

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

November 16, 2009

Via email to: Candy.Thompson@wdc.usda.gov

Candace Thompson, Acting Director
Production, Emergencies, and Compliance Division
Farm Service Agency
U.S. Department of Agriculture
Mail Stop 0517
1400 Independence Ave., S.W.
Washington, DC 20250-0517

RE: Disaster Assistance (General); Information Collection Notice
74 Fed. Reg. 47,186 (September 15, 2009)

Dear Acting Director Thompson:

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the Rural Advancement Foundation International—USA concerning the information collection notice related to disaster assistance published at 74 Federal Register 47,186 (September 15, 2009).

The Rural Advancement Foundation International—USA (RAFI) is a nonprofit organization based in North Carolina. RAFI is dedicated to cultivating markets, policies, and communities that support thriving, socially just and environmentally sound family farms. RAFI advances its mission in part through its Farm Sustainability program. Under this program, RAFI works to empower farmers by providing critical information and advocacy toward the goal that federal disaster assistance programs remain responsive to and supportive of developments in agriculture.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For over 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 has published six editions of its comprehensive book, *Farmers' Guide to Disaster Assistance*. The 2008 edition is posted in its entirety on the FLAG website, www.flaginc.org.

As part of the “Know Your Farmer, Know Your Food” campaign, USDA has either strengthened or launched a number of related initiatives. Many of the “Know Your Farmer” initiatives are targeted at building local and regional food systems, and at serving historically underserved producers, including beginning farmers, socially disadvantaged farmers, limited resource farmers, specialty crop farmers, and organic farmers. Disaster assistance programs are a crucial means to advance this mission, by strengthening the protection afforded to farmer income, including farmer income derived from direct marketing, retail sales, and value added enterprises. In order to achieve this mission, some practices in the area of disaster assistance programs will need to be examined and modified.

Disaster Determinations in Supplemental Revenue Assistance (SURE) Program May Be Based Upon Losses on a Single Farm

As we understand the September 15, 2009, Federal Register notice, Farm Service Agency (FSA) intends to use the information collection approach the agency has previously used for disaster determinations related to eligibility for the Emergency Loan (EM Loan) program for the SURE program. In general, this seems to be an appropriate adaptation of the existing information collection, though it may necessitate amendments to 7 C.F.R. part 1945-A as discussed below. As a threshold matter, it is important for the agency to clarify the more inclusive approach to eligibility under the SURE program.

The notice states, “Before emergency loans or payments under SURE can be made, the information needs to be collected to determine if the disaster areas meet the criteria of having a qualifying loss in order to be considered as an eligible County.” This language could be taken to suggest that losses must be experienced throughout the area in order for a farmer to recover under SURE. However, under the statute, farmers may be eligible for SURE benefits if they experience catastrophic losses, whether or not the damage is widespread.

The SURE statute defines “disaster county” as “a county included in the geographic area covered by a qualifying natural disaster declaration.” The definition states that the term “disaster county” also includes contiguous counties. A further inclusion under the definition of “disaster county” for purposes of the SURE statute is “any farm in which, during a calendar year[,] the actual production on the farm is less than 50 percent of the normal production on the farm.” 7 U.S.C. § 1531(a)(7) “Disaster county.”

Thus, it is possible that the information collection needs may be satisfied and payments under SURE made not only through the general process for county disaster determinations set forth in 7 C.F.R. part 1945-A, but also based upon reports of actual production losses on a farm of more than 50 percent of the normal production. We urge the agency to ensure that its information collection efforts and Damage Assessment Report forms recognize this additional route to SURE eligibility.

