

FLAG



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VIA E-MAIL: Clayton.Furukawa@wdc.usda.gov

Mr. Clayton Furukawa
ECP Program Manager
Conservation and Environmental Programs Division
Farm Service Agency
United States Department of Agriculture
STOP 0513
1400 Independence Avenue SW
Washington, DC 20250-0513

Dear Mr. Furukawa:

Re: Comments on Interim Final Rule for 2005 Hurricane Disaster Provisions of
Emergency Conservation Program, 7 CFR Part 701, 71 Fed. Reg. 30,263
(May 26, 2006)

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the interim final rule establishing the 2005 Hurricane Disaster Provisions of the Emergency Conservation Program (ECP) as published at 71 Federal Register 30,263 (May 26, 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.

The 2005 hurricanes caused unprecedented losses to farmers in the affected areas. As the agency correctly stated in the prefatory remarks to the interim rule, ECP cost-share will not make these producers whole, but it can reduce the impact of the disaster on the Gulf Coast farmers and ranchers recovering from hurricane-related losses. NFFC appreciates the opportunity to comment on the interim final rule for administration of the targeted ECP cost-share for certain oyster, nursery, and poultry producers and to private non-industrial forest landowners.

Equitable Distribution of Funds Is Necessary to Address the Widespread Damage

The 2005 hurricanes caused widespread and varying damage to the region's farmers. Many operations will take years to recover, and some may not recover at all. Knowing that, NFFC's highest priority is that all disaster assistance funds be equitably distributed to address the widespread damage. The programs will generally be administered, as stated in the prefatory remarks to the rule, on a "first-come, first-served" basis. As is also indicated in the prefatory remarks, need for these targeted ECP programs will likely exceed available funds. Therefore, NFFC urges FSA to pay particular attention to farmers having difficulty sorting out the deadlines, eligibility rules, and performance/practice requirements. It is common for there to be considerable confusion related to disaster assistance programs that are not funded or created until several months after the disaster occurs. It is essential that there be effective communication with farmers regarding how the programs will operate.

NFFC recommends FSA take the necessary steps to provide notice of the availability of ECP assistance to farmers affected by this disaster. We have met with farmers and know that confusion regarding these programs is a common problem. Because so much time has passed since the hurricanes and to ensure that farmers are aware of the new programs, notice should reach farmers who have previously sought or received standard ECP cost-share, farmers who have previously sought ECP assistance and were told there was no funding available or it was not available for their specific needs, and farmers who have applied for or sought other disaster assistance. In particular, efforts should be made to provide notice to the many small, limited resource, and socially disadvantaged farmers who are missed by traditional information outlets and outreach methods. Individualized notice may be necessary to ensure that these farmers will have the same opportunity apply for ECP cost-share.

In addition to the notice needed to ensure that farmers are aware of the new programs' availability, NFFC urges FSA to establish procedures to notify farmers when an application for ECP is complete, provide timely notice if additional information is needed, and notify farmers when their applications have been approved. Such procedures should assist FSA in timely and equitable distribution of the program payments and ensure program applicants receive timely notice of their appeal rights.

NFFC is generally concerned that ECP assistance, like many of the other disaster assistance programs for the 2005 hurricanes, creates a potential race to the county FSA office for program funds. To the extent the funds are insufficient to cover all of the affected farmers' losses, a first-come, first-served allocation system is inequitable. It is inequitable because it favors the most informed farmers. The current system favors those who have the greatest access to the fastest modes

of communication. Differences in access to information could be due to the disaster itself, the distribution of resources, or local characteristics, including those of individual farmers and agency officials. Regardless of the reasons for the differences, there is no question that they exist; and they cannot reasonably be the basis of providing assistance to one disaster-affected farmer over another.

Additionally, a first-come, first-served allocation system is inequitable because it may favor those who have suffered less damage in a disaster. A farmer in one county may have lost their house and vehicle; they may be displaced or not have access to the FSA office or Web site. While a farmer in another county may have less severe damage and would have more immediate access to apply for ECP assistance. Further, a first-come, first-served allocation system is inequitable because it fails to account for the differences in county-level commitment to programs and for the possibility of preferential treatment or discrimination within an FSA office. For all of these reasons, beyond being inequitable for all farmers, the first-come, first-served allocation system imposes an unreasonable burden on the people who need assistance the most, small, limited-resource, and minority farmers.

