

## Chapter 4

# Noninsured Crop Disaster Assistance Program

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## Chapter 4

# Noninsured Crop Disaster Assistance Program

### I. Introduction

This chapter provides basic information on USDA's Noninsured Crop Disaster Assistance Program (NAP). NAP was created to provide crop loss assistance to producers who are unable to obtain federal crop insurance for a particular crop.<sup>1</sup> The purpose of NAP is to provide a level of protection equal to catastrophic risk (CAT) coverage for these uninsurable crops. Coverage greater than the catastrophic insurance level is not available under NAP.

NAP was created by the Federal Crop Insurance Reform Act of 1994 because Congress recognized that crop insurance was not available for all crops.<sup>2</sup> Significant changes were made to NAP in the Agricultural Risk Protection Act of 2000.<sup>3</sup> The most significant changes under that Act included: (a) changing the deadline to apply for NAP benefits; (b) requiring producers to pay a service fee for NAP benefits; (c) requiring as a condition of NAP eligibility that producers annually provide records of crop acreage, yields, and production for each eligible crop; and (d) removing the area loss requirement for NAP eligibility.<sup>4</sup>

More recent changes to NAP were made by the Food, Conservation, and Energy Act of 2008, also known as the 2008 Farm Bill.<sup>5</sup> Included among these changes are: (a) a substantial increase in administrative fees; (b) new coverage in certain circumstances for aquaculture producers' losses related to drought; and (c) a requirement that producers must have obtained crop insurance or NAP coverage in order to establish eligibility for most other types of disaster assistance. This chapter will discuss these

new statutory changes in general terms, though the details of how the 2008 Farm Bill changes will be implemented will not be known until regulations are published by the Farm Service Agency (FSA).

FSA's administration of NAP is governed by official regulations published in the Code of Federal Regulations (CFR).<sup>6</sup> The specific regulations for NAP can be found in Title 7, Part 1437, of the CFR. In addition to these regulations, FSA has issued a NAP Handbook for state and county offices. This handbook, called "Noninsured Crop Disaster Assistance Program for 2001 and Subsequent Years," 1-NAP (Revision 1), provides policy guidance and detailed procedures for these offices to use when handling NAP requests and payments. The NAP Handbook is updated periodically as NAP policies and procedures change.<sup>7</sup> FSA may issue a new NAP Handbook or revision to reflect changes made under the 2008 Farm Bill, or it may simply address the changes through amendments to the existing handbook. Producers can request a copy of the NAP Handbook and amendments from their local FSA offices, or download a copy from FSA's website at [www.fsa.usda.gov/Internet/FSA\\_File/1-nap.pdf](http://www.fsa.usda.gov/Internet/FSA_File/1-nap.pdf).

## **II. Linkage: When NAP Coverage Is Required to Receive Other Disaster Assistance**

As mentioned earlier, NAP was created to provide a minimum level of crop loss coverage in cases where federal crop insurance is not available. In conjunction with offering this coverage, Congress has adopted various measures over the past several years attempting to ensure that producers who can participate in NAP will do so, rather than remaining without any crop loss coverage at all. For the most part, this encouragement to participate in NAP has been some form of "linkage," where eligibility for another desired benefit was tied to full participation in NAP or federal crop insurance, to the extent they were available.

### **A. Linkage Requirement for 2001-2005 Losses**

Linkage for NAP initially took the form of Congress making it an eligibility requirement for emergency crop loss disaster programs that the producer either: (1) had crop insurance or NAP coverage for all

eligible crops, or (2) agreed to obtain crop insurance or NAP coverage for each crop in each of the next two crop years.<sup>8</sup> If the agreement to obtain crop insurance or NAP coverage in the next two crop years was not fulfilled, the producer was obligated to reimburse FSA for the amount of payments received, plus interest.<sup>9</sup> This requirement applied to emergency crop loss assistance enacted for losses in crop years from 2001 to 2005. However, 2005 crops were only covered for losses that occurred during the 2004 hurricane season.<sup>10</sup>

### **B. Linkage Requirements for 2005-2007 Losses**

Beginning with the emergency crop loss assistance programs adopted after the 2005 Gulf Coast hurricanes, Congress and USDA began to impose new, stricter linkage requirements.

In early 2006, USDA used its discretionary funds to create several disaster assistance programs for producers in several southeastern states affected by the 2005 hurricanes.<sup>11</sup> The crop loss program that was created, called the *Hurricane Indemnity Program* (HIP), included a requirement that the producer must have obtained crop insurance or NAP coverage prior to the disaster, *and* must have actually received a crop insurance indemnity or NAP payment in order to be eligible for assistance under HIP.<sup>12</sup> There were no waivers or exceptions.

Congress later appropriated funds for additional emergency assistance programs for losses from the 2005 hurricanes.<sup>13</sup> Under these programs—the *Citrus Disaster Program*, the *Fruit and Vegetable Disaster Program*, the *Tropical Fruit Disaster Assistance Program*, and the *Nursery Disaster Assistance Program*—producers who did not have crop insurance or NAP coverage would be eligible, but their payments would be five percent lower than the payments received by producers who did have crop insurance or NAP coverage.<sup>14</sup> In a slight change from the 2001-2005 linkage requirement, any producer who received discounted benefits under any of these programs and had not obtained available crop insurance or NAP coverage was required to obtain such coverage for the next available coverage period.<sup>15</sup> A producer who failed to obtain coverage for the next period was

required to refund any disaster payments received under the programs.<sup>16</sup>

In 2007, Congress appropriated funds for emergency assistance programs for crop losses across the country in 2005, 2006, and 2007.<sup>17</sup> For the first time, Congress imposed a linkage requirement that was nearly as strict as the one adopted by USDA for its Hurricane Indemnity Program. To receive benefits under the *2005-2007 Crop Disaster Program*, a producer must have obtained crop insurance or NAP coverage, if coverage was available.<sup>18</sup> However, nothing required that the producer have actually received benefits, as was the case for HIP.

### **C. Linkage Requirement under the 2008 Farm Bill**

In general, the new disaster assistance programs created by the 2008 Farm Bill include a strict linkage requirement. For example, in general, a producer must have obtained crop insurance or NAP coverage for affected crops in order to be eligible for crop loss payments under the new *Supplemental Revenue Assistance Payment Program*.<sup>19</sup> Similarly, in general, a livestock producer must have obtained crop insurance or NAP coverage for grazing land in order to be eligible for payments under the new *Livestock Forage Disaster Program*.<sup>20</sup>

However, the new 2008 Farm Bill programs also recognize circumstances in which a waiver of the linkage requirement or equitable relief from the linkage requirement may be granted.

As with all aspects of the new 2008 Farm Bill programs, specific details will not be known until FSA issues program regulations.

#### **1. Waivers of Linkage Requirements under the 2008 Farm Bill**

The new 2008 Farm Bill disaster programs allow for waivers and other relief from strict linkage requirements in certain circumstances.



**a. Waiver for Socially Disadvantaged, Limited Resource, or Beginning Farmer or Rancher**

FSA may waive the requirement that the producer have obtained crop insurance or NAP coverage in the case of producers who meet the definition of socially disadvantaged, limited resource, or beginning farmers or ranchers.<sup>21</sup> If such a waiver is granted, FSA may provide disaster assistance at a level that it determines to be equitable and appropriate.

**b. Waiver for 2008 If Fee Paid by August 20, 2008**

Because the 2008 Farm Bill was enacted after the 2008 crop year was well underway, the linkage requirement for the new disaster programs is waived for 2008.<sup>22</sup> However, to secure eligibility for 2008 under the new programs, producers who have not already obtained crop insurance or NAP coverage must pay an administrative fee to FSA by August 20, 2008.<sup>23</sup> The amount of the fee that must be paid is still being determined by FSA.

**2. Equitable Relief from Linkage Requirements under the 2008 Farm Bill**

In addition to the broadly applicable waivers of the linkage requirement discussed above, the 2008 Farm Bill also authorizes FSA to provide equitable relief on a case-by-case basis to producers who unintentionally fail to satisfy the requirement to obtain crop insurance or NAP coverage on affected crops.<sup>24</sup>

FSA is directed to take special consideration to provide equitable relief to producers who suffer crop losses during the 2008 calendar year and who failed to satisfy the requirement to obtain crop insurance or NAP coverage on affected crops because the 2008 Farm Bill was enacted after the applicable closing dates for crop insurance and NAP coverage.<sup>25</sup> The specific direction to consider equitable relief in 2008—in addition to the general waiver in 2008 for all who pay the administrative fee by

August 20, 2008—suggests that equitable relief may be available for those who do not meet the waiver requirement. However, producers should never assume that they would be granted equitable relief.

### **III. NAP Eligibility Requirements**

In order for a crop loss to be covered by NAP, three types of eligibility rules apply. First, the specific crop must be eligible for assistance under NAP. Second, the particular reason for crop loss must be covered under NAP. Third, the producer must be eligible for NAP benefits. Each of these requirements is discussed in turn.<sup>26</sup>

#### **A. Crops Eligible for NAP Coverage**

Only certain crops are eligible for NAP benefits. There are three general requirements that determine crop eligibility. There are also several exceptions to the crop eligibility rule.

##### **1. Three General Crop Eligibility Requirements for NAP Coverage**

In general, in order to qualify for NAP coverage, the crop must meet all three of the following requirements.<sup>27</sup>

###### **a. Commercial Crop or Commodity**

The crop must be a commercial crop or other agricultural commodity.

###### **b. Produced for Food or Fiber**

Generally, the crop must be produced for food or fiber.

###### **c. CAT Coverage Not Available**

NAP coverage is available only if catastrophic (CAT) crop insurance coverage is not available in the area for the crop.

## **2. Exceptions to the Crop Eligibility Rules**

Several exceptions either expand or limit crop eligibility under NAP.

### **a. No Livestock Coverage**

Although livestock technically might meet the three requirements discussed above, the statute and regulations governing NAP provide that livestock and their by-products are not covered under NAP.<sup>28</sup> In general, livestock means any animal except aquacultural species.<sup>29</sup>

### **b. Exceptions to the Food and Fiber Rule**

Several crops are eligible for NAP coverage even though they may not be produced for food or fiber. These include: aquacultural (including ornamental fish), floricultural, ornamental nursery, Christmas tree, turfgrass, seed, and industrial crops, and sea grasses and sea oats.<sup>30</sup> Some of these specific crop exceptions are discussed in more detail below.

### **c. Forage Crops**

In general, crops grown for livestock consumption, such as grain and forage crops, may be covered under NAP if catastrophic (CAT) insurance coverage was not available for the year of the loss.<sup>31</sup> To qualify as forage, the land must generally be covered with mature grass or other vegetation (such as small grains) that is produced using acceptable farming, pasture, and range management practices that sustain the quality and quantity of grass or vegetation.<sup>32</sup> The grass or other vegetation should be suitable for grazing or mechanical harvest to feed livestock in a commercial operation. Forage produced on federal or state lands is eligible for NAP coverage.<sup>33</sup>

As discussed above, a livestock producer will need to obtain crop insurance or NAP coverage for crops grown on grazing

land in order to be eligible for the new Livestock Forage Disaster Program created under the 2008 Farm Bill.<sup>34</sup>

**d. Insurable Crops Damaged by Noninsurable Natural Disasters**

If federal crop insurance is available for the crop in the county, but the crop is affected by a natural disaster that is not named as an insurable peril under the producer's crop insurance policy, the crop is eligible for NAP.<sup>35</sup> For example, if federal crop insurance is available for sweet corn in a producer's county but the crop is hit by a disaster—such as an earthquake—that is not covered under a sweet corn crop insurance policy, the crop is eligible for NAP coverage.

**3. Categories of Crops That Are Definitely Eligible for NAP**

The following crops are specifically named as eligible for NAP benefits, provided that catastrophic crop insurance coverage could not be obtained for the year of the loss.<sup>36</sup>

**a. Commercial Crops Grown for Food**

Commercial crops grown for food are eligible for NAP.

**b. Commercial Crops Planted and Grown for Livestock Consumption**

Commercial crops planted and grown for livestock consumption are eligible for NAP.

**c. Commercial Crops Grown for Fiber**

Commercial crops grown for fiber are eligible for NAP. Trees grown for wood, paper, or pulp products, however, are not eligible.

**d. Commercially Produced Aquacultural Species**

Commercially produced aquacultural species are eligible for NAP.<sup>37</sup> Aquacultural species are defined as: (1) any species of

aquatic organism grown as food for human consumption;  
(2) fish raised as feed for fish that are consumed by humans;  
or (3) ornamental fish propagated and reared in an aquatic  
medium.<sup>38</sup>

**e. Floriculture Crops**

Floriculture crops are eligible for NAP. Eligible floriculture is limited to field-grown flowers (including flowers grown in containers in a field setting) and propagation stock (including tubers, bulbs, and seed) for eligible floriculture plants grown for commercial sale.<sup>39</sup>

**f. Ornamental Nursery Crops**

Ornamental nursery crops are eligible for NAP. Eligible ornamental nursery crops are limited to decorative plants grown in a controlled environment (whether in field or in containers) for commercial sale.<sup>40</sup>

**g. Christmas Tree Crops**

Christmas tree crops are eligible for NAP coverage.<sup>41</sup>

**h. Turfgrass Sod**

Turfgrass sod is eligible for NAP coverage.<sup>42</sup>

**i. Industrial Crops**

Industrial crops are eligible for NAP benefits. Industrial crops are commercial crops or other agricultural commodities used in manufacturing.<sup>43</sup> For NAP purposes, industrial crops include: castor beans, chia, crambe, crotalaria, cuphea, guar, guayule, hesperaloe, kenaf, lesquerella, meadowfoam, milkweed, plantago, ovato, sesame, and other crops specifically designated by USDA.<sup>44</sup>

The 2008 Farm Bill directs the Federal Crop Insurance Corporation to establish and carry out a pilot program in

Texas under which producers may obtain crop insurance coverage for sesame.<sup>45</sup> If crop insurance becomes available for sesame in a particular county, NAP coverage will no longer be available.

