

FLAG



FARMERS' LEGAL
ACTION GROUP,
INCORPORATED

360 North Robert Street Suite 500
Saint Paul, Minnesota 55101

Phone: 651 223.5400
Fax: 651 223.5335

Internet:
lawyers@flaginc.org

Web site:
www.flaginc.org

June 9, 2006

VIA E-MAIL: Diane.Sharp@wdc.usda.gov

Ms. Diane Sharp, Director
Production, Emergencies, and Compliance Division
Farm Service Agency
United States Department of Agriculture
STOP 0517
1400 Independence Avenue SW
Washington, DC 20250-0517

Dear Ms. Sharp:

Re: Comments on Interim Final Rule for 2005 Section 32 Hurricane
Disaster Programs, 71 Fed. Reg. 27,188 (May 10, 2006)

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the interim final rules establishing the 2005 Section 32 Hurricane Disaster Programs as published at 70 Federal Register 27,188 (May 10, 2006).

NFFC represents 30 grassroots farm and rural advocacy organizations serving more than 30 states, including in the disaster areas covered by this interim final rule. The coalition was formed in 1986 to coordinate the efforts of a growing network of grassroots organizations concerned with maintaining a family farm system of food production. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming. NFFC has long been interested in USDA's implementation of disaster assistance programs that benefit farmers and rural communities.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For two decades, FLAG has provided legal services to thousands of small and mid-sized family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural issues. FLAG is nationally known as a resource for farmers, farm advocates, and extension agents who are helping farmers or ranchers to recover from natural disasters. FLAG published its first edition of

Farmers' Guide to Disaster Assistance in 1993, and this *Guide* is now in its fifth edition. FLAG has also conducted training sessions and provided legal aid in response to every type of natural disaster—including five recent trainings following the 2005 hurricanes in the Gulf Coast.

NFFC commends FSA for using its discretionary Section 32 funds to begin to address the unprecedented losses of farmers and ranchers in the areas affected by the 2005 hurricanes. These disasters caused widespread damage to family farm operations throughout the Gulf Coast region. Therefore, NFFC deeply appreciates FSA's establishment of four additional hurricane disaster programs and one grant program for producers suffering hurricane-related losses, and welcomes the opportunity to comment on the interim final rule for administration of these programs.

NFFC's highest priority is that all disaster assistance funds be equitably distributed. Because the need for funds will probably exceed the amount currently allocated, and because the programs will to some extent be administered on a "first come, first served" basis, NFFC urges FSA to pay particular attention to farmers having difficulty sorting out the myriad of deadlines and eligibility rules. In particular, NFFC urges FSA to establish procedures to notify farmers when their application for disaster assistance is complete, and to provide timely notice if additional information is needed. Such procedures should also assist FSA in timely distribution of the program payments.

In addition, NFFC recommends that as additional assistance becomes available—perhaps through an appropriation by Congress—FSA provide individualized notice to farmers who have previously applied for assistance, to ensure that they are aware of new programs. Because so much time has passed since the hurricanes, and because many small, limited resource, and socially disadvantaged farms are "missed" by traditional information outlets and outreach methods, individualized notice is necessary to ensure that these farmers will remain eligible for future disaster assistance.

Hurricane Indemnity Program (HIP) – Need for Expanded Coverage

NFFC strongly supports the use of Section 32 funds to provide crop loss assistance to disaster-affected producers. However, NFFC is quite concerned that the interim final rule restricts the availability of this important assistance to only the limited class of farmers who have already received a crop loss indemnity or payment. This unfairly excludes a whole range of farmers who, for any number of reasons, did not receive a crop insurance indemnity or a Non-Insured Crop Disaster Assistance Program (NAP) payment for disaster-related crop losses.

NFFC certainly understands FSA's desire for administrative efficiency and acknowledges that some streamlining may be gained by allocating HIP payments in proportion to insurance indemnities or NAP payments already received. Moreover, NFFC does not desire to slow or disrupt the process of getting these payments to the farmers who need them. However, NFFC strongly believes that administrative efficiency alone is insufficient reason to deny assistance to the many producers in the region who have received no assistance

for their crop losses, and urges FSA to amend the final HIP rule accordingly. NFFC further urges FSA to seek the allocation of additional Section 32 funds and to support a Congressional appropriation in order to provide full HIP assistance to both insured and uninsured producers.