Still further uncertainty in how the limited funds will be distributed is introduced by the prefatory remarks to the interim rule, which state: “[i]n order to ensure that ECP helps the most affected counties, the Deputy Administrator may further prioritize ECP hurricane assistance based upon FSA’s assessment of needed recovery aid.” It is unclear from these remarks how this “further prioritizing” will affect individual ECP requests. To the extent that the earliest application submissions drive this “further prioritizing,” that will compound the inequities of the first-come, first-served allocation system.

Policy Needed for Approval of ECP Practices Started Before Submission of an ECP Request

In light of the unprecedented magnitude of the disaster caused by the 2005 hurricanes, many farmers have been forced to act in the 10 months since the disaster to address many of the debris removal, repair, and reconstruction needs described in the interim rule. However, the interim rule is noticeably silent on the question of these prior actions’ eligibility for the new ECP assistance.

The standing ECP program contains provisions, made applicable to the interim rule programs, about eligibility for cost-share if the conservation practice is started before a cost-share request is made. 7 CFR § 701.15. Those provisions state that, with limited exceptions, ECP cost-share is generally *unavailable* for practices started *before* approval of an ECP request. These standing rule provisions will be unworkable for the 2005 hurricane programs, even with the allowance for limited exceptions. If applied to the interim rule programs, these provisions will prevent FSA from assisting many farmers who are the intended beneficiaries of these programs.

The reality is that farmers could not wait 9-10 months for the funding and issuance of a program rule before starting to recover from the disasters. They were forced to clean up and take steps to try to recover from the devastation. This is especially true in cases where delay would have caused environmental or health damage, such as disposal of dead livestock or unstable structures. A dairy farmer could not wait for ECP to be approved before taking action to repair a fence and maintain what was left of the herd. These are the farmers ECP was created to help. FSA must clearly state how these pre-approval actions will be handled under the interim rule programs. Excluding these actions from ECP coverage is not what Congress intended with the special appropriation and authorization in December 2005, and it would be unreasonable for the agency not to adopt a broader waiver of the requirement at § 701.15.

Payment Terms Must Take Into Account Disaster Circumstances

The payment terms for the ECP cost-share programs defined in the interim rule vary depending on the program. In the context of a disaster on the scale of the 2005 hurricanes, NFFC believes the agency should must take into account the scarcity issues prevalent soon after the disaster that may have driven up the costs for ECP practices far beyond the normal market rate. For example, in farmer trainings and clinics following the 2005 hurricanes we heard farmers forced to pay up to \$4 per new fence post due to the disaster circumstances following the hurricanes. Prior to the hurricanes a new post normally cost \$3, and the farmers were hard pressed to pay the higher price, but they were forced to pay that price to ensure the safety of their remaining livestock or operation. With payment terms that limit benefits to the lesser of actual costs or allowable costs in some cases¹ it is imperative that allowable costs for the interim rule programs take into account the effect that resource scarcity after the hurricanes had on farmers' costs for materials and labor.

Provisions for Losses to Poultry Houses Are Unduly Burdensome and Need Clarification

Interim rule § 701.56, which addresses the specific ECP cost-share assistance to poultry producers for uninsured losses to poultry houses affected by the 2005 hurricanes, is unnecessarily burdensome and needs further clarification.

Although "poultry growers" is an undefined term in the interim rule, NFFC contends that the rule must be interpreted to include both independent poultry growers and contract poultry growers. Contract poultry growers are often left out of disaster assistance, even though they have made significant investments in their houses and face significant risks for damage and income losses. Conversely, in some instances, highlighted below, the interim rule could be interpreted to exclude independent poultry growers. Both categories of growers must be included as eligible poultry growers able to receive ECP cost-share under the interim rule.