**j. Seed Crops**

Seed crops are eligible for NAP. Seed crops are defined as propagation stock commercially produced for sale as seed stock for crops eligible for NAP.<sup>46</sup>

The 2008 Farm Bill directs the Federal Crop Insurance Corporation to establish and carry out a pilot program in Minnesota and North Dakota under which producers may obtain crop insurance coverage for grass seed, specifically Kentucky bluegrass and perennial rye grass.<sup>47</sup> If crop insurance becomes available for a specific grass seed crop in a particular county, NAP coverage will no longer be available.

**k. Sea Grass and Sea Oats**

Sea grasses and sea oats are eligible for NAP. They include ornamental plants grown for commercial sale and seeds and transplants produced for commercial sale as propagation stock.<sup>48</sup>

**4. Special Rules for Different or Multiple Crops**

**a. Different Types or Varieties of Crops**

Different types or varieties of a crop can be treated as separate crops for purposes of NAP eligibility.<sup>49</sup> In order for a distinction among crop types or varieties to be made, there must be evidence of a significant difference in the value of the different type or variety.<sup>50</sup> The separate type or variety must also be a scientifically recognized subspecies of a crop or commodity having a particular distinguishing characteristic or set of characteristics.<sup>51</sup>

**b. Seed Crops as Different Crops**

The requirements for qualifying a seed crop as a separate crop for NAP purposes are somewhat confusing. In order for a seed crop to be recognized as a separate crop under NAP, USDA must conclude that all of the following are true: (1) the specific crop acreage is seeded, or intended to be seeded, with the primary intention of producing commercial seed; (2) there is no possibility, without regard to market conditions, for other commercial uses of the production from the same crop; and (3) the acreage planted or intended to be planted to the seed crop has a growing period uniquely conducive to production of commercial seed and not conducive to the production of any other intended use.<sup>52</sup> USDA will consider that a commercial seed crop not meeting these criteria is a single crop together with all other intended uses of that crop type or variety grown by the producer.

**c. Different Types or Varieties of Forage**

Different types or varieties of forage crops may be defined by FSA as separate crops according to the intended method of harvest, whether mechanical or grazed.<sup>53</sup> Grazed forage may further be divided as warm season and cool season forage.<sup>54</sup> To the extent that the types or varieties of mechanically harvested forage are demonstrated to have significant differences in value, they may be further divided based upon the commodity used as forage.<sup>55</sup> Each of the crops on a specific acreage of wheat, barley, oats, triticale, or rye intended for use as forage shall be considered a separate small grain crop, distinct from each other small grain crop intended for forage, as well as distinct from other forage commodities and other intended uses of the small grain crops.<sup>56</sup>

**d. Multiple Crops**

In the case of a crop that historically has multiple plantings in the same crop year, each planting may be considered a different crop for NAP purposes.<sup>57</sup>

**B. Eligible Crop Losses**

In order to be eligible for NAP, the producer's crop loss must be caused by a natural disaster that occurs before or during harvest.<sup>58</sup>

**1. Defining Natural Disaster**

The NAP regulations broadly define natural disasters.<sup>59</sup>

**a. Damaging Weather**

A natural disaster can be damaging weather, including, but not limited to, drought, hail, excessive moisture, freeze, tornado, hurricane, excessive wind, or any combination of these events.

**b. Adverse Natural Occurrence**

A natural disaster for NAP purposes can be an adverse natural occurrence such as an earthquake, flood, or volcanic eruption.

**c. Damaging Conditions**

A natural disaster can also be what the NAP regulations call "related conditions." Related conditions include, but are not limited to, heat, insect infestation, or disease when these conditions result from an adverse natural occurrence or damaging weather. In order to qualify as a related condition for NAP eligibility, these problems must occur before or during the harvest and must directly cause, accelerate, or exacerbate the destruction or deterioration of an eligible crop.<sup>60</sup>



## **2. Losses Not Covered**

Losses are not covered under NAP if they are caused by the producer or could have been prevented by the producer. Specifically excluded from coverage are losses caused by the following.<sup>61</sup>

### **a. Neglect or Malfeasance**

Losses are not covered under NAP if they are caused by neglect or malfeasance.<sup>62</sup> Neither of these terms is defined in the regulations. According to standard legal definitions, however, malfeasance means wrongful or unlawful conduct. Neglect generally means failing to care for or give proper attention to something.

### **b. Failure to Reseed If Customary**

Losses are not covered under NAP if they are caused by a failure to reseed the crop if it is practicable and customary to do so.<sup>63</sup> Reseeding a crop generally means the same crop is planted on the same acreage after the first planting of the crop has failed.<sup>64</sup>

### **c. Failure to Follow Good Farming Practices**

Losses are not covered under NAP if they are caused by failure to follow good farming practices for the commodity and practice, as defined by USDA.<sup>65</sup>

The NAP regulations define good farming practices as the cultural practices generally used for the crop to make normal progress toward maturity and produce at least the approved yield.<sup>66</sup> The regulations further provide that good farming practices are normally those recognized by the Cooperative State Research, Education, and Extension Service (Extension Service) as compatible with agronomic and weather conditions in the area.<sup>67</sup>

**d. Water From Dam or Reservoir**

Losses are not covered under NAP if the crop is damaged by water from a public or private dam or reservoir if the land on which the crop was growing is covered by a related easement.<sup>68</sup>

**e. Failure of Irrigation System or Inadequate Irrigation Resources**

Losses are not covered under NAP if they are caused by a failure or breakdown of an irrigation system.<sup>69</sup> In general, losses are also not covered if they are caused by the producer having inadequate irrigation resources at the beginning of the crop year.<sup>70</sup> Tree crops and perennials are excepted from this restriction.

**f. Certain Crops: Loss of Inventory Due to Drought or Failure to Provide Water, Soil, or Growing Media**

The NAP regulations currently state that a loss of inventory for aquaculture, floriculture, or ornamental nursery crops is not covered under NAP if it stems from drought or any failure to provide water, soil, or growing media to these crops for any reason.<sup>71</sup>

The 2008 Farm Bill, however, includes new statutory language requiring FSA to make a determination whether losses of aquaculture were caused by drought, and to provide NAP assistance to eligible aquaculture producers from all losses related to drought.<sup>72</sup>

**g. Failure to Provide a Controlled Environment or Exercise Good Nursery Practices**

For some crops, eligibility for NAP coverage is conditioned on providing a controlled environment or exercising good nursery practices.<sup>73</sup> Losses are not covered under NAP if they are caused by any failure to provide the required environment

or practices.<sup>74</sup> A controlled environment is defined as “an environment in which everything that can practicably be controlled with structures, facilities, growing media (including but not limited to water, soil, or nutrients) by the producer, is in fact controlled by the producer.”<sup>75</sup>

#### **h. Additional Excluded Losses Listed in NAP Handbook**

The NAP Handbook lists additional types of losses that will not be eligible for NAP assistance for 2007 and subsequent crop years.<sup>76</sup> These include: (1) quarantine imposed by a county, state, or federal government agency; (2) drifting herbicide; (3) failure of the crop to mature in time for a specific market; (4) wildlife damage; (5) inability to obtain a market for the crop; and (6) certain instances of prevented planting, such as those caused by chemical and herbicide residue.

### **C. Producer Eligibility for NAP Benefits**

There are a number of producer eligibility requirements for NAP. Most of these concern the producer’s ongoing compliance with NAP and other USDA program provisions.

#### **1. Crop Reporting Requirements**

To be eligible for NAP benefits, producers must file acreage and production reports every year at the local FSA office.<sup>77</sup>

##### **a. Acreage Reports**

Producers who wish to be eligible for future participation in NAP must file one or more acreage reports every year at the local FSA office.<sup>78</sup> Anyone claiming a share in the crop will be bound by the report unless he or she files a separate report by the acreage reporting date.<sup>79</sup>

***(i) Deadline for Acreage Report***

Acreage reports must be filed no later than the specified acreage reporting deadline for the crop and the location.<sup>80</sup> If a producer fails to submit this information by the acreage reporting date, NAP benefits may be denied. However, an acreage report may still be considered timely, and NAP coverage may be available, if the crop or identifiable crop residue is still in the field when the report is filed.<sup>81</sup> In general, in such cases the farm operator must pay the cost of a farm inspection unless the FSA county committee determines that failure to report in a timely manner was beyond the producer's control.<sup>82</sup>

***(ii) Contents of Acreage Report***

An acreage report must include the following information.<sup>83</sup>

***(a) Crop Planted***

For each crop in which the producer has an interest, he or she must report all acreage in the county planted or prevented from being planted to that crop.<sup>84</sup> The information must include: (1) all acreage of the crop in the county in which the producer has a share; (2) the farm serial number(s) for the acreage; (3) the crop type; (4) the farming practices to be used; (5) the intended use of the crop; and (6) the date the crop was planted.<sup>85</sup> The information must include each planting if there are multiple plantings.<sup>86</sup> If the crop is a forage crop, the report must indicate the predominant species, type, or variety and whether it will be grazed or mechanically harvested.<sup>87</sup>

***(b) Producer's Share of the Crop***

The filing must include information on the producer's share in the crop—as of the time an application for

coverage was filed.<sup>88</sup> It must also include information about other persons who claim a share in the crop.<sup>89</sup>

**b. Follow Up With Production Report**

The producer must report the production, acreage yields, and harvest date for each harvested crop for which an application for NAP coverage is filed.<sup>90</sup>

*(i) Deadline for Production Report*

In general, the production report must be filed on or before the NAP acreage reporting date for the crop for the next crop year.<sup>91</sup>

*(ii) Contents of Production Report*

A production report must certify the production and acreage yield.<sup>92</sup>

**c. Maintain Acreage and Production Records for Three Years**

Producers must retain, for a minimum of three years, records of the acreage, production, and yields for each crop for which an application for NAP coverage is filed.<sup>93</sup>

If FSA determines that it is impractical to maintain crop acreage, production, or yield records for a certain crop, a producer of that crop must maintain whatever acreage and yield records *are* available along with other records specified in the NAP regulations.<sup>94</sup> For example, forage producers must specify whether they intend to harvest the crop mechanically or by grazing.<sup>95</sup> Other affected crops include honey, maple sap, value loss crops, ginseng, turfgrass sod, and tropical crops grown in tropical regions.<sup>96</sup>

## **2. No More Than \$2 Million in Gross Income**

Any person with more than \$2 million in qualifying gross revenues is not eligible for NAP assistance.<sup>97</sup> The \$2 million measurement is taken from the tax year just preceding the disaster year in which NAP assistance is requested.<sup>98</sup> The producer must maintain records of gross revenue for the preceding tax year to provide evidence of eligibility under this requirement if needed.<sup>99</sup> The NAP Handbook provides examples of gross annual income determinations.<sup>100</sup>

## **3. Sodbuster and Swampbuster Violators Not Eligible for NAP**

A producer who violates USDA's Highly Erodible Land (sometimes called "Sodbuster") or the Wetland Conservation (sometimes called "Swampbuster") provisions is ineligible for NAP benefits.<sup>101</sup>

## **4. Disqualification for Crop Insurance Fraud**

A person who has been found to have engaged in crop insurance fraud is ineligible to receive any NAP benefit for up to five years.<sup>102</sup>

## **5. Other Restrictions**

Other restrictions also apply to NAP benefits. For example, a person who has been convicted of producing a controlled substance is ineligible for NAP benefits for the year of the violation and the four years following.<sup>103</sup>

## **D. Land Eligible for NAP Coverage**

In general, the NAP regulations do not specify requirements for land to be eligible for NAP coverage. The 2008 Farm Bill, however, did specify some land that will be ineligible for NAP coverage.<sup>104</sup> Native sod acreage of more than five acres that is tilled for production of an annual agricultural crop for the first time after May 22, 2008, is not eligible for NAP coverage during the first five crop years of

planting.<sup>105</sup> Native sod is defined as land that has never been tilled on which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing.<sup>106</sup>

## **IV. NAP Coverage**

### **A. Pre-Planting Application and Fee Required**

In order to participate in NAP, producers are required to file an application for NAP coverage (Form CCC-471) in the local FSA office for the county where their acreage is located.<sup>107</sup> The application must be filed no later than the application closing date for that area and must be accompanied by a service fee.

#### **1. NAP Application Closing Dates**

The application closing date means the last date that producers can submit an application for coverage for noninsured crops for the specified crop year.<sup>108</sup> NAP application closing dates are established by FSA state committees and must correspond to the crop insurance sales closing dates for similar crops.<sup>109</sup> The NAP application closing date for annual crops must be at least 30 days before the earliest final planting dates to ensure that producers will be covered for prevented planting losses. Crops without final planting dates must have a NAP application closing date corresponding to the beginning of the crop year.

