation" can generate payments for "producers" involved in the operation) will be determined by FSA, based on the pounds of production of commercially marketed milk during the months of February 2009 through July 2009, multiplied by two.

(b) The maximum payment quantity for which a dairy operation can generate payments for its dairy producers under this subpart will be 6,000,000 pounds.

(c) The dairy operation's payment quantity will be used to determine the amount of DELAP payments made to dairy producers.

**§ 760.1308 Payment rate.**

(a) A national per-hundredweight payment rate will be calculated by dividing the available funding, less a reserve established by FSA, by the total pounds of eligible production approved for payment.

(b) Each eligible dairy producer's payment with respect to an operation will be calculated by multiplying the payment rate determined in paragraph (a) of this section by the dairy producer's share in the dairy operation's eligible production payment quantity as determined in accordance with section § 760.1307.

(c) In the event that approval of all eligible requests for benefits would result in expenditures in excess of the amount available, FSA will reduce the payment rate in a manner that FSA determines to be fair and reasonable.

**§ 760.1309 Appeals.**

The appeal regulations set forth at 7 CFR parts 11 and 780 apply to determinations made under this subpart.

**7 CFR Ch. VII (1-1-24 Edition)****§ 760.1310 Misrepresentation and scheme or device.**

(a) In addition to other penalties, sanctions or remedies as may apply, a dairy producer or operation will be ineligible to receive benefits under this subpart if the producer or operation is determined by FSA to have:

- (1) Adopted any scheme or device that tends to defeat the purpose of this subpart;
- (2) Made any fraudulent representation; or
- (3) Misrepresented any fact affecting a program determination.

(b) Any payment to any person or operation engaged in a misrepresentation, scheme, or device, must be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and receiving payment under this subpart will be jointly and severally liable with other producers or operations involved in such claim for benefits for any refund due under this section and for related charges. The remedies provided in this subpart will be in addition to other civil, criminal, or administrative remedies that may apply.

**§ 760.1311 Death, incompetence, or disappearance.**

(a) In the case of the death, incompetency, or disappearance of a person or the dissolution of an entity that is eligible to receive benefits in accordance with this subpart, such alternate person or persons specified in 7 CFR part 707 may receive such benefits, as determined appropriate by FSA.

(b) Payments may be made to an otherwise eligible dairy producer who is now deceased or to a dissolved entity if a representative who currently has authority to enter into an application for the producer or the producer's estate makes the request for benefits as specified in § 760.1303. Proof of authority over the deceased producer's estate or a dissolved entity must be provided.

(c) If a dairy producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must be identified in the request for benefits.

**Farm Service Agency, USDA****§ 760.1500****§ 760.1312 Maintaining records.**

(a) Persons requesting benefits under this subpart must maintain records and accounts to document all eligibility requirements specified in this subpart. Such records and accounts must be retained for 3 years after the date of payment to the dairy producer under this subpart.

(b) Destruction of the records after 3 years from the date of payment will be at the decision and risk of the party undertaking the destruction.

**§ 760.1313 Refunds; joint and several liability.**

(a) Any dairy producer that receives excess payment, payment as the result of erroneous information provided by any person, or payment resulting from a failure to comply with any requirement or condition for payment under this subpart, must refund the amount of that payment to FSA.

(b) Any refund required will be due from the date of the disbursement by the agency with interest determined in accordance with paragraph (d) of this section and late payment charges as provided in 7 CFR part 1403.

(c) Each dairy producer that has an interest in the dairy operation will be jointly and severally liable for any refund and related charges found to be due to FSA.

(d) Interest will be applicable to any refunds to FSA required in accordance with 7 CFR parts 792 and 1403. Such interest will be charged at the rate that the U.S. Department of the Treasury charges FSA for funds, and will accrue from the date FSA made the payment to the date the refund is repaid.

(e) FSA may waive the accrual of interest if it determines that the cause of the erroneous payment was not due to any action of the person or entity, or was beyond the control of the person or entity committing the violation. Any waiver is at the discretion of FSA alone.

**§ 760.1314 Miscellaneous provisions.**

(a) *Offset.* FSA may offset or withhold any amount due to FSA from any benefit provided under this subpart in accordance with the provisions of 7 CFR part 1403.

(b) *Claims.* Claims or debts will be settled in accordance with the provisions of 7 CFR part 1403.

(c) *Other interests.* Payments or any portion thereof due under this subpart will be made without regard to questions of title under State law and without regard to any claim or lien against the milk production, or proceeds thereof, in favor of the owner or any other creditor except agencies and instrumentalities of the U.S. Government.

(d) *Assignments.* Any dairy producer entitled to any payment under this part may assign any payments in accordance with the provisions of 7 CFR part 1404.

(e) *Violations of highly erodible land and wetland conservation provisions.* The provisions of part 12 of this title apply to this subpart. That part sets out certain conservation requirements as a general condition for farm benefits.

(f) *Violations regarding controlled substances.* The provisions of § 718.6 of this title, which generally limit program payment eligibility for persons who have engaged in certain offenses with respect to controlled substances, will apply to this subpart.

**Subpart O—Agricultural Disaster Indemnity Programs**

SOURCE: 83 FR 33801, July 18, 2018, unless otherwise noted.

**§ 760.1500 Applicability.**

(a) This subpart specifies the terms and conditions for the 2017 Wildfires and Hurricanes Indemnity Program (2017 WHIP) and the Wildfires and Hurricanes Indemnity Program Plus (WHIP+).

(b) The 2017 WHIP provides disaster assistance for necessary expenses related to crop, tree, bush, and vine losses related to the consequences of wildfires, hurricanes, and Tropical Storm Cindy that occurred in calendar year 2017, and for losses of peach and blueberry crops in calendar year 2017 due to extreme cold, and blueberry productivity losses in calendar year 2018 due to extreme cold and hurricane damage in calendar year 2017.

(c) WHIP+ provides disaster assistance for necessary expenses related to losses of crops, trees, bushes, and vines,

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as a consequence of Hurricanes Michael and Florence, other hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, wildfires, excessive moisture, and qualifying drought occurring in calendar years 2018 and 2019.

[84 FR 48528, Sept. 13, 2019, as amended at 86 FR 445, Jan. 6, 2021]

### § 760.1501 Administration.

(a) Programs under this subpart are administered under the general supervision of the Administrator, Farm Service Agency (FSA), and the Deputy Administrator for Farm Programs, FSA. Programs under this subpart are carried out by FSA State and county committees with instructions issued by the Deputy Administrator.

(b) FSA State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations in this subpart or instructions issued by the Deputy Administrator.

(c) The FSA State committee will take any action required by the regulations in this subpart that the FSA county committee has not taken. The FSA State committee will also:

(1) Correct, or require an FSA county committee to correct, any action taken by the FSA county committee that is not in accordance with the regulations in this subpart; or

(2) Require an FSA county committee to withhold taking any action that is not in accordance with this subpart.

(d) No delegation to an FSA State or county committee precludes the FSA Administrator, the Deputy Administrator, or a designee, from determining any question arising under this subpart or from reversing or modifying any determination made by an FSA State or county committee.

(e) The Deputy Administrator has the authority to permit State and county committees to waive or modify a non-statutory deadline specified in this part.

(f) Items of general applicability to program participants, including, but not limited to, application periods, application deadlines, internal operating guidelines issued to FSA State and county offices, prices, yields, and pay-

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ment factors established under this subpart, are not subject to appeal in accordance with part 780 of this chapter.

[83 FR 33801, July 18, 2018, as amended 84 FR 48528, Sept. 13, 2019]

### § 760.1502 Definitions.

The following definitions apply to this subpart. The definitions in §§ 718.2 and 1400.3 of this title also apply, except where they conflict with the definitions in this section. In the event of conflict, the definitions in this section apply.

*2017 WHIP factor* means the factor in § 760.1511, determined by the Deputy Administrator, that is based on the crop insurance or NAP coverage level elected by the 2017 WHIP participant for a crop for which a payment is being requested; or, as applicable, the factor that applies for a crop of a crop year where the participant had no insurance or NAP coverage.

*2017 WHIP yield* means, for a unit:

(1) For an insured crop, excluding crops located in Puerto Rico, the approved federal crop insurance APH, for the disaster year;

(2) For a NAP covered crop, excluding crops located in Puerto Rico, the approved yield for the disaster year;

(3) For a crop located in Puerto Rico or an uninsured crop, excluding citrus crops located in Florida, the county expected yield for the disaster year; and

(4) For citrus crops located in Florida, the yield based on documentation submitted according to § 760.1511(c)(3), or if documentation is not submitted, the county expected yield.

*Actual production* means the total quantity of the crop appraised, harvested, or assigned, as determined by the FSA State or county committee in accordance with instructions issued by the Deputy Administrator.

*Administrative county office* means the FSA county office designated to make determinations, handle official records, and issue payments for the farm as specified in accordance part 718 of this title.

*Appraised production* means the amount of production determined by FSA, or a company reinsured by the Federal Crop Insurance Corporation (FCIC), that was unharvested but was

determined to reflect the crop's yield potential at the time of appraisal.

*Approved yield* means the amount of production per acre, computed as specified in FCIC's Actual Production History (APH) Program in part 400, subpart G of this title or, for crops not included in part 400, subpart G of this title, the yield used to determine the guarantee. For crops covered under NAP, the approved yield is established according to part 1437 of this title.

*Average adjusted gross farm income* means the average of the portion of adjusted gross income of the person or legal entity that is attributable to activities related to farming, ranching, or forestry. The relevant tax years are:

(1) For 2017 WHIP, 2013, 2014, and 2015; and

(2) For WHIP+, 2015, 2016, and 2017.

*Average adjusted gross income* means the average of the adjusted gross income as defined under 26 U.S.C. 62 or comparable measure of the person or legal entity. The relevant tax years are:

(1) For 2017 WHIP, 2013, 2014, and 2015; and

(2) For WHIP+, 2015, 2016, and 2017.

*Bush* means, a low, branching, woody plant, from which at maturity of the bush, an annual fruit or vegetable crop is produced for commercial market for human consumption, such as a blueberry bush. The definition does not cover nursery stock or plants that produce a bush after the normal crop is harvested.

*Buy-up NAP coverage* means NAP coverage at a payment amount that is equal to an indemnity amount calculated for buy-up coverage computed under section 508(c) or (h) of the Federal Crop Insurance Act and equal to the amount that the buy-up coverage yield for the crop exceeds the actual yield for the crop.

*Catastrophic coverage* has the meaning as defined in § 1437.3 of this title.

*Citrus crops and citrus trees* include grapefruit, lemon, lime, Mandarin, Murcott, orange (all types), pummelo (pomelo), tangelo, tangerine, tangor.

*County disaster yield* means the average yield per acre calculated for a county or part of a county for the applicable crop year based on disaster events, and is intended to reflect the

amount of production that a participant would have been expected to make based on the eligible disaster conditions in the county or area, as determined by the FSA county committee in accordance with instructions issued by the Deputy Administrator.

*County expected yield* has the meaning assigned in § 1437.102(b) of this title.

*Coverage level* means the percentage determined by multiplying the elected yield percentage under a crop insurance policy or NAP coverage by the elected price percentage.

*Crop insurance* means an insurance policy reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended. It does not include private plans of insurance.

*Crop insurance indemnity* means, for the purpose of this subpart, the payment to a participant for crop losses covered under crop insurance administered by RMA in accordance with the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Crop year* means:

(1) For insurable crops, trees, bushes, and vines, the crop year as defined according to the applicable crop insurance policy;

(2) For NAP eligible crops, the crop year as defined in § 1437.3 of this title;

(3) For uninsurable trees, bushes, and vines, the calendar year in which the qualifying disaster event occurred.

*Damage factor* means a percentage of the value lost when a tree, bush, or vine is damaged and requires rehabilitation but is not completely destroyed, as determined by the Deputy Administrator.

*Eligible crop* means a crop for which coverage was available either from FCIC under part 400 of this title, or through NAP under § 1437.4 of this title, that was affected by a qualifying disaster event.

*Eligible disaster event* means a disaster event that was:

(1) For insured crops, an eligible cause of loss under the applicable crop insurance policy for the crop year;

(2) For NAP covered crops and uninsured crops, an eligible cause of loss as specified in § 1437.10 of this title.

*End use* means the purpose for which the harvested crop is used, such as grain, hay, or seed.

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*Expected production* means, for an agricultural unit, the historic yield multiplied by the number of planted or prevented planted acres of the crop for the unit.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation of USDA, administered by RMA.

*Final planting date* means the latest date, established by RMA for insurable crops, by which the crop must initially be planted in order to be insured for the full production guarantee or amount of insurance per acre. For NAP eligible crops, the final planting date is as defined in § 1437.3 of this title.

*Growth stage* means a classification system for trees, bushes, and vines based on a combination of age and production capability, determined by:

(1) The applicable insurance policy for insurable trees, bushes, and vines; or

(2) The Deputy Administrator for trees, bushes, and vines for which RMA does not offer an insurance policy.

*Harvested* means:

(1) For insurable crops, harvested as defined according to the applicable crop insurance policy;

(2) For NAP eligible single harvest crops, that a crop has been removed from the field, either by hand or mechanically;

(3) For NAP eligible crops with potential multiple harvests in 1 year or harvested over multiple years, that the producer has, by hand or mechanically, removed at least one mature crop from the field during the crop year;

(4) For mechanically-harvested NAP eligible crops, that the crop has been removed from the field and placed in a truck or other conveyance, except hay is considered harvested when in the bale, whether removed from the field or not. Grazed land will not be considered harvested for the purpose of determining an unharvested or prevented planting payment factor.

*Insurable crop* means an agricultural crop (excluding livestock) for which the producer on a farm is eligible to obtain a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501-1524).

*Multi-use crop* means a crop intended for more than one end use during the

crop year such as grass harvested for seed, hay, and grazing.

*Multiple cropping* means the planting of two or more different crops on the same acreage for harvest within the same crop year.

*Multiple planting* means the planting for harvest of the same crop in more than one planting period in a crop year on different acreage.

*NASS* means the National Agricultural Statistics Service.

*NAP* means the Noninsured Crop Disaster Assistance Program under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333) and part 1437 of this title.

*NAP covered crop* means a crop for which the producer on a farm obtained NAP coverage.

*NAP eligible crop* means an agricultural crop for which the producer on a farm is eligible to obtain NAP coverage.

*NAP service fee* means the amount the producer must pay to obtain NAP coverage.

*Planted acreage* means land in which seed, plants, or trees have been placed, appropriate for the crop and planting method, at a correct depth, into a seedbed that has been properly prepared for the planting method and production practice normal to the USDA plant hardiness zone as determined by the county committee.

*Prevented planting* means the inability to plant an eligible crop with proper equipment during the planting period as a result of an eligible cause of loss, as determined by FSA.

*Price* means price per unit of the crop or commodity and will be:

(1) For an insured crop under a crop insurance policy that establishes a price, and under WHIP+, the price for a crop for which the producer obtained a revenue plan of insurance is the greater of the projected price or the harvest price to determine liability, that established price;

(2) For an insured crop under a crop insurance policy that does not establish a price to determine crop insurance liability, the county average price, as determined by FSA;

(3) For a NAP covered crop or uninsured crop, the average market price determined in § 1437.12 of this title; or

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(4) For a tree, bush, or vine, the price determined by the Deputy Administrator based on the species of tree, bush, or vine and its growth stage.

*Production* means quantity of the crop or commodity produced expressed in a specific unit of measure including, but not limited to, bushels or pounds. Production under this subpart includes all harvested production, unharvested appraised production, and assigned production for the total planted acreage of the crop on the unit.

*Qualifying disaster event* means:

(1) For 2017 WHIP, a hurricane, wildfire, or Tropical Storm Cindy or related condition that occurred in the 2017 calendar year; extreme cold in calendar year 2017 for losses of peach and blueberry crops in calendar year 2017; and extreme cold and hurricane damage in calendar year 2017 for blueberry productivity losses in calendar year 2018; and

(2) For WHIP+, a hurricane, flood, tornado, typhoon, volcanic activity, snowstorm, wildfire, excessive moisture, qualifying drought, or related condition that occurred in the 2018 or 2019 calendar year.

*Qualifying drought* means an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year.

*Related condition* means damaging weather or an adverse natural occurrence that occurred as a direct result of a specified qualifying disaster event, as determined by FSA, such as excessive rain, high winds, flooding, mudslides, and heavy smoke, as determined by the Deputy Administrator.

*Repeat crop* means, with respect to production, a commodity that is planted or prevented from being planted in more than one planting period on the same acreage in the same crop year.

*RMA* means the Risk Management Agency.

*Salvage value* means the dollar amount or equivalent for the quantity of the commodity that cannot be marketed or sold in any recognized market for the crop.

*Secondary use* means the harvesting of a crop for a use other than the intended use.

*Secondary use value* means the value determined by multiplying the quantity of secondary use times the FSA-established price for that use.

*Tree* means a tall, woody plant having comparatively great height, and a single trunk from which an annual crop is produced for commercial market for human consumption, such as a maple tree for syrup, or papaya or orchard tree for fruit. It includes immature trees that are intended for commercial purposes. Nursery stock, banana and plantain plants, and trees used for pulp or timber are not considered eligible trees under this subpart.

*Tropical crops* is defined in §1437.501 of this title.

*Tropical region* is defined in §1437.502 of this title.

*Unharvested payment factor* means a percentage established by FSA for a crop and applied in a payment formula to reduce the payment for reduced expenses incurred because commercial harvest was not performed.

*Uninsured* means a crop that was not covered by crop insurance or NAP for the crop year for which a payment is being requested under this subpart.

*Unit* means, unless otherwise determined by the Deputy Administrator, basic unit as defined in part 457 or §1437.9 of this title, for ornamental nursery production, includes all eligible plant species and sizes.

*Unit of measure* means:

(1) For insurable crops, the FCIC-established unit of measure; and

(2) For NAP eligible crops, the established unit of measure used for the NAP price and yield.

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

*USDA Plant Hardiness Zone* means the 11 regions or planting zones as defined by a 10 degree Fahrenheit difference in the average annual minimum temperature.

*U.S. drought monitor* is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National

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Drought Mitigation Center at <http://droughtmonitor.unl.edu>.

*Value loss crop* has the meaning specified in subpart D, of part 1437 of this title.

*Vine* means a perennial plant grown under normal conditions from which an annual fruit crop is produced for commercial market for human consumption, such as grape, kiwi, or passion fruit, and that has a flexible stem supported by climbing, twining, or creeping along a surface. Nursery stock, perennials that are normally propagated as annuals such as tomato plants, biennials such as strawberry plants, and annuals such as pumpkin, squash, cucumber, watermelon, and other melon plants, are excluded from the term vine in this subpart.

*WHIP+ factor* means the factor in § 760.1511, determined by the Deputy Administrator, that is based on the crop insurance or NAP coverage level elected by the WHIP+ participant for a crop for which a payment is being requested; or, as applicable, the factor that applies for a crop during a crop year in which the participant had no insurance or NAP coverage.

*WHIP+ yield* means, for a unit:

(1) For an insured crop, excluding crops located in Puerto Rico, the approved federal crop insurance APH, for the crop year;

(2) For a NAP covered crop, excluding crops located in Puerto Rico, the approved yield for the crop year;

(3) For a crop located in Puerto Rico or an uninsured crop, excluding select crops, the county expected yield for the crop year; and

(4) For select crops, the yield based on documentation submitted according to § 760.1511(c)(3), or if documentation is not submitted, the county expected yield.