Issue a Proposed Rule to Amend 7 C.F.R. Part 1945-A and Solicit Public Comment on How to Adapt the Disaster Determination Process for the SURE Program

7 C.F.R. part 1945-A provides the authority for the information collection that is the subject of the September 15, 2009, Federal Register notice. Currently, it is concerned exclusively with the Emergency (EM) Loan program. We urge the agency to issue a proposed rule to amend 7 C.F.R. part 1945-A, and to solicit public comment on how to adapt the disaster determination process for the SURE program. In the alternative, the agency may elect to create a separate set of rules and information collection practices for disaster determinations for purposes of SURE.

Ensure that State and Local FSA Offices Follow Both Steps of the Disaster Designation Process, and Do Not Strictly Require an Effect on “Major Crops”

The agency’s approach to disaster designations has been poorly understood among farmers, and may have been incompletely understood among FSA state and local offices. The information collection indicates a two-step process. First, the county determines if there has been a loss of 30 percent or more to a major crop in the county. Second, if there has not been such a loss, the county completes a telephone survey to determine the number of farmers in the county who have sustained qualifying production losses, and the number of those farmers who will be unable to receive credit elsewhere.

We have some concerns about each of the two steps, but will begin with the first step. The Emergency Loan regulations state that a producer must have a disaster yield that is at least 30 percent below the normal production yield of a crop which comprises a basic part of an applicant’s total farming operation. 7 C.F.R. § 764.352 (h). Since the EM Loan regulations do not define or use the term “major crop,” it is not entirely clear what authority the agency relied upon for requiring that the loss be to a “major crop” in the supporting statement for information collection 0560-0170. Nor is it clear whether and how the “major crop” concept would apply for purposes of SURE.

The SURE program is designed to provide crop loss assistance for a wide variety of crops. In general, farmers must have crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage for all crops of economic significance in order to be eligible for SURE. SURE’s broadly inclusive approach suggests a need for changes to the agency’s disaster determination process.

For example, an urban fringe county (such as Dakota County in Minnesota), may be the site of a localized or particularized disaster (such as a hail storm, or a late or early freeze) which affects numerous truck farmers and market gardeners. If most of these farmers are diversified—growing tomatoes, potatoes, bell peppers, green beans, peas, gladiolas, etc.—there may not be a single affected crop that would appear to be a “major crop” for the county. It may be that “major crops” in the county such as corn and soybeans did not suffer a comparable severe effect. Yet in the aggregate, the effect on the vegetable, fruit, and

Candace Thompson, Acting Director
Page 4
November 16, 2009
FLAG

flower crops sold through direct marketing channels might be quite substantial. A disaster determination which results in access to the EM Loan program might be quite important for these farmers individually, and for the recovery of local and regional food systems generally.

To summarize our comments regarding the first step, we are concerned that some farmers who are seeking to participate in disaster assistance programs, and to manage their risks as proactively as they can, may still find themselves falling through the holes in the safety net. In particular, farmers growing crops for which crop insurance is not available may obtain NAP coverage for all of their crops. Yet, NAP coverage provides benefits only for losses over 50 percent. SURE supplements the NAP benefits, but is still geared primarily toward situations of catastrophic loss. A process for disaster determinations that is narrowly focused on “major crops” may prevent such farmers from being eligible for EM Loans when they suffer losses that are not severe enough to be eligible for NAP or SURE, but that are greater than 30 percent. Tying a disaster declaration to the effect of a natural disaster upon major crops interferes with the incentive for farmers to enroll in crop insurance and NAP. The effect of a natural disaster upon crops other than the ones the farmer grows is, of course, entirely outside that farmer’s control. We urge the agency to allow programs such as EM Loans, crop insurance, NAP, and SURE to work together as a risk management package.

With respect to the second step set forth in the supporting statement for the information collection, our concern is that it is not well known, and may be under-utilized. We encourage the agency, when it reauthorizes the information collection, to draw attention to this second step as a preliminary measure to a more thorough review of the disaster determination regulations as they apply to the SURE program.

Thank you for considering these comments.

Sincerely,

FARMERS’ LEGAL ACTION GROUP, INC.

/s/ Jill Krueger

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

JK/rc