

Farmers' Guide to Disaster Assistance

Volume 6: Noninsured Crop Disaster Assistance Program (NAP)

December 2019



A Publication of Farmers' Legal Action Group, Inc.

Farmers' Guide to Disaster Assistance

Seventh Edition

Volume 6: Noninsured Crop Disaster Assistance Program (NAP)

December 2019

Written and edited by Stephen Carpenter and Lindsay Kuehn

Copyedited by Wendy Reid

This publication was made possible with the generous support of:

U.S. Department of Agriculture, Farm Service Agency

Farm Aid

Otto Bremer Trust

Individual contributions from FLAG supporters

To support FLAG's work and publications like this one, please [click here](#) to make a tax-deductible donation.

This Guide to Noninsured Crop Disaster Assistance Program (NAP) is current through October 1, 2019.

These materials are not attorney-client legal advice and are intended to only provide general legal information. Farmers and others with specific questions should consult an attorney for advice regarding their particular situation.

This material is based upon work supported by the U.S. Department of Agriculture, Farm Service Agency, under Federal Award Identification No. FA-MN-6-009.

With respect to any opinions, findings, conclusions, or recommendations expressed herein, neither the United States Government nor Farmers' Legal Action Group, Inc., makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Users bear the sole responsibility for decisions affecting program participation and may want to consult other resources.

PUBLISHED BY
Farmers' Legal Action Group, Inc.
6 West Fifth Street, Suite 650
St. Paul, Minnesota, 55102-1404



www.flaginc.org

lawyers@flaginc.org

Text © Copyright 2019 Farmers' Legal Action Group, Inc. This Guide may be reprinted for educational purposes as long as Farmers' Legal Action Group, Inc., is credited when reprinting.

Cover photo Bell Pepper © [Li-Li LiveLife](#) from [Pixabay](#)

<https://pixabay.com/photos/bell-peppers-sweet-peppers-vegetable-3765627/>

Table of Contents

	Page
I. Introduction.....	1
A. Rules that Govern NAP	1
II. NAP Eligibility Requirements	1
A. Crops Eligible for NAP Coverage	1
1. Three General Crop Eligibility Requirements for NAP Coverage.....	1
a. Commercial Crop or Commodity	1
b. Produced for Food, Fiber or Animal Consumption	2
c. CAT Coverage or Additional Coverage Under FCIC Not Available	2
2. Exceptions to the Crop Eligibility Rules	2
a. No Livestock Coverage	2
b. Value Loss Crops—Exception to the Food, Fiber, and Animal Consumption Rule	2
3. Categories of Crops That Are Definitely Eligible for NAP	3
a. Commercial Crops Grown for Food	3
b. Commercial Crops Planted and Grown for Livestock Consumption.....	3
c. Commercial Crops Grown for Fiber.....	3
d. Commercially Produced Aquacultural Species	3
e. Floriculture Crops	3
f. Ornamental Nursery Crops.....	4
g. Christmas Tree Crops.....	4
h. Turfgrass Sod	4
i. Industrial Crops	4
j. Biomass Crops—Sweet Sorghum, Biomass Sorghum, and Industrial Crops	4
k. Seed Crops.....	4
l. Sea Grass and Sea Oats	5
4. Special Rules for Different or Multiple Crops.....	5
a. Different Types or Varieties of Crops.....	5
b. Seed Crops as Different Crops	5
c. Different Types or Varieties of Forage	6

d.	Double-Cropped Acreage	6
B.	Eligible Causes of Loss	6
1.	Defining an Eligible Cause of Loss	6
a.	Damaging Weather	7
b.	Adverse Natural Occurrence	7
c.	Damaging Related Conditions	7
2.	Ineligible Causes of Loss	7
a.	Neglect or Malfeasance	7
b.	Failure to Reseed or Replant if Customary	7
c.	Failure to Follow Good Farming Practices	8
d.	Water from Dam or Reservoir	8
e.	Failure of Irrigation System or Inadequate Irrigation Resources	8
f.	Certain Crops—Loss of Inventory Due to Drought or Failure to Provide Water, Soil, or Growing Media	8
g.	Failure to Provide a Controlled Environment or Exercise Good Nursery Practices	9
h.	Failure to Comply with Organic Standards	9
i.	Contamination of Organic Crops by Prohibited Substances	9
j.	Growing Crops in Areas Not Suited for the Crop	9
k.	Weeds	10
l.	Normal Variances in Temperature	10
m.	Loss of Inventory Due to Managerial Decision Not to Seed or Raise Crops in Necessary Containers	10
n.	Additional Excluded Losses Listed in NAP Handbook	10
C.	Farmer Eligibility	10
1.	Farmer Defined	10
2.	No More Than \$900,000 in Average Adjusted Gross Income	10
3.	Conservation Compliance	11
4.	Apply Good Farming Practices	11
5.	Crop Reporting Requirements	11
a.	Initial Acreage Reports	11

(i)	Deadline for Acreage Report	11
(ii)	Contents of Acreage Report.....	11
b.	Follow-Up with Production Report	12
c.	Maintain Acreage and Production Records for Three Years	12
6.	Disqualification for Crop Insurance Fraud	12
7.	Other Restrictions on Farmer Eligibility	13
III.	NAP Coverage	13
A.	NAP Coverage Levels for Eligible Losses.....	13
1.	Basic 50/55 NAP	13
a.	Basic 50/55 Coverage for Yield Losses	13
b.	Basic 50/55 Coverage for Value Loss Crops	13
c.	Basic 50/55 Coverage for Prevented Planting	14
d.	Basic 50/55 Coverage for Crop Acreage Intended to be Grazed.....	14
2.	Buy-Up Coverage.....	15
a.	Buy-Up Coverage for Yield Losses	15
b.	Buy-Up Coverage for Value Loss Crops	15
c.	Buy-Up Coverage for Prevented Planting.....	16
B.	NAP Payment Rates—Prices Paid for NAP Coverage	16
1.	Average Market Price Defined	16
a.	Organic Average Market Price	17
b.	Average Direct Market Price	17
2.	Payment Rates for NAP Coverage	17
a.	55 Percent of Average Market Price—Basic 50/55 NAP Coverage	17
b.	100 Percent of Average Market Price—Buy-Up Coverage	18
c.	Adjustments for Non-incurred Expenses	18
C.	NAP Losses	18
1.	Losses of Yield-Based Crops.....	18
a.	Establishing Approved Yield.....	19
(i)	Approved Yield—Based on Actual Production History	19
(ii)	When Actual Production History Not Available—Initial Approved Yield Will Be Created.....	19