*Yield* means unit of production, measured in bushels, pounds, or other unit of measure, per area of consideration, usually measured in acres.

[83 FR 33801, July 18, 2018, as amended 84 FR 48529, Sept. 13, 2019; 86 FR 445, Jan. 6, 2021]

### § 760.1503 Eligibility.

(a) Participants will be eligible to receive a payment under this subpart only if they incurred a loss to an eligible crop, tree, bush, or vine due to a

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qualifying disaster event, as further specified in this subpart.

(b) To be an eligible participant under this subpart a producer who is a person or legal entity must be a:

(1) Citizen of the United States;

(2) Resident alien; for purposes of this subpart, resident alien means "lawful alien;"

(3) Partnership consisting of solely of citizens of the United States or resident aliens; or

(4) Corporation, limited liability company, or other organizational structure organized under State law consisting solely of citizens of the United States or resident aliens.

(c) If any person who would otherwise be eligible to receive a payment dies before the payment is received, payment may be released as specified in § 707.3 of this title. Similarly, if any person or legal entity who would otherwise been eligible to apply for a payment dies or is dissolved, respectively, before the payment is applied for, payment may be released in accordance with this subpart if a timely application is filed by an authorized representative. Proof of authority to sign for the deceased producer or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application for payment. Eligibility of such participant will be determined, as it is for other participants, based upon ownership share and risk in producing the crop.

(d) Growers growing eligible crops under contract for crop owners are not eligible unless the grower is also determined to have an ownership share of the crop. Any verbal or written contract that precludes the grower from having an ownership share renders the grower ineligible for payments under this subpart.

(e) A person or legal entity is not eligible to receive disaster assistance under this subpart if it is determined by FSA that the person or legal entity:

(1) Adopted any scheme or other device that tends to defeat the purpose of this subpart or any of the regulations applicable to this subpart;

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(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination under any or all of the following: This subpart and parts 12, 400, 1400, and 1437 of this title.

(g) A person ineligible for crop insurance or NAP under §§ 400.458 or 1437.16 of this title, respectively, for any year is ineligible for payments under this subpart for the same year.

(h) The provisions of § 718.11 of this title, providing for ineligibility for payments for offenses involving controlled substances, apply.

(i) As a condition of eligibility to receive payments under this subpart, the participant must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of part 12 of this title for the applicable crop year for which the producer is applying for benefits under this subpart, and must not otherwise be precluded from receiving payments under parts 12, 400, 1400, or 1437 of this title or any law.

(j) Members of cooperative processors are not eligible for WHIP+ assistance for sugar beet losses.

[83 FR 33801, July 18, 2018, as amended 84 FR 48529, Sept. 13, 2019; 86 FR 445, Jan. 6, 2021]

**§ 760.1504 Miscellaneous provisions.**

(a) All persons with a financial interest in the legal entity receiving payments under this subpart are jointly and severally liable for any refund, including related charges, which is determined to be due to FSA for any reason.

(b) In the event that any application for payment under this subpart resulted from erroneous information or a miscalculation, the payment will be recalculated and any excess refunded to FSA with interest to be calculated from the date of the disbursement.

(c) Any payment to any participant under this subpart will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in part 792 of this chapter apply to payments made under this subpart.

(d) Any participant entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 792 of this chapter.

(e) The regulations in parts 11 and 780 of this title apply to determinations under this subpart.

**§ 760.1505 General provisions.**

(a) For loss calculations, the participant's unit structure will be:

(1) For an insured crop, the participant's existing unit structure established in accordance with part 457 of this title;

(2) For a crop with NAP coverage, the participant's existing unit structure established in accordance with part 1437 of this title;

(3) For an uninsured crop, the participant's unit structure established in accordance with part 1437 of this title.

(b) FSA county committees will make the necessary adjustments to assign production or reduce the 2017 WHIP yield or WHIP+ yield when the county committee determines:

(1) An acceptable appraisal or record of harvested production does not exist;

(2) The loss is due to an ineligible cause of loss;

(3) The loss is due to practices, soil type, climate, or other environmental factors that cause lower yields than those upon which the historic yield is based;

(4) The participant has a contract providing a guaranteed payment for all or a portion of the crop; or

(5) The crop was planted beyond the normal planting period for the crop.

(c) Assignment of production or reduction in yield will apply for practices that result in lower yields than those for which the historic yield is based.

(d) Eligibility and payments under this subpart will be determined based on a unit's:

(1) Physical location county for insured crops; and

(2) Administrative county for NAP covered crops and uninsured crops.

(e) FSA may separate or combine types and varieties as a crop for eligibility and payment purposes under this subpart when specific credible information as determined by FSA shows the crop of a specific type or variety has a

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significantly different or similar value, respectively, when compared to other types or varieties, as determined by the Deputy Administrator.

(f) Unless otherwise specified, all the eligibility provisions of part 1437 of this title apply to value loss crops and tropical crops under this subpart.

(g) The quantity or value of a crop will not be reduced for any quality consideration unless a zero value is established based on a total loss of quality, except as specified in § 760.1513(i).

(h) FSA will use the most reliable data available at the time payments under this subpart are calculated. If additional data or information is provided or becomes available after a payment is issued, FSA will recalculate the payment amount and the producer must return any overpayment amount to FSA. In all cases, payments can only issue based on the payment formula for losses that affirmatively occurred.

(i) A participant who received a payment for a loss under 2017 WHIP cannot:

(1) Be paid for the same loss under WHIP+; or

(2) Refund the 2017 WHIP payment to be eligible for payment for that loss under WHIP+.

[83 FR 33801, July 18, 2018, as amended 84 FR 48529, Sept. 13, 2019]

### § 760.1506 Availability of funds and timing of payments.

(a) For 2017 WHIP:

(1) An initial payment will be issued for 50 percent of each 2017 WHIP payment calculated according to this subpart, as determined by the Secretary. The remainder of the calculated 2017 WHIP payment will be paid to a participant only after the application period has ended and any crop insurance indemnity or NAP payment the participant is entitled to receive for the crop has been calculated and reported to FSA, and then only if there are funds available for such payment as discussed in this subpart.

(2) In the event that, within the limits of the funding made available by the Secretary, approval of eligible applications would result in payments in excess of the amount available, FSA will prorate payments by a national

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factor to reduce the payments to an amount that is less than available funds as determined by the Secretary. FSA will prorate the payments in such manner as it determines equitable.

(3) Applications and claims that are unpaid or prorated for any reason will not be carried forward for payment under other funds for later years or otherwise, but will be considered, as to any unpaid amount, void and nonpayable.

(b) For WHIP:

(1) For the 2018 crop year, the calculated WHIP+ payment will be paid at 100 percent.

(2) For the 2019 and 2020 crop years, an initial payment will be issued for 50 percent of each WHIP+ payment calculated according to this subpart, as determined by the Secretary. Up to the remaining 50 percent of the calculated WHIP+ payment will be paid only to the extent that there are funds available for such payment as discussed in this subpart.

(3) In the event that, within the limits of the funding made available by the Secretary, approval of eligible applications would result in payments in excess of the amount available, FSA will prorate 2019 and 2020 payments by a national factor to reduce the payments to the remaining available funds, as determined by the Secretary. FSA will prorate the payments accordingly.

(4) Applications and claims that are unpaid or prorated for aforementioned reasons of fund availability will not be carried forward for payment and will be considered, as to any unpaid amount, void and non-payable.

[83 FR 33801, July 18, 2018, as amended 84 FR 48529, Sept. 13, 2019]

### § 760.1507 Payment limitation.

(a) For any 2017 WHIP payments for the 2017 or 2018 crop year combined, a person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, 2017 WHIP payments of not more than:

(1) \$125,000, if less than 75 percent of the person or legal entity's average adjusted gross income is average adjusted gross farm income; or

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(2) \$900,000, if not less than 75 percent of the average adjusted gross income of the person or legal entity is average adjusted gross farm income.

(b) For any WHIP+ payments, a person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, WHIP+ payments of not more than:

(1) \$125,000 combined for the 2018, 2019, and 2020 crop years, if less than 75 percent of the person or legal entity's average adjusted gross income is average adjusted gross farm income; or

(2) \$250,000 for each of the 2018, 2019, and 2020 crop years, if 75 percent or more of the average adjusted gross income of the person or legal entity is average adjusted gross farm income, and such payments cannot exceed a total of \$500,000 combined for all of the 2018, 2019, and 2020 crop years.

(c) A person or legal entity's average adjusted gross income and average adjusted gross farm income are determined based on the:

(1) 2013, 2014, and 2015 tax years for 2017 WHIP;

(2) 2015, 2016, and 2017 tax years for WHIP+.

(d) To be eligible for more than \$125,000 in payments for the applicable period specified in this section, a person or legal entity must submit FSA-892 and provide a certification in the manner prescribed by FSA from a certified public accountant or attorney that at least 75 percent of the person or legal entity's average adjusted gross income was average adjusted gross farm income. Persons or legal entities who fail to provide FSA-892 and the required certification may not receive a 2017 WHIP payment, directly or indirectly, of more than \$125,000.

(e) The direct attribution provisions in part 1400 of this chapter apply to payments under this subpart for both payment limitation as well as in determining average AGI as defined and used in this rule.

[83 FR 33801, July 18, 2018, as amended 84 FR 48529, Sept. 13, 2019]

**§ 760.1508 Qualifying disaster events.**

(a) A producer will be eligible for payments under this subpart for a crop, tree, bush, or vine loss only if the producer suffered a loss to the crop, tree,

bush, or vine on the unit due to a qualifying disaster event.

(b) For a loss due to hurricane and conditions related to hurricanes, the crop, tree, bush, or vine loss must have occurred on acreage that was physically located in a county that received a:

(1) Presidential Emergency Disaster Declaration authorizing public assistance for categories C through G or individual assistance due to a hurricane occurring in the 2017 calendar year; or

(2) Secretarial Disaster Designation for a hurricane occurring in the 2017 calendar year.

(c) A producer with crop, tree, bush, or vine losses on acreage not located in a physical location county that was eligible under paragraph (b) of this section will be eligible for 2017 WHIP for losses due to hurricane and related conditions only if the producer provides supporting documentation that is acceptable to FSA from which the FSA county committee determines that the loss of the crop, tree, bush, or vine on the unit was reasonably related to a qualifying disaster event as specified in this subpart. Supporting documentation may include furnishing climatological data from a reputable source or other information substantiating the claim of loss due to a qualifying disaster event.

(d) For a loss due to wildfires and conditions related to wildfire in the 2017 calendar year, all counties where wildfires occurred, as determined by FSA county committees, are eligible for 2017 WHIP; a Presidential Emergency Disaster Declaration or Secretarial Disaster Designation for wildfire is not required. The loss of the crop, tree, bush, or vine must be reasonably related to wildfire and conditions related to wildfire, as specified in this subpart's definition of qualifying disaster event.

(e) For WHIP+, for a loss due to a qualifying disaster event, the crop, tree, bush, or vine loss must have occurred on acreage that was physically located in a county that received a:

(1) Presidential Emergency Disaster Declaration authorizing public assistance for categories C through G or individual assistance due to a qualifying

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disaster event occurring in the 2018 or 2019 calendar years; or

(2) Secretarial Disaster Designation for a qualifying disaster event occurring in the 2018 or 2019 calendar years.

(f) A producer with crop, tree, bush, or vine losses on acreage not located in a physical location county that was eligible under paragraph (e) of this section will be eligible for WHIP+ for losses due to qualifying disaster events only if the producer provides supporting documentation that is acceptable to FSA from which the FSA county committee determines that the loss of the crop, tree, bush, or vine on the unit was reasonably related to a qualifying disaster event as specified in this subpart. Supporting documentation may include furnishing climatological data from a reputable source or other information substantiating the claim of loss due to a qualifying disaster event.

[83 FR 33801, July 18, 2018, as amended 84 FR 48530, Sept. 13, 2019; 86 FR 445, Jan. 6, 2021]

### § 760.1509 Eligible and ineligible losses.

(a) Except as provided in paragraphs (b) through (e) of this section, to be eligible for payments under this subpart the unit must have suffered a loss of the crop, tree, bush, or vine, or prevented planting of a crop, due to a qualifying disaster event.

(b) A loss will not be eligible under this subpart if any of the following apply:

(1) The cause of loss is determined by FSA to be the result of poor management decisions, poor farming practices, or drifting herbicides;

(2) The cause of loss was due to failure of the participant to re-seed or re-plant to the same crop in a county where it is customary to re-seed or re-plant after a loss before the final planting date;

(3) The cause of loss was due to water contained or released by any governmental, public, or private dam or reservoir project if an easement exists on the acreage affected by the containment or release of the water;

(4) The cause of loss was due to conditions or events occurring outside of the applicable growing season for the crop, tree, bush, or vine;

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(5) The cause of loss was due to failure of a power supply or brownout; or

(6) FSA or RMA have previously disapproved a notice of loss for the crop and disaster event unless that notice of loss was disapproved solely because it was filed after the applicable deadline.

(c) The following types of loss, regardless of whether they were the result of an eligible disaster event, are not eligible losses:

(1) Losses to crops intended for grazing;

(2) Losses to crops for which FCIC coverage or NAP coverage is unavailable;

(3) Losses to volunteer crops;

(4) Losses to crops not intended for harvest;

(5) Losses of by-products resulting from processing or harvesting a crop, such as, but not limited to, cotton seed, peanut shells, wheat or oat straw, or corn stalks or stovers;

(6) Losses to home gardens;

(7) Losses of first year seeding for forage production, or immature fruit crops; or

(8) Losses to crops that occur after harvest.

(d) The following losses of ornamental nursery stock are not eligible losses:

(1) Losses caused by the inability to market nursery stock as a result of lack of compliance with State and local commercial ordinances and laws, quarantine, boycott, or refusal of a buyer to accept production;

(2) Losses affecting crops where weeds and other forms of undergrowth in the vicinity of nursery stock have not been controlled; or

(3) Losses caused by the collapse or failure of buildings or structures.

(e) The following losses for honey, as a crop, where the honey production by colonies or bees was diminished, are not eligible losses:

(1) Losses caused by the unavailability of equipment or the collapse or failure of equipment or apparatus used in the honey operation;

(2) Losses caused by improper storage of honey;

(3) Losses caused by bee feeding;

(4) Losses caused by the application of chemicals;

(5) Losses caused by theft;

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- (6) Losses caused by the movement of bees by or for the participant;
- (7) Losses caused by disease or pest infestation of the colonies, unless approved by the Deputy Administrator;
- (8) Losses of income from pollinators; or
- (9) Losses of equipment or facilities.

(f) Qualifying losses for trees, bushes, and vines will not include losses:

- (1) That could have been prevented through reasonable and available measures; and
- (2) To trees, bushes, or vines that were abandoned or were not in use or intended for commercial operation at the time of the loss.

[83 FR 33801, July 18, 2018, as amended 84 FR 48530, Sept. 13, 2019]

**§ 760.1510 Application for payment.**

(a) An application for payment under this subpart must be submitted to the FSA county office serving as the farm's administrative county office by the close of business on October 30, 2020. Producers must submit:

(1) For 2017 WHIP, a completed form FSA-890, Wildfires and Hurricanes Indemnity Program Application; or

(2) For WHIP+, a completed form FSA-894, Wildfires and Hurricanes Indemnity Program + Application.

(b) Once signed by a producer, the application for payment is considered to contain information and certifications of and pertaining to the producer regardless of who entered the information on the application.

(c) The producer applying for payment under this subpart certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information is subject to verification or spot check by FSA at any time, either before or after payment is issued. Refusal to allow FSA or any agency of the Department of Agriculture to verify any information provided will result in the participant's forfeiting eligibility for payment under this subpart. FSA may at any time, including before, during, or after processing and paying an application, require the producer to submit any additional information necessary to implement or determine any eligibility provision of

this subpart. Furnishing required information is voluntary; however, without it FSA is under no obligation to act on the application or approve payment. Providing a false certification will result in ineligibility and can also be punishable by imprisonment, fines, and other penalties.

(d) The application submitted in accordance with paragraph (a) of this section is not considered valid and complete for issuance of payment under this subpart unless FSA determines all the applicable eligibility provisions have been satisfied and the participant has submitted all of following completed forms and information:

(1) Report of all acreage for the crop for the unit for which payments under this subpart are requested, on FSA-578, Report of Acreage, or in another format acceptable to FSA;

(2) AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification; and

(3) For 2017 WHIP:

(i) FSA-891, Crop Insurance and/or NAP Coverage Agreement;

(ii) FSA-892, Request for an Exception to the WHIP Payment Limitation of \$125,000, if the applicant is requesting 2017 WHIP payments in excess of the \$125,000 payment limitation; and

(iii) FSA-893, 2018 Citrus Actual Production History and Approved Yield Record, Florida Only, for participants applying for payment for a citrus crop located in Florida;

(4) For WHIP+:

(i) FSA-895, Crop Insurance and/or NAP Coverage Agreement;

(ii) FSA-896, Request for an Exception to the WHIP Payment Limitation of \$125,000, if 75 percent or more of an applicant's average AGI is attributable to activities related to farming, ranching, or forestry and the applicant wants to be eligible to receive WHIP+ payments of more than \$125,000, up to the \$250,000 payment limitation per crop year, with an overall WHIP+ limit of \$500,000; and

(iii) FSA-897, Actual Production History and Approved Yield Record (WHIP+ Select Crops Only), for applicants requesting payments for select crops.

(e) Application approval and payment by FSA does not relieve a participant

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from having to submit any form required, but not filed, according to paragraph (d) of this section.

[83 FR 33801, July 18, 2018, as amended 84 FR 48530, Sept. 13, 2019; 86 FR 446, Jan. 6, 2021]

**§ 760.1511 Calculating payments for yield-based crop losses.**

(a) Payments made under this subpart to a participant for a loss to yield-based crops, including losses due to prevented planting, subject to § 760.1514(i) and (j), are determined for a unit by:

(1) Multiplying the eligible acres by the 2017 WHIP yield in paragraph (c) of this section or the WHIP+ yield in paragraph (d) of this section by the price;

(2) Multiplying the result from paragraph (a)(1) of this section by the applicable 2017 WHIP factor or WHIP+ factor in paragraph (b) of this section;

(3) Multiplying the applicable production in paragraph (d) of this section by the price;

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(4) Subtracting the result from paragraph (a)(3) of this section from the result of paragraph (a)(2) of this section;

(5) Multiplying the result from paragraph (a)(4) of this section by the participant's share in paragraph (e) of this section;

(6) Multiplying the result from paragraph (a)(5) of this section by the applicable payment factor in paragraph (g) of this section;

(7) Subtracting the amount of the gross insurance indemnity or NAP payment from the result from paragraph (a)(6) of this section;

(8) Subtracting the secondary use or salvage value of the crop from the result from paragraph (a)(7) of this section; and

(b) If the NAP or crop insurance coverage is at the coverage level listed in the first column, then the 2017 WHIP factor is listed in the second column, and the WHIP+ factor is listed in the third column:

TABLE 1 TO § 760.1511(b)

Coverage level	2017 WHIP factor (percent)	WHIP+ factor (percent)
(1) No crop insurance or No NAP coverage .....	65	70
(2) Catastrophic coverage .....	70	75
(3) More than catastrophic coverage but less than 55 percent .....	72.5	77.5
(4) At least 55 percent but less than 60 percent .....	75	80
(5) At least 60 percent but less than 65 percent .....	77.5	82.5
(6) At least 65 percent but less than 70 percent .....	80	85
(7) At least 70 percent but less than 75 percent .....	85	87.5
(8) At least 75 percent but less than 80 percent .....	90	92.5
(9) At least 80 percent .....	95	95

(c) The 2017 WHIP yield is:

(1) The producer's APH for insured crops under a crop insurance policy that has an associated yield and for NAP covered crops, excluding all crops located in Puerto Rico;

(2) The county expected yield for crops located in Puerto Rico and uninsured crops, excluding citrus crops located in Florida; or

(3) For uninsured citrus crops located in Florida:

(i) Determined based on information provided on FSA-893 and supported by evidence that meets the requirements of § 760.1513(c), or

(ii) If FSA-893 and supporting documentation are not submitted, the county expected yield.