#### **2. NAP Service Fees**

Producers are required to pay a nonrefundable service fee to receive coverage under NAP.<sup>110</sup> The total service fee required is based on how many different crops the producer has and in how many counties. The service fee for NAP coverage is \$100 per crop per administrative county, up to a maximum of \$300 per administrative county per year and \$900 per producer per year.

NAP service fees were increased under the 2008 Farm Bill.<sup>111</sup> The service fee for NAP coverage will increase to \$250 per crop per

administrative county, up to a maximum of \$750 per administrative county per year and a maximum of \$1,875 per producer per year. It is expected that the fee increase will take effect for the 2009 crop year.

**a. Administrative County**

An “administrative county” is the area covered by a local FSA service office, which may include more than one actual county.<sup>112</sup> For example, if all acreage in Charles County and St. Mary’s County is administered for FSA purposes out of a single office in St. Mary’s County, the two counties would be considered one administrative county for NAP purposes.<sup>113</sup> A producer growing crops in these two counties and no others would have a maximum service fee of \$300, or \$750 under the 2008 Farm Bill fee increase.

**b. Fee Waiver for Limited Resource Farmers**

The requirement to pay a service fee for NAP coverage may be waived for limited resource farmers.<sup>114</sup> The waiver is not automatic. It must be requested by the producer no later than the date the application for coverage is submitted.<sup>115</sup> The producer must maintain records for the two preceding tax years to provide evidence of eligibility for a waiver if needed.<sup>116</sup>

The NAP regulations use the definition of “limited resource farmer” applicable to the federal crop insurance programs.<sup>117</sup> This definition was substantially changed in August 2004.<sup>118</sup> Producers who qualified for a waiver of the administrative fee under the prior definition should continue to receive a waiver if they are still eligible under that definition, or if they qualify under the current definition.<sup>119</sup>



***(i) Current Definition—Gross Farm Sales up to \$116,800 and Below Average Household Income***

Under the current definition, a producer will qualify as a limited resource farmer if he or she: (1) has “direct or indirect” gross farm sales of \$116,800 or less in each of the previous two years;<sup>120</sup> and (2) has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years.<sup>121</sup>

***(ii) Prior Definition—Gross Income of \$20,000***

Under the prior definition, a producer could qualify as a limited resource farmer in one of two ways.<sup>122</sup> First, those who had an annual gross household income of \$20,000 or less from all sources of revenue for each of the last two years. Second, those who: (1) farmed less than 25 acres total for all crops, (2) got a majority of their gross income from the farm, and (3) had a gross income from farming operations of not more than \$20,000.

### **3. Continuous NAP Coverage**

The NAP coverage application (CCC-471) provides continuous NAP coverage. This means that once an initial coverage application has been filed, no new CCC-471 needs to be filed in following years so long as the producer continues to pay the service fee before the application closing date for each crop year.<sup>123</sup> However, producers must file a new application in order to change crop shares or to add or delete crops.

Local FSA offices are supposed to notify producers at least 60 days before the first application closing date of what service fees are due based on the producers’ previous crop year coverage. The notice should also remind producers of the deadline for payment of the service fee.<sup>124</sup>

## **B. Losses Covered Under NAP**

To be eligible for NAP benefits, a producer must have a catastrophic crop loss.<sup>125</sup> This can occur through one of four ways.<sup>126</sup> First, the producer is eligible if he or she was prevented from planting more than 35 percent of the crop because of a disaster. Second, the producer is eligible if the disaster causes a loss of more than 50 percent of the producer's approved yield for the crop. Third, the producer is eligible if the disaster causes a loss of more than 50 percent of the pre-disaster value of the crop. Fourth, the producer is eligible if the disaster causes a loss of more than 50 percent of the expected animal unit days for a pasture or forage crop.

### **1. Establishing Approved Yield**

The first step in determining whether a producer's individual loss is large enough to qualify for NAP coverage is to find the producer's approved yield.

#### **a. Defining Approved Yield**

Calculations of producer eligibility for NAP start with the producer's approved yield. Approved yields are based on the producer's actual production history for the crop, as reported and certified by the producer.<sup>127</sup> In general, the producer's approved yield is the average of his or her recent yields for the crop.<sup>128</sup> To calculate approved yield, CCC averages the producer's yields from at least the last four consecutive years.<sup>129</sup> In general, if the records are available, CCC will average up to ten consecutive years of crop yields to establish the producer's approved yield.<sup>130</sup> Any crop year in which the crop was out of rotation, not planted, or prevented from being planted is not included in the average.

#### **b. Initial Approved Yield Will Be Created If Actual Production History Not Available**

When first applying for NAP, if the producer is unable to provide verifiable records of at least four consecutive years of

past production, a four-year history will be created.<sup>131</sup> As needed to fill out the producer's actual yields, transitional yields—or "T-yields"—will be used in the actual production history database to establish an initial approved yield.<sup>132</sup> Also called "county expected yields," T-yields are an average of yields in the county for the five consecutive crop years immediately preceding the previous crop year.<sup>133</sup> For example, for the 2008 crop year, the base period would be 2002-2006. The T-yield may be adjusted for different farming and cultural practices.<sup>134</sup>

***(i) If No Production Records For Prior Crop Year***

If an approved yield has never been calculated for the crop, and if there are no production records available for the most recent crop year, then the producer's approved yield for the current crop year will be based on the simple average of 65 percent of the applicable T-yield for each of the previous four years.<sup>135</sup>

***(ii) If Certified Production Records Are Available Only for Most Recent Crop Year***

If certified acceptable production records are available only for the most recent crop year, and there are no zero-credited or assigned yields in the producer's history, then the producer's approved yield for the current crop year will be based on the simple average of the one actual yield plus 80 percent of the applicable T-yield for the missing crop years.<sup>136</sup>

***(iii) If Certified Production Records Available Only for Two Most Recent Crop Years***

If an approved yield has never been calculated for the crop, certified acceptable production records are available only for the two most recent crop years, and there are no zero-credited or assigned yields in the producer's history,

then the producer's approved yield for the current crop year will be based on the simple average of the two actual yields plus 90 percent of the applicable T-yield for the missing crop years.<sup>137</sup>

*(iv) If Certified Production Records Available Only for Three Most Recent Crop Years*

If an approved yield has never been calculated for the crop, certified acceptable production records are available only for the three most recent crop years, and there are no zero-credited or assigned yields in the producer's history, then the producer's approved yield for the current crop year will be based on the simple average of the three actual yields plus 100 percent of the applicable T-yield for the missing crop year.<sup>138</sup>

*(v) If Producer Is a "New Producer"*

If the producer fits the definition of a "new producer," the approved yield may be based on unadjusted T-Yields or a combination of actual yields and unadjusted T-Yields.<sup>139</sup> A new producer is a person who has not been actively engaged in farming for a share of the production of the eligible crop in the administrative county for more than two APH crop years.

**c. One Year's Yield May Be Assigned If Records Not Available**

Once an approved yield has been calculated for any year (based upon an actual or created production history), then an assigned yield will be used to update or extend the producer's actual production history when a producer fails to certify a report of production.<sup>140</sup> The assigned one-year yield will be equal to 75 percent of the approved yield calculated for the most recent crop year for which the producer does not certify

a report of production. Producers may have only one assigned yield in their actual production history.<sup>141</sup>

**d. Yields Replaced Due to Disaster Not Considered  
“Assigned” Yields**

By definition, an assigned yield is a yield that is assigned for a crop year for which the producer did not file an acceptable production report by the application closing date.<sup>142</sup> If a producer’s actual or appraised yield is less than 65 percent of the current crop year T-yield due to losses incurred in a disaster year, the producer may request that FSA replace that yield in the producer’s actual production history with a yield equal to 65 percent of the current crop year T-yield for purposes of determining the producer’s approved yield.<sup>143</sup> As long as the producer filed an acceptable production report for the disaster year by the application closing date, the replacement yield is not considered an assigned yield.<sup>144</sup>

**e. When Assigned Yields Not Available**

In two situations, assigned yields may not be available to the producer.<sup>145</sup>

**(i) *Producer Received an Assigned Yield in the Past and Did Not Report Yields***

If a producer receives an assigned yield for NAP purposes in one year because he or she had not submitted production records, the producer will be ineligible to receive an assigned yield for any other year unless he or she submits adequate production records for the eligible crop for all interim crop years.<sup>146</sup> The producer will receive a zero yield for those years he or she is ineligible to receive an assigned yield.<sup>147</sup> By providing a certification of production and supporting documents and production records, producers may replace an assigned yield with an

actual yield, and restore eligibility for another assigned yield.<sup>148</sup>

***(ii) Acreage for Crop Increased Dramatically in the County***

If the acreage devoted to a particular crop in a county increased by more than 100 percent over any one of the last seven years, special rules govern whether a producer of that crop in that county will be able to have an assigned yield.<sup>149</sup> In general, the producer will be required to provide detailed documentation of production costs, acreage planted, and yield for the year in which assistance is being requested.<sup>150</sup> The producer may also be required to document that the crop, if harvested, could have been marketed at a reasonable price.<sup>151</sup>

These extra record requirements may be avoided in two ways.<sup>152</sup> First, they are not needed if the producer had the crop inspected by a third party acceptable to FSA before the loss occurred. Second, the record requirements need not be met if the FSA County Executive Director and the FSA State Director recommend an exemption from the reporting requirements and FSA approves the recommendation.

**2. Yield Loss Coverage—Based on Actual Yield**

One type of NAP coverage provides payments based upon the producer's individual loss of actual yield compared to his or her approved yield. A producer is eligible for NAP benefits if his or her actual yield is less than 50 percent of the approved yield for the crop.<sup>153</sup> There are a few important considerations involved in determining a producer's actual yield for this purpose.

**a. Entire Unit Used to Calculate Yield Loss**

Production from the producer's entire unit must be used to determine whether the producer's yield is low enough to qualify for a NAP payment.<sup>154</sup>

Identifying a producer's unit can be confusing. It is also very important for NAP eligibility. For example, if a producer suffered a very large loss in one field but did better with the same crop in a different field, and both fields were in the same unit, it might mean that the producer would not qualify for NAP. If the fields were in separate units, it might mean that the loss in the first field would qualify for NAP.

In general, a unit is created in one of three ways.

*(i) All 100 Percent Crop Share Acreage*

All acreage of an eligible crop in an administrative county in which the producer has a 100 percent crop share constitutes a single unit.<sup>155</sup> This includes land that the producer owned and farmed himself or herself. It also includes, as a part of the same unit, land that the same producer rents for cash, for a fixed commodity payment, or for other consideration or payment that does not give the landlord a share in the crop. As a result, several different fields could create a single unit.

For example, if a producer owned land and grew a crop on his or her land, and also rented land from two different landlords—each for cash—and grew the same crop on all of this land, all of these fields together would be a single unit.

*(ii) Crop Share Lease Acreage—Tenant Has Separate Unit for Each Landlord*

Where interest in a crop is split between a landlord and a tenant, a unit is created from all of the acreage in the

administrative county that is owned by one person and operated by the other person.<sup>156</sup> If a producer rents several fields in a county from the same landlord and grows the same crop on each field, those fields together would be one unit. On the other hand, a single producer could have several units of the same crop—one with each landlord from whom the producer is renting land on a share basis.

***(iii) Crop Share Lease Acreage—Landlord Has Separate Unit for Each Tenant***

When a person rents out land on a share basis, that person is eligible to obtain NAP coverage for his or her share of the crop. The unit for NAP coverage will be all acreage owned by that person in the county that is rented out to a single tenant and on which the same crop is raised.<sup>157</sup>

Acreage rented out on a share basis to a different tenant will represent a separate unit.

***(iv) Example of Unit Calculation***

The NAP Handbook offers an example of how a unit calculation might work:<sup>158</sup> if, in addition to the land the person owns, the person rents land from five landlords—three on a crop share basis and two on a cash basis—the person would be entitled to four units, one unit each for each crop share lease and one unit that includes the two cash leases and the land owned by the person.

***(v) Acreage for Strip Crops and Skip Rows***

When one crop is planted in alternation with another crop, only the acreage that is actually planted to the crop being measured will be considered to be acreage devoted to the measured crop.<sup>159</sup> In general, the entire acreage of a field or subdivision will be considered as devoted to the crop only where the distance between rows of the crop is 40 inches or less for all rows.<sup>160</sup>



**b. Quality Losses Generally Not Taken Into Account**

The quantity of a producer's yield is not reduced for quality considerations unless the production has a zero value.<sup>161</sup>

**c. Some Guaranteed Contract Payments Affect Yield Calculations**

Producers who have a contract to receive a guaranteed payment for producing—as opposed to delivering—a crop will have their production calculation adjusted upward by the amount of production corresponding to the amount of the contract payment received.<sup>162</sup>

The NAP Handbook sets out a calculation that local offices are to use when making this adjustment.<sup>163</sup> First, the total amount of the guaranteed payment is divided by the approved average market price for the crop. Then, the amount of any actual or other assigned production for the acreage is subtracted from that result. The total is the amount of assigned production that will be added to the unit's production to reflect the guaranteed payment.