(a)	If No Production Records Exist for Prior Crop Year	20
(b)	If Certified Production Records Are Available Only for Most Recent Crop Year	20
(c)	If Certified Production Records Available Only for Two Most Recent Crop Years	20
(d)	If Certified Production Records Available Only for Three Most Recent Crop Years	20
(e)	If Farmer Is a “New Farmer”	21
(iii)	One Year’s Yield May Be Assigned if Records Not Available	21
(iv)	Zero-Credited Yield Used When Farmer Received an Assigned Yield in the Past and Did Not Report Yields	22
(v)	Replacement Yield Used when Yield is Low Due to Disaster	22
b.	Determining Actual Yield Loss	22
(i)	Entire Unit Used to Calculate Yield Loss	22
(a)	All 100 Percent Crop Share Acreage.....	23
(b)	Crop Share Lease Acreage—Tenant Has Separate Unit for Each Landlord	23
(c)	Crop Share Lease Acreage—Landlord Has Separate Unit for Each Tenant.....	23
(d)	Example of Unit Calculation.....	23
(ii)	Quality Losses Generally Not Taken Into Account	24
(iii)	Some Guaranteed Contract Payments Affect Yield Calculations.....	24
2.	Losses of Value Loss Crops	25
a.	Eligible Value Loss Crops.....	25
b.	Crops Must be Unmarketable	25
c.	Value Loss Crops Not Eligible for Prevented Planting Payments	26
d.	Determining the NAP Payment	26
(i)	Basic 50/55 Coverage	26
(ii)	Buy-Up Coverage	26
3.	Losses from Prevented Planting.....	26
a.	Not Applicable to the U.S. Virgin Islands	26
b.	At least 35 Percent of Total Acreage Unplanted	27

c.	Timing of Eligible Cause of Loss	27
d.	Demonstrate Intent to Plant	27
e.	Prevented Planting Due to Drought—Special Rules	27
f.	Ineligible Crops and Acreage for Prevented Planting Coverage	28
(i)	Value-Loss Crops	28
(ii)	Tree Crops and Other Perennials	28
(iii)	Uninsured Crop Acreage	28
(iv)	Acreage Planted During Late-Planting Period	28
(v)	Acreage that was Harvested, Grazed, or Hayed	28
(vi)	Planned Fallow Land	29
(vii)	Acreage Affected by Chemical or Herbicide Residue	29
(viii)	Acreage Used for Conservation Purposes	29
(ix)	Reduced Water Supply that is NOT the Result of a Natural Disaster	29
(x)	Lack of Adequate Irrigation on NAP Application Closing Date	29
(xi)	Acreage Not Planted Due to Management Decisions	29
(xii)	Acreage Covered with Pasture or other Forage Crops During Normal Planting Time	30
(xiii)	Ineligible Double-Cropped Acreage	30
(xiv)	Acreage for Which Another Person Receives a Prevented Planting Payment	30
(xv)	Acreage that is Devoted to Non-Cropland	30
4.	Losses of Forage for Animal Consumption	30
a.	Forage Defined	31
b.	Method of Harvest—Grazed or Mechanically Harvested	31
c.	Eligible Forage Loss Determinations	32
(i)	Losses of Forage Acreage Intended for Grazing	32
(a)	Buy-Up Coverage NOT Available for Grazing Losses	32
(b)	Determining the Loss of Forage Acreage	32
(c)	Carrying Capacity	32
(ii)	Losses of Mechanically-Harvested Forage	33
5.	Losses in Tropical Regions	33

a.	Tropical Region Defined	33
b.	Covered Crops	34
c.	Eligible Causes of Loss	34
(i)	U.S. Virgin Islands.....	34
(ii)	All other Tropical Regions.....	34
d.	Prevented Planting—NOT Applicable to the U.S. Virgin Islands	35
e.	Multiple Planting Periods—NOT Applicable to Tropical Crops	35
f.	Loss Calculations for Tropical Regions.....	35
(i)	Loss Calculation for Annual and Multiple Planting Tropical Crops	35
(ii)	Loss Calculation for Perennial and Biennial Tropical Crops	36
(iii)	Loss Calculation for Grazing and Yield-Based Tropical Crops	36
D.	NAP Coverage Periods	37
1.	Coverage Period for Annual Crops.....	37
2.	Coverage Period for Biennial and Perennial Non-Forage Crops	37
3.	Coverage Period for Biennial and Perennial Forage Crops.....	37
4.	Coverage Period for Multiple Planted Crops	38
5.	Coverage Period for Covered Tropical Region Crops.....	38
6.	Coverage Period for Value Loss Crops	38
7.	Coverage Periods for Other Crops.....	38
a.	Honey	39
b.	Maple Sap.....	39
c.	Biomass Crops.....	39
E.	The Amount Paid on the Loss.....	39
1.	Farmer's Share of NAP Benefits the Same as Farmer's Crop Share	40
2.	How to Calculate Loss Benefits	40
a.	Benefits Calculation for Yield-Based Losses and Losses to Forage Intended to be Mechanically Harvested	40
b.	Benefits Calculation for Prevented Planting.....	41
c.	Benefits Calculation for Loss of Value Loss Crops.....	42
d.	Benefits Calculation for Losses of Forage Intended to be Grazed	43
VI.	NAP Benefit Limitations.....	44