FSA Should Offer a Waiver of the Insurance/NAP Requirement for Those Who Agree to Obtain Coverage in the Future

Having pre-existing insurance coverage has never been an absolute prerequisite to eligibility for emergency crop loss assistance. Indeed, when the NAP program was established by the Federal Crop Insurance Reform Act of 1994, Pub. L. No. 103-35 §§ 111-112, it was intended to provide crop loss assistance to producers who were unable to obtain crop insurance for a particular crop. Producers were not required to pay any fees or sign up in at the beginning of the season. This changed with the passage for the Agricultural Risk Protection Act of 2000 (ARPA), Pub. L. No. 106-224. Under ARPA, producers were required to file an application for NAP coverage by the application closing date for the crop and to pay an administrative fee. The new requirements were applicable for the 2001 season (with some adjustment due to the publication date of the rule) and subsequent season. But even with this Congressional shift to an emphasis upon obtaining pre-season coverage for crop losses, Congress has not denied emergency crop loss assistance to those without pre-season coverage. Thus, the interim final rule is the first time that pre-existing coverage would be an absolute prerequisite for emergency crop loss assistance.

In light of the unprecedented magnitude of the regional disaster caused by the 2005 hurricanes—one of the worst natural disasters in our nation's history—NFFC implores FSA to reconsider the equity of choosing this event to pioneer for the first time the absolute requirement of advance crop insurance or NAP coverage. NFFC believes that recent history provides a more equitable alternative. In the case of both the 2001-2002 Crop Disaster Program (authorized by Congress in the Agricultural Assistance Act of 2003) and the 2003-2005 Crop Disaster Program (authorized by Congress in the Military Construction, Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005), farmers who did not have crop insurance or NAP coverage on crops that were lost due to natural disaster were eligible to participate in the disaster assistance programs, if they agreed to purchase crop insurance or NAP coverage for the affected crops for the next two years. See 7 C.F.R. § 1480.7 (2004) and 7 C.F.R. § 1479.106 (2006). In this way, the incentive of Crop Disaster Program payments contributed to the goal of greater participation in crop insurance and NAP, while still providing emergency assistance to those who needed it. Adding a similar waiver and future obligation in this instance would effectively utilize the HIP program to assist farmers whose purchasing power has been most severely affected due to their uninsured losses, while at the same time contributing to the long-term goal of greater participation in risk management programs such as crop insurance and NAP.

Excluding Uninsured Producers from Crop Loss Assistance Is Inequitable and Will Have a Disproportionate Impact Upon Limited Resource and Socially Disadvantaged Farmers

NFFC is very concerned that the interim final rule, as written, will have a disproportionate impact on the relatively large number of limited resource and minority farmers in the affected region. As FSA knows, and NFFC confirmed by participating in series of disaster assistance trainings for farmers following these hurricanes, there are many small vegetable and fruit farmers in the affected states. These farmers are a critical part of regional food systems through farmers' markets, "farm to school" programs, and the like. Many of these are limited resource and minority farmers who do not have crop insurance or NAP coverage—either because they did not know they had to enroll in these programs before the planting season, or because they could not access technical assistance to initiate their coverage, or because they were unable to afford crop insurance or NAP coverage. (While limited resource farmers may request a waiver of the administrative fees for crop insurance and NAP, the availability of waivers has not been widely publicized and as a consequence, many potentially eligible farmers are unaware of its existence.)

Excluding Uninsured Crops Unfairly Punishes Double Cropping

In addition, many farmers in the South plant both a spring crop and a fall crop. Farmers who suffered a loss on their spring crop may not have been eligible for NAP coverage on their second crop. Thus, these farmers may have had NAP coverage, but may not have received a NAP payment for hurricane related losses. Similarly, beginning farmers may have begun their operations with a fall crop, and have been told they were ineligible for NAP coverage because they missed the application closing date for the spring crop. All of these farmers would be penalized twice for the failure of NAP to provide coverage for double cropping—in the denial of NAP coverage and in the denial of HIP benefits.

Requirement that Indemnity or Payment Be "Received" Is Itself Too Restrictive

Even if FSA were to continue its absolute exclusion of uninsured producers, the interim final rule's requirement that the farmer must have already "received" an indemnity payment before being eligible to apply for HIP payments will unnecessarily exclude still more farmers who had coverage but who have not received an indemnity. For example, a farmer who was denied coverage for a technical reason or whose appeal of a denial of coverage is still pending would be excluded by a literal reading of the interim final rule. Again, the 2001-2002 and 2003-2005 Crop Disaster Programs provide a useful model. For those programs, the statutory language focused upon whether the farmer had obtained crop insurance or NAP coverage, rather than upon receipt of benefits. Pub. L. No. 108-324 § 101 (a)(4). If FSA were to adopt such a rule, the HIP payment could be calculated based upon what the crop insurance indemnity or NAP payment would have been had it been awarded, though admittedly at the cost of some loss in efficiency. At the very least, FSA should amend this rule to expressly permit farmers who had insurance or NAP coverage—but who have not yet received an indemnity or payment—to get in line and apply for a HIP payment while the insurance issues are being sorted out.