NFFC contends that the requirement under interim rule § 701.56(d) that the grower provide a copy of the grower's contract with the poultry integrator is unnecessarily burdensome, unclear, and potentially unlawful. NFFC cannot see the necessity for such a requirement. The contract between the poultry integrator and the grower contains no information relevant to determining the accuracy of the uninsured losses the grower would be seeking to recover through ECP cost-share. It should be enough for the grower to provide information on the insurance payments for the poultry houses. It is entirely unclear why the contracts would be needed and how the contracts would be used if they are collected. Although the rule suggests the contracts will not be required in all circumstances, there is no indication of when FSA will require this additional documentation. The rule merely states that contracts "may be required." In addition, confidentiality clauses in some of the grower contracts may make it unlawful for a grower to share the contract. If this requirement remains in the rule, it must be clarified to indicate what contracts are needed for verification of uninsured losses, under

¹ The payment terms for both oyster (§ 701.54(b)) and nursery (§ 701.55(b)) producers note that their cost-share terms will be subject to the standing ECP cost-share provision in 7 CFR § 701.26. That section provides cost share for participants up to 75 percent of the "lesser of the participant's total actual cost or the total allowable costs," while qualified limited resource producers can receive a cost share up to 90 percent of the actual cost or total allowable cost of the practices.

what circumstances they will be required, and how, explicitly, they will be used. Furthermore, this requirement cannot be used to exclude independent poultry growers from ECP cost-share benefits.

NFFC has several concerns related to the elaborately drafted provision in interim rule § 701.56(f). This provision limits ECP cost-share assistance to poultry houses for commercial enterprise, and then goes on to define “commercial poultry enterprise” and “commercial quantity.” The requirement that the houses have a commercial quantity of poultry “at all times” fails to recognize the realities of the contract poultry production industry and is an unworkable standard for determining eligibility for ECP cost-share benefits; such a requirement would exclude the very people the benefit is intended to help. Contract poultry growers routinely have time without birds when they are anticipating delivery of the next flock. A standard broiler contract can have five to five-and-a-half flocks per year. With a flock taking on average eight weeks, that accounts for 40-48 weeks of production per year. This illustrates what we know is true for *all* contract poultry growers: there are several weeks every year when they do not have poultry in their houses. Growers can also be “held out” by their integrator, resulting in time without birds. NFFC is not suggesting that there should not be a requirement under the rule for active involvement as a grower at the time of the disaster. However, the standard articulated in the rule is unworkable because it ignores actual industry practice for the majority of poultry growers.

Similarly, the definition of “commercial quantity” in § 701.56(f) seems unworkable and contrary to the commonly known practices in the contract poultry production industry. “Commercial quantity” is defined as “a quantity per week that would normally exceed \$100 in sales.” The “per week” quantity does not reflect the practical situation of contract poultry growers who would more accurately have a quantity based on a flock, or an average over the span of for a flock, or an average over a year. As defined, the commercial quantity may exclude some independent growers and should be revised to create a standard more reflective of the diversity of the growers and market.

Also in § 701.56(f), the requirement that the houses contain poultry or related products such as eggs that are actually “sold” in commercial quantities is not reflective of the contract poultry production industry and would unreasonably limit this program’s availability. In some cases there might be an actual sale by a grower, but it may also be true that the transaction between the integrator and the grower is simply provided for in the poultry growing arrangement and not considered an actual sale. Perhaps this requirement should be read as saying *if* sold, the poultry or related products must be worth \$100, not that they must necessarily be sold. Either interpretation demonstrates that revision or clarification of the rule is necessary.

Finally, clarification is needed regarding interim rule § 701.56(g). This provision requires poultry houses that are the subject ECP benefits under this rule to be “reconstructed or repaired to meet current building standards.” It is unclear whether this means state and local building standards, or whether it could also mean a poultry integrators’ standards and/or specifications.

Clarifications Needed in Provisions for Forest Landowners

Section 701.57 of the interim rule, addressing ECP payments to private non-industrial forest landowners for reforestation and rehabilitation of forest land, requires clarification of the definitions, the valuation of costs, and the priority for payments.

It is unclear from the interim rule what is specifically meant by “non-industrial.” This term is used throughout the interim rule: in the prefatory remarks, the definitions provided in § 701.51, and in § 701.57. And yet, the term is undefined throughout. Although the term appears in two of the definitions in § 701.51, “Private non-industrial forest land” and “Private non-industrial landowner,” it is used in those definitions without any explanation of what it means. It certainly cannot mean that the timber is never going to be harvested, nor can it mean to dictate the harvesting timing or requirements. NFFC suggests the intended interpretation might be an individual producer, and not a corporation such as Weyerhaeuser. There is potential for confusion and misunderstanding without a clear definition. The definitions should be revised to define the term “non-industrial” in order to ensure a better understanding of how the ECP provisions relating to forest land will operate.