(d) The WHIP+ yield is:

(1) The producer's APH for insured crops under a crop insurance policy that has an associated yield and for NAP covered crops, excluding all crops located in Puerto Rico;

(2) The county expected yield for crops located in Puerto Rico and uninsured crops, excluding select crops; or

(3) For select crops:

(i) Determined based on information provided on FSA-897 and supported by evidence that meets the requirements of § 760.1513(c), or

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(ii) If FSA-897 and supporting documentation are not submitted, the county expected yield.

(e) The production used to calculate a payment under this subpart will be determined as specified in § 760.1513.

(f) The eligible participant's share of a payment under this subpart is based on the participant's ownership entitlement share of the crop or crop proceeds, or, if no crop was produced, the share of the crop the participant would have received if the crop had been produced. If the participant has no ownership share of the crop, the participant is ineligible for payment.

(g) Payment factors will be used to calculate payments for crops produced with significant and variable production and harvesting expenses that are not incurred because the crop acreage was prevented planted, or planted but not harvested, as determined by FSA. The use of payment factors is based on whether the crop acreage was unharvested or prevented planted, not whether a participant actually incurs or does not incur expenses. Payment factors are generally applicable to all similarly situated participants and are not established in response to individual participants. Accordingly established payment factors are not appealable under parts 11 and 780 of this title. A crop that is intended for mechanical harvest, but subsequently grazed and not mechanically harvested, will have an unharvested payment factor applied.

(h) Production from all end uses of a multi-use crop will be calculated separately and summarized together.

[83 FR 33801, July 18, 2018, as amended 84 FR 48530, Sept. 13, 2019; 86 FR 446, Jan. 6, 2021]

**§ 760.1512 Production losses; participant responsibility.**

(a) For any record submitted along with the certification of production, the record must be either a verifiable or reliable record that substantiates the certification to the satisfaction of the FSA county committee. If the eligible crop was sold or otherwise disposed of through commercial channels, a record of that disposition must be provided to FSA with the certification.

(1) Acceptable production records include:

(i) RMA or NAP records, if accurate and complete;

(ii) Commercial receipts;

(iii) Settlement sheets;

(iv) Warehouse ledger sheets or load summaries; or

(v) Appraisal information from a loss adjuster acceptable to FSA.

(2) If the eligible crop was farm-stored, sold, fed to livestock, or disposed of by means other than verifiable commercial channels, acceptable records for these purposes include:

(i) Truck scale tickets;

(ii) Appraisal information from a loss adjuster acceptable to FSA;

(iii) Contemporaneous reliable diaries; or

(iv) Other documentary evidence, such as contemporaneous reliable measurements.

(3) Determinations of reliability with respect to this paragraph will take into account, as appropriate, the ability for FSA to review and verify or compare the evidence against the similarity of the evidence or reports or data received by FSA for the crop or similar crops. Other factors deemed relevant may also be taken into account.

(b) If RMA or NAP records are not available, or if the FSA county committee determines the RMA or NAP records as reported by the insured or covered participant appear to be questionable or incomplete, or if the FSA county committee makes inquiry, the participant is responsible for:

(1) Retaining and providing, at time of application and whenever required by FSA, the best available verifiable or reliable or other production records for the crop;

(2) Summarizing all the production evidence;

(3) Accounting for the total amount of unit production for the crop, whether or not records reflect this production;

(4) Providing the information in a manner that can be easily understood by the FSA county committee; and

(5) Providing supporting documentation if the FSA county committee has reason to question the disaster event or that all production has been taken into account.

(c) FSA may verify the production evidence submitted with records on file

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at the warehouse, gin, or other entity that received or may have received the reported production.

(d) Participants must provide all records for any production of a crop that is grown with an arrangement, agreement, or contract for guaranteed payment.

(e) Under WHIP+, participants requesting payments for losses to adulterated wine grapes must submit verifiable sales tickets that document that the reduced price received was due to adulteration due to a qualifying disaster event. For adulterated wine grapes that have not been sold, participants must submit verifiable records obtained by testing or analysis to establish that the wine grapes were adulterated due to a qualifying disaster event and the price they would receive due to adulteration.

[83 FR 33801, July 18, 2018, as amended 84 FR 48531, Sept. 13, 2019]

**§ 760.1513 Determination of production.**

(a) The harvested production of eligible crop acreage harvested more than once in a crop year includes the total harvested production from all the harvests in the crop year.

(b) If a crop is appraised and subsequently harvested as the intended use, the actual harvested production must be taken into account to determine payments. FSA will analyze and determine whether a participant's evidence of actual production represents all that could or would have been harvested.

(c) For all crops eligible for loan deficiency payments or marketing assistance loans (see parts 1421 and 1434 of this title) with an intended use of grain but harvested as silage, ensilage, cabbage, hay, cracked, rolled, or crimped, production will be converted to a whole grain equivalent based on conversion factors as previously established by FSA.

(d) If a participant does not receive compensation based upon the quantity of the commodity delivered to a purchaser, but has an agreement or contract for guaranteed payment for production, the determination of the production will be the greater of the actual production or the guaranteed pay-

ment converted to production as determined by FSA.

(e) Production that is commingled between crop years, units, ineligible and eligible acres, or different practices before it was a matter of record or combination of record and cannot be separated by using records or other means acceptable to FSA will be prorated to each respective year, unit, type of acreage, or practice, respectively. Commingled production may be attributed to the applicable unit, if the participant made the unit production of a commodity a matter of record before commingling and does any of the following, as applicable:

(1) Provides copies of verifiable documents showing that production of the commodity was purchased, acquired, or otherwise obtained from beyond the unit;

(2) Had the production measured in a manner acceptable to the FSA county committee; or

(3) Had the current year's production appraised in a manner acceptable to the FSA county committee.

(f) The FSA county committee will assign production for the unit when the FSA county committee determines that:

(1) The participant has failed to provide adequate and acceptable production records;

(2) The loss to the crop is because of a disaster condition not covered by this subpart, or circumstances other than natural disaster, and there has not otherwise been an accounting of this ineligible cause of loss;

(3) The participant carries out a practice, such as multiple cropping, that generally results in lower yields than the established historic yields;

(5) A crop was late-planted;

(6) Unharvested acreage was not timely appraised; or

(7) Other appropriate causes exist for such assignment as determined by the Deputy Administrator.

(g) The FSA county committee will establish a county disaster yield that reflects the amount of production producers would have produced considering the eligible disaster events in the county or area for the same crop. The county disaster yield for the county or

area will be expressed as either a percent of loss or yield per acre. The county disaster yield will apply when:

(1) Unharvested acreage has not been appraised by FSA or a company reinsured by FCIC; or

(2) Acceptable production records for harvested acres are not available from any source.

(h) In no case will the production amount of any applicant be less than the producer's certified loss.

(i) Under WHIP+, production for eligible adulterated wine grapes will be adjusted for quality deficiencies due to a qualifying disaster event. Wine grapes are eligible for production adjustment only if adulteration occurred prior to harvest and as a result of a qualifying disaster event or as a result of a related condition (such as application of fire retardant). Losses due to all other causes of adulteration (such as addition of artificial flavoring or chemicals for economic purposes) are not eligible for WHIP+. Production will be eligible for quality adjustment if, due to a qualifying disaster event, it has a value of less than 75 percent of the average market price of undamaged grapes of the same or similar variety. The value per ton of the qualifying damaged production and the average market price of undamaged grapes will be determined on the earlier of the date the damaged production is sold or the date of final inspection for the unit. Grape production that is eligible for quality adjustment will be reduced by:

(1) Dividing the value per ton of the damaged grapes by the value per ton for undamaged grapes; and

(2) Multiplying this result (not to exceed 1.000) by the number of tons of the eligible damaged grapes.

[83 FR 33801, July 18, 2018, as amended 84 FR 48531, Sept. 13, 2019]

**§ 760.1514 Eligible acres.**

(a) Eligible acreage will be calculated using the lesser of the reported or determined acres shown to have been planted or prevented from being planted to a crop.

(b) Initial crop acreage will be the payment acreage for under this subpart, unless the provisions for subsequent crops in this section are met.

Subsequently planted or prevented planted acre acreage is considered acreage for under this subpart only if the provisions of this section are met. All plantings of an annual or biennial crop are considered the same as a planting of an initial crop in tropical regions as defined in part 1437, subpart F, of this title.

(c) In cases where there is double cropped acreage, each crop may be included in the acreage only if the specific crops are approved by the FSA State committee as eligible double cropping practices in accordance with procedures approved by the Deputy Administrator.

(d) Except for insured crops, participants with double cropped acreage not meeting the criteria in paragraph (c) of this section may have such acreage included in the acreage on more than one crop only if the participant submits verifiable records establishing a history of carrying out a successful double cropping practice on the specific crops for which payment is requested.

(e) Participants having multiple plantings may receive payments for each planting included only if the planting meets the requirements of part 1437 of this title and all other provisions of this subpart are satisfied.

(f) Losses due to prevented planting are eligible under this subpart only if the loss was due to a qualifying disaster event. Provisions of parts 718 and 1437 of this title specifying what is considered prevented planting and how it must be documented and reported apply. Crops located in tropical regions are not eligible for prevented planting.

(g) Subject to the provisions of this subpart, the FSA county committee will:

(1) Use the most accurate data available when determining planted and prevented planted acres; and

(2) Disregard acreage of a crop produced on land that is not eligible for crop insurance or NAP.

(h) If a farm has a crop that has both FSA and RMA acreage for insured crops, eligible acres will be based on the lesser of RMA or FSA acres.

(i) For 2017 WHIP, prevented planting acres will be considered eligible acres if they meet all requirements of this subpart.

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(j) For WHIP+:

(1) 2018 and 2020 crop year prevented planting acres and 2019 crop year uninsured and NAP-covered prevented planting acres will be eligible acres if they meet all requirements of this subpart; and

(2) 2019 crop year insured prevented planting acres will not be eligible acres.

[83 FR 33801, July 18, 2018, as amended 84 FR 48531, Sept. 13, 2019]

**§ 760.1515 Calculating payments for value loss crops.**

(a) Payments made under this subpart to a participant for a loss on a unit with respect to value loss crops are determined by:

(1) Multiplying the field market value of the crop immediately before the qualifying disaster event by the 2017 WHIP factor or WHIP+ factor specified in § 760.1511(b);

(2) Subtracting the sum of the field market value of the crop immediately after the qualifying disaster event and the value of the crop lost due to ineligible causes of loss from the result from paragraph (a)(1) of this section;

(3) Multiplying the result from paragraph (a)(2) of this section by the participant's share;

(4) Multiplying the result from paragraph (a)(3) of this section by the applicable payment factor;

(5) Subtracting the gross insurance indemnity or NAP payment from the result from paragraph (a)(4) of this section;

(6) Subtracting the secondary use or salvage value of the crop from the result from paragraph (a)(5) of this section; and

(7) Subtracting the amount of any payment for future economic losses received under the Florida Citrus Recovery Block Grant Program.

(b) In the case of an insurable value loss crop for which crop insurance provides for an adjustment in the guarantee, liability, or indemnity, such as in the case of inventory exceeding peak inventory value, the adjustment will be used in determining the payment under this subpart for the crop.

(c) In the case of a NAP eligible value loss crop for which NAP provides for an adjustment in the level of assistance,

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such as in the case of unharvested field grown inventory, the adjustment will be used in determining the payment for the crop.

[83 FR 33801, July 18, 2018, as amended 84 FR 48531, Sept. 13, 2019]

**§ 760.1516 Calculating payments for tree, bush, and vine losses.**

(a) Payments will be calculated separately based on the growth stage of the trees, bushes, or vines, as determined by the Deputy Administrator.

(b) Payments made under this subpart to a participant for a loss on a unit with respect to tree, bush, and vine losses are determined by:

(1) Multiplying the expected value (see paragraph (c) of this section) of the trees, bushes, or vines immediately before the qualifying disaster event by the 2017 WHIP factor or WHIP+ factor specified in § 760.1511(b);

(2) Subtracting the actual value (see paragraph (d) of this section) of the trees, bushes, or vines immediately after the qualifying disaster event from the result of paragraph (b)(1) of this section;

(3) Multiplying the result of paragraph (b)(2) of this section by the participant's share;

(4) Subtracting the amount of any insurance indemnity received from the result of paragraph (b)(3) of this section; and

(5) Subtracting the value of any secondary use or salvage value from the result of paragraph (b)(4) of this section.

(c) Expected value is determined by multiplying the total number of trees, bushes, or vines that were damaged or destroyed by a qualifying disaster event by the price.

(d) Actual value is determined by:

(1) Multiplying the number of trees, bushes, or vines damaged by a qualifying disaster event by the damage factor;

(2) Adding the result of paragraph (d)(1) of this section and the number of trees, bushes, or vines destroyed by a qualifying disaster event;

(3) Multiplying the result of paragraph (d)(2) of this section by the price; and

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(4) Subtracting the result of paragraph (d)(3) of this section from the expected value from paragraph (c) of this section.

(e) The FSA county committee will adjust the number of damaged and destroyed trees, bushes, and vines, if it determines that the number of damaged or destroyed trees, bushes, or vines certified by the participant is inaccurate.

(f) Citrus trees located in Florida are ineligible for payment under 2017 WHIP.

[83 FR 33801, July 18, 2018, as amended 84 FR 48532, Sept. 13, 2019]

**§ 760.1517 Requirement to purchase crop insurance or NAP coverage.**

(a) For the first 2 consecutive crop years for which crop insurance or NAP coverage is available after the enrollment period for 2017 WHIP or WHIP+ ends, subject to paragraph (c) of this section, a participant who receives payment under this subpart for a crop loss in a county must obtain:

(1) For an insurable crop, crop insurance with at least a 60 percent coverage level for that crop in that county; or

(2) For a NAP eligible crop:

(i) NAP coverage with a coverage level of 60 percent, if available for the applicable crop year, or NAP catastrophic coverage if NAP coverage is not offered at a 60 percent coverage level for that crop year.

(ii) Participants who exceed the average adjusted gross income limitation for NAP payment eligibility<sup>1</sup> for the applicable crop year may meet the purchase requirement specified in paragraph (a)(2)(i) of this section by purchasing Whole-Farm Revenue Protection crop insurance coverage, if eligible, or paying the NAP service fee and premium even though the participant will not be eligible to receive a NAP payment due to the average adjusted gross income limit but will be eligible for the WHIP payment.

(b) For the first 2 consecutive insurance years for which crop insurance is available after the enrollment period for 2017 WHIP ends, subject to para-

graph (c) of this section, any participant who receives 2017 WHIP payments for a tree, bush, or vine loss must purchase a plan of insurance for the tree, bush, or vine with at least a 60 percent coverage level.

(c) The final crop year to purchase crop insurance or NAP coverage to meet the requirements of paragraphs (a) and (b) of this section is the:

(1) 2021 crop year for 2017 WHIP payment eligibility, except as provided in paragraph (c)(2) of this section;

(2) 2023 crop year for:

(i) WHIP+ payment eligibility; and  
(ii) 2017 WHIP payment eligibility for losses due to Tropical Storm Cindy, losses of peach and blueberry crops in calendar year 2017 due to extreme cold, and blueberry productivity losses in calendar year 2018 due to extreme cold and hurricane damage in calendar year 2017.

(d) If a producer fails to obtain crop insurance or NAP coverage as required in paragraphs (a) and (b) of this section, the producer must reimburse FSA for the full amount of 2017 WHIP payment or WHIP+ payment plus interest that the producer received for that crop, tree, bush, or vine loss. A producer will only be considered to have obtained NAP coverage for the purposes of this section if the participant applied and paid the requisite NAP service fee and paid any applicable premium by the applicable deadline and completed all program requirements, including filing an acreage report as may be required under such coverage agreement.

[83 FR 33801, July 18, 2018, as amended 84 FR 48532, Sept. 13, 2019]

**Subpart P—On-Farm Storage Loss Program**

SOURCE: 84 FR 48532, Sept. 13, 2019, unless otherwise noted.

**§ 760.1600 Applicability.**

(a) This subpart specifies the terms and conditions for the On-Farm Storage Loss Program. The On-Farm Storage Loss Program will provide payments to eligible producers who suffered uncompensated losses of harvested commodities stored in on farm

<sup>1</sup>See §§ 1400.500(a) and 1400.1(a)(4) of this title.

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structures as a result from hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires that occurred in the 2018 and 2019 calendar years.

(b) The regulations in this subpart are applicable to crops of barley, small and large chickpeas, corn, grain sorghum, lentils, oats, dry peas, peanuts, rice, wheat, soybeans, oilseeds, hay and other crops designated by Commodity Credit Corporation (CCC) stored in on-farm structures. These regulations specify the general provisions under which the On-Farm Storage Loss Program will be administered by CCC. In any case in which money must be refunded to CCC in connection with this part, interest will be due to run from the date of disbursement of the sum to be refunded. This provision will apply, unless waived by the Deputy Administrator, irrespective of any other rule.

(c) Eligible on-farm structures include all on-farm structures deemed acceptable by the Deputy Administrator for Farm Programs.

(d) Adjusted Gross Income (AGI) and payment limitation provisions specified in part 760.1607 of this chapter apply to this subpart.

### § 760.1601 Administration.

(a) The On-Farm Storage Loss Program will be administered under the general supervision of the Executive Vice President, CCC and will be carried out in the field by FSA State and county committees, respectively.

(b) State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations, except as provided in paragraph (e) of this section.

(c) The FSA State committee will take any required action not taken by the FSA county committee. The FSA State committee will also:

(1) Correct or require correction of an action taken by a county committee that is not in compliance with this part; or

(2) Require a county committee to not take an action or implement a decision that is not under the regulations of this part.

(d) The Executive Vice President, CCC, or a designee, may determine any

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question arising under these programs, or reverse or modify a determination made by a State or county committee.

(e) The Deputy Administrator for Farm Programs, FSA, may authorize State and county committees to waive or modify non-statutory deadlines and other program requirements in cases where lateness or failure to meet such other requirements does not adversely affect the operation of the On-Farm Storage Loss Program.

(f) A representative of CCC may execute applications and related documents only under the terms and conditions determined and announced by CCC. Any document not executed under such terms and conditions, including any purported execution before the date authorized by CCC, will be null and void.