The NAP Handbook gives the following example.<sup>164</sup> Assume that the producer has a guaranteed payment of \$4,000 for producing the crop, that the producer's actual production is 3,000 pounds, and that the approved average market price is \$1.00 per pound. The assigned yield reflecting the payment guarantee would be calculated in the following way.

- **Step One.** The guaranteed crop payment of \$4,000 is divided by \$1.00 per pound. The result is 4,000 pounds.
- **Step Two.** Subtract the producer's actual production of 3,000 pounds. The result is 1,000 pounds.

Therefore, the producer will receive an additional assigned yield of 1,000 pounds of production to reflect the contract guarantee.

**d. Providing Proof of Actual Yield**

Producers are required to provide documentary evidence of production by no later than the acreage reporting date for the crop year following the crop year they file an application for payment.<sup>165</sup>

*(i) Records Acceptable to FSA*

FSA has somewhat strict standards regarding the type of records that are acceptable to support a producer's yield certification.<sup>166</sup> The following describes records that the regulations say FSA may find acceptable. The regulations do not prohibit other types of records or evidence. The regulations seem to give FSA significant discretion in determining what is an acceptable record.<sup>167</sup>

*(a) Commercial Documents*

If the crop was sold or otherwise disposed of through commercial channels, records acceptable to FSA may include commercial receipts, settlement sheets, warehouse ledger sheets, or load summaries—provided that the records are reliable or verifiable.<sup>168</sup>

*(b) Other Documentary Evidence*

Other documentary evidence may be used to verify the information provided by the producer if the crop has been sold, fed to livestock, or otherwise disposed of through noncommercial channels. Examples of acceptable documentary evidence include truck scale tickets and contemporaneous measurements or diaries—provided that these records are reliable or verifiable.<sup>169</sup> The regulations do not define what is meant by “contemporaneous” for these purposes. A contemporaneous measurement or diary likely means one that was taken or written down at the time of the harvest or very shortly thereafter.

*(ii) Failure to Produce Records Acceptable to FSA*

Failure to produce production records acceptable to FSA can have several severe results. According to the NAP Handbook, at a minimum, FSA will tell the producer that production records will not be used for purposes of actual production history or to calculate assistance.<sup>170</sup> An assigned, zero-credited, or T-yield will apply instead of the production and yield reported by the producer.<sup>171</sup> However, the NAP regulations provide that producers who fail to file a production report by the application closing date may still have the production data added to their actual production history for subsequent years if they submit acceptable documentary evidence for the production.<sup>172</sup>

More seriously, the failure to produce acceptable records may subject the producer to criminal and civil false claims actions under various federal statutes.<sup>173</sup> In addition to any civil or criminal liability, FSA will require the producer to refund any NAP payment received, with interest, and to pay liquidated damages.<sup>174</sup> Third, sanctions for engaging in a misrepresentation, fraud, scheme or device may apply.<sup>175</sup>

**3. Prevented Planting Coverage—Based on Unplanted Acreage**

Production losses due to prevented planting are eligible for NAP assistance.<sup>176</sup> Prevented planting means the producer is unable to plant a crop with proper equipment during the planting period for the crop or commodity as a result of an eligible cause of loss.<sup>177</sup> A producer is eligible for NAP benefits if he or she was prevented from planting more than 35 percent of the total acreage intended for the crop because of the disaster.<sup>178</sup> The benefits for the unplanted acreage will be based in part on the producer's approved yield for that acreage.<sup>179</sup> The following conditions affect NAP prevented planting coverage.

**a. Intended to Plant a Crop— But Was Prevented**

In general, the producer must show the intent to plant the acreage by providing documentation of field preparation, seed purchase, and any other information that shows the acreage could have been planted and harvested under normal weather conditions.<sup>180</sup>

FSA's comments accompanying a NAP rule adopted in 2006 suggest that the requirement that producers document intent to plant may be somewhat less when an area is prevented from being planted due to drought.<sup>181</sup>

**b. Resources to Plant, Grow, and Harvest**

The producer may be required to prove that the resources to plant, grow, and harvest the intended crop were available to the producer.<sup>182</sup>

**c. Timing of Natural Disaster for Prevented Planting**

For the prevented planting losses to be eligible for NAP, the timing of the natural disaster is important. It must have occurred: (1) after a previous planting period for the crop year, and (2) before the final planting date for the crop year in which a request for NAP payment is made.<sup>183</sup> For crops with multiple plantings in a single crop year where one or more crop has been harvested, the provision in the regulations is confusing. The regulation states that the natural disaster must occur before the harvest date of the first planting in the applicable planting period.<sup>184</sup> The NAP Handbook is less confusing. It says that in order to establish prevented planting for a crop type with multiple plantings, the disaster must have occurred after the final planting date of the final planting period for the same crop type in the previous crop year and before the final planting date of the same crop type for the planting period that is the basis of the prevented planting

notice of loss.<sup>185</sup> To the extent that it will help the farmer, CCC is bound to follow the policy adopted in its NAP Handbook.<sup>186</sup>

**d. Conservation or Planned Fallow Land Not Eligible**

Land used for conservation purposes or land that is intended to be or considered to have been left unplanted under any USDA program is not eligible for NAP prevented planting coverage.<sup>187</sup> This includes land enrolled in the Conservation Reserve Program (CRP) or the Wetland Reserve Program (WRP).

Also, if the planting history or the conservation plan for the land shows that it would have remained fallow for crop rotation purposes, the land is not eligible for prevented planting coverage under NAP.<sup>188</sup>

**C. The Coverage Period**

The coverage period is the time during which NAP coverage is available for loss of production of the eligible crop as a result of natural disaster.<sup>189</sup>

**1. Coverage Period for Annual Crops**

The NAP coverage period for annual crops, including annual forage crops, begins on the *later* of 30 calendar days after the date the producer files an application for NAP coverage (CCC-471) or the date the crop is planted.<sup>190</sup> The crop must be planted by the final planting date established for the crop. The NAP coverage period for annual crops ends the *earliest* of the following: the date harvest is complete, the normal harvest date for the crop in the area, the date of the producer's total abandonment of the crop, or the date of total destruction of the crop.

## **2. Coverage Period for Biennial and Perennial Non-Forage Crops**

The NAP coverage period for biennial and perennial crops not intended for forage use begins 30 calendar days after the closing date for filing applications for NAP coverage (CCC-471).<sup>191</sup> The NAP coverage period for perennial crops not intended for forage ends the *earliest* of the following: the date harvest is complete, the normal harvest date in the area, the date of the producer's total abandonment of the crop, the date of total destruction of the crop, or ten months from the NAP application closing date (unless a longer period is specifically allowed).<sup>192</sup>

## **3. Coverage Period for Biennial and Perennial Forage Crops**

The NAP coverage period for biennial and perennial forage crops begins the *latest* of 30 calendar days after the closing date for filing applications for NAP coverage (CCC-471), the date first year seedings were planted, or the date following the normal harvest date of the previous crop year.<sup>193</sup> The NAP coverage period for biennial and perennial forage crops ends on the normal harvest date of the subsequent year.<sup>194</sup>

Although the regulation states that NAP coverage may begin on the date first year seedings are planted, the NAP Handbook states that no coverage will be provided for first year seedings.<sup>195</sup> Any producer who is denied NAP coverage for first year seedings may wish to seek legal advice.

## **4. Coverage Period for Multiple Planted Crops**

The NAP coverage period for multiple planted crops begins the *later* of 30 calendar days after the application for NAP coverage (CCC-471) is filed or the date the crop is planted within the specific planting period.<sup>196</sup> The NAP coverage period for a multiple planted crop ends for the specific planting period the *earliest* of the date harvest is complete, the latest normal harvest date (based on the number of days needed for the crop to mature),

the date of the producer's abandonment of the crop, or the date of the destruction of the crop.

## **5. Coverage Period for Special Crops**

### **a. Value Loss or Controlled Environment Crops**

The NAP coverage period for value loss or controlled environment crops begins 30 calendar days after the application closing date.<sup>197</sup> The application closing date is established as September 1 for all such crops, including ornamental nursery, aquaculture, Christmas trees, ginseng, floriculture, mushrooms, and turfgrass sod.<sup>198</sup> The NAP coverage period for these crops begins on October 1 and ends on September 30 of each crop year.<sup>199</sup>

### **b. Honey**

The NAP coverage period for honey begins on January 1 and ends on December 31.<sup>200</sup> The application closing date is no later than December 1.<sup>201</sup>

### **c. Maple Sap**

The NAP coverage period for maple sap begins the *later* of 30 calendar days after the application closing date for NAP coverage or the date the crop comes out of dormancy.<sup>202</sup> The NAP coverage period for maple sap ends on the *earlier* of the date harvest is complete or the normal harvest date.<sup>203</sup>

## **D. The Amount Paid on the Loss**

Payments under NAP are based on the producer's loss percentage and a market price percentage.<sup>204</sup> This section explains how the calculation is made.

### **1. Reduced Yield Loss—50 Percent of Approved Yield**

Payments are made on yield loss exceeding 50 percent of the producer's approved or assigned yield for the crop.<sup>205</sup> The 50

percent loss calculation acts both to determine eligibility for NAP and to determine the benefits paid. Only if the producer's yield loss exceeds 50 percent of approved yield will he or she be eligible for NAP. If the producer is eligible, payments will only be made on the amount of the yield loss that is greater than 50 percent.<sup>206</sup>

While NAP payments for forage crops that are mechanically harvested may be determined using the above calculations, NAP assistance is also available for lost forage on acreage that CCC determines is predominantly grazed if the loss is greater than 50 percent of the producer's expected carrying capacity, as expressed in Animal Unit Days (AUDs).<sup>207</sup> Grazing loss may be determined based on the percentage of loss for similar mechanically harvested forage crops on the same farm or similar farms in the area. In the absence of such evidence, CCC may determine a collective percentage of loss for the region based upon at least two independent assessments.<sup>208</sup>

Like other individual production losses, the 50 percent forage loss requirement is both an initial eligibility test and the baseline loss for NAP assistance. NAP payments will only be available for the amount of forage loss exceeding 50 percent of expected AUDs. For example, a producer who suffers a 40 percent loss in yield or AUD would not be eligible for any NAP benefits. However, a producer who suffers a 60 percent loss may be eligible for NAP benefits since the loss is greater than 50 percent. Payment to this producer would be based on ten percent of the approved or assigned yield or AUD, that is, the amount of loss greater than 50 percent.

## **2. Value Loss Crops—50 Percent of Crop Value**

NAP coverage for value loss crops—such as Christmas trees, turfgrass sod, aquaculture, ornamental nursery, mushrooms, floriculture, and sea grass and sea oats—is available only if the disaster-related value loss exceeds 50 percent of the total crop value.<sup>209</sup>



### **3. Prevented Planting Loss—35 Percent of Crop Acreage**

Prevented planting payments are available if the producer is prevented from planting more than 35 percent of the total eligible acreage he or she intended to plant to the eligible crop.<sup>210</sup> As with yield loss, this percentage acts to determine both eligibility for NAP payments and the level of NAP payments once the producer is found eligible.<sup>211</sup> Only if the producer's prevented planting loss is greater than 35 percent will he or she be eligible for NAP. If the producer is eligible, payments will only be made on the amount of the loss that is greater than 35 percent.

### **4. Price—Based on a Percentage of Average Market Price**

NAP benefits are paid based on a percentage of what USDA calls the average market price.<sup>212</sup> The average market price is expressed as a certain dollar amount per ton, bushel, or whatever unit of measure is appropriate for the crop. The price is set by USDA on a harvested basis and is based in part on historical data.<sup>213</sup> It does not take into account any transportation, storage, processing, marketing, or other post-harvest costs.

#### **a. 55 Percent of Average Market Price**

NAP benefits are calculated at 55 percent of the established average market price for the crop.<sup>214</sup>

#### **b. Adjustments for Nonincurred Expenses**

NAP payment rates are adjusted for crops that are produced with significant and variable expenses that are not incurred because the crop was either not planted or not harvested due to the disaster.<sup>215</sup> The regulations do not explain how these adjustments will be calculated. The NAP Handbook states that the adjustments will be made through payment factors established by the FSA state committee for each state and approved by the FSA Deputy Administrator for Farm Programs.<sup>216</sup> The payment factors are to be based on the

percentage of total crop production costs that are not expended due to prevented planting or inability to harvest the crop.<sup>217</sup>

## **5. Producer's Share of NAP Benefits the Same as Producer's Crop Share**

The producer's NAP benefits are based on his or her share of the crop. A share is the producer's percentage interest in the eligible crop as an owner, operator, or tenant at the time of planting or beginning of the crop year.<sup>218</sup>

The producer's share of the crop is the same as the producer's share of the NAP benefits.<sup>219</sup> For example, if a producer had a 50 percent share in the crop, the producer would be entitled to 50 percent of the NAP benefits available for the loss.