A.	Payment Limitation for Farmers with Basic 50/55 Coverage—\$125,000 Per Person.....	44
B.	Payment Limitation for Farmers with Buy-Up Coverage—\$300,000 Per Person.....	44
C.	Limitation on Multiple Benefits from USDA for Same Disaster Loss.....	44
D.	Creditor Claims on NAP Payments.....	45
VII.	Applying for NAP Coverage.....	45
A.	Administrative County.....	45
B.	NAP Application Closing Dates	46
C.	NAP Service Fees	46
1.	Service Fees for Covered Tropical Crops.....	46
2.	Service Fee for Honey	47
3.	Fee Waiver for Certain Farmers.....	47
D.	Documentation Requirements for NAP Coverage.....	47
1.	Documentation of Production.....	47
a.	Records Acceptable to FSA	48
(i)	Commercial Documents—If Crop Sold Through Commercial Channels.....	48
(ii)	Other Documentary Evidence—If Crop Disposed of Through Non-Commercial Channels	48
b.	Failure to Produce Records Acceptable to FSA	49
E.	Continuous NAP Coverage.....	49
VIII.	Collecting NAP Benefits.....	49
A.	Reporting the Crop Loss: In General, File Notice Within 15 Days After Loss.....	49
1.	Low-Yield and Value Loss Claims	50
2.	Prevented Planting Claims.....	50
3.	Hand-harvested Crops—NOT Applicable to the U.S. Virgin Islands.....	50
4.	Tropical Crops in the U.S. Virgin Islands.....	50
5.	Late-Filed Notices of Loss—NOT Applicable to the U.S. Virgin Islands	50
B.	Applying for NAP Benefits.....	50
1.	File Application for Payment	51
2.	If the Crop Is Not Harvested—Crop Left Intact Until Appraised or Released.....	51
3.	If the Crop Is Harvested—Documentary Evidence	51

IX.	Waiving Deadlines, Adjusting Program Requirements, and Providing Equitable Relief	51
A.	Waiving Deadlines	51
B.	Adjusting Program Requirements	52
C.	Equitable Relief for Failure to Comply with Program Requirements	52
X.	USDA Appeal Rights.....	52
XI.	Discrimination Is Illegal	53

Noninsured Crop Disaster Assistance Program (NAP)

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 farmers who are unable to obtain federal crop insurance for a particular crop.¹

A. Rules that Govern NAP

Federal statute authorizes NAP.² The 2018 Farm Bill made some changes to NAP.³ Those changes are included in this Guide.

The Farm Service Agency (FSA) has issued regulations that govern NAP and that can be found in the Code of Federal Regulations.⁴

In addition to these regulations, FSA has issued a NAP Handbook that sets rules for the program.⁵ FSA also sometimes issues Notices that govern NAP.⁶

II. 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 crop loss must be caused by a NAP-eligible cause of loss. Third, the farmer must be eligible for NAP benefits. Each of these requirements is discussed below.

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.⁷

a. Commercial Crop or Commodity

The crop must be a commercial crop or other agricultural commodity.⁸

¹ 7 U.S.C. § 7333.

² 7 U.S.C. § 7333(a)(2)(A).

³ See, generally, Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601 (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333).

⁴ See 7 C.F.R. pt. 1437 (2019). NAP is under the general supervision of the Commodity Credit Corporation (CCC) and is carried out by FSA. 7 C.F.R. § 1437.2(a) (2019).

⁵ See Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years, 1-NAP (Revision 2)(Feb. 15, 2019) It can be found here:

<https://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk>.

⁶ See, for example, FSA notice NAP-200, Reviewing Average Market Prices in NCT (June 11, 2019) (expires Dec. 1, 2019).

⁷ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(1)(B) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(a)(2)(A)); 7 C.F.R. § 1437.4 (2019).

⁸ 7 C.F.R. § 1437.4(a) (2019); NAP Handbook, page 2-13, para. 52.A (Feb. 15, 2019).

b. Produced for Food, Fiber or Animal Consumption

Generally, the crop must be produced for food, fiber, or as forage for animal consumption.⁹

c. CAT Coverage or Additional Coverage Under FCIC Not Available

In general, NAP coverage is available only if one of the following applies: (1) catastrophic crop insurance coverage (CAT) is not available in the area; (2) additional coverage under the Federal Crop Insurance Corporation (FCIC) is not available in the area, except if the only available additional coverage involves a whole farm plan of insurance, or if the only available policy provides coverage for specific intervals based on weather indexes;¹⁰ or (3) the farmer's crop practices are not covered under FCIC, and FSA has determined—in advance of the coverage period—that the practices are suitable for NAP coverage.¹¹

2. Exceptions to the Crop Eligibility Rules

Several exceptions either expand or limit crop eligibility under NAP.

a. No Livestock Coverage

NAP does not provide coverage for livestock and their by-products.¹²

b. Value Loss Crops—Exception to the Food, Fiber, and Animal Consumption Rule

Several crops are eligible for NAP coverage even though they may not be produced for food, fiber, or animal consumption. These include commercial production of any of the following: aquacultural species (including ornamental fish), floricultural crops, ornamental nursery plants, Christmas tree crops, turfgrass sod, sweet sorghum, biomass sorghum, seed crops, industrial crops, sea grasses, and sea oats.¹³ At least in part, these are what FSA calls “value loss crops.” The NAP coverage requirements for value loss crops are described in more detail later in this chapter.

⁹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(1)(B) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(a)(2)(A)); 7 C.F.R. § 1437.4(b)(1)-(b)(3) (2019); NAP Handbook, pages 2-13 and 2-14, para. 52.A, B (Feb. 15, 2019).

¹⁰ These exceptions, making NAP available in limited circumstances when additional coverage under the FCIC is available, are new with the passing of the 2018 Farm Bill. See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(1)(B) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(a)(2)(A)).

¹¹ 7 C.F.R. § 1437.4(a)(4) (2019). For the effect of changes in crop coverage by Federal Crop Insurance policies, see NAP Handbook, page 2-13, para. 52.A (Feb. 15, 2019).

¹² Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(1)(B) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(a)(2)(A)); 7 C.F.R. § 1437.4(b)(1) (2019); NAP Handbook, page 2-16, para. 53.A, (Feb. 15, 2019). The NAP regulations do not define livestock.

¹³ 7 C.F.R. § 1437.4(b)(4) (2019).