Fact That Damage Occurred Due to a Covered Cause of Loss Should Not Be Re-Determined by FSA

Finally, although the obvious logic of limiting HIP payments to already covered losses is based on administrative efficiency, the way the program is structured under the interim final rule now does not achieve that streamlining. Section 760.202(a) apparently requires eligible producers to both (1) receive a crop insurance indemnity or a NAP payment “[r]ecorded by RMA or FSA as being due to an eligible hurricane . . . during a disaster period” and (2) have FSA re-establish that the crop loss must actually be “due to” an enumerated cause of list. *Compare* § 760.202(a)(2) *with* § 760.202(a)(3).

This seems to create a two-step system. If receipt of an indemnity or NAP payment due to an eligible hurricane loss is not considered sufficient evidence of cause of loss, the efficiency benefit of the interim rule is reduced. A new determination of the cause of loss should not be made in each case. NFFC recommends that § 760.202(a)(3) be omitted from the final rule.

Standing Program for Feed Assistance Needed Immediately After Disaster

NFFC applauds FSA’s recognition of the critical need for feed assistance following the 2005 hurricanes by implementation of the Feed Indemnity Program (FIP). However, feed assistance was desperately needed in the immediate aftermath of disaster, when feed was nearly impossible to come by, livestock were starving, and entire pastures were destroyed by salty floodwaters. For many farmers who lost or were forced to sell their livestock immediately after the disaster occurred due to lack of feed, these program payments come nearly nine months too late.

Therefore, after this important program is administered for the 2005 hurricanes, NFFC urges FSA to create a standing program for feed assistance that will enable a much faster response to feed issues the next time a similar crisis occurs. FSA should either aggressively seek such a program from Congress or create the program through consistent, designated use of its Section 32 discretionary funds.

Support for Flexibility in Required Documentation

Given the scope of the total devastation in many disaster areas, NFFC supports FSA’s efforts to simplify and ensure some flexibility in its loss documentation requirements for both FIP and the Livestock Indemnity Program (LIP). Certainly, there will be many instances when all of the traditional forms of records have been destroyed (both those in the possession of the farmer and of other private and governmental entities), and cases where re-creating new records is exceedingly difficult given the other immediate needs that must still be addressed in many disaster-affected areas.

Therefore, NFFC appreciates that FSA has expressly included “any other verifiable documents available to confirm the existence of the claimed livestock” as a permissible form of supporting evidence for a FIP application, and third-party certification as a method of verifying livestock deaths for LIP. This is a good start to providing essential

flexibility in this application process, while still ensuring payments made are based upon genuine losses. NFFC encourages FSA to retain this language and implement it so as to continue to exercise, in practice, its discretion to ease the burden of this application process on the affected producers.

Support for LIP Assistance for All Non-adult Livestock

In § 760.402 the interim rule states that non-adult beef cattle, non-adult buffalo/beefalo, and non-adult dairy cattle are divided into subcategories for purposes of LIP based upon whether their weight is greater than or less than 400 pounds. No rationale is presented for this categorization. In fact, while the definitions in LIP § 760.402 assert that the non-adult livestock are categorized based upon weight, these categories do not appear to be included elsewhere in the rule. NFFC supports making LIP benefits available for all non-adult livestock lost as a result of the named 2005 Gulf Coast hurricanes. Diversified family farms often have livestock of varying sizes and ages. It is important that producers receive an equitable amount of assistance for all non-adult livestock that were lost, because loss of any of these livestock affects the purchasing power of these farmers.

Remove Arbitrary Minimum Weight for FIP

Under the interim § 760.303, assistance under FIP for non-adult beef cattle, non-adult buffalo/beefalo, and non-adult dairy cattle is limited to animals weighing 500 pounds or more. No rationale is provided for the exclusion of beef cattle, buffalo/beefalo, and dairy cattle weighing less than 500 pounds. Because the storms hit in the late summer and early fall, many offspring born in the late winter and spring on cow-calf operations and the like may have been under 500 pounds at the time of the disaster. Cow-calf operators are often small operations with substantial land resources, but few cash resources. Because many of these producers have realized drastically lower-than-projected income from their 2005 calves, FIP assistance for these producers for all of their livestock losses is critical to restoring their buying power. Cow-calf operations are the critical foundation tier for beef and dairy production in the region and the nation, so it is imperative that this agricultural sector receive adequate assistance.