(g) Items of general applicability to program participants, including, but not limited to, application periods, application deadlines, internal operating guidelines issued to State and county offices, prices, and payment factors established by the On-Farm Storage Loss Program, are not subject to appeal.

### § 760.1602 Definitions.

The definitions in this section apply for all purposes of program administration. Terms defined in §§ 760.1502 and 760.1421 of this chapter also apply, except where they conflict with the definitions in this section.

*Administrative County Office* is the FSA County Office where a producer's FSA records are maintained.

*CCC* means the Commodity Credit Corporation.

*COC* means the FSA county committee.

*Covered commodity* means wheat, oats, and barley (including wheat, oats, and barley used for haying), corn, grain sorghum, long grain rice, medium grain rice, seed cotton, pulse crops, soybeans, other oilseeds, and peanuts as specified in 7 CFR 1412 and produced and mechanically harvested in the United States.

*Crop* means with respect to a year, commodities harvested in that year. Therefore, the referenced crop year of a commodity means commodities that when planted were intended for harvest in that calendar year.

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*Crop year* means the relevant contract or application year. For example, the 2014 crop year is the year that runs from October 1, 2013, through September 30, 2014, and references to payments for that year refer to payments made under contracts or applications with the compliance year that runs during those dates.

*FSA* means the Farm Service Agency of the United States Department of Agriculture.

*Oilseeds* means any crop of sunflower seed, canola, rapeseed, safflower, flaxseed, mustard seed, crambe, sesame seed, and other oilseeds as designated by CCC or the Secretary.

*Qualifying disaster* event means a hurricane, flood, tornado, typhoon, volcanic activity, snowstorm, or wildfire or related condition that occurred in the 2018 or 2019 calendar year.

*Recording FSA County Office* is the FSA County Office that records eligibility data for producers designated as multi-county producers.

*Related condition* means damaging weather or an adverse natural occurrence that occurred as a direct result of a hurricane or wildfire qualifying disaster event, such as excessive rain, high winds, flooding, mudslides, and heavy smoke.

*Secretary* means the Secretary of the United States Department of Agriculture, or the Secretary's delegate.

*STC* means the FSA State committee.

**§ 760.1603 Eligible producers.**

(a) To be an eligible producer, the producer must:

(1) Be a person, partnership, association, corporation, estate, trust, or other legal entity that produces an eligible commodity as a landowner, landlord, tenant, or sharecropper, or in the case of rice, furnishes land, labor, water, or equipment for a share of the rice crop.

(2) Comply with all provisions of this part and, as applicable:

(i) 7 CFR part 12—Highly Erodible Land and Wetland Conservation;

(ii) 7 CFR part 707—Payments Due Persons Who Have Died, Disappeared, or Have Been Declared Incompetent;

(iii) 7 CFR part 718—Provisions Applicable to Multiple Programs;

(v) 7 CFR part 1400—Payment Limitation & Payment Eligibility; and  
(vii) 7 CFR part 1403—Debt Settlement Policies and Procedures.

(b) A receiver or trustee of an insolvent or bankrupt debtor's estate, an executor or an administrator of a deceased person's estate, a guardian of an estate of a ward or an incompetent person, and trustees of a trust is considered to represent the insolvent or bankrupt debtor, the deceased person, the ward or incompetent, and the beneficiaries of a trust, respectively. The production of the receiver, executor, administrator, guardian, or trustee is considered to be the production of the person or estate represented by the receiver, executor, administrator, guardian, or trustee. On-Farm Storage Loss Program documents executed by any such person will be accepted by CCC only if they are legally valid and such person has the authority to sign the applicable documents.

(c) A minor who is otherwise an eligible producer is eligible to receive a program payment only if the minor meets one of the following requirements:

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

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

(3) Any program application signed by the minor is cosigned by a person determined by the FSA county committee to be financially responsible; or

(e) A producer must meet the requirements of actively engaged in farming, cash rent tenant, and member contribution as specified in 7 CFR part 1400 to be eligible for program payments.

**§ 760.1604 Eligible commodities.**

(a) Commodities eligible to be compensated for loss made under this part are:

(1) Covered Commodities;

(2) Hay; and

(3) Stored in an on-farm structure that under normal circumstances, would have maintained the quality of the commodity throughout harvest until marketing or feed if not for the qualifying weather event.

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(b) A commodity produced on land owned or otherwise in the possession of the United States that is occupied without the consent of the United States is not an eligible commodity.

### § 760.1605 Miscellaneous provisions.

(a) All persons with a financial interest in the legal entity receiving payments under this subpart are jointly and severally liable for any refund, including related charges, which is determined to be due to FSA for any reason.

(b) In the event that any application for payment under this subpart resulted from erroneous information or a miscalculation, the payment will be recalculated and any excess refunded to FSA with interest to be calculated from the date of the disbursement.

(c) Any payment to any participant under this subpart will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in part 792 of this chapter apply to payments made under this subpart.

(d) Any participant entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 792 of this chapter.

(e) The regulations in 7 CFR parts 11 and 780 apply to determinations under this subpart.

### § 760.1606 General provisions.

Losses will be determined total production in storage at time of loss. Eligibility and payments will be based on physical location of storage. Payments will be made on commodities that were completely lost or destroyed while in storage due to the qualifying weather related event.

### § 760.1607 Availability of funds and timing of payments.

For the On-Farm Storage Loss Program, payments will be issued as applications are approved.

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### § 760.1608 Payment limitation and AGI.

(a) Per loss year, a person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly payments of not more than \$125,000.

(b) The direct attribution provisions in § 760.1507 of this part apply for payment limitation as defined and used in this rule.

### § 760.1609 Qualifying disaster events.

(a) The On-Farm Storage Loss Program will provide a payment to eligible producers who suffered losses of harvested commodities while such commodities were stored in on farm structures as a result from hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires that occurred in the 2018 and 2019 calendar years.

(b) For a loss due to or related to an event specified in paragraph (a) of this section, the loss must have occurred on acreage that was physically located in a county that received a:

(1) Presidential Emergency Disaster Declaration authorizing public assistance for categories C through G or individual assistance due to a hurricane occurring in the 2018 or 2019 calendar year; or

(2) Secretarial Disaster Designation for a hurricane occurring in the 2018 or 2019 calendar year.

(c) A producer with a loss not located in a physical location county that was eligible under paragraph (b)(1) of this section will be eligible for a program payment for losses due to hurricane and related conditions only if the producer provides supporting documentation that is acceptable to FSA from which the FSA county committee determines that the loss of the commodity was reasonably related to a qualifying disaster event as specified in this subpart and meets all other eligibility conditions. Supporting documentation may include furnishing climatological data from a reputable source or other information substantiating the claim of loss due to a qualifying disaster event.

(d) For a loss due to wildfires and conditions related to wildfire in the 2018 or 2019 calendar year, all counties

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where wildfires occurred, as determined by FSA county committees, are eligible program payments; a Presidential Emergency Disaster Declaration or Secretarial Disaster Designation for wildfire is not required. The loss must be reasonably related to wildfire and conditions related to wildfire, as specified in this subpart's definition of qualifying disaster event.

(e) For a loss due to floods, tornadoes, typhoons, volcanic activity, snowstorms or any other directly related weather disaster event, the loss must be reasonably related to the disaster event as specified in this subpart's definition of qualifying disaster event.

**§ 760.1610 Eligible and ineligible losses.**

(a) Except as provided in paragraphs (b) of this section, to be eligible for payments under this subpart the commodity stored in an eligible structure must have suffered a loss due to a qualifying disaster event.

(b) A loss will not be eligible for the On-Farm Storage Loss Program this subpart if any of the following apply:

(1) The cause of loss is determined by FSA to be the result of poor management decisions, poor farming practices, or previously damaged structures;

(2) The cause of loss was due to failure of the participant to store the commodity in an eligible structure before the qualifying disaster event; or

(3) The cause of loss was due to water contained or released by any governmental, public, or private dam or reservoir project if an easement exists on the acreage affected by the containment or release of the water.

(c) The following types of loss, regardless of whether they were the result of an eligible disaster event, are not eligible losses:

(1) Losses to crops that have not been harvested.

(2) Losses to crops not intended for harvest;

(4) Losses caused by improper storage;

(5) Losses caused by the application of chemicals; and

(6) Losses caused by theft.

**§ 760.1611 Application for payment.**

(a) An application for payment under this subpart must be submitted to the FSA county office serving as the farm's administrative county office by the close of business on a date that will be announced by the Deputy Administrator.

(b) Once signed by a producer, the application for payment is considered to contain information and certifications of and pertaining to the producer regardless of who entered the information on the application.

(c) The producer applying for the On-Farm Storage Loss Program under this subpart certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information is subject to verification or spot check by FSA at any time, either before or after payment is issued. Refusal to allow FSA or any agency of the Department of Agriculture to verify any information provided will result in the participant's forfeiting eligibility for this program. FSA may at any time, including before, during, or after processing and paying an application, require the producer to submit any additional information necessary to implement or determine any eligibility provision of this subpart. Furnishing required information is voluntary; however, without it FSA is under no obligation to act on the application or approve payment. Providing a false certification will result in ineligibility and can also be punishable by imprisonment, fines, and other penalties.

(d) The application submitted in accordance with paragraph (a) of this section is not considered valid and complete for issuance of payment under this subpart unless FSA determines all the applicable eligibility provisions have been satisfied and the participant has submitted all required documentation.

(e) Application approval and payment by FSA does not relieve a participant from having to submit any form required, but not filed.

## § 760.1612

### § 760.1612 Calculating payments on-farm storage losses.

(a) Payments made under this subpart to a participant for loss of stored commodities are calculated, except hay or silage, by:

- (1) Multiplying the eligible quantity of the eligible commodity by the RMA determined price;
- (2) Multiplying the result from paragraph (a)(1) of this section by a 75 percent factor.

(b) Payments made under this subpart to a participant for loss of stored hay or silage, by:

- (1) Multiplying the eligible quantity of the eligible commodity by a price as determined by the Secretary;
- (2) Multiplying the result from paragraph (b)(1) of this section by a 75 percent factor.

## Subpart Q—Milk Loss Program

SOURCE: 84 FR 48534, Sept. 13, 2019, unless otherwise noted.

### § 760.1700 Applicability.

This subpart specifies the terms and conditions for the Milk Loss Program. The Milk Loss Program will provide payments to eligible dairy operations for milk that was dumped or removed without compensation from the commercial milk market due to the results of droughts, wildfires, hurricanes, floods, derechos, excessive heat, winter storms, freeze (including polar vortex), and smoke exposure that occurred in the 2020, 2021, and 2022 calendar year. The Milk Loss Program will also provide payments to eligible dairy operations for milk that was dumped or removed without compensation from the commercial milk market due to the results of tornadoes that occurred in the 2022 calendar year.

[88 FR 62288, Sept. 11, 2023]

### § 760.1701 Administration.

This milk loss payment program will be carried out by FSA under the direction and supervision of the Deputy Administrator. In the field, the program will be administered by the State and county committees.

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### § 760.1702 Definitions.

The following definitions apply to the Milk Loss Program.

*Affected farmer* means an individual person or legal entity who produces milk which is removed from the commercial market any time or who produces but was unable to deliver milk to a commercial market as a result of a qualifying event, which is limited to either a:

- (1) Weather-related event preventing transportation of the milk; or
- (2) Weather-related event causing a power outage or structural damage causing milk to be unmerchantable.

*Application period* means any period during calendar year 2020, 2021, and 2022 which an affected farmer's milk is dumped or removed without compensation from the commercial market due to a qualifying disaster event for which application for payment is made.

*Average adjusted gross farm income* means the average of the person or legal entity's adjusted gross income derived from farming, ranching, and forestry operations for the 3 taxable years preceding the most immediately preceding complete taxable year.

(1) If the resulting average adjusted gross farm income derived from items 1 through 12 of the definition of "income derived from farming, ranching, and forestry operations" is at least 66.66 percent of the average adjusted gross income of the person or legal entity, then the average adjusted gross farm income may also take into consideration income or benefits derived from the following:

- (i) The sale of equipment to conduct farm, ranch, or forestry operations; and
- (ii) The provision of production inputs and services to farmers, ranchers, foresters, and farm operations.

(2) The relevant tax years are:

- (i) For the 2020 program year, 2016, 2017, and 2018; and
- (ii) For the 2021 program year, 2017, 2018, and 2019; and
- (iii) For the 2022 program year, 2018, 2019, and 2020.

*Average adjusted gross income* means the average of the adjusted gross income as defined under 26 U.S.C. 62 or comparable measure of the person or

legal entity. The relevant tax years are:

- (1) For the 2020 program year, 2016, 2017, and 2018;
- (2) For the 2021 program year, 2017, 2018, and 2019; and
- (3) For the 2022 program year, 2018, 2019, and 2020.

*Base period* means the first full calendar month prior to the claim period in which no qualifying disaster event occurred. If the claim period is multiple consecutive months, the base period remains the same calendar month preceding the start of the claim period.

*Beginning farmer or rancher* means a farmer or rancher who has not operated a farm or ranch for more than 10 years and who materially and substantially participates in the operation. For a legal entity to be considered a beginning farmer or rancher, at least 50 percent of the interest must be beginning farmers or ranchers.

*Claim period* means the calendar month, or months, in which milk was dumped or removed and usually is the calendar month immediately following the base period.

*Commercial market* means the market to which the affected farmer normally delivers milk and from which it was removed.

*County committee* means the FSA county committee.

*Deputy Administrator* means the Deputy Administrator for Farm Programs, FSA.

*FSA* means the Farm Service Agency, U.S. Department of Agriculture.

*Income derived from farming, ranching, and forestry operations* means income of an individual or entity derived from:

- (1) Production of crops, specialty crops, and unfinished raw forestry products;
- (2) Production of livestock, aquaculture products used for food, honeybees, and products derived from livestock;
- (3) Production of farm-based renewable energy;
- (4) Selling (including the sale of easements and development rights) of farm, ranch, and forestry land, water or hunting rights, or environmental benefits;
- (5) Rental or lease of land or equipment used for farming, ranching, or

forestry operations, including water or hunting rights;

(6) Processing, packing, storing, and transportation of farm, ranch, forestry commodities including renewable energy;

(7) Feeding, rearing, or finishing of livestock;

(8) Payments of benefits, including benefits from risk management practices, crop insurance indemnities, and catastrophic risk protection plans;

(9) Sale of land that has been used for agricultural purposes;

(10) Payments and benefits authorized under any program made available and applicable to payment eligibility and payment limitation rules;

(11) Income reported on Internal Revenue Service (IRS) Schedule F or other schedule used by the person or legal entity to report income from such operations to the IRS;

(12) Wages or dividends received from a closely held corporation, and IC-DISC or legal entity comprised entirely of family members when more than 50 percent of the legal entity's gross receipts for each tax year are derived from farming, ranching, or forestry activities as defined in this subpart; and

(13) Any other activity related to farming, ranching, and forestry, as determined by the Deputy Administrator for Farm Programs.

*Limited resource farmer or rancher* means a farmer or rancher:

(i) Who is a person whose:

(ii) Direct or indirect gross farm sales did not exceed:

(A) \$180,300 in each calendar year for 2017 and 2018 (the relevant years for the 2020 program year); or

(B) \$179,000 in each of the 2018 and 2019 calendar years for the 2021 program year;

(C) \$189,200 in each of the 2019 and 2020 calendar years for the 2022 program year; and,

(ii) Total household income was at or below the national poverty level for a family of four in each of the same two previous years referenced in paragraph (1)(i) of this definition;<sup>1</sup> or

<sup>1</sup> Limited resource farmer or rancher status can be determined using a website available through the Limited Resource Farmer and

*Continued*

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(2) That is an entity and all members who hold an ownership interest in the entity meet the criteria in paragraph (1) of this definition.

*Milk marketing organization* means the marketing agency to or through which the affected dairy farmer marketed milk at the time the milk was either dumped or unable to be delivered to the commercial market due to a qualifying weather related event.

*Ownership interest* means to have either a legal ownership interest or a beneficial ownership interest in a legal entity. For the purposes of administering this subpart, a person or legal entity that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is considered to have a beneficial ownership interest in such legal entity.

*Pay period* means:

(1) In the case of an affected farmer who markets milk through a milk marketing organization, the period used by the milk marketing organization in settling with the affected farmer for milk, usually biweekly or monthly; or

(2) In the case of an affected farmer whose commercial market consists of direct retail sales to consumers, a calendar month.

*Payment subject to refund* means a payment which is made by a milk marketing organization to an affected farmer, and which such farmer is obligated to refund to the milk marketing organization.

*Person* means an individual, partnership, association, corporation, trust, estate, or other legal entity.

*Qualifying disaster event* means droughts, wildfires, hurricanes, floods, derechos, excessive heat, winter storms, freeze (including a polar vortex), and smoke exposure, occurring in

the 2020, 2021, and 2022 calendar years. Qualifying disaster event also includes tornadoes occurring in the 2022 calendar year. Losses due to drought are only eligible if any area within the county in which the loss occurs was rated by the U.S. Drought Monitor as having a D2 (Severe Drought) for eight consecutive weeks or a D3 (Extreme Drought) or higher level of drought intensity during the applicable calendar years.

*Removed from the commercial market* means:

(1) Produced and destroyed or fed to livestock;

(2) Produced and delivered to a milk marketing organization who destroyed it or disposed of it as salvage; or

(3) Produced and otherwise diverted to other than the commercial market.

*Same loss* means the event or trigger that caused the milk to be removed from the commercial market.

*Secretary* means the Secretary of Agriculture of the United States or any officer or employee of the U.S. Department of Agriculture to whom the Secretary delegates authority to act as the Secretary.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who is a member of a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. For entities, at least 50 percent of the ownership interest must be held by individuals who are members of such a group. Socially disadvantaged groups include the following and no others unless approved in writing by the FSA Deputy Administrator for Farm Programs (Deputy Administrator):

(1) American Indians or Alaskan Natives;

(2) Asians or Asian-Americans;

(3) Blacks or African Americans;

(4) Hispanics or Hispanic Americans;

(5) Native Hawaiians or other Pacific Islanders; and

(6) Women.

*State committee* means the FSA State committee.

*Underserved farmer or rancher* means a beginning farmer or rancher, limited resource farmer or rancher, socially

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disadvantaged farmer or rancher, or veteran farmer or rancher.

*Veteran farmer or rancher* means a farmer or rancher:

(1) Who has served in the Armed Forces (as defined in 38 U.S.C. 101(10)<sup>2</sup>) and:

(i) Has not operated a farm or ranch for more than 10 years; or

(ii) Has obtained status as a veteran (as defined in 38 U.S.C. 101(2)<sup>3</sup>) during the most recent 10-year period; or

(2) That is an entity, and at least 50 percent of the ownership interest is held by members who meet the criteria in paragraph (1) of this definition.

[84 FR 48534, Sept. 13, 2019, as amended at 88 FR 62288, Sept. 11, 2023]

(4) 7 CFR part 1403—Debt Settlement Policies and Procedures.