3. Categories of Crops That Are Definitely Eligible for NAP

The following crops are specifically named as eligible for NAP benefits, so long as they satisfy the other crop eligibility requirements.¹⁴

a. Commercial Crops Grown for Food

Commercial crops grown for food are eligible for NAP.¹⁵

b. Commercial Crops Planted and Grown for Livestock Consumption

Commercial crops planted and grown for livestock consumption are eligible for NAP.¹⁶ This includes grain and forage crops.

c. Commercial Crops Grown for Fiber

Commercial crops grown for fiber are eligible for NAP.¹⁷ Trees grown for wood, paper, or pulp products, however, are not eligible.

d. Commercially Produced Aquacultural Species

Commercially produced aquacultural species, including ornamental fish, are eligible for NAP.¹⁸ 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.¹⁹ The aquacultural species must be raised in a controlled water environment on private property in order to qualify for NAP.²⁰

e. Floriculture Crops

Floriculture crops are eligible for NAP.²¹ 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.²² To be eligible for NAP, the floriculture crops must be grown on private property and in a setting that is suitable to their successful production.²³

¹⁴ 7 C.F.R. § 1437.4(b) (2019); NAP Handbook, pages 2-13 and 2-14, para. 52.B (Feb. 15, 2019).

¹⁵ 7 C.F.R. § 1437.4(b)(1) (2019); NAP Handbook, page 2-13, para. 52.B (Feb. 15, 2019).

¹⁶ 7 C.F.R. § 1437.4(b)(2) (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

¹⁷ 7 C.F.R. § 1437.4(b)(3) (2019); NAP Handbook, page 2-13, para. 52.B (Feb. 15, 2019).

¹⁸ 7 C.F.R. §§ 1437.4(b)(4)(i), 1437.303 (2019); NAP Handbook, page 2-13, para. 52.B (Feb. 15, 2019).

¹⁹ 7 C.F.R. § 1437.303(a) (2019); NAP Handbook, page 12-224, para. 901.A (Feb. 15, 2019).

²⁰ NAP Handbook, page 12-224, para. 901.A (Feb. 15, 2019). For additional eligibility requirements for aquacultural species, see 7 C.F.R. § 1437.303 (2019).

²¹ 7 C.F.R. §§ 1437.4(b)(4)(ii), 1437.304 (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

²² 7 C.F.R. § 1437.304 (2019); NAP Handbook, page 12-236, para. 903.A (Feb. 15, 2019).

²³ For more detailed eligibility requirements for floriculture crops, see 7 C.F.R. § 1437.304 (2019).

f. Ornamental Nursery Crops

Ornamental nursery crops are eligible for NAP.²⁴ Eligible ornamental nursery crops are limited to decorative plants grown in a controlled environment (whether in a field or in containers) for commercial sale.²⁵

g. Christmas Tree Crops

Christmas tree crops are eligible for NAP coverage so long as the trees are grown exclusively for commercial use as a Christmas tree.²⁶

h. Turfgrass Sod

Turfgrass sod is eligible for NAP coverage.²⁷

i. Industrial Crops

Industrial crops are eligible for NAP benefits. Industrial crops are commercial crops or other agricultural commodities used in manufacturing.²⁸ 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 FSA.²⁹

j. Biomass Crops—Sweet Sorghum, Biomass Sorghum, and Industrial Crops

Biomass crops are eligible for NAP coverage.³⁰ Biomass crops are defined as any feedstock crop grown for the express purpose of producing a bio-based product.

Biomass crops include sweet sorghum, biomass sorghum, and industrial crops that are grown expressly for the purpose of producing a feedstock for renewable biofuel, renewable electricity and bio-based products.³¹

k. Seed Crops

Seed crops are eligible for NAP.³² Seed crops are defined as propagation stock commercially produced for sale as seed stock for NAP-eligible crops.³³ This includes non-ornamental seedlings, sets, cuttings, rootstock, and others as

²⁴ 7 C.F.R. §§ 1437.4(b)(4)(iii), 1437.305 (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

²⁵ 7 C.F.R. § 1437.305(a) (2019); NAP Handbook, page 12-254, para. 906.A (Feb. 15, 2019).

²⁶ 7 C.F.R. §§ 1437.4(b)(4)(iv), 1437.306 (2019); NAP Handbook, page 2-13, para. 52.B (Feb. 15, 2019).

²⁷ 7 C.F.R. §§ 1437.4(b)(4)(v), 1437.309 (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

²⁸ 7 C.F.R. §§ 1437.3, “Industrial crop,” 1437.4(b)(4)(viii) (2019).

²⁹ 7 C.F.R. § 1437.3, “Industrial crop” (2019); NAP Handbook, Exhibit 2, page 13, “Industrial Crop” (Feb. 15, 2019).

³⁰ NAP Handbook, page 12-391, paras. 975.A, B (Feb. 15, 2019).

³¹ 7 C.F.R. § 1437.4(b)(4)(vi)-(viii) (2019); NAP Handbook, page 12-391, paras. 975.A, B (Feb. 15, 2019).

³² 7 C.F.R. § 1437.4(b)(4)(ix) (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

³³ 7 C.F.R. § 1437.3, “Seed crop” (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

determined by FSA.³⁴ For example, tree seedlings being raised as a seed crop for use as propagation stock in a commercial Christmas tree operation are eligible NAP crops.³⁵

l. Sea Grass and Sea Oats

Sea grasses and sea oats are eligible for NAP.³⁶ Eligible sea grasses and sea oats are limited to ornamental plants grown for commercial sale and seeds and transplants produced for commercial sale as propagation stock.³⁷

4. Special Rules for Different or Multiple Crops

In some cases, NAP treats different varieties of a crop or forage, or multiple plantings of a crop in the same crop year, as separate crops for purposes of NAP eligibility. The following rules apply.

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.³⁸ 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.³⁹ 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.⁴⁰

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, FSA 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 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.⁴¹

FSA will consider a commercial seed crop that does not meet these three criteria as a single crop and not as a separate crop. This will be true even if the farmer intends it to be a seed crop and different from general commercial production,

³⁴ 7 C.F.R. § 1437.4(b)(4)(ix) (2019).

³⁵ NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

³⁶ 7 C.F.R. §§ 1437.4(b)(4)(x), 1437.310 (2019); NAP Handbook, page 2-14, para. 52.B (Feb. 15, 2019).

³⁷ 7 C.F.R. § 1437.310(a) (2019).

³⁸ 7 C.F.R. § 1437.13(b) (2019).

³⁹ 7 C.F.R. § 1437.13(b) (2019).

⁴⁰ NAP Handbook, page 4-6, para. 201.A (Feb. 15, 2019).