Furthermore, requiring a determination of the weight of the animal at the beginning of the disaster period introduces many difficult questions of proof and documentation, which would make the program more difficult to administer. Feed losses associated with any beef cattle, buffalo/beefalo, and dairy cattle owned at the beginning of the disaster period, regardless of weight, should be eligible under the program. Family farms that raise replacement heifers, as well as cow-calf operations, would be disproportionately affected by § 760.303 as written in the interim rule. NFFC urges FSA to treat family farms equitably and to remove this exclusion in the final rule. This would make FIP as inclusive as LIP.

Address Confusion about Appealability

NFFC appreciates the inclusion in the interim rule of sec. 760.107 concerning appeals. Appeals are critical to ensure that program applicants receive due process of law. As sec. 760.107 states, the appeal regulations in 7 C.F.R. parts 11 and 780 apply to determinations made pursuant to subparts B-F. NFFC notes that subpart G, the aquaculture block grants, are omitted from this list, and assumes that states will be responsible for administering appeals under that program.

One recurring issue with respect to FSA's implementation of 7 C.F.R. part 11 concerns appealability. This issue is relevant here because the disaster programs in the interim rule contain many rules of general applicability that will need to be applied based upon an individual farmer's circumstances. NFFC is aware of internal debate within USDA between FSA and NAD on the issue of appealability. A review of decisions posted on the NAD decision webpage, http://www.nad.usda.gov/public_search.html, using the search term "appealable" reveals that in recent cases, NAD has overwhelmingly found FSA decisions to be appealable because of the importance of the farmer's individual circumstances to FSA's decision-making process in each of the cases. In light of NAD's interpretation of appealability and its statutory authority to determine appealability (7 U.S.C. § 6992), NFFC urges FSA to develop stringent criteria under which it will find decisions to be non-appealable. That is, FSA should err, if it must err, on the side of appealability. This will reduce administrative expenses in reviews of appealability, as well as better protect the due process rights of farmers.

NFFC also urges FSA to revise the form letters it uses to advise farmers of their appeal rights, and their rights under 7 C.F.R. sec. 11.6 in particular. Reports from farm advocates and advisors indicate that many farmers who receive decisions from FSA regarding appealability are confused. It is hard for them to understand that FSA's opinion on appealability is not necessarily a binding decision. FSA decision letters should clearly advise farmers that while FSA believes its adverse determination is not appealable, FSA's opinion is not binding upon the National Appeals Division. FSA letters should advise farmers that they have the right to write a letter to the Director of the National Appeals Division, who shall determine whether the decision is adverse to the individual participant and thus appealable or is a matter of general applicability and thus not subject to appeal. FSA letters should make it clear to farmers that the National Appeals Division Director has the authority to issue a final determination notice that upholds or reverses the determination of the agency on appealability. FSA letters should make it clear that if the NAD Director rules that the FSA decision was appealable, the farmer will be able to appeal the decision and have a hearing.

Avoid Forcing Producers to Race to the County Office to Fight for Disaster Assistance

NFFC is concerned that many of these Section 32 programs are crafted so as to create a potential race to the county office for program funds. To the extent the funds are insufficient to cover all of the affected farmers' losses, a first-come, first-serve allocation system is inequitable because it favors the most informed and sophisticated producers, without accounting for other affected producers who are at least equally in need of assistance.

For example, in the prefatory comments, FSA notes that HIP payments will be equal to 30 percent of crop insurance indemnities and 30 percent of NAP payments. However, although crop loss indemnities are said to total approximately \$291 million and the NAP payments will be \$16.6 million, totaling \$307.6 million, FSA has figured HIP payments should only "total a maximum of \$60 million." This \$60 million is less than 20 percent of the total indemnity and NAP payments estimated by FSA. Perhaps some of these crop insurance indemnities and NAP payments went to individuals whose adjusted gross income renders them ineligible, but NFFC is concerned that these calculations indicate that there will not be sufficient funding under HIP, even if uninsured persons are excluded. If this is the case, NFFC encourages FSA to allocate additional funds to HIP so that those who are not able to get "first in line" at the county office will nonetheless receive the benefit.

In addition, NFFC is concerned about the potential ambiguity created in the FIP eligibility criteria stating that an eligible livestock producer must have "owned or cash-leased, but not both for the same livestock." Similar language appears in LIP where either a legal owner or a contract grower may receive the payment. This language is potentially troubling as it fails to set a priority as between the two potential applicants for each program.