As discussed in the previous edition of this book, NAP regulations in effect from 2002 to 2006 contained errors in the calculations of NAP benefits, with the effect of raising the eligibility threshold and lowering payments for producers with less than a 100 percent share in the crop. On March 17, 2006, FSA published a NAP rule correcting the calculations.<sup>220</sup>

## **6. How to Calculate Loss Benefits**

The regulations spell out how to calculate NAP benefits step-by-step.<sup>221</sup>

### **a. Benefits Calculation for Low Yield**

When the producer has sustained a loss in yield in excess of 50 percent of the producer's approved yield for the crop, the NAP low yield payment will be determined by the following calculation.<sup>222</sup>

- **Step One:** Multiply the producer's total eligible acreage planted to the eligible crop by the producer's share.<sup>223</sup>

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- **Step Two:** Multiply the result in Step One by 50 percent of the approved yield per acre of the crop.<sup>224</sup>
- **Step Three:** Multiply net production on the total eligible acreage by the producer's share.<sup>225</sup>
- **Step Four:** Subtract the product of Step Three from the product of Step Two.<sup>226</sup>
- **Step Five:** Determine the final payment price by multiplying the average market price by any applicable payment factors, and then multiply by 55 percent.<sup>227</sup>
- **Step Six:** Multiply the result in Step Four by the final payment price determined in Step Five.<sup>228</sup>
- **Step Seven:** Multiply the value of salvage and secondary use of the crop by the producer's share.<sup>229</sup>
- **Step Eight:** Subtract the amount from Step Seven from the result in Step Six.<sup>230</sup>

### **b. Benefits Calculation for Losses of Grazed Forage**

When the producer has suffered more than a 50 percent loss of forage on acreage reported to CCC as intended to be grazed, the NAP grazed forage payment calculation is made in the following way.<sup>231</sup>

- **Step One:** Multiply the eligible acreage by the producer's share.<sup>232</sup>
- **Step Two:** Divide the result from Step One by the carrying capacity established for the specific acreage.<sup>233</sup>
- **Step Three:** Multiply the result from Step Two by the number of days established as the grazing period.<sup>234</sup>
- **Step Four:** Add any adjustments to AUD for forage management and maintenance practices to the result from Step Three.<sup>235</sup>

- **Step Five:** Multiply the result from Step Four by the applicable percentage of loss determined by CCC.<sup>236</sup>
- **Step Six:** Multiply the amount of AUD lost to other causes by the producer's share.<sup>237</sup>
- **Step Seven:** Subtract the result in Step Six from the result in Step Five.<sup>238</sup>
- **Step Eight:** Multiply the result in Step Four by 50 percent.<sup>239</sup>
- **Step Nine:** Subtract the result in Step Eight from the result in Step Seven. (If the result is zero or a negative number, no NAP assistance will be available.)<sup>240</sup>
- **Step Ten:** Determine the final payment price by multiplying the AUD value (including any adjustments), by 55 percent.<sup>241</sup>
- **Step Eleven:** Multiply the result in Step Nine by the result in Step Ten.<sup>242</sup>

**c. Benefits Calculation for Prevented Planting**

When the producer has been unable to plant at least 35 percent of the acreage intended for the eligible crop, the NAP prevented planting payment calculation is made in the following way.<sup>243</sup>

- **Step One:** Add the total acres planted and prevented from being planted.<sup>244</sup>
- **Step Two:** Multiply the result in Step One by 35 percent.<sup>245</sup>
- **Step Three:** Subtract the result in Step Two from the total prevented planted acres.<sup>246</sup>
- **Step Four:** Multiply the producer's share by the result from Step Three.<sup>247</sup>

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- **Step Five:** Multiply the result from Step Four by the approved yield.<sup>248</sup>
- **Step Six:** Multiply the producer's share by the assigned production.<sup>249</sup>
- **Step Seven:** Subtract the result from Step Six from the result in Step Five.<sup>250</sup>
- **Step Eight:** Determine the final payment price for the producer for the crop by multiplying the average market price by any applicable payment factors, and then multiply by 55 percent.<sup>251</sup>
- **Step Nine:** Multiply the result in Step Seven by the result in Step Eight.<sup>252</sup>

### d. Benefits Calculation for Value Losses

When the producer has sustained a loss in value in excess of 50 percent of the pre-disaster value of the crop, the NAP value loss payment will be determined by the following calculation.<sup>253</sup>

- **Step One:** Multiply the field market value of the crop before the disaster by 50 percent.<sup>254</sup>
- **Step Two:** Subtract the sum of the field market value after the disaster and the value of ineligible causes of loss from the result in Step One.<sup>255</sup>
- **Step Three:** Multiply result from Step Two by the producer's share.<sup>256</sup>
- **Step Four:** Multiply the result from Step Three by 55 percent plus whatever factor deemed appropriate to reflect savings from nonharvesting of damaged crop, or other factors as determined by CCC.<sup>257</sup>

- **Step Five:** Multiply the salvage value by the producer's share.<sup>258</sup>
- **Step Six:** Subtract the result from Step Five from the result of Step Four.<sup>259</sup>

## V. Collecting NAP Benefits

There are certain steps a producer must be sure to follow when claiming NAP benefits. If these are not followed, the producer may be found ineligible for the benefits even if all of the loss requirements have been met.

There are also limits on how much a producer can receive in NAP benefits and whether NAP benefits can be combined with other disaster assistance programs.

### A. Reporting the Crop Loss: In General, Within 15 Days After Loss

In order to collect NAP benefits, producers must report their losses. In general, a producer must give FSA notice of any crop loss within 15 calendar days after damage to the crop.<sup>260</sup> For low yield claims and allowable value loss, a notice of loss must be filed the *earlier* of: (1) 15 calendar days after the damaging weather or adverse natural occurrence, or date loss of the crop or commodity becomes apparent; and (2) 15 calendar days after the normal harvest date.<sup>261</sup> For prevented planting coverage, the producer must give notice within 15 calendar days after the final planting date.<sup>262</sup> The notice must be filed at the local FSA office serving the county where the producer's crop is located.<sup>263</sup>

At the discretion of FSA, a notice filed beyond the 15 days allowed may be considered to be timely filed if FSA has the opportunity to verify the information on the notice of loss by inspecting the specific acreage or crop involved, and to determine, based on the inspection, that an eligible cause of loss caused the claimed damage or loss.<sup>264</sup>

## **B. Applying for NAP Benefits**

In addition to reporting the crop loss, the producer must also apply for NAP benefits.

### **1. Deadline to Apply for Benefits**

Producers must file an application for NAP benefits on the proper FSA form with the local FSA office prior to the *earlier* of: (1) the date the producer files an application for coverage for the crop for the subsequent crop year; or (2) the application closing date for the crop for the subsequent crop year.<sup>265</sup>

### **2. If the Crop Is Not Harvested—Crop Left Intact Until Appraised or Released**

If the producer chooses not to harvest the crop, all eligible acres for which the producer intends to make a NAP application must be left intact until they have been appraised and released by an FCIC- or CCC-approved loss adjuster.<sup>266</sup> The appraisal and release must be requested prior to the destruction or abandonment of the crop acreage, or no later than the normal harvest date.<sup>267</sup>

### **3. If the Crop Is Harvested—Documentary Evidence**

If the producer harvests the damaged crop, FSA requires the producer to notify the local office within 15 days after the harvest is completed and to provide documentary evidence of the crop production.<sup>268</sup> This may mean leaving a representative sample of the crop unharvested for inspection by a loss adjuster.<sup>269</sup> The required documentary evidence must be filed no later than the acreage reporting date for the crop in the subsequent crop year.<sup>270</sup>

## **C. \$100,000 Per Person Annual Limitation on NAP Benefits**

No person may receive NAP payments in excess of \$100,000 per crop year, regardless of the level of loss incurred.<sup>271</sup>

## **D. Multiple Benefits From USDA for Same Disaster Loss**

Multiple benefits from USDA for the same disaster loss are restricted. In general, if a producer is eligible to receive NAP benefits and also any other USDA program benefits for the same crop loss, the producer must choose which benefits to accept.<sup>272</sup> The producer generally may not receive benefits from more than one USDA program for the same loss.<sup>273</sup>

If the other USDA disaster benefits do not become available until after the producer has filed an application for NAP benefits, NAP regulations allow the producer to take the other benefit and refund the total amount of the NAP payment to the local office.<sup>274</sup> Producers who elect to accept other disaster assistance rather than claim a NAP payment are still required to make production and acreage reports to ensure future NAP eligibility.<sup>275</sup>

### **1. 2008 Farm Bill Programs Specifically Permit Multiple Benefits for the Same Loss**

With the passage of the 2008 Farm Bill, Congress appears to have approved some forms of multiple benefits from USDA for the same loss.<sup>276</sup> Eligible producers will be able to receive payments under the Supplemental Revenue Assistance Payment Program or the Livestock Forage Disaster Program in addition to NAP benefits.

Detailed regulations implementing the 2008 Farm Bill had not yet been issued at the time this book was being written, but it seems likely that payments under these new programs will be limited to amounts that would not exceed 95 or 100 percent of losses when added to NAP payments and any other assistance received, as has been done under the Crop Disaster Program in the past.

### **2. FSA Emergency (EM) Loan Borrowers Also Eligible for NAP**

The restriction on multiple benefits for the same disaster loss is somewhat different for NAP and FSA Emergency (EM) loans. Producers are eligible to receive both NAP benefits and an EM



loan for the same crop disaster.<sup>277</sup> The amount of the NAP payment will be deducted, however, from the producer's qualifying loss amount for the EM loan.<sup>278</sup> See Chapter 7 of this book for more information about FSA Emergency loans.

## **E. Creditor Claims on NAP Payments**

Generally, NAP payments will be made to the producer without taking into account any interest or lien claimed by the producer's creditors.<sup>279</sup> Therefore, a typical crop lien will not, by itself, result in NAP payments automatically being sent to the creditor. Thus, in many cases, despite the fact that a valid lien attaches to the payment, the producer may receive a check that does not name the secured creditor. In this situation, producers should review their lending documents with a legal advisor or advocate to determine whether their creditors have a right to the NAP payment.

There are two situations in which a producer's creditor will have direct access to the NAP payment. The first is when the producer has assigned his or her payment to the creditor in accordance with USDA regulations. The second is when the creditor is a government agency that offsets the payment to pay a delinquent debt owed by the producer.

### **1. Assignments**

NAP regulations permit a producer to assign his or her NAP payment to a creditor.<sup>280</sup> If this is done according to the payment assignment regulations, USDA will recognize the assignment and issue the NAP payment check to both the producer and the creditor.

### **2. Administrative Offsets**

NAP payments may be offset if the producer is delinquent on a debt owed to the United States government.<sup>281</sup> In this situation, the producer should receive a notice of the offset, but he or she

may not receive any of the payment. Instead, the payment would be applied against the delinquent debt owed to the government.

## **VI. Waiving Deadlines, Adjusting Program Requirements, and Providing Equitable Relief**

Current NAP regulations allow NAP administrators to waive some deadlines and to provide equitable relief for failure to comply with some program requirements.

### **A. Waiving Deadlines**

The FSA Deputy Administrator for Farm Programs may authorize FSA state and county committees to waive or change NAP deadlines, except for statutory deadlines, where lateness does not adversely affect operation of the program.<sup>282</sup> The regulations do not give any further guidance as to when FSA should waive deadlines.

FSA is never required to issue a waiver; thus a producer should never plan on receiving a waiver. They are likely to be granted only very rarely. In an emergency, however, or when the strict application of the regulations seems unfair, an attempt to get a waiver might be worth the effort.

### **B. Adjusting Program Requirements**

The regulations governing the payments for eligible crops with low yields note that adjustments may be made as needed to accomplish the purposes and goals of the program.<sup>283</sup>

### **C. Equitable Relief for Failure to Comply with Program Requirements**

The FSA Administrator may also authorize what is known as "equitable relief." Equitable relief is authorized in two situations. First, equitable relief might be granted in cases where a producer relied in good faith upon incorrect information or actions taken by FSA and, as a result, failed to comply with program requirements.<sup>284</sup>

Second, equitable relief might be granted in cases where a producer made a good faith effort to comply with program requirements but still failed to comply.<sup>285</sup> The producer must have substantially performed his or her obligations.

A producer granted equitable relief would likely be allowed to receive NAP benefits.<sup>286</sup> The producer might be required to correct any failure to comply with program requirements.

As with waivers, FSA is never required to grant equitable relief; thus, a producer should never plan on receiving equitable relief. It is likely to be granted only very rarely. In an emergency, however, or when the strict application of the regulations seems unfair, a request for equitable relief might be worth the effort.

## **VII. USDA Appeal Rights**

Adverse decisions made by FSA are appealable.<sup>287</sup> For example, denial of participation in NAP, denial of NAP benefits, or a decision that the producer had not complied with the NAP requirements should all be adverse decisions subject to appeal.<sup>288</sup>

USDA's National Appeals Division (NAD) handles NAP appeals.<sup>289</sup> The NAD director has the authority to make an independent determination whether a NAP decision is adverse to the producer and thus appealable, or is a matter of general applicability and thus not subject to appeal.<sup>290</sup> If a producer submits a timely request for review of the agency's decision on appealability, the NAD director will issue a final determination notice that either upholds the determination of the agency or reverses it and allows the appeal to proceed.

NAD regulations set out a structured appeals process with important deadlines and other requirements. For example, appeals must be filed with NAD within 30 days after the producer first receives notice of the adverse decision.<sup>291</sup> For more details about appeals, consult the FLAG article on the NAD appeals system.<sup>292</sup> Producers may also wish to visit the

NAD website for further information about the appeals process and to read decisions issued by NAD on previous appeals related to NAP.<sup>293</sup>

### **VIII. Discrimination Is Illegal**

FSA is prohibited from subjecting any person to discrimination on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or the receipt of income from any public assistance program.<sup>294</sup> Prohibited discrimination may include excluding a person from participation in NAP or denying program benefits.