⁴¹ 7 C.F.R. § 1437.13(i) (2019); NAP Handbook, page 4-12, para. 202.F (Feb. 15, 2019). In addition, the unique growing period that is necessary for the production of the commercial seed (or the physiological event that occurs during that growing period, such as vernalization in a biennial crop like carrots or onions) must render the possibility of any other use of the crop acreage improbable.

and even if the type or variety of the crop suggests that it is a seed crop and different from a commercial crop.⁴²

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.⁴³ Grazed forage may further be divided as warm season and cool season forage.⁴⁴ 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.⁴⁵

In addition, each small grain crop intended as forage—meaning a stand of pure wheat, barley, oats, triticale, or rye—shall be considered a separate small grain crop that is distinct from other forage commodities and other small grain crops with different intended uses.⁴⁶ If a small grain crop is produced for two different intended purposes in the same planting, such as forage and grain, the acreage may be recognized as two separate crops.⁴⁷

d. Double-Cropped Acreage

In the case of land that has consecutive planting—on the same acreage—of two different crops, each planting may be considered a different crop for NAP purposes.⁴⁸ The acreage must be in an area where double-cropping is recognized as a good farming practice, as determined by FSA. In addition, both crops must have adequate time to reach maturity for each of their intended purposes. For example, that could mean winter wheat followed by corn or soybeans.

B. Eligible Causes of Loss

In order to be eligible for NAP, the farmer's crop loss must occur during the farmer's coverage period, and must be caused by what FSA terms an "eligible cause of loss."⁴⁹ What is considered an eligible cause of loss may differ depending on the type of crop loss the farmer has suffered.⁵⁰

1. Defining an Eligible Cause of Loss

The NAP regulations broadly define what is considered an eligible cause of loss.⁵¹ As a general rule, eligible causes of loss include damaging weather, adverse natural occurrences, and related conditions that result from either of those.⁵²

⁴² NAP Handbook, page 4-12, para. 202.F (Feb. 15, 2019).

⁴³ 7 C.F.R. § 1437.13(f) (2019); NAP Handbook, page 12-7, para. 801.B (Feb. 15, 2019).

⁴⁴ 7 C.F.R. § 1437.13(g) (2019); NAP Handbook, page 12-6, para. 801.B (Feb. 15, 2019).

⁴⁵ 7 C.F.R. § 1437.13(h) (2019).

⁴⁶ 7 C.F.R. § 1437.401(e) (2019); NAP Handbook, page 12-54, para. 805.A (Feb. 15, 2019).

⁴⁷ NAP Handbook, page 12-54, para. 805.A (Feb. 15, 2019).

⁴⁸ 7 C.F.R. § 1437.13(e) (2019); NAP Handbook, page 4-15, para. 204.A (Feb. 15, 2019).

⁴⁹ 7 C.F.R. § 1437.10(a), (e) (2019). A coverage period is defined as the time period during which NAP coverage is available for an eligible crop because of an eligible loss. 7 C.F.R. § 1437.6(a) (2019); NAP Handbook, page 2-19, para. 54.A (Feb. 15, 2019).

⁵⁰ 7 C.F.R. § 1437.10(a) (2019); NAP Handbook, page 2-4, para. 51.A (Feb. 15, 2019).

⁵¹ 7 C.F.R. § 1437.10 (2019).

⁵² 7 C.F.R. § 1437.10 (2019); NAP Handbook, page 2-9, para. 51.B (Feb. 15, 2019).

All eligible causes of loss must occur before or during the harvest and must directly cause, accelerate, or exacerbate the destruction or deterioration of an eligible crop.⁵³

a. Damaging Weather

A natural disaster can be damaging weather, including, but not limited to, drought, hail, excessive moisture, freeze, tornado, hurricane, excessive wind, insufficient chill hours,⁵⁴ or any combination of these events.⁵⁵

b. Adverse Natural Occurrence

A natural disaster for NAP purposes can be an adverse natural occurrence such as an earthquake, flood, volcanic eruption, or any combination of these events.⁵⁶

c. Damaging Related Conditions

An eligible cause of loss can also be what NAP regulations call a “related condition.”⁵⁷ Related conditions are conditions that must result from either damaging weather or adverse natural occurrences. In other words, related conditions are not eligible for NAP coverage in and of themselves. For example, heat, insect infestation, disease, insufficient chill hours, or any combination of these events can be related conditions so long as they occurred because of an adverse natural occurrence or damaging weather.

2. Ineligible Causes of Loss

Losses are not covered under NAP if they are caused by the farmer or could have been prevented by the farmer.⁵⁸ Specifically excluded from NAP coverage are losses caused by the following.

a. Neglect or Malfeasance

Losses are not covered under NAP if they are caused by neglect or malfeasance.⁵⁹ 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 or Replant if Customary

Losses are not covered under NAP if they are caused by a failure to reseed or replant the crop if it is practicable and customary to do so by the final planting

⁵³ 7 C.F.R. § 1437.10(c) (2019); NAP Handbook, page 2-9, para. 51.B (Feb. 15, 2019).

⁵⁴ Insufficient chill hours are considered an eligible cause of loss only for certain crops and locations that have been predetermined by FSA. For more details on insufficient chill hours, see 7 C.F.R. § 1437.10(b)(viii) (2019) and NAP Handbook, page 2-10, para. 51.C (Feb. 15, 2019).

⁵⁵ 7 C.F.R. § 1437.10(b)(1) (2019); NAP Handbook, page 2-9, para. 51.B (Feb. 15, 2019).

⁵⁶ 7 C.F.R. § 1437.10(b)(2) (2019); NAP Handbook, page 2-9, para. 51.B (Feb. 15, 2019).

⁵⁷ 7 C.F.R. § 1437.10(b)(3) (2019); NAP Handbook, page 2-9, para. 51.B (Feb. 15, 2019).

⁵⁸ 7 C.F.R. § 1437.10(d) (2019); NAP Handbook, pages 2-12 and 2-12.5, para. 51.E (Feb. 15, 2019).