Under interim rule § 701.57(a), to be eligible for ECP cost-share for costs related to reforestation, rehabilitation, and related measures, a forest landowner “must have suffered a loss of, or damage to, at least 35 percent of forest acres.” This standard will exclude the vast majority of farmers who are in need of the assistance. Total losses of at least 35 percent across the forest acres is simply too high a percentage, does not reflect the nature of the 2005 hurricanes disaster, and appears to have been arbitrarily set by the agency. Losses would be more accurately determined on a particular acre, not the landowner’s total acreage. The interim rule further states that the 35 percent loss threshold will be determined “based on the value of the *land* before and after the hurricane.” That valuation method seems erroneous, since presumably the rule meant to address the value of the timber and the land, but not the land alone. In addition, it is unclear from the interim rule whether the costs associated with developing a forest management plan by a “person with appropriate forestry credentials” as required under § 701.57(b)(1) would be included in the cost considered for ECP payments.

Interim rule § 701.57(b)(3) requires the private non-industrial forest landowner to “exercise *good stewardship* on the forest land of the landowner while maintaining the land in a forested state.” “Good stewardship” is undefined in the interim rule. It is unclear how it will be measured or evaluated, and by whom. NFFC notes that the requirement of using “best management practices” in § 701.57(b)(2) would seem to make a good stewardship requirement redundant, but acknowledges that the 2006 Act explicitly provided for the term. Since the term is required, it simply leaves the implementation open to too much discretion for it to remain undefined in the rule.

Finally, the prefatory remarks to the interim rule include a descending order list for determining priority of the requests for cost share for forest land. However, that list (Longleaf pine/Atlantic white cedar or bottomland, upland hardwood, loblolly/slash pine, and mixed stand) is not included in the interim rule. Interim rule § 701.57(e) merely states that ECP requests will be “prioritized based on planting tree species best suited to the site as stated in the forest management plan.” If FSA will be utilizing the list from the prefatory remarks in its determination of landowner’s ECP benefits, that list should be included in the rule to ensure that all applicants know how their requests for cost-share will be evaluated. For example, if a landowner is “first-come” to the FSA office with a request to reforest with loblolly pine, would that necessarily mean that all requests for longleaf pine would be reviewed and approved first, regardless of when they were submitted? If the list is going to be a means to deny assistance, then there needs to be an determination of whether it accurately reflects the program’s priorities. NFFC does not provide comment on the actual list and its ordering, other than to note that we are aware that many of the small, limited-resource, and minority forest landowners we work with commonly have stands made up of the bottom three

categories on the list and could face exclusion from the ECP cost-share benefits if the priority list from the prefatory remarks is utilized to rank ECP requests. If there are standards all applications will be prioritized by, all applicants should have that knowledge.

Eligibility for Oyster Program Provisions Is Unclear

The oyster producer provisions of interim rule § 701.54 are not clear regarding operator eligibility. NFFC emphasizes that the ECP cost-share benefit should be available to both aquaculture and wild harvest operators.

Need for Increased Clarity of Defined Terms and Corrections to Drafting Errors

Interim rule § 701.51 defines “barn” as “a structure used for the housing of animals or farm equipment.” NFFC does not suggest that this is an inaccurate definition, however, it is unnecessarily restrictive, and the agency has not provided any explanation for the restriction. Barns that enclosed feed and hay and were similarly affected by the hurricanes should also be included under the definition and covered by ECP cost-share.

NFFC notes two minor drafting errors that should also be corrected in the final rule to add clarity. Interim rule § 701.50 should read “In addition **to** benefits elsewhere....” And, under interim rule § 701.56, “[t]he lesser of” should be removed from § 701.56(b)(1) because this phrase is redundant and is already stated in § 701.56(b).

Flexibility in Required Documentation Needed

Given the total devastation in many disaster areas after the 2005 hurricanes, NFFC supports any efforts to simplify and ensure some flexibility in loss documentation requirements for the ECP programs under the interim rule. Certainly, there will be many instances where all of the traditional forms of records have been destroyed (both those in the possession of the farmer and those in the possession of private and governmental entities). In many such cases, re-creating new records would be exceedingly difficult given the other more urgent needs that must still be addressed in many disaster-affected areas.