[88 FR 62290, Sept. 11, 2023]

**§ 760.1704 Payments to dairy farmers for milk.**

(a) A milk loss payment will be made to an affected farmer who is determined by the FSA county committee to be in compliance with all the terms and conditions of this subpart in the amount equal to 90 percent for affected farmers who meet the definition of underserved farmer or rancher or 75 percent for all other affected farmers of the fair market value of the farmer's normal marketings for the application period, less:

(1) Any amount the affected farmer received for milk marketed during the application period; and

(2) Any payment not subject to refund that the affected farmer received from a milk handler with respect to milk removed from the commercial market during the application period.

(b) [Reserved]

[88 FR 62290, Sept. 11, 2023]

**§ 760.1705 Normal marketings of milk.**

(a) The FSA county committee will determine the affected farmer's normal marketings of milk which, for the purposes of this subpart, will be the sum of the quantities of milk for which the farmer would have sold in the commercial market in each of the pay periods in the application period be it not for the removal of the affected farmer's milk from the commercial market as a result of a qualifying disaster event.

(b) Normal marketings for each pay period are based on the average daily production during the base period.

(c) Normal marketings determined in paragraph (b) of this section are adjusted for any change in the daily average number of cows milked during each pay period the milk is off the market compared with the average number of cows milked daily during the base period.

(d) If only a portion of a pay period falls within the application period, normal marketings for such pay period will be reduced so that they represent only that part of such pay period which is within the application period.

<sup>2</sup>The term "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components.

<sup>3</sup>The term "veteran" means a person who served in the active military, naval, air, or space service, and who was discharged or released under conditions other than dishonorable.

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(e) The days eligible for indemnification begin on the date milk was removed or dumped and continue for the concurrent days milk was removed or dumped. Once the dairy operation returns to the normal marketing of milk, the dairy operation is no longer eligible for assistance for milk removed or dumped due to that qualifying disaster event unless after restarting commercial marketing of milk, additional milk is removed or dumped due to the same qualifying disaster event.

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, Sept. 11, 2023]

**§ 760.1706 Fair market value of milk.**

(a) The FSA county committee will determine the fair market value of the affected farmer's dumped milk, which, for the purposes of this subpart, will be the sum of the net proceeds such farmer would have received for normal marketings in each of the pay periods in the application period but for the qualifying disaster event.

(b) The base period per cow average daily milk production is determined by dividing the full month of milk marketings by the average number of cows in milk production for that month and the number of days in that month. To determine the milk loss payment, the base period per cow average daily milk production is multiplied by the number of milking cows in production for the claim period and by the number of days milk was removed or dumped in the claim period with the result divided by 100 to determine the applicable hundredweight and then multiplied by the hundredweight pay price.

(c) To determine the hundredweight pay price for milk, the FSA county committee will deduct from the gross pay price from the claim period milk marketing statement the per hundredweight hauling rate for the applicable month and the per hundredweight \$0.15 promotion fee which it determines are normally incurred by the affected farmer but which were not incurred because of the removal of the farmer's milk from the commercial market.

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, Sept. 11, 2023]

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(a) The affected farmer must furnish to the FSA county committee complete and accurate information sufficient to enable the FSA county committee or the Deputy Administrator to make the determinations required in this subpart. Such information must include, but is not limited to:

(1) A copy of the notice from, or other evidence of action by, the public agency which resulted in the dumping or removal of the affected farmer's milk from the commercial market.

(2) The specific weather or disaster event and its results on milk marketing for the claim period.

(3) The quantity and butterfat test of milk produced and marketed during the base period. This information must be a certified statement from the affected farmer's milk marketing organization or any other evidence the FSA county committee accepts as an accurate record of milk production and butterfat tests during the base period.

(4) The average number of dry cows, bred heifers, and cows milked during the base period and during each pay period in the application.

(5) The affected farmer will provide two milk marketing statements, one for the base period and one for the claim period.

(6) On the milk marketing statement the per hundredweight hauling rate and the per hundredweight \$0.15 promotion fee, which are normally incurred by affected farmers who market through the milk marketing organization, that the affected farmer did not incur because of the dumping or removal of the milk from the commercial market, then the average price stated by the milk marketing organization will be the average gross price paid less these costs. If the milk marketing organization does not have this information, the affected farmer will furnish a statement specifying these costs, if any.

(7) The amount of proceeds, if any, received by the affected farmer from the marketing of milk produced during the application period.

(8) The amount of any payments not subject to refund made to the affected

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farmer by the milk marketing organization with respect to the milk produced during the application period and removed from the commercial market.

(9) A detailed written statement from the affected farmer regarding the circumstances of the milk removal or dumping, the type and geographic scope of the weather event, what transportation limitations occurred in addition to how and where the removed or dumped milk was discarded.

(b) If requested by FSA, the affected farmer must provide additional documentation that establishes the affected farmer's eligibility for a Milk Loss Program payment.

[88 FR 62290, Sept. 11, 2023]

**§ 760.1708 Application for payments for milk loss.**

The affected farmer or the affected farmer's legal representative must sign and file an application for payment on a form which is approved for that purpose by the Deputy Administrator. The form must be filed with the county FSA office for the county where the farm headquarters are located no later than close of business of the designated deadline announced by the Secretary for 2020, 2021, and 2022 losses.

[88 FR 62291, Sept. 11, 2023]

**§ 760.1709 Payment limitation and AGI.**

(a) Per calendar year, a person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly payments of not more than \$125,000 according to the provisions in § 760.1507(b)(1); or not more than \$250,000 according to the provisions in § 760.1507(b)(2) if at least 75 percent of the person's or legal entity's average adjusted gross income is average adjusted gross farm income and the applicant provides the required certification(s) and documentation. Payments made to a joint venture or general partnership cannot exceed an amount determined by multiplying the maximum payment limitation by the number of persons and legal entities that comprise the first-level ownership of the joint venture or general partnership.

(b) To certify the average adjusted gross farm income, a person or legal entity, including all members with an ownership interest in a legal entity, general partnership, or joint venture, must provide the following:

(1) A certification in the manner prescribed by FSA from the person or legal entity that the average adjusted gross farm income of the person or legal entity is at least 75 percent of the average adjusted gross income; and

(2) A certification in the manner prescribed by FSA from a licensed certified public accountant or attorney that the average adjusted gross farm income of the person or legal entity is at least 75 percent of the average adjusted gross income.

(c) A new legal entity will have its adjusted gross farm income averaged only for those years for which it was in business; however, a new legal entity will not be considered "new" to the extent it takes over an existing operation and has any elements of common ownership interest and land with the preceding person or legal entity, or with persons or legal entities with an interest in the "old" legal entity. When there is such commonality, income of the previous person or legal entity will be averaged with that of the "new" legal entity for the base period.

(d) For a person filing a joint federal tax return, the certification of average adjusted gross farm income will be reported as if the person had filed a separate federal tax return and the calculation is consistent with the information supporting the filed joint return.

(e) All persons and legal entities are subject to an audit by FSA of any information submitted for the purpose of increasing the program's payment limitation. As a part of this audit, income tax returns may be requested, and if requested, must be supplied by all related persons and legal entities. In addition to any other requirement under any Federal statute, relevant Federal income tax returns and documentation must be retained a minimum of 2 years after the end of the calendar year corresponding to the year for which payments or benefits are requested. Failure to provide necessary and accurate information to verify compliance will

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result in ineligibility for Milk Loss Program benefits.

(f) The direct attribution provisions in § 760.1507 apply for both payment limitation as well as in determining average adjusted gross farm income as defined and used in this subpart.

[88 FR 62291, Sept. 11, 2023]

### § 760.1710 Time and method of application.

(a) A completed FSA-376, Milk Loss Program Application, must be submitted at the time of application along with the information listed in § 760.1707 to the affected farmer's recording county office by the close of business on the Milk Loss Program application deadline. Applications may be submitted in person or by mail, email, facsimile, or other methods announced by FSA. The Deputy Administrator has the discretion and authority to waive or modify deadlines and other requirements or program provisions in cases where the Deputy Administrator determines it is equitable to do so and where the Deputy Administrator finds that the lateness or failure to meet such other requirements or program provisions do not adversely affect Milk Loss Program operation.

(b) Failure of an individual, entity, or a member of an entity to submit the following payment limitation and payment eligibility forms within 60 days from the date of the Milk Loss Program application deadline, may result in no payment or a reduced payment:

(1) Form AD-2047, Customer Data Worksheet, for new customers or existing customers who need to update their customer profile;

(2) Form CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, if applicable for the program year or years for which the affected farmer is applying for the Milk Loss Program and if the affected farmer chooses to provide that certification;

(3) Form CCC-901, Member Information for Legal Entities, if applicable;

(4) Form CCC-902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;

(5) Form FSA-510, Request for an Exception to the \$125,000 Payment Limitation for Certain Programs, accom-

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panied by a certification from a certified public accountant or attorney as to that person or legal entity's certification, for a legal entity and all members of that entity, for each applicable program year, including the legal entity's members, partners, or shareholders, as provided in 7 CFR part 1400; and

(6) Form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, for the Milk Loss Program and applicable affiliates as provided in 7 CFR part 12.

(c) If supporting documentation is requested under § 760.1707(b), the documentation must be submitted to FSA within 60 calendar days from the request or the application will be disapproved by FSA.

(d) Milk Loss Program payments are limited to 30 days per year for each of 2020, 2021, and 2022.

(e) Each Milk Loss Program application is limited to the milk loss for one calendar month due to a qualifying disaster event or multiple qualifying disaster events. Milk loss that occurs in a subsequent month for the same qualifying disaster event will require a separate application.

[88 FR 62291, Sept. 11, 2023]

### § 760.1711 Limitation of authority.

(a) FSA county executive directors and State and county committees do not have authority to modify or waive any of the provisions of the regulations in this subpart.

(b) The FSA State committee may take any action authorized or required by the regulations in this subpart to be taken by the FSA county committee when such action has not been taken by the FSA county committee. The FSA State committee may also:

(1) Correct, or require a county committee to correct, any action taken by such county committee which is not in accordance with the regulations in this subpart; or

(2) Require a county committee to withhold taking any action which is not in accordance with the regulations in this subpart.

(c) No delegation herein to a State or county committee will preclude the Deputy Administrator or designee from

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determining any question arising under the regulations in this subpart or from reversing or modifying any determination made by a State or county committee.

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, 62292, Sept. 11, 2023]

**§ 760.1712 Estates and trusts; minors.**

(a) A receiver of an insolvent debtor's estate and the trustee of a trust estate will, for the purpose of this subpart, be considered to represent an insolvent affected farmer and the beneficiaries of a trust, respectively, and the production of the receiver or trustee will be considered to be the production of the represented person. Program documents executed by any such person will be accepted only if they are legally valid and such person has the authority to sign the applicable documents.

(b) An affected dairy farmer who is a minor will be eligible for milk loss payments only if at least one of the following requirements is true:

(1) The right of majority has been conferred on him by court proceedings or by law;

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

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

[88 FR 62292, Sept. 11, 2023]

**§ 760.1713 Setoffs.**

(a) If the affected farmer is indebted to any agency of the United States and such indebtedness is listed on the county debt record, milk loss payments due the affected farmer the regulations in this part will be applied, as provided in the Secretary's setoff regulations, 7 CFR part 13, to such indebtedness.

(b) Compliance with the provisions of this section will not deprive the affected farmer of any right that would otherwise be available have to contest the justness of the indebtedness involved in the setoff action, either by administrative appeal or by legal action.

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, 62292, Sept. 11, 2023]

**§ 760.1714 Overdisbursement.**

If the milk loss payment disbursed to an affected farmer exceeds the amount authorized under the regulations in this subpart, the affected farmer will be personally liable for repayment of the amount of such excess.

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, 62292, Sept. 11, 2023]

**§ 760.1715 Death, incompetency, or disappearance.**

In the case of the death, incompetency, or disappearance of any affected farmer who would otherwise receive a milk loss payment, such payment may be made to the person or persons specified in the regulations contained in part 707 of this chapter. The person requesting such payment must file Form FSA-325, "Application for Payment of Amounts Due Persons Who Have Died, Disappeared, or Have Been Declared Incompetent," as provided in that part.

[84 FR 48534, Sept. 13, 2019. Redesignated at 88 FR 62290, Sept. 11, 2023]

**§ 760.1716 Records and inspection of records.**

(a) The affected farmer, milk marketing organization, and any other person who furnished information to such farmer or to the FSA county committee for the purpose of enabling such farmer to receive a milk loss payment under this subpart, must maintain any existing books, records, and accounts supporting any information so furnished for 3 years following the end of the year during which the application for payment was filed.

(b) The affected farmer, milk marketing organization, and any other person who furnishes such information to the affected farmer or to the FSA county committee must permit authorized representatives of the Department of Agriculture and the General Accounting Office, during regular business hours, to inspect, examine, and make copies of such books, records, and accounts.

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, 62292, Sept. 11, 2023]

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### § 760.1717 Assignment.

No assignment will be made of any milk loss payment due or to come due under the regulations in this subpart. Any assignment or attempted assignment of any indemnity payment due or to come due under this subpart will be null and void.

[84 FR 48534, Sept. 13, 2019. Redesignated at 88 FR 62290, Sept. 11, 2023]

### § 760.1718 Instructions and forms.

Affected farmers may obtain information necessary to make application for a milk loss payment from the county FSA office.

[84 FR 48534, Sept. 13, 2019. Redesignated at 88 FR 62290, Sept. 11, 2023]

### § 760.1719 Availability of funds.

Milk loss program payments will be made on a first-come, first-served basis. Applications received after all funds are used will not be paid.

[84 FR 48534, Sept. 13, 2019. Redesignated at 88 FR 62290, Sept. 11, 2023]

### § 760.1720 Calculating payments for milk losses.

(a) Payments made under this subpart to a participant for loss of milk as a result of a qualifying disaster event are calculated as follows:

(1) Amount of the fair market value of the farmer's normal marketings for the application period; less

(2) Any amount the farmer received for milk marketed during the applications period; and

(3) Any payment not subject to refund which the farmer received from a milk marketing organization with respect to milk removed from the commercial market during the application period;

(4) Multiplied by a program factor of 90 percent for underserved farmers or ranchers, or 75 percent for all other farmers or ranchers.

(b) [Reserved]

[84 FR 48534, Sept. 13, 2019. Redesignated and amended at 88 FR 62290, 62292, Sept. 11, 2023]

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### Subpart R—Quality Loss Adjustment Program

SOURCE: 86 FR 446, Jan. 6, 2021, unless otherwise noted.

### § 760.1800 Applicability.

This subpart specifies the terms and conditions for the Quality Loss Adjustment (QLA) Program. The QLA Program provides disaster assistance for crop quality losses that were a consequence of hurricanes, excessive moisture, floods, qualifying drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.

### § 760.1801 Administration.

(a) The QLA Program is administered under the general supervision of the Administrator, Farm Service Agency (FSA), and the Deputy Administrator for Farm Programs, FSA. The QLA Program is carried out by FSA State and county committees with instructions issued by the Deputy Administrator.

(b) FSA State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations in this subpart or instructions issued by the Deputy Administrator.

(c) The FSA State committee will take any action required by the regulations in this subpart that the FSA county committee has not taken. The FSA State committee will also:

(1) Correct, or require an FSA county committee to correct, any action taken by the FSA county committee that is not in accordance with the regulations in this subpart; or

(2) Require an FSA county committee to withhold taking any action that is not in accordance with this subpart.

(d) No delegation to an FSA State or county committee precludes the FSA Administrator or the Deputy Administrator from determining any question arising under this subpart or from reversing or modifying any determination made by an FSA State or county committee.

(e) The Deputy Administrator has the authority to:

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(1) Permit State and county committees to waive or modify a non-statutory deadline specified in this subpart; and

(2) Delegate authority to FSA State or county committees to make determinations under § 760.1812(f) and (g).

(f) Items of general applicability to program participants, including, but not limited to, application periods, application deadlines, internal operating guidelines issued to FSA State and county offices, prices, and payment factors established under this subpart, are not subject to appeal in accordance with part 780 of this chapter.

**§ 760.1802 Definitions.**

The following definitions apply to this subpart. The definitions in §§ 718.2 and 1400.3 of this title also apply, except where they conflict with the definitions in this section. In the event of conflict, the definitions in this section apply.

*Affected production* means the producer's ownership share of harvested production of an eligible crop, adjusted to standard moisture as established by the U.S. Grains Standards Act, a State regulatory agency, or industry standard, that had both:

(1) A quality loss due to a qualifying disaster event; and

(2) At least a 5 percent quality loss due to all eligible disaster events.

*Average market price* means the average market price determined according to § 1437.12 of this title.

*Coverage level* means the percentage determined by multiplying the elected yield percentage under a crop insurance policy or NAP coverage by the elected price percentage.

*Crop insurance* means an insurance policy reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended. It does not include private plans of insurance.

*Crop insurance indemnity* means, for the purpose of this subpart, the payment to a participant for crop losses covered under crop insurance administered by RMA in accordance with the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Crop year* means:

(1) For insurable crops, the crop year as defined according to the applicable crop insurance policy; and

(2) For NAP-eligible crops, the crop year as defined in § 1437.3 of this title.

*Eligible crop* means a crop for which coverage was available either from FCIC under part 400 of this title, or through NAP under § 1437.4 of this title.

*Eligible disaster event* means a disaster event that is an eligible cause of loss specified in § 1437.10 of this title, excluding insect infestation.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation of USDA, administered by RMA.

*FSA* means the Farm Service Agency, an agency of USDA.

*Grading factor* means a factor that describes the physical condition or a feature that is evaluated to determine the quality of the production, such as broken kernels and low-test weight.

*Good farming practices* means the cultural practices generally recognized as compatible with agronomic and weather conditions and used for the crop to make normal progress toward maturity, as determined by FSA. These practices are:

(1) For conventional farming practices, those generally recognized by agricultural experts for the area, which could include one or more counties; or

(2) For organic farming practices, those generally recognized by the organic agricultural experts for the area or contained in the organic system plan that is in accordance with the National Organic Program specified in part 205 of this title.

*Harvested* means:

(1) For insurable crops, harvested as defined according to the applicable crop insurance policy;

(2) For NAP-eligible single harvest crops, that a crop has been removed from the field, either by hand or mechanically;

(3) For NAP-eligible crops with potential multiple harvests in 1 year or harvested over multiple years, that the producer has, by hand or mechanically, removed at least 1 mature crop from the field during the crop year; and

(4) For mechanically harvested NAP-eligible crops, that the crop has been removed from the field and placed in a

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truck or other conveyance, except hay is considered harvested when in the bale, whether removed from the field or not.

*Insurable crop* means an agricultural crop (excluding livestock) for which the producer on a farm is eligible to obtain a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Multiple market crop* means a crop that is delivered to a single market but can have fresh and processed prices based on grading. For example, a producer may intend to sell all production of an apple crop as fresh production; however, based on grading of the crop at the market, the producer is compensated for some production at the fresh price and for some production at the processing price.

*Multiple planting* means the planting for harvest of the same crop in more than one planting period in a crop year on different acreage.

*NAP* means the Noninsured Crop Disaster Assistance Program under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333) and part 1437 of this title.

*NAP-eligible crop* means an agricultural crop for which the producer on a farm is eligible to obtain NAP coverage.

*NAP service fee* means the amount specified in § 1437.7 of this title that the producer must pay to obtain NAP coverage.