⁵⁹ 7 U.S.C. § 7333(h)(1); 7 C.F.R. § 1437.10(d)(1) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

date.⁶⁰ Reseeding or replanting a crop generally means the same crop is planted on the same acreage after the first planting of the crop has failed.

c. Failure to Follow Good Farming Practices

Losses are not covered under NAP if they are caused by a failure to follow recognized good farming practices for the crop.⁶¹

The NAP regulations define good farming practices as the cultural practices generally used for a crop to make normal progress toward maturity and produce at least the approved yield.⁶²

d. Water from Dam or Reservoir

Losses are not covered under NAP if the crop is damaged by water that is contained or released by a public, private, or governmental dam or reservoir, or if the land on which the crop was growing is covered by an easement for the containment or release of the water.⁶³

e. Failure of Irrigation System or Inadequate Irrigation Resources

Losses are not covered under NAP if they are caused by certain irrigation failures or inadequacies.

First, losses caused by a failure or breakdown of an irrigation system are not covered unless the failure was due to an eligible cause of loss.⁶⁴

Second, with the exception of tree crop and perennial losses, losses caused by the farmer having inadequate irrigation resources at the beginning of the crop year are not covered.⁶⁵

Finally, losses that are the result of the farmer's failure to carry out good irrigation practices for the crop are not covered.⁶⁶

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

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,

⁶⁰ 7 U.S.C. § 7333(h)(2); 7 C.F.R. § 1437.10(d)(9) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

⁶¹ 7 U.S.C. § 7333(h)(3); 7 C.F.R. § 1437.10(d)(2) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

⁶² 7 C.F.R. § 1437.3, “Good farming practices” (2019); NAP Handbook, Exhibit 2, page 11, “Good farming practices” (Feb. 15, 2019). For conventional farming practices, this means practices that are generally recognized as good by agricultural experts for the area. For organic farming, this means practices that are generally recognized as good by organic agricultural experts for the area, or practices that are contained in an organic system plan that follows the requirements of the National Organic Program.

⁶³ 7 C.F.R. § 1437.10(d)(3) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

⁶⁴ 7 C.F.R. § 1437.10(d)(4) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

⁶⁵ 7 C.F.R. § 1437.10(d)(10) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

⁶⁶ 7 C.F.R. § 1437.10(d)(5) (2019).

soil, or growing media to these crops for any reason.⁶⁷ However, if FSA determines that an aquaculture loss was due to a drought, and all other NAP eligibility provisions are satisfied, the aquaculture loss is eligible for NAP coverage.⁶⁸

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

For some crops, eligibility for NAP coverage is conditioned on the farmer providing a controlled environment or exercising good nursery practices.⁶⁹ Losses are not covered under NAP if they are caused by any failure to provide the required environment or practices.⁷⁰

A controlled environment is defined by FSA as an environment in which everything that can practicably be controlled with structures, facilities, and growing media by the farmer, is in fact controlled by the farmer.⁷¹ This includes, but is not limited to, water, soil, and nutrients. Controlled environments are only required for those crops for which a controlled environment is expected to be provided, such as aquaculture, floriculture, ornamental nursery stock, and mushrooms.

h. Failure to Comply with Organic Standards

For crops grown using organic farming practices, losses are not covered under NAP if they are caused by the farmer's failure to comply with organic standards.⁷²

i. Contamination of Organic Crops by Prohibited Substances

For crops grown using organic farming practices—on organic, transitional, or buffer zone acreage—losses are not covered under NAP if they are caused by the application or drift of prohibited substances such as herbicides.⁷³

j. Growing Crops in Areas Not Suited for the Crop

NAP will not cover losses that FSA determines are the result of any managerial decision to grow or produce a crop in an area that is not suited for the successful commercial production of that crop.⁷⁴

⁶⁷ 7 C.F.R. § 1437.10(d)(11) (2019); NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019).

⁶⁸ 7 U.S.C. § 7333(c)(2); 7 C.F.R. §§ 1437.10(d)(11), 1437.303(g) (2019).

⁶⁹ 7 C.F.R. §§ 1437.303(d)(2) (aquaculture), 1437.304(c), (e) (floriculture), 1437.305(d) (ornamental nursery), 1437.307(a) (mushrooms) (2019).

⁷⁰ 7 C.F.R. § 1437.10(d)(12) (2019); NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019).

⁷¹ NAP Handbook, Exhibit 2, page 7, "Controlled environment" (Feb. 15, 2019). Arguably, the fact that losses occurred does not inevitably lead to the conclusion that the farmer 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 farmer to control certain aspects of the environment.

⁷² 7 C.F.R. § 1437.10(d)(14) (2019); NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019). For purposes of NAP, farmers must follow the organic standards as provided for by the Organic Foods Production Act of 1990 (7 U.S.C. § 6501 et seq.) and in the Federal Regulations (7 C.F.R. pt. 205).

⁷³ 7 C.F.R. § 1437.10(d)(15) (2019); NAP Handbook, page 4-25, para. 208.B (Feb. 15, 2019).

⁷⁴ 7 C.F.R. § 1437.10(d)(8) (2019); NAP Handbook, page 2-7, para. 51.A (Feb. 15, 2019).

k. Weeds

Losses are not covered under NAP if they are caused by weeds.⁷⁵

l. Normal Variances in Temperature

With the exception of insufficient chill hours,⁷⁶ losses are not covered under NAP if they are caused by normal variances in temperature rather than an otherwise eligible damaging weather event or adverse natural occurrence.⁷⁷

m. Loss of Inventory Due to Managerial Decision Not to Seed or Raise Crops in Necessary Containers

With the exception of eligible mollusk losses,⁷⁸ losses are not covered under NAP if they are caused by a managerial decision not to seed or raise an NAP-eligible crop in containers, net pens, wire baskets, on ropes, or using similar devices.⁷⁹

n. Additional Excluded Losses Listed in NAP Handbook

The NAP Handbook lists additional types of losses that will not be eligible for NAP coverage.⁸⁰ These include: (1) losses due to quarantine imposed by a county, state, or federal government agency; (2) failure of the crop to mature in time for a specific market; (3) wildlife damage; (4) inability to obtain a market for the crop; and (5) certain instances of prevented planting, such as those caused by chemical and herbicide residue.

C. Farmer Eligibility

There are a number of farmer eligibility requirements for NAP. Most of these requirements concern the farmer's ongoing compliance with NAP and other FSA program provisions.

