

and accounts to document all eligibility requirements specified herein and must keep such records and accounts for 3 years after the date of payment to their dairy operations under this program. Destruction of the records after such date is at the risk of the party required, by this part, to keep the records.

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

(a) Excess payments, payments provided as the result of erroneous information provided by any person, or payments resulting from a failure to meet any requirement or condition for payment under the application or this part, must be refunded to FSA.

(b) A refund required under this section is due with interest determined in accordance with paragraph (d) of this section and late payment charges as provided in 7 CFR part 792. Notwithstanding any other regulation, interest will be due from the date of the disbursement to the producer or other recipient of the funds.

(c) Persons signing a dairy operation's application as having an interest in the operation will be jointly and severally liable for any refund and related charges found to be due under this section.

(d) In the event FSA determines a participant owes a refund under this part, FSA will charge program interest from the date of disbursement of the erroneous payment. Such interest will accrue at the rate that the United States Department of the Treasury charges FSA for funds plus additional charges as deemed appropriate by the Administrator or provided for by regulation or statute.

(e) The debt collection provisions of part 792 of this chapter applies to this part except as is otherwise provided in this part.

**§ 786.114 Miscellaneous provisions.**

(a) Payments or any portion thereof due under this part must be made without regard to questions of title under State law and without regard to any claim or lien against the livestock, or proceeds thereof, in favor of the owner or any other creditor except agencies

and instrumentalities of the U.S. Government.

(b) Any producer entitled to any payment under this part may assign any payments in accordance with the provisions of 7 CFR part 1404.

**§ 786.115 Termination of program.**

This program will be terminated after payment has been made to those applicants certified as eligible pursuant to the application period established in § 786.104. All eligibility determinations will be final except as otherwise determined by the Deputy Administrator. Any claim for payment may be denied once the allowed funds are expended, irrespective of any other provision of this part.

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

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

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

SOURCE: 80 FR 63898, Oct. 22, 2015, unless otherwise noted.

### Subpart A—General

#### § 789.1 Purpose.

This part provides guidance and procedures for use of the Defense Production Act priorities and allocations authority by the United States Department of Agriculture (USDA) with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer in this part. (The guidance and procedures in this part are consistent with the guidance and procedures provided in other regulations issued under Executive Order 13603. Guidance and procedures for use of the Defense Production

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Act priorities and allocations authority with respect to other types of resources are as follows: For all forms of energy, refer to the Department of Energy’s Energy Priorities and Allocations System (EPAS) regulation in 10 CFR part 217; for all forms of civil transportation, refer to the Department of Transportation’s Transportation Priorities and Allocations System (TPAS) regulation in 49 CFR part 33; for water resources, refer to the Department of Defense; for health resources, refer to the Department of Health and Human Services’ Health Resources Priorities and Allocations System in 45 CFR part 101; and for all other materials, services, and facilities, including construction materials, refer to the Department of Commerce’s Defense Priorities and Allocations System (DPAS) regulation in 15 CFR part 700.)

#### § 789.2 Priorities and allocations authority.

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

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

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

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

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

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

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

#### § 789.3 Program eligibility.

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

### Subpart B—Definitions

#### § 789.8 Definitions.

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

*Allocations order* means an official action to control the distribution of materials, services, or facilities for a pur-

pose deemed necessary or appropriate to promote the national defense.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Homeland security* includes efforts:

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

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

*Item* means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

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

*Livestock* means all farm-raised animals.

*Livestock resources* means materials, facilities, vehicles, health supplies,

services, and equipment required for the production and distribution of livestock.

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

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

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

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

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

*Materials* includes:

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

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

*National defense* means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to Title VI of the Stafford Act and critical infrastructure protection and restoration.

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

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

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

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

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

*Secretary* means the Secretary of Agriculture.

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

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

- (1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;
- (2) The construction of facilities;
- (3) The movement of individuals and property by all modes of civil transportation; or
- (4) Other national defense programs and activities.

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

*Stafford Act* means the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197h).

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

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

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

### Subpart C—Placement of Rated Orders

#### § 789.10 Delegations of authority.

(a) [Reserved]

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

#### § 789.11 Priority ratings.

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

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

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

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

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

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

### § 789.12 Elements of a rated order.

(a) Each rated order must include:

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

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

quired delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

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

(4) A statement as follows:

(i) A statement that reads:

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

(ii) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement specified in paragraph (a)(4)(i) of this section:

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

(b) [Reserved]

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

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

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

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

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

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

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

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

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders that can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

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

(c) *Optional rejection.* Unless otherwise directed by USDA for a rated order involving food resources, food resource facilities, livestock resources, veterinary resources, plant health resources, or the domestic distribution of farm equipment and commercial fertilizer, rated orders may be rejected in any of the following cases as long as a

supplier does not discriminate among customers:

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

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

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

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

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

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

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

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or electronic confirmation must be provided within 5 working days.

(e) *Exception for emergency preparedness conditions.* If the rated order is placed for the purpose of emergency

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preparedness and includes the additional statement as specified in § 789.12(a)(4)(ii), a person must accept or reject a rated order and send the acceptance or rejection in writing or in an electronic format:

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

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

### § 789.14 Preferential scheduling.

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

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

(c) For conflicting rated orders:

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

delivered or performed on the same day, the person must give precedence to those orders that have the earliest receipt dates.