*Nutrient factor* means a factor determined by a test that measures the nutrient value of a crop to be fed to livestock. Examples include, but are not limited to, relative feed value and total digestible nutrients.

*Production* means quantity of the crop produced, which is expressed in a specific unit of measure including, but not limited to, bushels or pounds.

*QLA Program* means the Quality Loss Adjustment Program.

*Qualifying disaster event* means a hurricane, flood, tornado, typhoon, volcanic activity, snowstorm, wildfire, excessive moisture, qualifying drought, or a related condition that occurred in the 2018 or 2019 calendar year.

*Qualifying drought* means an area within the county was rated by the U.S. Drought Monitor as having a D3

(extreme drought) or higher level of drought intensity during the applicable calendar year.

*Quality loss* means:

(1) For forage crops, a reduction in an applicable nutrient factor for the crop; and

(2) For crops other than forage, a reduction in the total dollar value of the crop due to reduction in the physical condition of the crop indicated by an applicable grading factor.

*Related condition* means damaging weather or an adverse natural occurrence that occurred as a direct result of a specified qualifying disaster event, such as excessive rain, high winds, flooding, mudslides, and heavy smoke, as determined by the Deputy Administrator. The term does not include insect infestation.

*Reliable production record* means evidence provided by the participant that is used to substantiate the amount of production reported when verifiable records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, invoices for custom harvesting, and records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries that are determined acceptable by the FSA county committee. To determine whether the records are acceptable, the FSA county committee will consider whether they are consistent with the records of other producers of the crop in that area.

*RMA* means the Risk Management Agency, an agency of USDA.

*Salvage value* means the dollar amount or equivalent for the quantity of the commodity that cannot be marketed or sold in any recognized market for the crop.

*Secondary use* means the harvesting of a crop for a use other than the intended use.

*Unit of measure* means:

(1) For insurable crops, the FCIC-established unit of measure; and

(2) For NAP-eligible crops, the established unit of measure used for the NAP price and yield.

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

*U.S. Drought Monitor* is a system for classifying drought severity according

to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at <http://droughtmonitor.unl.edu>.

*Value loss crop* has the meaning specified in subpart D of part 1437 of this title.

*Verifiable documentation* means evidence that can be verified by FSA through an independent source.

*Verifiable percentage of loss* is the percentage of loss determined by comparing the applicable nutrient factors for a producer's affected production of a forage crop with the average of such nutrient factors from the 3 preceding crop years, as documented on FSA-899, Historical Nutritional Value Weighted Average Worksheet.

*WHIP+* means the Wildfires and Hurricanes Indemnity Program Plus under subpart O of this part.

#### § 760.1803 Participant eligibility.

(a) Participants will be eligible to receive a payment under this subpart only if they incurred a loss to an eligible crop due to a qualifying disaster event, as further specified in this subpart.

(b) To be an eligible participant under this subpart, a person or legal entity must be a:

(1) Citizen of the United States;

(2) Resident alien; for purposes of this subpart, resident alien means "lawful alien" (see § 1400.3 of this title);

(3) Partnership consisting solely of citizens of the United States or resident aliens; or

(4) Corporation, limited liability company, or other similar organizational structure organized under State law consisting solely of citizens or resident aliens of the United States.

(c) If any person who would otherwise be eligible to receive a payment dies before the payment is received, payment may be released as specified in § 707.3 of this chapter. Similarly, if any person or legal entity who would otherwise have been eligible to apply for a payment dies or is dissolved, respec-

tively, before the payment is applied for, payment may be released in accordance with this subpart if a timely application is filed by an authorized representative. Proof of authority to sign for the deceased producer or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application. Eligibility of such participant will be determined, as it is for other participants, based upon ownership share and risk in producing the crop.

(d) An ownership share is required to be eligible for a payment under this subpart. Growers growing eligible crops under contract for crop owners are not eligible for a payment under this subpart unless the grower is also determined to have an ownership share of the crop. Any verbal or written contract that precludes the grower from having an ownership share renders the grower ineligible for payments under this subpart.

(e) A person or legal entity is not eligible to receive assistance under this subpart if FSA determines that the person or legal entity:

(1) Adopted any scheme or other device that tends to defeat the purpose of this subpart or any of the regulations applicable to this subpart;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination under any or all of the following: This subpart and parts 12, 400, 1400, and 1437 of this title.

(f) A person who is ineligible for crop insurance or NAP under § 400.458 or § 1437.16 of this title, respectively, for any year is ineligible for payments under this subpart for the same year.

(g) The provisions of § 718.11 of this chapter, providing for ineligibility for payments for offenses involving controlled substances, apply.

(h) As a condition of eligibility to receive payments under this subpart, the participant must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of part 12 of this title for the applicable crop year for which

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the producer is applying for benefits under this subpart, and must not otherwise be precluded from receiving payments under part 12, 400, 1400, or 1437 of this title or any law.

**§ 760.1804 Eligibility of affected production.**

(a) To be eligible for the QLA Program, an eligible crop's affected production must have suffered a quality loss due to a qualifying disaster event and had at least a 5 percent quality loss due to all eligible disaster events. Whether affected production of a crop had a 5 percent loss will be determined separately for crops with different crop types, intended uses, certified organic or conventional status, county, and crop year.

(b) Affected production of the following is not eligible for the QLA Program:

(1) Crops that were not grown commercially;

(2) Crops that were intended for grazing or were grazed;

(3) Crops not intended for harvest;

(4) Volunteer crops;

(5) Value loss crops;

(6) Maple sap;

(7) Honey;

(8) By-products resulting from processing or harvesting a crop, such as, but not limited to, cotton seed, peanut shells, wheat or oat straw, or corn stalks or stovers;

(9) First-year seeding for forage production;

(10) Immature fruit crops;

(11) Crops for which FCIC coverage or NAP coverage is unavailable;

(12) Multiple market crops for which the producer previously received a crop insurance indemnity or WHIP+ payment for a quality loss;

(13) Crops for which production used to calculate a crop insurance indemnity or WHIP+ payment was adjusted based on a comparison of the producer's sale price to FCIC established price;

(14) Crops that received a crop insurance indemnity, NAP payment, or WHIP+ payment based on the quantity of production that was considered unmarketable;

(15) Crops for which the producer previously received a crop insurance in-

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demnity, NAP payment, or WHIP+ payment for which production was reported as salvage value or secondary use;

(16) Sugar beets for which a member of a cooperative processor received a payment through a cooperative agreement; and

(17) Crops that were destroyed.

(c) Only affected production from initial crop acreage will be eligible for a QLA Program payment, unless the provisions for subsequent crops in this section are met. All plantings of an annual or biennial crop are considered the same as a planting of an initial crop in tropical regions as defined in part 1437, subpart F, of this title.

(d) In cases where there is double cropped acreage, affected production of each crop may be eligible only if the specific crops are approved by the FSA State committee as eligible double cropping practices in accordance with procedures approved by the Deputy Administrator.

(e) Participants having affected production from multiple plantings may receive payments for each planting only if the planting meets the requirements of part 1437 of this title and all other provisions of this subpart are satisfied.

**§ 760.1805 Qualifying disaster events.**

(a) A producer is eligible for payments under this subpart only if the producer's affected production of an eligible crop suffered a crop quality loss due to a qualifying disaster event.

(b) A crop quality loss due to a qualifying disaster event must have occurred on acreage that was physically located in a county that received a:

(1) Presidential Emergency Disaster Declaration authorizing public assistance for categories C through G or individual assistance due to a qualifying disaster event occurring in the 2018 or 2019 calendar years; or

(2) Secretarial Disaster Designation for a qualifying disaster event occurring in the 2018 or 2019 calendar years.

(c) A producer with a crop quality loss on acreage not physically located in a county that was eligible under paragraph (b) of this section will be eligible for the QLA Program for losses due to qualifying disaster events only

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if the producer provides supporting documentation from which the FSA county committee determines that the crop quality loss on the unit was reasonably related to a qualifying disaster event as specified in this subpart. Supporting documentation may include furnishing climatological data from a reputable source or other information substantiating the claim of loss due to a qualifying disaster event.

**§ 760.1806 Ineligible losses.**

(a) A loss is not eligible under this subpart if any of the following apply:

(1) The cause of loss is determined by FSA to be the result of poor management decisions, poor farming practices, or drifting herbicides;

(2) The loss could have been mitigated using good farming practices, including losses due to high moisture content that could be mitigated by following best practices for drying and storing the crop;

(3) The qualifying disaster event occurred after the crop was harvested;

(4) FSA or RMA have previously disapproved a notice of loss for the crop and disaster event, unless that notice of loss was disapproved solely because it was filed after the applicable deadline; or

(5) The cause of loss was due to:

(i) Conditions or events occurring outside of the applicable growing season for the crop;

(ii) Insect infestation;

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

(iv) Failure of a power supply or brownout; or

(v) Failure to harvest or market the crop due to lack of a sufficient plan or resources.

(b) [Reserved]

**§ 760.1807 Miscellaneous provisions.**

(a) All persons with a financial interest in a legal entity receiving payments under this subpart are jointly and severally liable for any refund, including related charges, that is determined to be due to FSA for any reason.

(b) In the event that any application under this subpart resulted from erro-

neous information or a miscalculation, the payment will be recalculated and any excess refunded to FSA with interest to be calculated from the date of the disbursement.

(c) Any payment to any participant under this subpart will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in part 3 of this chapter apply to payments made under this subpart.

(d) Any participant entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 3 of this chapter.

(e) The regulations in parts 11 and 780 of this title apply to determinations under this subpart.

**§ 760.1808 General provisions.**

(a) Eligibility and payments under this subpart will be determined based on the county where the affected production was harvested.

(b) FSA county committees will make any necessary adjustments to the applicant's affected production and other information on the application form used to calculate a payment when the county committee determines:

(1) Additional documentation has been requested by FSA but has not been provided by the participant;

(2) The loss is due to an ineligible cause; or

(3) The participant has a contract providing a guaranteed payment for all or a portion of the crop.

(c) Unless otherwise specified, all eligibility provisions of part 1437 of this title also apply to tropical crops for eligibility under this subpart.

(d) FSA will use the most reliable data available at the time payments under this subpart are calculated. If additional data or information is provided or becomes available after a payment is issued, FSA will recalculate the payment amount and the producer must return any overpayment amount to FSA. In all cases, payments can

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only issue based on the payment formula for losses that affirmatively occurred.

(e) Production that is commingled between counties, crop years, or ineligible and eligible acres before it was a matter of record or combination of record and cannot be separated by using records or other means acceptable to FSA will be prorated to each respective year, county, or type of acreage, respectively.

**§ 760.1809 Payment and adjusted gross income limitation.**

(a) A person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, payments of not more than \$125,000 for each of the 2018, 2019, and 2020 crop years under this subpart.

(b) Payments made to a joint operation, including a joint venture or general partnership, cannot exceed the amount determined by multiplying the maximum payment amount specified in paragraph (a) of this section by the number of persons and legal entities, other than joint operations, that comprise the ownership of the joint operation.

(c) The direct attribution provisions in § 1400.105 of this title apply to payments under this subpart.

(d) The notification of interest provisions in § 1400.107 of this title apply to payments under this subpart.

(e) The provisions for recognizing persons added to a farming operation for payment limitation purposes as described in § 1400.104 of this title apply to payments under this subpart.

(f) The \$900,000 average AGI limitation provisions in part 1400 of this title relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, apply to each applicant for the QLA Program unless at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. A person's or legal entity's average AGI for each of the program years 2018, 2019 or 2020, is determined by using the average of the adjusted gross incomes for the 3 taxable years preceding the most immediately preceding taxable year. If the person's or legal entity's average

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AGI is below \$900,000 or at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry-related activities, the person or legal entity, is eligible to receive payments under this subpart.

**§ 760.1810 Time and method of application.**

(a) A completed FSA-898, Quality Loss Adjustment (QLA) Program Application, must be submitted in person, by mail, email, or facsimile to any FSA county office by the close of business on March 5, 2020.

(b) An application submitted in accordance with paragraph (a) of this section is not considered valid and complete for issuance of payment under this subpart unless FSA determines all the applicable eligibility provisions have been satisfied and the producer has submitted all of following by March 19, 2020:

(1) Documentation required by § 760.1811;

(2) FSA-578, Report of Acreage, for all acreage for any crop for which payments under this subpart are requested;

(3) FSA-895, Crop Insurance and/or NAP Coverage Agreement; and

(4) For forage crops, FSA-899, Historical Nutritional Value Weighted Average Worksheet, if verifiable documentation of historical nutrient factors is available.

(c) In addition to the forms listed in paragraph (b) of this section, applicants must also submit all the following eligibility forms within 60 days from the date of signing the QLA Program application if not already on file with FSA:

(1) AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification;

(2) CCC-902 Automated, Farm Operating Plan for Payment Eligibility 2009 and Subsequent Program Years;

(3) CCC-941 Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information; and

(4) CCC-942 Certification of Income from Farming, Ranching and Forestry Operations, if applicable.

(d) Failure to submit all required forms by the applicable deadlines in

paragraphs (b) and (c) of this section may result in no payment or a reduced payment.

(e) Application approval and payment by FSA does not relieve a participant from having to submit any form required, but not filed, according to this section.

(f) Once signed by a producer, the application is considered to contain information and certifications of and pertaining to the producer regardless of who entered the information on the application.

(g) The producer applying for payment under this subpart certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information is subject to verification or spot check by FSA at any time, either before or after payment is issued. Refusal to allow FSA or any agency of the USDA to verify any information provided will result in the participant's forfeiting eligibility for payment under this subpart. FSA may at any time, including before, during, or after processing and paying an application, require the producer to submit any additional information necessary to implement or determine any eligibility provision of this subpart. Furnishing information specified in this subpart is voluntary; however, FSA may choose not to act on the application or approve payment if the required information is not provided. Providing a false certification will result in ineligibility and can also be punishable by imprisonment, fines, and other penalties.

**§ 760.1811 Required documentation and verification.**

(a) If requested by FSA, an applicant must provide documentation that establishes the applicant's ownership share and value at risk in the crop.

(b) The applicant must provide acceptable documentation that is dated and contains all information required to substantiate the applicant's certification to the satisfaction of the FSA county committee. Verifiable documentation is required to substantiate the total dollar value loss and associated affected production, grading factors, and nutritional factors. FSA may

verify the records with records on file at the warehouse, gin, or other entity that received or may have received the reported production. Reliable production records are required to substantiate the reported amount of affected production for applications not based on the total dollar value loss.

(c) To be considered acceptable, verifiable documentation for grain crops that were sold may come from any time between harvest and sale of the affected production, unless the FSA county committee determines the record is not representative of the condition within 30 days of harvest. For all other crops, the verifiable documentation must come from tests or analysis completed within 30 days of harvest, unless the FSA county committee determines that the record is representative of the condition of the affected production at time of harvest. Examples of acceptable records for purposes of this paragraph (c) include:

- (1) Warehouse grading sheets;
- (2) Settlement sheets;
- (3) Sales receipts showing grade and price or disposition to secondary market due to quality; and

(4) Laboratory test results.

(d) For forage crops, producers must submit verifiable documentation showing the nutrient factors for the affected production. Producers must also submit verifiable documentation of the historical nutrient factors for the 3 preceding crop years if available. The nutrient factors that must be documented for a crop will be determined by the FSA county committee based on the standard practice for the crop in that county.

(e) For all crops other than forage crops, producers must submit verifiable documentation of the total dollar value loss due to quality, if available, and verifiable documentation of grading factors due to quality.

(f) The participant is responsible for:

(1) Retaining, providing, and summarizing, at time of application and whenever required by FSA, the best available verifiable production records for the crop;

(2) Providing the information in a manner that can be easily understood by the FSA county committee; and

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(3) Providing supporting documentation about the disaster event if the FSA county committee has reason to question the disaster event.

(e) Participants must provide all records for any production of a crop that is grown with an arrangement, agreement, or contract for guaranteed payment.

(f) Participants are required to retain documentation in support of their application for 3 years after the date of approval.

(g) Participants receiving QLA Program payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

**§ 760.1812 Payment calculation.**

(a) Payments will be calculated separately for crops based on the crop type, intended use, certified organic or conventional status, county, and crop year.

(b) For forage crops with verifiable documentation of nutrient factors for the affected production and for the 3 preceding crop years, the payment will be equal to the producer's total affected production multiplied by the producer's verifiable percentage of loss, multiplied by the average market price, multiplied by 70 percent.

(c) For forage crops with verifiable documentation of nutrient factors for the affected production but not for the 3 preceding crop years, the payment will be equal to the producer's total affected production multiplied by the county average percentage of loss in paragraph (f) of this section, multiplied by the average market price, multiplied by 70 percent, multiplied by 50 percent.

(d) For crops other than forage with verifiable documentation of the total dollar value loss due to quality, the payment will be equal to the producer's total dollar value loss on the affected production, multiplied by 70 percent.

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(e) For crops other than forage without verifiable documentation of the total dollar value loss but with verifiable documentation of grading factors, the payment will be equal to the producer's affected production multiplied by the county average loss per unit of measure in paragraph (g) of this section, multiplied by 70 percent, multiplied by 50 percent.

(f) The county average percentage of loss is the average percentage of loss from producers eligible for payment under paragraph (b) of this section if at least 5 producers in a county are eligible for payment for a crop under paragraph (b) of this section. If less than 5 producers in a county are eligible for payment for a crop under paragraph (b) of this section, the Deputy Administrator will:

(1) Determine a county average percentage of loss based on the best available data, including, but not limited to, evidence of losses in contiguous counties; or

(2) If a county average percentage of loss cannot be determined due to insufficient data, not issue payments to applicants under paragraph (c) of this section.

(g) The county average loss per unit of measure is based on the weighted average sales price from producers eligible for payment under paragraph (d) of this section if at least 5 producers in a county are eligible for payment for a crop under paragraph (d) of this section. If less than 5 producers are eligible for payment in a county under paragraph (d) of this section, the Deputy Administrator will:

(1) Determine a county average loss per unit of measure based on the best available data, including, but not limited to, evidence of losses in contiguous counties; or

(2) If a county average loss per unit of measure cannot be determined due to insufficient data, not issue payments to applicants under paragraph (e) of this section.

**§ 760.1813 Availability of funds and timing of payments.**

(a) Payments will be issued after the application period has ended and all applications have been reviewed by FSA.

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(b) In the event that, within the limits of the funding made available by the Secretary, approval of eligible applications would result in payments in excess of the amount available, FSA will prorate payments by a national factor to reduce the payments to an amount that is less than available funds as determined by the Secretary.

(c) Applications and claims that are unpaid or prorated for any reason will not be carried forward for payment under other funds for later years or otherwise, but will be considered, as to any unpaid amount, void and nonpayable.

**§ 760.1814 Requirement to purchase crop insurance or NAP coverage.**

(a) For the first 2 consecutive crop years for which crop insurance or NAP coverage is available after the enrollment period for the QLA Program ends, a participant who receives payment under this subpart for a crop loss in a county must obtain:

(1) For an insurable crop, crop insurance with at least a 60 percent coverage level for that crop in that county; or

(2) For a NAP-eligible crop, NAP coverage with a coverage level of 60 percent.