## Chapter 4 Notes

- <sup>1</sup> 1994 Reform Act §§ 111-112 (was codified at 7 U.S.C. § 1519).
- <sup>2</sup> Pub. L. No. 103-354, §§ 101-120, 108 Stat. 3178, 3180-3208 (1994) (codified as amended at 7 U.S.C. §§ 1501-1521 and in scattered sections of 2, 7, and 18 U.S.C.).
- <sup>3</sup> Agricultural Risk Protection Act of 2000 (2000 ARPA), Pub. L. No. 106-224, Title 1, 114 Stat. 358 (June 20, 2000) (codified at 7 U.S.C. §§ 1501-1523, 7331, 7333).
- <sup>4</sup> 2000 ARPA § 109 (codified at 7 U.S.C. § 7333).
- <sup>5</sup> Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), Pub. L. No. 110-234, 122 Stat. 923 (May 22, 2008).
- <sup>6</sup> The regulations provide that NAP is under the general supervision of the Executive Vice President of the Commodity Credit Corporation (CCC) and is carried out by the FSA state and county committees. 7 C.F.R. § 1437.2(a) (2008). In practice, because the Executive Vice President of CCC is also the Administrator of FSA, many of the duties delegated to this person under the regulations will actually be performed by FSA designees. The contrast between the statute and the regulations may be important if USDA attempts to use the anti-injunction statute (which applies to CCC but not to FSA) as a defense in NAP litigation. 15 U.S.C. § 714b(c).
- <sup>7</sup> As of the time this book was being written, 40 amendments to the NAP Handbook had been issued.
- <sup>8</sup> See 7 C.F.R. § 1480.7(a) (2006) (2001 and 2002 Crop Disaster Program); 7 C.F.R. § 1479.106(a) (2006) (2003-2005 Crop Disaster Program).
- <sup>9</sup> See 7 C.F.R. § 1480.7(c) (2006) (2001 and 2002 Crop Disaster Program); 7 C.F.R. § 1479.106(c) (2006).
- <sup>10</sup> See 70 Fed. Reg. 15,725 (2005) (prefatory comments to final rule for 2003-2005 Crop Disaster Program).
- <sup>11</sup> See FSA Notice DAP-241, "2005 Section 32 Hurricane Provisions for the Hurricane Indemnity Program (HIP) and Tree Indemnity Program (TIP)" (April 14, 2006) (expired June 1, 2007).
- <sup>12</sup> 7 C.F.R. § 760.202 (2008).

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- <sup>13</sup> Emergency Agricultural Disaster Assistance Act of 2006, Pub. L. No. 109-234, Title III, 120 Stat. 474 (June 15, 2006).
- <sup>14</sup> 7 C.F.R. § 1416.7(a) (2008).
- <sup>15</sup> 7 C.F.R. § 1416.7(b) (2008).
- <sup>16</sup> 7 C.F.R. § 1416.7(c) (2008).
- <sup>17</sup> U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, Title IX, 121 Stat. 211 (May 25, 2007).
- <sup>18</sup> 7 C.F.R. § 760.806 (2008).
- <sup>19</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(g)).
- <sup>20</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)).
- <sup>21</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)(5)(B), (g)(3)).  
Limited resource farmers may also request a waiver of the administrative fee required for NAP coverage or catastrophic crop insurance. By requesting a waiver of the fee before the application closing date or sales closing date, the limited resource farmer may actually participate in the programs, rather than receive a waiver of the duty to do so.
- <sup>22</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)(5)(C), (g)(4)).
- <sup>23</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)(5)(C), (g)(4)); FSA Notice DAP-283, "Announcing Supplemental Agricultural Disaster Assistance Programs," 3.A (May 29, 2008) (expires Dec. 1, 2008).
- <sup>24</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)(5)(D)(i), (g)(5)(A)).
- <sup>25</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)(5)(D)(ii), (g)(5)(B)).
- <sup>26</sup> FSA has adopted certain special NAP provisions for crops grown in tropical regions, including Hawaii, Puerto Rico, and other specified areas. These unique NAP provisions are not discussed in this book. They can be found in the NAP regulations at 7 C.F.R. pt 1437, subpart F (2008) and in Section 3 of Part 4 of the NAP Handbook.
- <sup>27</sup> 7 C.F.R. § 1437.4 (2008). These three requirements are specifically mentioned in the statute. 7 U.S.C. § 7333(a)(2)(A).
- <sup>28</sup> 7 U.S.C. § 7333(a)(2)(A); 7 C.F.R. § 1437.4(b)(1) (2008).

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- 29 The NAP regulations do not define livestock.
- 30 7 C.F.R. § 1437.4(b)(4) (2008).
- 31 7 C.F.R. § 1437.4(b)(2) (2008).
- 32 7 C.F.R. § 1437.401(a) (2008). An FSA notice from 2007 provides some additional detail about forage crop eligibility for NAP. FSA Notice NAP-101, “Clarifying Forage Crop Definition and Recording Planting Periods on National Crop Table (NCT)” (June 6, 2007) (expired Dec. 1, 2007).
- 33 7 C.F.R. § 1437.4(b)(2) (2008).
- 34 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531(d)).
- 35 7 C.F.R. § 1437.4(a)(4)(ii) (2008).
- 36 7 C.F.R. § 1437.4(b) (2008).
- 37 In addition to NAP coverage for the losses to the aquacultural species themselves, assistance may be available under other programs for losses to feed for aquacultural species such as catfish. For further information about feed assistance programs, see Chapter 6 of this book.
- 38 7 C.F.R. § 1437.303(a) (2008). The 2008 Farm Bill directs the Federal Crop Insurance Corporation to begin research and development of crop insurance policies for aquaculture, including bivalve, freshwater, and saltwater species. 2008 Farm Bill § 12023(a) (to be codified at 7 U.S.C. § 1522(12)). If and when crop insurance becomes available for a given aquaculture species in a particular county, it will no longer be eligible for NAP coverage.
- 39 7 C.F.R. § 1437.304(a) (2008).
- 40 7 C.F.R. § 1437.305(a) (2008).
- 41 7 C.F.R. § 1437.306 (2008).
- 42 7 C.F.R. § 1437.309 (2008).
- 43 7 C.F.R. § 1437.3, “Industrial crop” (2008).
- 44 7 C.F.R. § 1437.3, “Industrial crop” (2008).
- 45 2008 Farm Bill § 12025(a) (to be codified at 7 U.S.C. § 1523(g)).
- 46 7 C.F.R. §§ 1437.3, “Seed crop,” 1437.4(b)(4)(vii) (2008).
- 47 2008 Farm Bill § 12025(a) (to be codified at 7 U.S.C. § 1523(h)).
- 48 7 C.F.R. §§ 1437.4(b)(4)(viii), 1437.310 (2008).
- 49 7 C.F.R. § 1437.12(b) (2008).

- 50 7 C.F.R. § 1437.12(b) (2008).
- 51 NAP Handbook, page 4-37, para. 173 (June 26, 2006).
- 52 7 C.F.R. § 1437.12(i) (2008). The unique growing period must be physiologically required for the production of commercial seed—the regulations give an example of vernalization of a biennial crop such as carrots or onions—and the physiological event must make the possibility of any other use of the crop acreage improbable. 7 C.F.R. § 1437.12(i)(3) (2008).
- 53 7 C.F.R. § 1437.12(f) (2008).
- 54 7 C.F.R. § 1437.12(g) (2008).
- 55 7 C.F.R. § 1437.12(h) (2008).
- 56 7 C.F.R. § 1437.401(e) (2008).
- 57 7 C.F.R. § 1437.12(e) (2008).
- 58 7 U.S.C. § 7333(a)(3); 7 C.F.R. § 1437.9(c) (2008). Harvest is defined in the regulations. 7 C.F.R. § 1437.3, “Harvested” (2008). A single-harvest crop is considered harvested when the producer has removed the crop from the field. The crop is considered harvested once it is taken off the field and placed in a truck or other conveyance or is consumed by grazing livestock. Hay is considered harvested when baled, whether it is removed from the field or not.
- 59 7 C.F.R. § 1437.9 (2008).
- 60 7 C.F.R. § 1437.9(c)(3) (2008).
- 61 7 C.F.R. § 1437.9(e) (2008).
- 62 7 C.F.R. § 1437.9(e)(1) (2008). The NAP statute prohibits coverage for this kind of loss. 7 U.S.C. § 7333(h)(1).
- 63 7 C.F.R. § 1437.9(e)(2) (2008). The NAP statute prohibits coverage for this kind of loss. 7 U.S.C. § 7333(h)(2).
- 64 See 7 C.F.R. § 1437.3, “Reseeded or replanted crop” (2002). This definition is not found in the current regulations or NAP Handbook.
- 65 7 C.F.R. § 1437.9(e)(3) (2008). The NAP statute prohibits coverage for this kind of loss. 7 U.S.C. § 7333(h)(3).
- 66 7 C.F.R. § 1437.3, “Good farming practices” (2008).



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- <sup>67</sup> In the past, some producers have complained that sustainable and organic agricultural practices have been treated as though they were not good farming practices. FSA comments accompanying a NAP rule issued in 2006 suggest that alternative farming practices and innovations that are supported by data from the Cooperative State Research, Education, and Extension Service are included in the definition of good farming practices. 71 Fed. Reg. 13,737 (2006) (prefatory comments).
- <sup>68</sup> 7 C.F.R. § 1437.9(e)(4) (2008).
- <sup>69</sup> 7 C.F.R. § 1437.9(e)(5) (2008).
- <sup>70</sup> 7 C.F.R. § 1437.9(e)(6) (2008).
- <sup>71</sup> 7 C.F.R. § 1437.9(e)(7) (2008).
- <sup>72</sup> 2008 Farm Bill § 12027 (to be codified at 7 U.S.C. § 7333(c)(2)).
- <sup>73</sup> See, for example, 7 C.F.R. §§ 1437.305(d) (ornamental nursery), 1437.307(a) (mushrooms) (2008).
- <sup>74</sup> 7 C.F.R. § 1437.9(e)(8) (2008).
- <sup>75</sup> 7 C.F.R. § 1437.3 “Controlled environment” (2008). Arguably, the fact that losses occurred does not inevitably lead to the conclusion that the producer failed to provide a controlled environment. The duty to provide a controlled environment is not an absolute duty, because the definition of “controlled environment” takes into account whether it was practicable for the producer to control certain aspects of the environment.
- <sup>76</sup> NAP Handbook, page 2-4.5, para. 21.5B (June 12, 2007).
- <sup>77</sup> The statute requires the producer to provide records of “crop acreage, acreage yields, and production for each crop, as required by the Secretary.” 7 U.S.C. § 7333(b)(2).
- <sup>78</sup> 7 C.F.R. § 1437.7 (2008); 7 C.F.R. § 718.102 (2008). At the time this book was written, the proper form for farm acreage reports was FSA-578. NAP Handbook, page 4-1, para. 151.B (Oct. 22, 2001).
- <sup>79</sup> 7 C.F.R. § 1437.7(d) (2008).
- <sup>80</sup> 7 C.F.R. § 1437.7(d) (2008).
- <sup>81</sup> 7 C.F.R. §§ 1437.7(d), 718.104(a) (2008).
- <sup>82</sup> 7 C.F.R. § 718.104(b) (2008).

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- 83 7 C.F.R. § 1437.7(d) (2008).
- 84 7 C.F.R. § 1437.7(d) (2008).
- 85 7 C.F.R. § 1437.7(d) (2008).
- 86 7 C.F.R. § 1437.7(d)(1) (2008).
- 87 7 C.F.R. §§ 1437.7(d)(5), 1437.401(b) (2008).
- 88 7 C.F.R. § 1437.7(d)(3) (2008).
- 89 7 C.F.R. § 1437.7(d)(6) (2008).
- 90 7 C.F.R. § 1437.7(a) (2008). At the time this book was written, the proper form for production reports was CCC-452. NAP Handbook, page 4-3, para. 151.D (June 22, 2005).
- 91 7 C.F.R. § 1437.7(a) (2008).
- 92 7 C.F.R. § 1437.7(a) (2008).
- 93 7 C.F.R. § 1437.7(a) (2008).
- 94 7 C.F.R. § 1437.7(a) (2008).
- 95 7 C.F.R. § 1437.401(b) (2008).
- 96 7 C.F.R. § 1437.106(d) (2008) (honey); 7 C.F.R. § 1437.107(d) (2008) (maple sap); 7 C.F.R. § 1437.301(c) (2008) (value loss crops); 7 C.F.R. § 1437.308(d) (2008) (ginseng); 7 C.F.R. § 1437.309(e) (2008) (turfgrass sod); 7 C.F.R. § 1437.401(b) (2008) (forage); 7 C.F.R. §§ 1437.503(c), 1437.504(b) (2008) (tropical crops grown in tropical regions).
- 97 7 U.S.C. § 7333(i)(4); 7 C.F.R. § 1437.14(b) (2008). Person, for these purposes, is defined according to USDA's payment limitation regulations. 7 U.S.C. § 7333(i)(1)(A). These regulations can be found at 7 C.F.R. pt. 1400 (2008).
- 98 7 C.F.R. § 1437.13(a)(2) (2008). Gross revenue has a particular definition for the purposes of NAP. 7 U.S.C. § 7333(i)(1)(B); 7 C.F.R. § 1437.14(b) (2008). For a person who receives more than 50 percent of his or her gross income from farming, ranching, and forestry operations, "qualifying gross revenue" means the annual gross income for the taxable year from those operations. For a person who receives 50 percent or less of his or her gross income from farming, ranching, and forestry operations, "qualifying gross revenue" means the person's total gross income for the taxable year from all sources.
- 99 7 C.F.R. § 1437.7(g) (2008).