1. Farmer Defined

A farmer can be an owner, operator, landlord, tenant, or sharecropper.⁸¹ To qualify for NAP coverage, the farmer must have a valid share in the crop and also share in the risk of producing the crop. Contract growers and legal entities can qualify as farmers under NAP.⁸²

2. No More Than \$900,000 in Average Adjusted Gross Income

NAP assistance is not available for any farmer—whether a person or legal entity other than a joint venture or general partnership—with more than \$900,000 in average adjusted gross income for the three taxable years preceding the most immediately

⁷⁵ 7 C.F.R. § 1437.10(d)(16) (2019); NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019).

⁷⁶ Insufficient chill hours are considered an eligible cause of loss only for certain crops and locations that have been predetermined by FSA. For more details on insufficient chill hours, see 7 C.F.R. § 1437.10(b)(viii) (2019) and NAP Handbook, page 2-10, para. 51.C (Feb. 15, 2019).

⁷⁷ 7 C.F.R. § 1437.10(d)(7) (2019); NAP Handbook, page 2-7, para. 51.A (Feb. 15, 2019).

⁷⁸ For more details on eligible mollusk losses, see 7 C.F.R. § 1437.303(e) (2019).

⁷⁹ 7 C.F.R. § 1437.10(d)(13) (2019); NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019).

⁸⁰ NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019).

⁸¹ 7 C.F.R. § 718.2, "Farmer" (2019); NAP Handbook, page 3-1, para. 100.A (Feb. 15, 2019).

⁸² NAP Handbook, page 3-1, para. 100.A (Feb. 15, 2019).

preceding complete taxable year.⁸³ The farmer must maintain records of gross revenue for the preceding tax year in order to provide evidence of eligibility under this requirement.⁸⁴

3. Conservation Compliance

Farmers must be in compliance with general FSA restrictions against conversion of highly erodible land and wetlands.⁸⁵

4. Apply Good Farming Practices

Farmers must apply good farming practices for each covered crop in order to be eligible for NAP.⁸⁶

5. Crop Reporting Requirements

To be eligible for NAP benefits, farmers must maintain records of crop acreage, acreage yields, and production.⁸⁷

a. Initial Acreage Reports

Farmers who wish to be eligible for future participation in NAP must file one or more acreage reports (form FSA-578) every year with the farmer's local FSA administrative county office.⁸⁸ 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.⁸⁹

(i) Deadline for Acreage Report

Acreage reports must be filed no later than the specified acreage reporting deadline for the specific crop and location.⁹⁰ If a farmer fails to submit this information by the acreage reporting date, NAP benefits may be denied.

(ii) Contents of Acreage Report

For each crop in which the farmer has an interest, he or she must report all acreage in the county planted or prevented from being planted to that crop.⁹¹ The acreage reports must include: (1) the number of acres of the crop in the county in which the farmer has a share; (2) the FSA farm serial number(s) for the acreage; (3) the crop type; (4) the farming practices to be used for the crop; (5) the intended use of the crop; (6) the date the crop was planted; (7) the farmer's share in the crop as of the time an

⁸³ 7 C.F.R. §§ 1400.1(a)(4), 1400.500(a) (2019).

⁸⁴ 7 C.F.R. § 1437.8(g) (2019).

⁸⁵ 7 C.F.R. § 1437.16(a) (2019); NAP Handbook, page 3-7, para. 103.A (Feb. 15, 2019). The regulations governing highly erodible land and wetland conservation can be found at 7 C.F.R. pt. 12 (2019).

⁸⁶ 7 C.F.R. § 1437.4(a)(4)(iv) (2019); NAP Handbook, page 2-12, para. 51.E (Feb. 15, 2019).

⁸⁷ 7 C.F.R. § 1437.8(a) (2019).

⁸⁸ 7 C.F.R. § 1437.8(d) (2019); NAP Handbook, page 6-1, para. 375.A (Feb. 15, 2019).

⁸⁹ 7 C.F.R. § 1437.8(d) (2019).

⁹⁰ 7 C.F.R. § 1437.8(d) (2019).

⁹¹ 7 C.F.R. § 1437.8(d) (2019); NAP Handbook, page 6-2, para. 375.C (Feb. 15, 2019).

application for coverage was filed; and (8) the identity of all farmers with a share in the crop.⁹² The information must include each planting if there are multiple plantings.⁹³

For forage crops, the report must indicate the predominant species, type, or variety and whether it will be grazed or mechanically harvested.⁹⁴

For organic crops that are eligible to use an organic average market price, the report must identify the crops that are planted on acreage using conventional farming practices, certified organic acreage, transitional acreage that is being converted to organic, and buffer zone acreage.⁹⁵

b. Follow-Up with Production Report

The farmer must report the production, acreage yields, and harvest date for each harvested crop for which an application for NAP coverage is filed.⁹⁶

In general, the production report must be filed on or before the NAP acreage reporting date for the crop for the next crop year.⁹⁷ For crops that have a coverage period of more than twelve months, the production report must be filed no later than sixty days after the normal harvest date.

c. Maintain Acreage and Production Records for Three Years

Farmers 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.⁹⁸

If FSA determines that it is impractical to maintain crop acreage, production, or yield records for a certain crop, the farmer of that crop must maintain whatever acreage and yield records are available, along with any other records that FSA requires for specific crops.⁹⁹ For example, forage farmers must specify whether they intend to harvest the crop mechanically or by grazing.¹⁰⁰ Additional documentation requirements also apply to honey, maple sap, value loss crops, ginseng, turfgrass sod, and tropical crops grown in tropical regions.¹⁰¹

6. Disqualification for Crop Insurance Fraud

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

⁹² 7 C.F.R. § 1437.8(d) (2019).

⁹³ 7 C.F.R. § 1437.8(d)(1) (2019).

⁹⁴ 7 C.F.R. §§ 1437.8(d)(5), 1437.401(b) (2019).

⁹⁵ 7 C.F.R. § 1437.8(d)(6) (2019).

⁹⁶ 7 C.F.R. § 1437.8(a) (2019).

⁹⁷ 7 C.F.R. § 1437.8(a) (2019); NAP Handbook, page 9-3, para. 601.A (Feb. 15, 2019).

⁹⁸ 7 C.F.R. § 1437.8(a) (2019); NAP Handbook, page 9-3, para. 601.A (Feb. 15, 2019).

⁹⁹ 7 C.F.R. § 1437.8(a) (2019).

¹⁰⁰ 7 C.F.R. § 1437.401(b) (2019).