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

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

### § 789.15 Extension of priority ratings.

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

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

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

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

(1) An official action of USDA; or

(2) Written notification from the person who placed the rated order.

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

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of the date the change is received by the supplier.

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

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

(1) A change in shipping destination;

(2) A reduction in the total amount of the order;

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

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

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

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

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

### § 789.17 Use of rated orders.

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

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

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

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

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

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

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

(2) A DO rating and the program identification symbol indicated on the

customer's rated order must be used on the order. A DX rating must not be used even if the inventory was used to fill a DX-rated order.

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

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

(d) For combining rated and unrated orders:

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

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

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

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

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

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

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person

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must combine rated orders as provided in paragraph (c) of this section, if possible, to obtain minimum procurable quantities.

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

### § 789.18 Limitations on placing rated orders.

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

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

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

(i) Delivery on a date earlier than needed;

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

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

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

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

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

(B) Production or construction equipment or items to be used for the manu-

facture of production equipment. For information on requesting priority rating authority, see § 789.21; or

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

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

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

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

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

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

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

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

### Subpart D—Special Priorities Assistance

#### § 789.20 General provisions.

(a) APAS is designed to be largely self-executing. However, if production or delivery problems arise, a person should immediately contact the Farm Service Agency Administrator for special priorities assistance pursuant to §§ 789.20 through 789.24 and as directed by § 789.73. If the Farm Service Agency is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, USDA may forward the request to another resource agency, as

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appropriate, for action. Special priorities assistance is a service provided to alleviate problems.

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

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

### § 789.21 Requests for priority rating authority.

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Whether the contractor is the sole source;

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

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

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

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

### § 789.22 Examples of assistance.

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations in which:

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

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

(b) Other examples of special priorities assistance include:

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

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

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

### § 789.23 Criteria for assistance.

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

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

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

(b) [Reserved]

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

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

(1) Secure a price advantage;

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

(3) Gain competitive advantage;

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

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

(b) [Reserved]

## Subpart E—Allocations Actions

### § 789.30 Policy.

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

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

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

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

### § 789.31 General procedures.

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

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

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

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

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

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

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

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

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

(b) [Reserved]

### § 789.32 Precedence over priority rated orders.

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

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

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

(1) Made a written finding that:

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

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

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

(3) The President has approved the finding.

(b) [Reserved]

### § 789.34 Types of allocations orders.

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

- (1) Set-asides;
  - (2) Directives; and
  - (3) Allotments.
- (b) [Reserved]

### § 789.35 Elements of an allocations order.

(a) Each allocations order will include:

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

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

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

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

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

(b) [Reserved]

### § 789.36 Mandatory acceptance of allocations orders.

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

(b) A person must not discriminate against an allocations order in any manner such as by charging higher prices for resources covered by the order or by imposing terms and conditions for contracts and orders involving allocated resources(s) that differ from the person's terms and conditions for contracts and orders for the resource(s) prior to receiving the allocations order.

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

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upon realization of the inability to accept the order.

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

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

### Subpart F—Official Actions

#### § 789.40 General provisions.

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

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

#### § 789.41 Rating authorizations.

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

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

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

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

#### § 789.42 Directives.

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

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

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

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

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

#### § 789.43 Letters of understanding.

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

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

### Subpart G—Compliance

#### § 789.50 General provisions.

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

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

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

#### § 789.51 Audits and investigations.

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

evaluation to detect problems or failures in the implementation of this part.

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

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

(2) *Information not available.* Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

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

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

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

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

(d) The production of books, records, documents, other writings, and infor-

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

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

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

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

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

(3) *Delivering individual and documentation.* Any individual 18 years of age or over may serve an administrative subpoena, demand for information, or inspection authorization. When personal service is made, the individual making the service must prepare an affidavit specifying the manner in which service was made and the identity of

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the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure will be stated on the original document.

### § 789.52 Compulsory process.

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

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

### § 789.53 Notification of failure to comply.

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

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

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

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

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

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

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

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

(3) Delivering any item if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable laws, this part, or an official action. In such instances, the person must immediately notify USDA that, in accordance with this provision, delivery has not been made.

### § 789.55 Compliance conflicts.

If compliance with any provision of the Defense Production Act and other applicable laws, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable laws, this part, or an official action,

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the person must immediately notify USDA for resolution of the conflict.

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

**§ 789.60 Adjustments or exceptions.**

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

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

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

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

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

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

**§ 789.61 Appeals.**

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

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

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

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

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

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

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

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

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

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

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

### Subpart I—Miscellaneous Provisions

#### § 789.70 Protection against claims.

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

#### § 789.71 Records and reports.

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

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

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

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

(e) Section 705(d) of the Defense Production Act, as implemented by Executive Order 13603, provides that informa-

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

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

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

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

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

#### § 789.73 Communications.

Except as otherwise provided, all communications concerning this part, including requests for copies of this part and explanatory information, requests for guidance or clarification, and submission of appeals as specified in § 789.61 will be addressed to the Administrator, Farm Service Agency, Room 4752, Mail Stop 0512, USDA, 1400 Independence Ave. SW., Washington,

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DC 20250-0512 or email: *FSA.EPD@wdc.usda.gov*. This address is also to be used for requests for adjustments or exceptions to the Farm Service Agency Deputy Administrator for Management as specified in § 789.60.

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

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

The programs listed in this schedule have been approved for priorities and allocations

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

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