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- <sup>100</sup> NAP Handbook, Exhibit 10 (May 31, 2001). See also NAP Handbook, page 2-25, para. 33 (June 12, 2007).
- <sup>101</sup> 7 C.F.R. § 1437.15(a) (2008). For the current conservation regulations, see 7 C.F.R. pt. 12 (2008).
- <sup>102</sup> 7 U.S.C. § 1515(h)(3)(B)(ii); 7 C.F.R. §§ 718.11(a)(2), 1405.8(a)(2) (2008).
- <sup>103</sup> 7 C.F.R. § 1437.15 (2008). Controlled substance regulations can be found at 7 C.F.R. § 718.11 (2008).
- <sup>104</sup> 2008 Farm Bill § 12020(b) (to be codified at 7 U.S.C. § 7333(a)(4)).
- <sup>105</sup> Whether native sod acreage in the Prairie Pothole National Priority Area is subject to this provision is to be decided by the governor of the state in which the land is located. 2008 Farm Bill § 12020(b) (to be codified at 7 U.S.C. § 7333(a)(4)(C)).
- <sup>106</sup> 2008 Farm Bill § 12020(b) (to be codified at 7 U.S.C. § 7333(a)(4)).
- <sup>107</sup> 7 C.F.R. § 1437.6(a) (2008). NAP Handbook, page 2-8, para. 23.B (Jan. 16, 2007).
- <sup>108</sup> 7 C.F.R. § 1437.3, “Application Closing Date” (2008).
- <sup>109</sup> NAP Handbook, page 2-10, para. 23.C (June 22, 2005) and page 2-11, para. 23.C (Oct. 22, 2001).
- <sup>110</sup> 7 C.F.R. § 1437.6(b) (2008).
- <sup>111</sup> 2008 Farm Bill § 12028 (to be codified at 7 U.S.C. § 7333(k)(1)).
- <sup>112</sup> 7 C.F.R. § 1437.3, “Administrative county office” (2008).
- <sup>113</sup> Sample service fee calculations may be found in the NAP Handbook. NAP Handbook, page 2-14.4, para. 24.B (June 12, 2007) and page 2-14.5, paras. 24.B and 24.C (Jan. 24, 2003) and page 2-14.6, para. 24.C (Jan. 10, 2006).
- <sup>114</sup> 7 C.F.R. § 1437.6(d) (2008).
- <sup>115</sup> 7 C.F.R. § 1437.6(d) (2008).
- <sup>116</sup> 7 C.F.R. § 1437.7(h) (2008).
- <sup>117</sup> 7 C.F.R. § 1437.6(d) (2008).
- <sup>118</sup> 69 Fed. Reg. 48,651, 48,731 (2004) (codified at 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Limited resource farmer’”).
- <sup>119</sup> 7 C.F.R. § 457.8, Common Crop Insurance Policy, “7. Annual Premium and Administrative Fees (e)(4)” (2008).

- <sup>120</sup> The amount in the regulation—\$100,000—is adjusted for inflation each year using the Prices Paid by Farmer Index as compiled by the National Agricultural Statistical Service. The amount for 2008 is \$116,800. Future adjustments can be found through USDA’s Limited Resource Farmer/Rancher self-determination tool at [www.lrfstool.sc.egov.usda.gov/tool.asp](http://www.lrfstool.sc.egov.usda.gov/tool.asp).
- <sup>121</sup> 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Limited resource farmer’” (2008). Household income figures are to be determined annually using Commerce Department Data.
- <sup>122</sup> See 7 C.F.R. § 457.8, Common Crop Insurance Policy, “1. Definitions, ‘Limited resource farmer’” (2008).
- <sup>123</sup> NAP Handbook, page 2-12, para. 23.E (Jan. 16, 2007).
- <sup>124</sup> NAP Handbook, page 2-12, para. 23.E (Jan. 16, 2007).
- <sup>125</sup> 7 U.S.C. § 7333(d); 7 C.F.R. § 1437.1(a) (2008).
- <sup>126</sup> 7 C.F.R. § 1437.9(a) (2008).
- <sup>127</sup> 7 C.F.R. § 1437.102(e) (2008).
- <sup>128</sup> The statute requires that the yield coverage be based on the actual production history over a period of not less than four and not more than ten previous consecutive crop years. 7 U.S.C. § 7333(e)(2). It also includes the requirement that the expected yield be based on the average of these years.
- <sup>129</sup> 7 C.F.R. § 1437.102(e)(2) (2008).
- <sup>130</sup> 7 C.F.R. § 1437.102(e)(2) (2008). The base period is five crop years for apples and peaches.
- <sup>131</sup> 7 C.F.R. § 1437.102(e)(3) (2008). The statute requires that assigned yields be used and that they be equal to not less than 65 percent of the transitional yield of the producer. 7 U.S.C. § 7333(e)(3). The statute further provides that if the producer has acceptable actual production records for some years but not enough for the approved yield calculation, the producer’s assigned yield is to be adjusted to reflect those records.
- <sup>132</sup> 7 C.F.R. § 1437.102(e)(3) (2008).
- <sup>133</sup> 7 C.F.R. § 1437.102(b)(1) (2008).
- <sup>134</sup> 7 C.F.R. § 1437.102(b)(5) (2008).
- <sup>135</sup> 7 U.S.C. § 7333(e)(3); 7 C.F.R. § 1437.102(e)(3)(i) (2008).

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- <sup>136</sup> 7 C.F.R. § 1437.102(e)(3)(ii) (2008).
- <sup>137</sup> 7 C.F.R. § 1437.102(e)(3)(iii) (2008).
- <sup>138</sup> 7 C.F.R. § 1437.102(e)(3)(iv) (2008).
- <sup>139</sup> 7 C.F.R. § 1437.102(i) (2008). An entity which includes individuals with more than two APH crop years of production history during the base period will not qualify as a new producer for APH determination purposes.
- <sup>140</sup> 7 C.F.R. § 1437.102(c)(2) (2008).
- <sup>141</sup> 7 C.F.R. § 1437.102(c)(2) (2008).
- <sup>142</sup> 7 U.S.C. § 7333(e)(3); NAP Handbook, Exhibit 2, page 4 (July 25, 2003).
- <sup>143</sup> 7 C.F.R. § 1437.102(f) (2008). NAP Handbook, page 5-10, para. 256.A (Mar. 19, 2002).
- <sup>144</sup> 7 U.S.C. § 7333(e)(5).
- <sup>145</sup> The general prohibition of assigned yields on these grounds is found in the statute. 7 U.S.C. § 7333(e)(4), (5).
- <sup>146</sup> 7 U.S.C. § 7333(e)(5); 7 C.F.R. § 1437.102(d)(2) (2008).
- <sup>147</sup> 7 C.F.R. § 1437.102(d) (2008). FSA has allowed a one-time exception to the zero yield rule for producers who applied for NAP and established approved yields before 2001 but failed to report production since that time. In an effort to “allow all producers to have an equitable yield after the implementation of the Agricultural Risk Protection Act of 2000,” FSA replaces the missing yields with yields equal to the higher of 65 percent of the current crop year T-yield or the missing crop years’ actual yield. 7 C.F.R. § 1437.102(g) (2008). The NAP Handbook refers to this as the “substituted yield.” NAP Handbook, page 5-13, para. 259 (Mar. 19, 2002).
- <sup>148</sup> 7 C.F.R. § 1437.102(d)(2) (2008). See also 7 C.F.R. § 1437.7(a) (2008) and discussion related to note 172.
- <sup>149</sup> 7 U.S.C. § 7333(e)(4); 7 C.F.R. § 1437.102(c)(4) (2008). If data is not available but it appears that the acreage increased significantly from previous years, the same requirements may apply.
- <sup>150</sup> 7 U.S.C. § 7333(e)(4)(A)(i); 7 C.F.R. § 1437.102(c)(4)(i) (2008).
- <sup>151</sup> 7 U.S.C. § 7333(e)(4)(A)(i); 7 C.F.R. § 1437.7(c)(4)(ii) (2008).
- <sup>152</sup> 7 U.S.C. § 7333(e)(4)(B); 7 C.F.R. § 1437.7(c)(5) (2008).

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- <sup>153</sup> 7 U.S.C. § 7333(d)(1); 7 C.F.R. § 1437.9 (2008).
- <sup>154</sup> 7 C.F.R. §§ 1437.8, 1437.102(a) (2008).
- <sup>155</sup> 7 C.F.R. § 1437.8(b)(1) (2008).
- <sup>156</sup> 7 C.F.R. § 1437.8(b)(2) (2008).
- <sup>157</sup> 7 C.F.R. § 1437.8(b)(3) (2008).
- <sup>158</sup> NAP Handbook, page 2-20, para. 28 (May 31, 2001). See also NAP Handbook, page 10-62, para. 797 (Oct. 22, 2001).
- <sup>159</sup> 7 C.F.R. § 718.108(a) (2008).
- <sup>160</sup> 7 C.F.R. § 718.108(b) (2008). The FSA Deputy Administrator for Farm Programs has discretion to approve larger room allowances. 7 C.F.R. § 718.108(d) (2008).
- <sup>161</sup> 7 C.F.R. § 1437.9(b) (2008).
- <sup>162</sup> 7 C.F.R. § 1437.7(e) (2008). This provision is found in the statute. 7 U.S.C. § 7333(f). The regulation addresses contract payments for “planted acreage,” while the statute addresses contract payments for “producing” a crop.
- <sup>163</sup> NAP Handbook, pages 6-17 and 6-18, para. 332.B (May 31, 2001).
- <sup>164</sup> NAP Handbook, page 6-18, para. 332.B (May 31, 2001).
- <sup>165</sup> 7 C.F.R. § 1437.7(a) (2008).
- <sup>166</sup> 7 C.F.R. § 1437.7(a) (2008).
- <sup>167</sup> 7 C.F.R. § 1437.7(a) (2008).
- <sup>168</sup> 7 C.F.R. § 1437.7(a)(1) (2008). The NAP Handbook sets out detailed definitions of “verifiable” and “reliable.” NAP Handbook, page 6-3, para. 322.C (Jan. 24, 2003) and page 6-4, paras. 322.C and 322.D (May 31, 2001). Verifiable records of production are records provided by the producer that can be verified by FSA through an independent source. Verifiable records must be dated, must show the disposition of the crop production including quantity and price, must be seasonal or crop specific for crops produced more than once in a calendar year, and must be provided with the producer’s certification of production in support of any application for payment and whenever a record of production is otherwise required by FSA.
- If verifiable records are not available, FSA may accept reliable records—such as copies of receipts, income ledgers, deposit slips, register tapes, invoices, or pick records—that support the producer’s application. But the reliable, non-

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verifiable records will only be considered acceptable for NAP purposes after FSA compares the producer's record of production with neighboring producers of the crop who have provided records of production. If similar levels of production were experienced on neighboring farms, the records will be considered acceptable. If the neighboring producers had significantly different levels of production from the records submitted by the producer, the records will not be considered acceptable. NAP Handbook, page 6-6, para. 322.E (May 31, 2001).

- <sup>169</sup> 7 C.F.R. § 1437.7(a)(2) (2008). See previous note for a discussion of the meanings of "verifiable" and "reliable."
- <sup>170</sup> NAP Handbook, page 6-5, para. 322.E (May 31, 2001).
- <sup>171</sup> NAP Handbook, page 6-2, para. 322.A (Jan. 24, 2003).
- <sup>172</sup> 7 C.F.R. § 1437.7(a) (2008).
- <sup>173</sup> 7 C.F.R. § 1437.15(g) (2008).
- <sup>174</sup> 7 C.F.R. § 1437.15(d) (2008); NAP Handbook, page 2-37, para. 38 (July 25, 2003).
- <sup>175</sup> 7 C.F.R. § 1437.15(c) (2008). If FSA determines there has been a violation, the producer will be ineligible for a NAP payment for the crop year of the violation plus two subsequent crop years. The sanctions apply to the specific producer and all other interests the producer has and other entities or joint ventures for all crops, all units, and all administrative counties and states. NAP Handbook, page 2-35, para. 36.B (July 25, 2003).
- <sup>176</sup> 7 C.F.R. § 1437.1(a) (2008).
- <sup>177</sup> 7 C.F.R. §§ 1437.201(a); 718.103(a) (2008).
- <sup>178</sup> 7 U.S.C. § 7333(c)(3); 7 C.F.R. § 1437.201(b)(1) (2008).
- <sup>179</sup> 7 C.F.R. § 1437.202(a)(4) (2008); NAP Handbook, page 4-109, para. 195.E (Jan. 24, 2003); FSA Notice NAP-88 "Obtaining and Documenting Two Independent Assessments of Grazed Forage Acreage Conditions" (April 13, 2006) (expired Oct. 1, 2006).
- <sup>180</sup> 7 C.F.R. § 718.103(c)(1) (2008). The NAP Handbook refers to a Compliance Handbook for further requirements. NAP Handbook, page 2-16.4, para. 25.4.B (Jan. 16, 2007). According to this handbook, producers must provide evidence to CCC that they made preliminary efforts to plant the crop, such as disking the land, placing purchase orders, taking delivery of seed and

fertilizer, or applying for financing. Acreage and Compliance Determination Handbook, 2-CP (Rev. 15), page 2-24.1, para. 24.I (May 13, 2008).