Unlike the interim final rule for 2005 Section 32 Hurricane Disaster Programs, as published at 70 Federal Register 27,188 (May 10, 2006),² the ECP interim rule lacks any stated flexibility in the application process and documentation requirements. This may be particularly relevant to farmers seeking ECP cost-share for private non-industrial forest land under § 701.57. Eligibility under this provision is based on a 35 percent loss on forested acreage, which necessarily requires proof of the forested acres both prior to and after the disaster. Flexibility in acceptable documentation or verification would still ensure payments that are made based upon genuine losses, while recognizing the challenging circumstances this disaster created for everyone. NFFC encourages FSA to consider similar language for ECP as was provided in the Section 32 interim rule to ensure that the policy of

² For example, the rule for the Section 32 programs expressly includes a provision allowing for “any other verifiable documents available to confirm the existence of the claimed livestock” as a permissible form of supporting evidence for an FIP application, and allowed third-party certification as a method of verifying livestock deaths for LIP.

easing the application burden on affected farmers will apply across all of the 2005 hurricane disaster programs.

Disaster Assistance Payments Should Be Exempt from Administrative Offset

Section 701.41 of the standing ECP rule, applicable to the interim rule programs, provides that cost-share assistance will be subject to the regulations governing administrative offsets and withholdings found in 7 C.F.R. Part 792. Section 792.7(n)(2) of that Part provides that offset action will not be taken when FSA determines such action will unduly interfere with the administration of an FSA program. NFFC urges FSA to make such a determination for ECP cost-share assistance in light of the magnitude of the disaster addressed by these payments. An exemption from internal administrative offset would serve the purposes of ECP cost-share, as stated in the prefatory comments, to “reduce the impact of the disaster on producers.” Offset of the program payments would have a devastating effect upon the farmers who desperately need these payments and would directly undermine the program’s purpose of reducing the impact of the 2005 hurricanes on these farmers. In contrast, exempting these cost-share payments from offset would allow farmers to work toward clean-up, reconstruction, and reforestation, of their farming operations, with the goal of rehabilitating their farmland and restoring financial viability. Under 31 U.S.C. § 3716(c)(3)(B), 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.

Other Unmet Disaster Needs Must Still Be Addressed

NFFC supports FSA’s efforts to target money through the interim rule for the needs of certain oyster, nursery, and poultry producers and private non-industrial forest landowners. However, NFFC stresses that for family farmers affected by the 2005 hurricanes there is still tremendous need for the standard cost-share benefits under ECP, as the agency referred to in the prefatory remarks accompanying the interim rule. NFFC urges FSA take steps to ensure that standard ECP cost-share benefits are funded and available to all disaster counties and eligible farmers.

Cost-share assistance is not enough, however. An overarching concern is that cost-share is unworkable for so many family farmers. Many small, limited-resource, and minority farmers cannot afford to do the necessary work and then hope to seek reimbursement through a cost-share program that may or may not come along many months after a disaster. To many farmers it does not make sense to have a program that requires you to expend money up-front when you have lost your income, only with the hopes of getting reimbursement later. In this way, ECP cost-share does not seem to be tied to the disaster need.

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 acknowledges that FSA has taken a significant step toward helping some of these affected farmers through use of its Section 32 funds to establish disaster assistance programs.³ NFFC urges FSA to continue to work aggressively to ensure the unmet disaster needs

³ FLAG submitted comments on behalf of NFFC on June 9, 2006, related to the 2005 Section 32 hurricane disaster program interim final rule published at 71 Fed. Reg. 27,188 (May 10, 2006). In those comments, NFFC provided some explicit examples of unmet needs including assistance to dairy farmers suffering

are addressed, by either a supplemental appropriation from Congress that provides a full aid package for all affected farmers or additional allocation of Section 32 funds.

Finally, NFFC notes that many FSA farm loan program borrowers received a one-year suspension of loan payments due on or around January 1, 2006. This means that the affected farmers will have two loan installment payments (plus interest) due on January 1, 2007. NFFC urges FSA to address these obligations in advance of January 2007, knowing that many, if not most, farming operations in the hurricane-affected areas will not have recovered sufficiently to be able to meet this financial obligation. NFFC anticipates that primary loan servicing may be appropriate for many farmers. But FSA will be stretched to capacity and beyond if thousands of farmers in the region are faced with payments that cannot be made come January 2007. 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/ Jess Anna Speier

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production losses due to spoilage, days they could not milk due to lost electricity or days they milked but the trucks could not get through 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.