Therefore, NFFC urges FSA to clarify that, as between the owner and cash-lessee, priority will be given to cash-lessees, so long as they bear the risk of loss with regard to these livestock. NFFC presumes that in the case of owners and contract growers, owners will be rendered ineligible by their adjusted gross income, so the priority for contract growers is implicit. Clarifying the priority in favor of cash lessees and contract growers will avoid a "race to the county office" between these parties, and ensure both FIP and LIP are assisting local producers in order to best achieve the programs' purpose of restoring purchasing power in the affected communities.

Many producers farm land in more than one county. Typically, they must apply for disaster assistance programs in each of these counties. NFFC appreciates that the farmers' applications for each of the programs may need to be processed in the county for which benefits are sought. However, it would be a great help to producers if they were not required to travel to each county office. NFFC urges FSA to utilize electronic filing and other information-sharing technology to allow farmers to apply for benefits for multiple counties, but only travel to one office. That FSA office could then transmit the appropriate information to other county offices as needed. In the alternative, the date a

farmer files his or her first application for assistance under one of the Section 32 Disaster Programs in a county office should be counted as the application date for the farmer's losses in other counties.

Disaster Assistance Payments Should Be Exempted from Administrative Offset

The proposed rule provides that disaster assistance payments made under these Section 32 programs would be subject to the regulations governing administrative offsets and withholdings found in 7 C.F.R. part 792. Part 792 provides that offset action will not be taken when FSA determines such action will unduly interfere with the administration of an FSA program. 7 C.F.R. § 792.7(n)(2). NFFC urges FSA to make such a determination for these programs in light of the magnitude of the disaster addressed by these programs. This exemption from internal administrative offset would serve the purposes of Section 32. An exemption from offset by other federal agencies is within the Secretary of Treasury's discretion to grant once requested by the Secretary of Agriculture. 31 U.S.C. § 3716(c)(3)(B).

The purpose of these programs, as stated by FSA in the prefatory comments, is to reestablish farmers' purchasing power in areas affected by significant and widespread destruction. Offset of these program payments could have a devastating effect upon the producers who desperately need these payments and would directly undermine the program's purpose of bolstering these same farmers' purchasing power. In contrast, exempting these payments from offset would allow the farmer to rebuild his or her farming operation, with the goal of restoring financial viability, including catching up on the missed payments. This will enhance the agency's collection efforts while serving other program goals and rebuilding regional food systems at the same time.

Clarify Definition of Application Period

Finally, as a technical correction, NFFC notes that defining "application *period*" to mean "the *date* ...for producers to apply for the program" is potentially confusing. The definition should be revised to expressly include the entire period of time in which applications are accepted, rather than referring to a single date.

Other Unmet Disaster Needs Must Still Be Addressed

NFFC is gravely concerned about the recovery of farmers across the hurricane-affected states, and in particular the region's minority and limited resource farmers who were often already struggling to remain on the land. NFFC appreciates that FSA has taken this significant step toward helping some of these affected farmers through use of its Section 32 funds to establish these programs. However, NFFC urges FSA to continue to work aggressively to ensure Congress passes a full aid package for all affected farmers.

In addition to the uninsured crop losses discussed above, NFFC is concerned that many other disaster-related critical needs have not yet been addressed. For example, dairy farmers in the affected states suffered production losses due to spoilage, days they could not milk due to lost electricity or days they milked but the trucks could not get to them

Hurricane Disaster Programs Comments

Page 10

June 9, 2006

FLAG

to pick up the milk, and lower production due to stress on the cows, lack of feed for the cows, or the unplanned sale of cows due to lack of feed. These production losses need to be addressed for these farmers, as they were for dairy farmers in Florida following the 2004 hurricanes through the 2004 Dairy Disaster Assistance Payment Program. 7 C.F.R. pt. 1430-C.

NFFC urges FSA to ensure these and other unmet disaster needs are addressed, again either by seeking supplemental appropriations from Congress or with the additional allocation of Section 32 funds.

Finally, NFFC notes that many, many FSA farm loan program borrowers received temporary suspensions on loan payments due on January 1, 2006. This means that the affected farmers will have two loan installment payments (including interest) due on January 1, 2007. NFFC urges FSA to form plans for farmers to address these obligations in advance of January, 2007 if they know that their farming operations are not yet financially able to meet them. NFFC anticipates that disaster set aside and primary loan servicing may be appropriate tools for many farmers. But FSA will be stretched to capacity and beyond if farmers must wait until January, 2007 to begin addressing their longer term recovery needs. NFFC urges FSA to engage in public dialogue and discussion with farmers and farm groups in the region to formulate plans to address these challenges.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

/s/ Jessica A. Shoemaker

Jessica A. Shoemaker
Staff Attorney
Email: jshoemaker@flaginc.org

/s/ Jill Krueger

Jill Krueger
Senior Staff Attorney
Email: jkrueger@flaginc.org