- 181 71 Fed. Reg. 13,737, 13,739 (2006) (prefatory comments discussing § 718.103(f)).
- 182 7 C.F.R. § 718.103(c), (d) (2008).
- 183 7 C.F.R. § 718.103(a)(1), (2) (2008).
- 184 7 C.F.R. § 718.103(a)(2) (2008).
- 185 NAP Handbook, page 2-15, para. 25.A (Jan. 16, 2007).
- 186 See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (noting that, "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required.").
- 187 7 C.F.R. § 718.103(h)(2) (2008).
- 188 7 C.F.R. § 718.103(h)(1) (2008).
- 189 7 C.F.R. § 1437.5(a) (2008).
- 190 7 C.F.R. § 1437.5(b) (2008).
- 191 7 C.F.R. § 1437.5(c) (2008).
- 192 NAP Handbook, page 2-5, para. 22.A (Oct. 22, 2001).
- 193 7 C.F.R. § 1437.5(g) (2008).
- 194 7 C.F.R. § 1437.5(g) (2008). The coverage period may also end upon abandonment or total destruction of the crop. NAP Handbook, page 2-7, para. 22.A (June 26, 2006).
- 195 NAP Handbook, page 2-7, para. 22.A (June 26, 2006).
- 196 NAP Handbook, page 2-5, para. 22.A (Oct. 22, 2001).
- 197 7 C.F.R. § 1437.5(d) (2008).
- 198 NAP Handbook, page 2-6, para. 22.A (Oct. 22, 2001). Presumably, this also includes sea grass and sea oats, since they are value loss crops.
- 199 7 C.F.R. § 1437.5(f) (2008); NAP Handbook, page 2-6, para. 22.A (Oct. 22, 2001).
- 200 NAP Handbook, page 2-6, para. 22.A (Oct. 22, 2001).
- 201 7 C.F.R. § 1437.5(e) (2008).



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- 202 7 C.F.R. § 1437.5(f) (2008); NAP Handbook, page 2-6, para. 22.A (Oct. 22, 2001).
- 203 7 C.F.R. § 1437.5(f) (2008).
- 204 7 C.F.R. §§ 1437.11(d), 1437.105 (2008).
- 205 7 C.F.R. § 1437.9(a) (2008).
- 206 7 C.F.R. § 1437.105 (2008).
- 207 7 C.F.R. § 1437.403(h) (2008). Expected AUDs are found by dividing the total acreage of forage in the county categorized by CCC as predominantly grazed by the approved carrying capacity, and multiplying that result by the number of days used to determine the carrying capacity. 7 C.F.R. § 1437.402 (2008); NAP Handbook, page 4-106, para. 195.A (July 25, 2003) and page 4-107, para. 195.B and C (Jan. 24, 2003). AUDs may be increased for management and maintenance practices, including irrigation.
- 208 7 C.F.R. § 1437.401(f)(2) (2008).
- 209 7 C.F.R. § 1437.302(a) (2008).
- 210 7 C.F.R. § 1437.201(b)(1) (2008).
- 211 7 C.F.R. § 1437.202(a)(2) (2008).
- 212 7 U.S.C. § 7333(d)(2); 7 C.F.R. § 1437.11(a) (2008).
- 213 7 C.F.R. § 1437.11(a) (2008).
- 214 7 C.F.R. § 1437.11(d) (2008). This has been the applicable percentage since the 1999 crop year; it is set by the statute. 7 U.S.C. § 7333(d)(2).
- 215 7 U.S.C. § 7333(d)(3)(A); 7 C.F.R. § 1437.11(c), (d) (2008).
- 216 NAP Handbook, page 3-10, para. 109.A (June 12, 2007).
- 217 NAP Handbook, page 3-11, para. 109.B (May 31, 2001).
- 218 NAP Handbook, Exh. 2, page 12 (July 25, 2003). Acreage or interest attributed to a spouse or minor child may be considered part of the producer's share unless that individual is considered to be a "separate person" under USDA regulations. See 7 C.F.R. §§ 1400.105, 1400.106 (2008).
- 219 See, for example, 7 C.F.R. § 1437.105 (2008).
- 220 71 Fed. Reg. 13,737, 13,739 (2006) (prefatory comments noting corrections to §§ 1437.105 and 1437.202).
- 221 7 C.F.R. pt. 1437, subpts. B-E (2008).

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- 222 7 C.F.R. § 1437.105 (2008).
- 223 7 C.F.R. § 1437.105(a)(1) (2008).
- 224 7 C.F.R. § 1437.105(a)(2) (2008).
- 225 7 C.F.R. § 1437.105(a)(3) (2008).
- 226 7 C.F.R. § 1437.105(a)(4) (2008).
- 227 7 C.F.R. § 1437.11(d) (2008).
- 228 7 C.F.R. § 1437.103(a)(5) (2008).
- 229 7 C.F.R. § 1437.103(a)(6) (2008).
- 230 7 C.F.R. § 1437.103(a)(6) (2008).
- 231 7 C.F.R. pt. 1437, subpt. E (2008).
- 232 7 C.F.R. § 1437.403(a) (2008).
- 233 7 C.F.R. § 1437.403(b) (2008). Carrying capacity is established according to  
rules set forth in 7 C.F.R. § 1437.402 (2008).
- 234 7 C.F.R. § 1437.403(c) (2008).
- 235 7 C.F.R. § 1437.403(d) (2008).
- 236 7 C.F.R. § 1437.403(e) (2008).
- 237 7 C.F.R. § 1437.403(f) (2008).
- 238 7 C.F.R. § 1437.403(g) (2008).
- 239 7 C.F.R. § 1437.403(h) (2008).
- 240 7 C.F.R. § 1437.403(i) (2008).
- 241 7 C.F.R. § 1437.11(b), (d) (2008).
- 242 7 C.F.R. §§ 1437.403(j) (2008).
- 243 7 C.F.R. § 1437.202 (2008).
- 244 7 C.F.R. § 1437.202(a)(1) (2008).
- 245 7 C.F.R. § 1437.202(a)(2) (2008).
- 246 7 C.F.R. § 1437.202(a)(3) (2008).
- 247 7 C.F.R. § 1437.202(a)(4) (2008).
- 248 7 C.F.R. § 1437.202(a)(4) (2008).
- 249 7 C.F.R. § 1437.202(a)(5) (2008).

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- 250 7 C.F.R. § 1437.202(a)(6) (2008).
- 251 7 C.F.R. §§ 1437.202(a)(7), 1437.11(d) (2008). As discussed earlier in this section, the price may be adjusted to reflect expenses not incurred by the producer because the crop was prevented from being planted. See 7 C.F.R. § 1437.5(c) (2008).
- 252 7 C.F.R. § 1437.202(a)(7) (2008).
- 253 7 C.F.R. § 1437.302 (2008). There is a typographical error in the regulation, in that it refers in various places to paragraphs (a)(1) through (a)(5). Since there are no such paragraphs, it seems clear that the intended references are to paragraphs (a) through (e).
- 254 7 C.F.R. § 1437.302(a) (2008).
- 255 7 C.F.R. § 1437.302(b) (2008).
- 256 7 C.F.R. § 1437.302(c) (2008).
- 257 7 C.F.R. § 1437.302(d) (2008).
- 258 7 C.F.R. § 1437.302(e) (2008).
- 259 7 C.F.R. § 1437.302(f) (2008).
- 260 7 C.F.R. § 1437.10(a) (2008).
- 261 7 C.F.R. § 1437.10(a)(2) (2008).
- 262 7 C.F.R. § 1437.10(a)(1) (2008).
- 263 7 C.F.R. § 1437.10(a) (2008).
- 264 7 C.F.R. § 1437.10(c) (2008).
- 265 7 C.F.R. § 1437.10(g) (2008).
- 266 7 C.F.R. § 1437.10(d) (2008).
- 267 7 C.F.R. § 1437.10(d) (2008).
- 268 7 C.F.R. § 1437.7(a), (b)(1) (2008).
- 269 7 C.F.R. § 1437.7(b) (2008).
- 270 7 C.F.R. § 1437.7(a) (2008).
- 271 7 U.S.C. § 7333(i)(2); 7 C.F.R. § 1437.14(a) (2008). Person, for this purpose, is defined according to USDA's payment limitation regulations. 7 U.S.C. § 7333(i)(1)(a). These regulations can be found at 7 C.F.R. pt. 1400 (2008).

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- <sup>272</sup> 7 C.F.R. § 1437.13(a) (2008). This general restriction is found in the statute. 7 U.S.C. § 7333(i)(3).
- <sup>273</sup> In recent years, Congress and USDA have implemented a Crop Disaster Program (CDP) and other ad hoc disaster assistance programs, under which assistance could be received in addition to NAP benefits. In general, crop insurance proceeds, NAP payments, CDP benefits, and payment for the crop that was not lost could all be received, provided the total of all of these did not exceed 95 percent of the value of the expected production of the crop for the relevant period, had there been no loss. See 7 C.F.R. §§ 1479.105(e), 1480.6(e) (2006).
- <sup>274</sup> 7 C.F.R. § 1437.13(d) (2008).
- <sup>275</sup> 7 C.F.R. § 1437.13(c) (2008).
- <sup>276</sup> 2008 Farm Bill § 12033(a) (to be codified at 7 U.S.C. § 1531).
- <sup>277</sup> 7 U.S.C. § 7333(i)(3)(B)); 7 C.F.R. § 1437.13(b) (2008).
- <sup>278</sup> 7 C.F.R. § 764.353(c)(4) (2008).
- <sup>279</sup> 7 C.F.R. § 1437.15(i) (2008).
- <sup>280</sup> 7 C.F.R. § 1437.15(k) (2008). CCC regulations governing assignments are applicable to NAP benefits. These regulations are found at 7 C.F.R. pt. 1404 (2008).
- <sup>281</sup> 7 C.F.R. § 1437.15(k) (2008). CCC offset regulations apply to NAP payments. These regulations are found at 7 C.F.R. pt. 1403 (2008). The offsetting agency may also have regulations that could apply. See, for example, 7 C.F.R. pt. 792 (2008) (offset regulations for several FSA programs). USDA recently published a final rule to amend its general debt management regulations. 73 Fed. Reg. 1 (2008) (to be codified at 7 C.F.R. pt. 3, subpt. B). See also the Treasury Department's administrative offset regulations, which are applicable to all federal agencies. 31 C.F.R. pt. 285 (2008).
- <sup>282</sup> 7 C.F.R. § 1437.2(e) (2008).
- <sup>283</sup> 7 C.F.R. § 1437.103(b) (2008).
- <sup>284</sup> 7 C.F.R. § 718.303 (2008).
- <sup>285</sup> 7 C.F.R. § 718.304 (2008).
- <sup>286</sup> 7 C.F.R. § 718.305 (2008).
- <sup>287</sup> 7 C.F.R. § 1437.15(h) (2008). An "adverse decision" is defined as

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an administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant. The term includes a denial of equitable relief by an agency or the failure of an agency to issue a decision or otherwise act on the request or right of the participant within timeframes specified by agency program statutes or regulations or within a reasonable time if timeframes are not specified in such statutes or regulations.

7 C.F.R. § 11.1, “Adverse decision” (2008).

<sup>288</sup> 7 C.F.R. § 11.3 (2008). The NAP regulations provide that matters including, but not limited to, application periods, coverage periods, application deadlines, fees, prices, yields, and payment factors established for NAP that are used for similar farmers and crops are not to be construed as individual program eligibility determinations, and are not subject to administrative review. 7 C.F.R. § 1437.2(f) (2008). However, FSA does not make the final determination as to whether or not an adverse decision is appealable. 7 C.F.R. § 11.6 (2008).

<sup>289</sup> 7 C.F.R. pt. 11 (2008). See also 7 C.F.R. pt. 780 for FSA regulations related to NAD appeals.

<sup>290</sup> 7 C.F.R. § 11.6(b)(2) (2008).

<sup>291</sup> 7 C.F.R. § 11.6(b)(1) (2008).

<sup>292</sup> *USDA’s National Appeals Division Practice and Procedures* by FLAG attorney Karen Krub, available at [www.flaginc.org/topics/pubs/arts/NADarticle\\_NatlAgLawCtr2003.pdf](http://www.flaginc.org/topics/pubs/arts/NADarticle_NatlAgLawCtr2003.pdf), or contact FLAG by telephone at 651-223-5400; by fax at 651-223-5335; by mail at 360 North Robert Street, Suite 500, Saint Paul, MN 55101; or by electronic mail at [lawyers@flaginc.org](mailto:lawyers@flaginc.org).

<sup>293</sup> The NAD website can be found at [www.nad.usda.gov](http://www.nad.usda.gov).

<sup>294</sup> 7 C.F.R. pt. 15d (2008).