(b) Participants who exceed the average adjusted gross income limitation for NAP payment eligibility<sup>1</sup> for the applicable crop year may meet the purchase requirement specified in paragraph (a)(2) of this section by purchasing Whole-Farm Revenue Protection crop insurance coverage, if eligible, or paying the NAP service fee and premium even though the participant will not be eligible to receive a NAP payment due to the average adjusted gross income limit.

(c) The final crop year to purchase crop insurance or NAP coverage to meet the requirements of paragraph (a) of this section is the 2023 crop year.

(d) A participant who obtained crop insurance or NAP coverage for the crop in accordance with the requirements for WHIP+ in § 760.1517 is considered to have met the requirement to purchase

<sup>1</sup>See §§ 1400.500(a) and 1400.1(a)(4) of this title.

crop insurance or NAP coverage for the QLA Program.

(e) If a producer fails to obtain crop insurance or NAP coverage as required in this section, the producer must reimburse FSA for the full amount of QLA Program payment plus interest. A producer will only be considered to have obtained NAP coverage for the purposes of this section if the participant submitted a NAP application for coverage and paid the requisite NAP service fee and any applicable premium by the applicable deadline and completed all program requirements required under the coverage agreement, including filing an acreage report.

**Subpart S—Emergency Relief Program**

SOURCE: 88 FR 1883, Jan. 11, 2023, unless otherwise noted.

**§ 760.1900 Applicability and administration.**

(a) This subpart specifies the eligibility requirements and payment calculations for Phase 2 of the Emergency Relief Program (ERP). ERP provides payments to producers who suffered eligible crop losses due to qualifying disaster events, which include wildfires, hurricanes, floods, derechos, excessive heat, winter storms, freeze (including a polar vortex), smoke exposure, excessive moisture, qualifying drought, and related conditions occurring in calendar years 2020 and 2021.<sup>1</sup> To be eligible for ERP Phase 2 payments, participants must comply with all provisions under this subpart.

(b) ERP is administered under the general supervision and direction of the Administrator, Farm Service Agency (FSA).

(c) The FSA State committee will take any action required by this subpart that an FSA county committee has not taken. The FSA State committee will also:

<sup>1</sup>ERP Phase 1 was administered according to the notice of funds availability published in the FEDERAL REGISTER on May 18, 2022 (87 FR 30164-30172). A clarification to the notice of funds availability for ERP Phase 1 was published on August 18, 2022 (87 FR 50828-50830).

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(1) Correct, or require an FSA county committee to correct, any action taken by such county FSA committee that is not in accordance with the regulations of this subpart; or

(2) Require an FSA county committee to withhold taking any action that is not in accordance with this subpart.

(d) No provision or delegation to an FSA State or county committee will preclude the FSA Administrator, the Deputy Administrator, or a designee or other such person, from determining any question arising under the programs of this subpart, or from reversing or modifying any determination made by an FSA State or county committee.

(e) The Deputy Administrator has the authority to permit State and county committees to waive or modify deadlines (except deadlines specified in a law) and other requirements or program provisions not specified in law, in cases where lateness or failure to meet such other requirements or program provisions do not adversely affect operation of ERP.

### § 760.1901 Definitions.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title apply, except where they conflict with the definitions in this section.

*2017 WHIP* means the 2017 Wildfires and Hurricanes Indemnity Program under 7 CFR part 760, subpart O.

*Administrative fee* means the amount an insured producer paid for catastrophic risk protection, and additional coverage for each crop year as specified in the applicable crop insurance policy.

*Application* means the ERP Phase 2 application form.

*Aquaculture* means any species of aquatic organisms grown as food for human or livestock consumption or for industrial or biomass uses, fish raised as feed for fish that are consumed by humans, and ornamental fish propagated and reared in an aquatic medium. Eligible aquacultural species must be raised by a commercial operator and in water in a controlled environment.

*ARC and PLC* means the Agriculture Risk Coverage (ARC) and Price Loss

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Coverage (PLC) programs under 7 CFR part 1412.

*Average adjusted gross farm income* means the average of the person or legal entity's adjusted gross income derived from farming, ranching, or forestry operations for the 3 taxable years preceding the most immediately preceding complete taxable year.

(1) If the resulting average adjusted gross farm income is at least 66.66 percent of the average adjusted gross income of the person or legal entity, then the average adjusted gross farm income may also take into consideration income or benefits derived from the following:

(i) The sale of equipment to conduct farm, ranch, or forestry operations; and

(ii) The provision of production inputs and services to farmers, ranchers, foresters, and farm operations.

(2) The relevant tax years are:

(i) For the 2020 program year, 2016, 2017, and 2018; and

(ii) For the 2021 program year, 2017, 2018, and 2019.

*Average adjusted gross income* means the average of the adjusted gross income as defined under 26 U.S.C. 62 or comparable measure of the person or legal entity. The relevant tax years are:

(1) For the 2020 program year, 2016, 2017, and 2018; and

(2) For the 2021 program year, 2017, 2018, and 2019.

*BCAP* means the Biomass Crop Assistance Program under 7 CFR part 1450.

*Beginning farmer or rancher* means a farmer or rancher who has not operated a farm or ranch for more than 10 years and who materially and substantially participates in the operation. For a legal entity to be considered a beginning farmer or rancher, at least 50 percent of the interest must be beginning farmers or ranchers.

*Benchmark revenue* means allowable gross revenue for the benchmark year. If a producer began farming in 2020 or 2021 and did not have allowable gross revenue in either 2018 or 2019, the benchmark revenue is the producer's reasonably expected allowable gross revenue for the disaster year prior to

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the impact of the qualifying disaster event.

*Benchmark year* means the 2018 or 2019 tax year, as elected by the producer.

*Buy-up NAP coverage* means NAP coverage at a payment amount that is equal to an indemnity amount calculated for buy-up coverage computed under section 508(c) or (h) of the Federal Crop Insurance Act and equal to the amount that the buy-up coverage yield for the crop exceeds the actual yield for the crop.

*Catastrophic coverage* has the same meaning as in 7 CFR 1437.3.

*CCC* means the Commodity Credit Corporation.

*Certifying agent* means a private or governmental entity accredited by the USDA Secretary for the purpose of certifying a production, processing, or handling operation as organic.

*CFAP* means the Coronavirus Food Assistance Program 1 and 2 under 7 CFR part 9, subparts A through C, excluding assistance for contract producers specified in § 9.203(l) through (o).

*Controlled environment* means an environment in which everything that can practically be controlled by the producer with structures, facilities, and growing media (including but not limited to water, soil, or nutrients), is in fact controlled by the producer, as determined by industry standards.

*County* means the county or parish of a state. For Alaska, Puerto Rico, and the Virgin Islands, a county is an area designated by the State committee with the concurrence of the Deputy Administrator.

*County committee* means the FSA county committee.

*Coverage level* means the percentage determined by multiplying the elected yield percentage under a crop insurance policy or NAP coverage by the elected price percentage.

*Crop insurance* means an insurance policy reinsured by the Federal Crop Insurance Corporation under the provisions of the Federal Crop Insurance Act, as amended.

*Crop insurance indemnity* means the payment to a participant for crop losses covered under crop insurance administered by RMA in accordance with the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Deputy Administrator* means Deputy Administrator for Farm Programs, Farm Service Agency, U.S. Department of Agriculture, or their designee.

*Direct market crop* means a crop sold directly to consumers without the intervention of an intermediary such as a registered handler, wholesaler, retailer, packer, processor, shipper, or buyer (for example, a crop sold at a farmer's market or roadside stand), excluding crops sold for livestock consumption.

*Disaster year* means the calendar year in which the qualifying disaster event occurred (that is, 2020 or 2021).

*Disaster year revenue* means the allowable gross revenue for:

(1) The 2020 or 2021 tax year, as elected by the producer, for the 2020 disaster year; and

(2) The 2021 or 2022 tax year, as elected by the producer, for the 2021 disaster year.

(3) Producers must choose consecutive tax years if they are applying for both the 2020 and 2021 disaster years (that is, they may choose 2020 tax year revenue for the 2020 disaster year, and 2021 tax year revenue for the 2021 disaster year; or they may choose 2021 tax year revenue for the 2020 disaster year, and 2022 tax year revenue for the 2021 disaster year).

*ELAP* means the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program under part 1416, subpart B, of this title.

*Eligible crop* means a crop, including eligible aquaculture, that is produced in the United States as part of a farming operation and is intended to be commercially marketed. It excludes:

(1) Crops for grazing;

(2) Aquatic species that do not meet the definition of aquaculture;

(3) *Cannabis sativa* L. and any part of that plant that does not meet the definition of hemp; and

(4) Timber.

*Farming operation* means a business enterprise engaged in the production of agricultural products, commodities, or livestock, operated by a person, legal entity, or joint operation, and that is eligible to receive payments, directly or indirectly, under this subpart. A person or legal entity may have more

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than one farming operation if the person or legal entity is a member of one or more legal entity or joint operation.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation of USDA, administered by RMA.

*Hemp* means the plant species *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis, that is grown under a license or other required authorization issued by the applicable governing authority that permits the production of the hemp.

*High value crop* means:

(1) Any eligible crop not specifically identified as a specialty crop or listed in the definition of "other crop"; and

(2) Any eligible crop, regardless of whether it is identified as a specialty crop or listed in the definition of "other crop," if the crop is a direct market crop, organic crop, or a crop grown for a specific market in which specialized products can be sold resulting in an increased value compared to the typical market for the crops (for example, soybeans intended for tofu production), as determined by the Deputy Administrator.

*Income derived from farming, ranching, and forestry operations* means income of an individual or entity derived from:

(1) Production of crops, specialty crops, and unfinished raw forestry products;

(2) Production of livestock, aquaculture products used for food, honeybees, and products derived from livestock;

(3) Production of farm-based renewable energy;

(4) Selling (including the sale of easements and development rights) of farm, ranch, and forestry land, water or hunting rights, or environmental benefits;

(5) Rental or lease of land or equipment used for farming, ranching, or forestry operations, including water or hunting rights;

(6) Processing, packing, storing, and transportation of farm, ranch, forestry

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commodities including renewable energy;

(7) Feeding, rearing, or finishing of livestock;

(8) Payments of benefits, including benefits from risk management practices, crop insurance indemnities, and catastrophic risk protection plans;

(9) Sale of land that has been used for agricultural purposes;

(10) Payments and benefits authorized under any program made available and applicable to payment eligibility and payment limitation rules;

(11) Income reported on Internal Revenue Service (IRS) Schedule F or other schedule used by the person or legal entity to report income from such operations to the IRS;

(12) Wages or dividends received from a closely held corporation, Interest Charge Domestic International Sales Corporation (IC-DISC), or legal entity comprised entirely of family members when more than 50 percent of the legal entity's gross receipts for each tax year are derived from farming, ranching, or forestry activities as defined in this document; and

(13) Any other activity related to farming, ranching, and forestry, as determined by the Deputy Administrator.

*IRS* means the Department of Treasury, Internal Revenue Service.

*LDP* means the Loan Deficiency Payment programs in 7 CFR parts 1421, 1425, 1427, 1434, and 1435.

*Legal entity* means a corporation, joint stock company, association, limited partnership, irrevocable trust, estate, charitable organization, or other similar organization including any such organization participating in a business structure as a partner in a general partnership, a participant in a joint venture, a grantor of a revocable trust, or as a participant in a similar organization. A business operating as a sole proprietorship is considered a legal entity.

*Limited resource farmer or rancher* means a farmer or rancher:

(1) Who is a person whose:

(i) Direct or indirect gross farm sales did not exceed:

(A) \$180,300 in each calendar year for 2017 and 2018 (the relevant years for the 2020 program year); or

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(B) \$179,000 in each of the 2018 and 2019 calendar years for the 2021 program year;

and

(ii) Total household income was at or below the national poverty level for a family of four in each of the same two previous years referenced in paragraph (1)(i) of this definition;<sup>1</sup> or

(2) That is an entity and all members who hold an ownership interest in the entity meet the criteria in paragraph (1) of this definition.

*LFP* means the Livestock Forage Disaster Program under CFR part 1416, subpart C.

*MLG* means marketing loan gains under the Marketing Assistance Loan program provisions in 7 CFR parts 1421, 1425, 1427, 1434, and 1435.

*Minor child* means a person who is under 18 years of age as of June 1, 2020.

*MFP* means the 2018 Market Facilitation Program under 7 CFR part 1409, subpart A, and the 2019 Market Facilitation Program under 7 CFR part 1409, subpart B.

*NAP* means the Noninsured Crop Disaster Assistance Program under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333) and 7 CFR part 1437.

*On-Farm Storage Loss Program* means the On-Farm Storage Loss Program under 7 CFR part 760, subpart P.

*Organic crop* means a crop that is organically produced consistent with section 2103 of the Organic Foods Production Act of 1990 (7 U.S.C. 6502) and grown on acreage certified by a certifying agent as conforming to organic standards specified in 7 CFR part 205.

*Other crop* means cotton, peanuts, rice, feedstock, and any crop grown with an intended use of grain, silage, or forage, unless the crop meets the requirements in paragraph (2) of the definition of "high value crop."

*Ownership interest* means to have either legal ownership interest or beneficial ownership interest in a legal entity. For the purposes of administering ERP Phase 2, a person or legal entity

that owns a share or stock in a legal entity that is a corporation, limited liability company, limited partnership, or similar type entity where members hold a legal ownership interest and shares in the profits or losses of such entity is considered to have an ownership interest in such legal entity. A person or legal entity that is a beneficiary of a trust or heir of an estate who benefits from the profits or losses of such entity is also considered to have a beneficial ownership interest in such legal entity.

*Person* means an individual, natural person and does not include a legal entity.

*Premium* means the premium paid by the producer for crop insurance coverage or NAP buy-up coverage levels.

*Producer* means a person or legal entity who was entitled to a share in the eligible crop available for marketing or would have shared had the eligible crop been produced and marketed.

*Program year* means:

(1) For ERP Phase 2, the disaster year; and

(2) For all other programs, the program year as defined in the applicable program provisions.

*Qualifying disaster event* means wildfires, hurricanes, floods, derechos, excessive heat, winter storms, freeze (including a polar vortex), smoke exposure, excessive moisture, qualifying drought, and related conditions.

*Qualifying drought* means an area within the county was rated by the U.S. Drought Monitor as having a drought intensity of D2 (severe drought) for eight consecutive weeks or D3 (extreme drought) or higher level for any period of time during the applicable calendar year.

*Related condition* means damaging weather and adverse natural occurrences that occurred concurrently with and as a direct result of a specified qualifying disaster event. Related conditions include, but are not limited to:

(1) Excessive wind that occurred as a direct result of a derecho;

(2) Silt and debris that occurred as a direct and proximate result of flooding;

(3) Excessive wind, storm surges, tornadoes, tropical storms, and tropical depressions that occurred as a direct result of a hurricane; and

<sup>1</sup>Limited resource farmer or rancher status can be determined using a website available through the Limited Resource Farmer and Rancher Online Self Determination Tool through Natural Resources Conservation Service at <https://lrftool.sc.egov.usda.gov>.

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(4) Excessive wind and blizzards that occurred as a direct result of a winter storm.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who is a member of a group whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. For entities, at least 50 percent of the ownership interest must be held by individuals who are members of such a group. Socially disadvantaged groups include the following and no others unless approved in writing by the Deputy Administrator:

(1) American Indians or Alaskan Natives;

(2) Asians or Asian-Americans;

(3) Blacks or African Americans;

(4) Hispanics or Hispanic Americans;

(5) Native Hawaiians or other Pacific Islanders; and

(6) Women.

*Specialty crops* means fruits, tree nuts, vegetables, culinary herbs and spices, medicinal plants, and nursery, floriculture, and horticulture crops. This includes common specialty crops identified by USDA's Agricultural Marketing Service at <https://www.ams.usda.gov/services/grants/scbgp/specialty-crop> and other crops as designated by the Deputy Administrator.

*Substantial beneficial interest (SBI)* has the same meaning as specified in the applicable crop insurance policy. For the purposes of ERP Phase 1, Federal crop insurance records for "transfer of coverage, right to indemnity" are considered the same as SBIs.

*STRP* means the Seafood Trade Relief Program announced in the notice of funds availability published on September 14, 2020 (85 FR 56572-56575).

*Underserved farmer or rancher* means a beginning farmer or rancher, limited resource farmer or rancher, socially disadvantaged farmer or rancher, or veteran farmer or rancher.

*United States* means all 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

*U.S. Drought Monitor* means the system for classifying drought severity according to a range of abnormally dry to

exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at <http://droughtmonitor.unl.edu>.

*Veteran farmer or rancher* means a farmer or rancher:

(1) Who has served in the Armed Forces (as defined in 38 U.S.C. 101(10)<sup>2</sup>) and:

(i) Has not operated a farm or ranch for more than 10 years; or

(ii) Has obtained status as a veteran (as defined in 38 U.S.C. 101(2)<sup>3</sup>) during the most recent 10-year period; or

(2) That is an entity and at least 50 percent of the ownership interest is held by members who meet the criteria in paragraph (1) of this definition.

*WHIP+* means the Wildfires and Hurricanes Indemnity Program Plus under 7 CFR part 760, subpart O.

### § 760.1902 Producer eligibility requirements.

(a) To be eligible for ERP Phase 2, a producer must have suffered a loss in disaster year allowable gross revenue, as compared to the benchmark allowable gross revenue, due to necessary expenses associated with losses of eligible crops due in whole or in part to a qualifying disaster event that occurred in the 2020 or 2021 calendar year.

(b) To be eligible for an ERP Phase 2 payment, a producer must be a:

(1) Citizen of the United States;

(2) Resident alien, which for purposes of this subpart means "lawful alien" as defined in part 1400 of this title;

(3) Partnership organized under State law consisting solely of citizens of the United States or resident aliens;

(4) Corporation, limited liability company, or other organizational structure organized under State law

<sup>2</sup>The term "Armed Forces" means the United States Army, Navy, Marine Corps, Air Force, Space Force, and Coast Guard, including the reserve components.

<sup>3</sup>The term "veteran" means a person who served in the active military, naval, air, or space service, and who was discharged or released under conditions other than dishonorable.

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consisting solely of citizens of the United States or resident aliens; or

(5) Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).

[88 FR 1883, Jan. 11, 2023, as amended at 88 FR 62292, Sept. 11, 2023]

**§ 760.1903 Allowable gross revenue.**

(a) For the purposes of this subpart, “allowable gross revenue” includes revenue from:

(1) Sales of eligible crops produced by the producer, which includes sales resulting from value added through post-production activities that were reportable on IRS Schedule F;

(2) Sales of eligible crops a producer purchased for resale that had a change in characteristic due to the time held (for example, a plant purchased at a size of 2 inches and sold as an 18-inch plant after 4 months), less the cost or other basis of such eligible crops;

(3) The taxable amount of cooperative distributions directly related to the sale of the eligible crops produced by the producer;

(4) Benefits for eligible crops under the following agricultural programs: 2017 WHIP, ARC and PLC, BCAP, LDP, MLG, MFP, the On-Farm Storage Loss Program, and STRP;

(5) CCC loans for eligible crops, if treated as income and reported to IRS;

(6) Crop insurance proceeds for eligible crops, minus the amount of administrative fees and premiums;

(7) NAP payments for eligible crops, minus the amount of service fees and premiums;

(8) ELAP payments for an aquaculture crop;

(9) Payments issued through grant agreements with FSA for losses of eligible crops;

(10) Grants from the Department of Commerce, National Oceanic and Atmospheric Administration and State program funds providing direct payments for the loss of eligible crops or the loss of revenue from eligible crops;

(11) Other revenue directly related to the production of eligible crops that IRS requires the producer to report as income;

(12) For the disaster year only, ERP Phase 1 payments issued to another

person or entity for the producer’s share of an eligible crop, regardless of the tax year in which the payment would be reported to IRS; and

(13) For the benchmark year only, 2018, 2019 and 2020 WHIP+ and QLA payments.

(b) Allowable gross revenue does not include revenue from sources other than those listed in paragraph (a) of this section, including but not limited to, revenue from:

(1) Federal assistance programs not included in paragraph (a) of this section;

(2) Sales of livestock, animal by-products, and any commodities that are excluded from “eligible crops”;

(3) Resale items not held for characteristic change;

(4) Income from a pass-through entity such as an S Corp or limited liability company;

(5) Conservation program payments;

(6) Any pandemic assistance payments that were not for the loss of eligible crops or the loss of revenue from eligible crops;

(7) Custom hire income;

(8) Net gain from hedging or speculation;

(9) Wages, salaries, tips, and cash rent;

(10) Rental of equipment or supplies; and

(11) Acting as a contract producer of an agricultural commodity.

(c) A producer is required to certify to an adjusted allowable gross revenue for the benchmark year on FSA-521 if the producer had a decreased operation capacity in a disaster year for which they are applying for ERP Phase 2, compared to the benchmark year.

(d) A producer may certify to an adjusted allowable gross revenue for the benchmark year on FSA-521 if either of the following apply:

(1) The producer did not have a full year of revenue for 2018 or 2019; or

(2) The producer had expanded their operation capacity in a disaster year for which they are applying for ERP Phase 2, compared to the benchmark year.

(e) Change in operation capacity does not include crop rotation from year to year, changes in farming practices such

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as converting from conventional tillage to no-till, or increasing the rate of fertilizers or chemicals. If requested by FSA, producers are required to submit documentation to FSA to support adjustments described in paragraphs (c) and (d) of this section within 30 calendar days of the request. The documentation to support an adjustment due to a change in operation capacity must show that the adjustment to the producer's benchmark revenue is due to an:

- (1) Addition or decrease in production capacity of the farming operation;
- (2) Increase or decrease in the use of existing production capacity; or
- (3) Physical alterations that were made to existing production capacity.

(f) If a producer began farming in 2020 or 2021 and did not have allowable gross revenue in a benchmark year, the producer may certify to an adjusted benchmark allowable gross revenue on form FSA-521 that represents what had been the producer's reasonably expected disaster year revenue prior to the impact of the qualifying disaster event. If requested by FSA, documentation required to support a producer's certification must be provided within 30 calendar days of FSA's request, or the producer will be considered ineligible for ERP Phase 2. Acceptable documentation must be generated in the ordinary course of business and dated prior to the impact of the disaster event and includes, but is not limited to:

- (1) Financial documents such as a business plan or cash flow statement that demonstrate an expected level of revenue;
- (2) Sales contracts or purchase agreements; and
- (3) Documentation supporting production capacity, use of existing production capacity, or physical alterations that demonstrate production capacity.

(g) The allowable gross revenue will be based on the year for which the revenue would be reported for the purpose of filing a tax return, except for the ERP Phase 1 payments specified in paragraph (a)(12) of this section.

(h) Producers who file or would be eligible to file a joint tax return will certify their allowable gross revenue

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based on what it would have been had they filed taxes separately for the applicable year.

(i) On form FSA-521, for each applicable disaster year, producers must indicate the percentage of their allowable gross revenue from specialty and high value crops and the percentage from other crops. The percentages certified must be equal to the percentages that the producer would have reasonably expected to receive for the disaster year if not for the qualifying disaster event.

(j) The Deputy Administrator may determine that certain eligible crops produced by a producer that do not generate revenue for the producer directly from the sale of the crop and that the producer uses within their ordinary operation may be included in a producer's allowable gross revenue. This determination is at the Deputy Administrator's discretion. The value of the eligible crop reported in the producer's allowable gross revenue will be based on the producer's actual production of the crop and a price for the crop based on the best available data for each crop, as determined by the Deputy Administrator and published through guidance on FSA's website.

[88 FR 1883, Jan. 11, 2023 as amended at 88 FR 39768, June 20, 2023]

### § 760.1904 Time and method of application.

(a) A completed FSA-521, Emergency Relief Program (ERP) Phase 2 Application, must be submitted to the producer's recording county office by the close of business on the date announced by the Deputy Administrator. Applications may be submitted in person or by mail, email, facsimile, or other methods announced by FSA.

(b) Failure of an individual, entity, or a member of an entity to submit the following payment limitation and payment eligibility forms within 60 days from the date of the ERP Phase 2 application deadline, may result in no payment or a reduced payment:

(1) Form AD-2047, Customer Data Worksheet, for new customers or existing customers who need to update their customer profile;

(2) Form CCC-860, Socially Disadvantaged, Limited Resource, Beginning

and Veteran Farmer or Rancher Certification, applicable for the program year or years for which the producer is applying for ERP;

(3) Form CCC-901, Member Information for Legal Entities, if applicable;

(4) Form CCC-902, Farm Operating Plan for an individual or legal entity as provided in 7 CFR part 1400;

(5) Form FSA-510, Request for an Exception to the \$125,000 Payment Limitation for Certain Programs, accompanied by a certification from a certified public accountant or attorney as to that person or legal entity's certification, for a legal entity and all members of that entity, for each applicable program year, including the legal entity's members, partners, or shareholders, as provided in 7 CFR part 1400; and

(6) Form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, for the ERP Phase 2 applicant and applicable affiliates as provided in 7 CFR part 12.

(c) If requested by FSA, the producer must provide additional documentation that establishes the producer's eligibility for ERP Phase 2. If supporting documentation is requested, the documentation must be submitted to FSA within 30 calendar days from the request or the application will be disapproved by FSA. FSA may request supporting documentation to verify information provided by the producer and the producer's eligibility including, but not limited to, the producer's:

(1) Allowable gross revenue reported on the ERP Phase 2 application;

(2) Percentages of the expected allowable gross revenue from:

(i) Specialty and high value crops; and

(ii) Other crops; and

(3) Ownership share in the agricultural commodities.

#### **§ 760.1905 Payment calculation.**

(a) ERP Phase 2 payments will be calculated separately for each disaster year. If a producer indicates that they have expected revenue for both specialty and high value crops and other crops for a disaster year, a payment will be calculated separately for:

(1) Specialty and high value crops; and

(2) Other crops.

(b) To determine a producer's ERP Phase 2 payment amount, FSA will calculate:

(1) The producer's benchmark year allowable gross revenue, adjusted according to 7 CFR 760.1903, if applicable, multiplied by the ERP factor of 70 percent; minus

(2) The producer's disaster year allowable gross revenue; minus

(3) The sum of the producer's gross ERP Phase 1 payments for the 2020 program year, if the calculation is for the 2020 disaster year, or for the 2021 and 2022 program years, if the calculation is for the 2021 disaster year; minus

(4) The sum of the producer's net CFAP payments (excluding payments for contract producer revenue), net 2020 WHIP+ payments, and net 2020 Quality Loss Adjustment (QLA) Program payments, if the calculation is for the 2020 disaster year; and

(5) Multiplied by the percentage of the expected disaster year revenue for specialty and high value crops or other crops, as applicable, to determine the separate payments for specialty and high value crops or other crops.

(c) FSA will issue an initial payment equal to the lesser of the amount calculated according to this section or the maximum initial payment amount of \$2,000. If a producer has also received a payment under ERP Phase 1, FSA will reduce the producer's initial ERP Phase 2 payment amount by subtracting the producer's ERP Phase 1 gross payment amount.

(d) After the close of the ERP Phase 2 application period, FSA will issue a final payment equal to the amount calculated according to this section minus the amount of the producer's initial payment. If total calculated payments exceed the total funding available for ERP Phase 2, the ERP factor may be adjusted and the final payment amounts will be prorated to stay within the amount of available funding. If there are insufficient funds, a differential of 15 percent will be used for underserved producers similar to ERP Phase 1, but with a cap at the statutory maximum of 70 percent. For example, if the ERP Factor is set at 50 percent, the

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factor used for underserved producers will be 65 percent, but if the factor is set at 55 percent or higher, the factor for underserved producers will be capped at 70 percent.

(e) If a producer receives assistance through CFAP or ERP Phase 1 after their ERP Phase 2 payment is calculated, the producer's ERP Phase 2 payment will be recalculated and the producer must refund any resulting overpayment.

[88 FR 1883, Jan. 11, 2023, as amended at 88 FR 62292, Sept. 11, 2023]

### § 760.1906 Payment limitation and attribution.

(a) The payment limitation for ERP is determined by the person's or legal entity's average adjusted gross farm income (income from activities related to farming, ranching, or forestry). Specifically, if their average adjusted gross farm income is less than 75 percent of their average adjusted gross income (AGI) for the three taxable years preceding the most immediately preceding complete tax year, a person or legal entity, other than a joint venture or general partnership, cannot receive, directly or indirectly, more than \$125,000 in payments for specialty crops and high value crops<sup>1</sup> and \$125,000 in payment for all other crops under:

(1) ERP Phase 1 for program year 2020 and ERP Phase 2 for program year 2020, combined; and

(2) ERP Phase 1 for program year 2021 and ERP Phase 2 for program year 2021, combined.

(b) If at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry related activities and the producer provides the required certification and documentation, as discussed below, the person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, up to:

<sup>1</sup>High value crops were not defined in ERP Phase 1; therefore, only ERP Phase 1 payments for specialty crops, as defined in the ERP Phase 1 notice of funds availability, will be counted toward the increased payment limitation for specialty and high value crops.

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(1) \$900,000 for specialty crops and high value crops combined for:

(i) ERP Phase 1 for program year 2020 and ERP Phase 2 for program year 2020, combined; and

(ii) ERP Phase 1 for program year 2021 and ERP Phase 2 for program year 2021, combined; and

(2) \$250,000 for all other crops for:

(i) ERP Phase 1 for program year 2020 and ERP Phase 2 for program year 2020, combined; and

(ii) ERP Phase 1 for program year 2021 and ERP Phase 2 for program year 2021, combined.

(c) The relevant tax years for establishing a producer's AGI and percentage derived from farming, ranching, or forestry related activities are:

(1) Years 2016, 2017, and 2018 for program year 2020; and

(2) Years 2017, 2018, and 2019 for program year 2021.

(d) To receive more than \$125,000 in ERP payments, producers must submit form FSA-510, accompanied by a certification from a certified public accountant or attorney as to that person or legal entity's certification. If a producer requesting the increased payment limitation is a legal entity, all members of that entity must also complete form FSA-510 and provide the required certification according to the direct attribution provisions in 7 CFR 1400.105, "Attribution of Payments." If a legal entity would be eligible for the increased payment limitation based on the legal entity's average AGI from farming, ranching, or forestry related activities but a member of that legal entity either does not complete a form FSA-510 and provide the required certification or is not eligible for the increased payment limitation, the payment to the legal entity will be reduced for the limitation applicable to the share of the ERP Phase 2 payment attributed to that member.

(e) If a producer files form FSA-510 and the accompanying certification after their ERP Phase 2 payment is issued but before the deadline announced by FSA, FSA will process the form FSA-510 and issue the additional payment amount if a maximum initial payment amount has not been reached.

(f) A payment made to a legal entity will be attributed to those members

who have a direct or indirect ownership interest in the legal entity, unless the payment of the legal entity has been reduced by the proportionate ownership interest of the member due to that member's ineligibility. Attribution of payments made to legal entities will be tracked through four levels of ownership in legal entities as follows:

(1) First level of ownership: Any payment made to a legal entity that is owned in whole or in part by a person will be attributed to the person in an amount that represents the direct ownership interest in the first-level or payment legal entity;

(2) Second level of ownership: Any payment made to a first-level legal entity that is owned in whole or in part by another legal entity (referred to as a second-level legal entity) will be attributed to the second-level legal entity in proportion to the ownership of the second-level legal entity in the first-level legal entity; if the second-level legal entity is owned in whole or in part by a person, the amount of the payment made to the first-level legal entity will be attributed to the person in the amount that represents the indirect ownership in the first-level legal entity by the person;

(3) Third and fourth levels of ownership: Except as provided in the second-level ownership in paragraph (f)(2) of this section and in the fourth level of ownership in paragraph (f)(4) of this section, any payments made to a legal entity at the third and fourth levels of ownership will be attributed in the same manner as specified in paragraph (f)(2) of this section; and

(4) Fourth-level of ownership: If the fourth level of ownership is that of a legal entity and not that of a person, a reduction in payment will be applied to the first-level or payment legal entity in the amount that represents the indirect ownership in the first-level or payment legal entity by the fourth-level legal entity.

(g) Payments made directly or indirectly to a person who is a minor child will not be combined with the earnings of the minor's parent or legal guardian.

(h) A producer that is a legal entity must provide the names, addresses, ownership share, and valid taxpayer identification numbers of the members

holding an ownership interest in the legal entity. Payments to a legal entity will be reduced in proportion to a member's ownership share when a valid taxpayer identification number for a person or legal entity that holds a direct or indirect ownership interest, at the first through fourth levels of ownership in the business structure, is not provided to FSA.

(i) If an individual or legal entity is not eligible to receive ERP Phase 2 payments due to the individual or legal entity failing to satisfy payment eligibility provisions, the payment made either directly or indirectly to the individual or legal entity will be reduced to zero. The amount of the reduction for the direct payment to the producer will be commensurate with the direct or indirect ownership interest of the ineligible individual or ineligible legal entity.

(j) Like other programs administered by FSA, payments made to an Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304), will not be subject to payment limitation.

[88 FR 1883, Jan. 11, 2023 as amended at 88 FR 39768, June 20, 2023]

**§ 760.1907 Eligibility subject to verification.**

(a) Producers who are approved for participation in ERP Phase 2 are required to retain documentation in support of their application for 3 years after the date of approval.

(b) Participants receiving ERP Phase 2 payments must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and to allow representatives to make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

**§ 760.1908 Miscellaneous provisions.**

(a) If an ERP Phase 2 payment resulted from erroneous information provided by a producer, or any person acting on their behalf, the payment will be recalculated and the producer must

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refund any excess payment with interest calculated from the date of the disbursement of the payment.

(b) If FSA determines that the producer intentionally misrepresented information provided on their application, the application will be disapproved and the producer must refund the full payment to FSA with interest from the date of disbursement.

(c) Any required refunds must be resolved in accordance with part 3 of this title.

(d) A producer, whether a person or legal entity, that either fails to timely provide all required documentation or fails to satisfy any eligibility requirement for ERP Phase 2, is not eligible to receive ERP Phase 2 payments, directly or indirectly. An ERP Phase 2 payment to an eligible legal entity applicant whose member(s) either fails to timely provide all required documentation or fails to satisfy any eligibility requirement for ERP Phase 2 will be reduced proportionate to that member's ownership interest in the legal entity.

(e) Any payment under this subpart will be made without regard to questions of title under State law and without regard to any claim or lien against the commodity or proceeds from the sale of the commodity. The regulations governing offsets in part 3 of this title apply to payments made under this subpart.

(f) For the purposes of the effect of a lien on eligibility for Federal programs (28 U.S.C. 3201(e)), USDA waives the restriction on receipt of funds under ERP Phase 2 but only as to beneficiaries who, as a condition of the waiver, agree to apply the ERP Phase 2 payments to reduce the amount of the judgment lien.

(g) In addition to any other Federal laws that apply to ERP Phase 2, the following laws apply: 15 U.S.C. 714; 18 U.S.C. 286, 287, 371, and 1001.

### § 760.1909 Perjury.

In either applying for or participating in ERP Phase 2, or both, the producer is subject to laws against perjury and any resulting penalties and prosecution, including, but not limited to, 18 U.S.C. 1621. If the producer willfully makes and represents as true any

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verbal or written declaration, certification, statement, or verification that the producer knows or believes not to be true, in the course of either applying for or participating in ERP Phase 2, or both, then the producer may be guilty of perjury and, except as otherwise provided by law, may be fined, imprisoned for not more than 5 years, or both, regardless of whether the producer makes such verbal or written declaration, certification, statement, or verification within or without the United States.

### § 760.1910 Requirement to purchase crop insurance or NAP coverage.

(a) Producers must report all crops that suffered a revenue loss in whole or in part due to a qualifying disaster event on form FSA-522, Crop Insurance and/or NAP Coverage Agreement.

(b) All producers who receive ERP Phase 2 payments must file an accurate acreage report and purchase crop insurance or NAP coverage where crop insurance is not available, for the next 2 available crop years. For each crop reported according to paragraph (a) of this section, participants must obtain crop insurance or NAP, as may be applicable:

(1) At a coverage level equal to or greater than 60 percent for insurable crops; or

(2) At the catastrophic level or higher for NAP crops.

(c) Availability will be determined from the date a producer receives an ERP payment and may vary depending on the timing and availability of crop insurance or NAP for a producer's particular crops. The final crop year to purchase crop insurance or NAP coverage to meet the second year of coverage for this requirement is the 2026 crop year.

(d) In situations where crop insurance is unavailable for a crop, an ERP participant must obtain NAP coverage. Section 1001D of the Food Security Act of 1985 (1985 Farm Bill) provides that a person or entity with an AGI greater than \$900,000 is not eligible to participate in NAP; however, producers with

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an AGI greater than \$900,000 are eligible for ERP. To reconcile this restriction in the 1985 Farm Bill and the requirement to obtain NAP or crop insurance coverage, ERP participants may meet the purchase requirement by purchasing Whole-Farm Revenue Protection (WFRP) crop insurance coverage, if eligible, or they may pay the applicable NAP service fee despite their ineligibility for a NAP payment. In other words, the service fee must be paid even though no NAP payment may be made because the AGI of the person or entity exceeds the 1985 Farm Bill limitation.

(e) If both Federal crop insurance and NAP coverage are unavailable for a crop, the producer must obtain WFRP crop insurance coverage, if eligible.

(f) For all crops listed on form FSA-522, producers who have the crop or crop acreage in subsequent years and who fail to obtain the 2 years of crop insurance or NAP coverage required as required by this section, must refund the ERP Phase 2 payment with interest from the date of disbursement. Producers who do not plant a crop listed on form FSA-522 in a year for which this requirement applies are not subject to the crop insurance or NAP purchase requirement for that year.

(g) Producers who received an ERP Phase 1 payment for a crop are not required to obtain additional years of crop insurance or NAP coverage for that crop if they also receive an ERP Phase 2 payment for a loss associated with that crop.

**PART 761—FARM LOAN PROGRAMS; GENERAL PROGRAM ADMINISTRATION****Subpart A—General Provisions**

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AUTHORITY: 5 U.S.C. 301 and 7 U.S.C. 1989.

SOURCE: 72 FR 63285, Nov. 8, 2007, unless otherwise noted.

**Subpart A—General Provisions****§ 761.1 Introduction.**

- (a) The Administrator delegates the responsibility to administer Farm Loan Programs of the Consolidated Farm and Rural Development Act (7