¹⁰¹ 7 C.F.R. §§ 1437.106(d), 1437.107(d), 1437.301(c), 1437.308(d), 1437.309(e), 1437.503(c), 1437.504(b) (2019).

¹⁰² 7 U.S.C. § 1515(h)(3)(B)(ii); 7 C.F.R. §§ 718.11(a)(2), 1405.8(a)(2) (2019).

7. Other Restrictions on Farmer Eligibility

Other restrictions also apply to NAP benefits. For example, a farmer who has been convicted of producing a controlled substance is ineligible for NAP benefits for the year of the violation and the four subsequent years.¹⁰³ In addition, any farmer who misrepresents facts, or makes any fraudulent misrepresentations with respect to their NAP application, will be ineligible for NAP coverage for the year of the violation as well as the two subsequent crop years.¹⁰⁴

III. NAP Coverage

A farmer's coverage under NAP is dependent on three main factors. First, the level of NAP coverage the farmer elects. Second, the payment rate that applies for the farmer's coverage level. And finally, the type of loss the farmer suffers. Each of these is discussed in turn below.

A. NAP Coverage Levels for Eligible Losses

In general, NAP provides financial assistance to farmers who experience low yields, loss of inventory, or prevented planting due to an eligible cause of loss, such as an adverse natural occurrence or damaging weather event.¹⁰⁵ NAP offers two primary types of coverage levels for these losses: (1) the Basic 50/55 NAP plan; and (2) a buy-up coverage plan.¹⁰⁶ After the NAP application closing date, farmers cannot change their selected coverage level.¹⁰⁷

1. Basic 50/55 NAP

The traditional NAP coverage is known as the basic 50/55 coverage plan. This plan provides payments based on the amount of loss the farmer suffers relative to either the farmer's expected yield, the expected value of the crop's inventory, the expected acreage to be planted, or the acreage intended for grazing.¹⁰⁸ The farmer is then paid for any eligible losses at a predetermined rate.

a. Basic 50/55 Coverage for Yield Losses

Under the basic 50/55 coverage plan, a farmer is eligible for NAP benefits for any losses that are more than 50 percent of the farmer's approved expected yield. The farmer is paid for those losses at a rate of 55 percent of the market price for the crop.¹⁰⁹ Only if the farmer's loss is more than 50 percent of the approved yield will he or she be eligible for basic 50/55 coverage.¹¹⁰

b. Basic 50/55 Coverage for Value Loss Crops

Under the basic 50/55 coverage plan for value loss crops, NAP assistance is determined by comparing the value of a farmer's eligible value loss crop

¹⁰³ 7 C.F.R. § 1437.16(b) (2019). Controlled substance regulations can be found at 7 C.F.R. § 718.6 (2019).

¹⁰⁴ 7 C.F.R. § 1437.16(c) (2019).

¹⁰⁵ 7 C.F.R. § 1437.4(a) (2019); NAP Handbook, page 1-1, para. 1.B (Feb. 15, 2019).

¹⁰⁶ Buy-up coverage is available for 2019 and future years. See FSA Notice NAP-197, 2018 Farm Bill Amendments Increase NAP Service Fees and Reinstate Buy-Up Coverage, page 4 (April 4, 2019) (expires Nov. 1, 2019).

¹⁰⁷ NAP Handbook, page 5-5, para. 301.A (Feb. 15, 2019).

¹⁰⁸ NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

¹⁰⁹ 7 C.F.R. § 1437.5(b), (c)(1) (2019); NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

¹¹⁰ 7 C.F.R. § 1437.105(a) (2019).

inventory immediately before an eligible cause of loss to the value of the inventory immediately after the loss.¹¹¹ A farmer is eligible for Basic 50/55 NAP benefits for any losses that exceed 50 percent of the total value of the farmer's eligible inventory at the time of the cause of loss.¹¹² The farmer is paid for those losses at a rate of 55 percent of the market price for the crop. Only if the farmer's loss exceeds 50 percent of the value of the farmer's inventory will he or she be eligible for basic 50/55 coverage.

Only certain crops are eligible as value loss crops. Currently, value loss crops include, but are not limited to, the following:¹¹³

- Aquaculture, including ornamental fish,
- Christmas trees,
- Floriculture,
- Ginseng roots,
- Mushrooms,
- Ornamental nursery,
- Propagation stock of nonornamental nursery,
- Sea grass and sea oats, and
- Turfgrass sod.

c. Basic 50/55 Coverage for Prevented Planting

Unlike yield or inventory-based losses, prevented planting losses are calculated based on the acreage that is prevented from being planted relative to the total acreage that the farmer intended to plant in a crop year.¹¹⁴

Under the basic 50/55 coverage plan, a farmer is eligible for prevented planting losses only when those losses exceed 35 percent.¹¹⁵ The basic 50/55 coverage will be paid on the amount of loss that exceeds 35 percent at a rate of 55 percent of the average market price for the crop.¹¹⁶

d. Basic 50/55 Coverage for Crop Acreage Intended to be Grazed

NAP eligibility for acreage that is intended to be grazed requires that farmers suffer a loss of animal unit days (AUDs) in excess of 50 percent of the expected AUDs.¹¹⁷ This determination is made on the basis of acreage, carrying capacity, and grazing period.

¹¹¹ 7 C.F.R. § 1437.5(c)(2) (2019); NAP Handbook, page 8-10, para. 578.B (Feb. 15, 2019).

¹¹² 7 C.F.R. § 1437.5(b), (c)(2) (2019); NAP Handbook, page 8-10, para. 578.B (Feb. 15, 2019).

¹¹³ 7 C.F.R. §§ 1437.303-1437.310 (2019); NAP Handbook, page 12-221, para. 900.A (Feb. 15, 2019).

¹¹⁴ 7 C.F.R. § 1437.5(a) (2019); NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

¹¹⁵ 7 C.F.R. § 1437.5(a) (2019); NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

¹¹⁶ 7 C.F.R. § 1437.5(b) (2019); NAP Handbook, page 2-25, para. 55.B (Feb. 15, 2019).

¹¹⁷ 7 C.F.R. § 1437.5(b) (2019); NAP Handbook, page 2-25, para. 55.B (Feb. 15, 2019).

2. Buy-Up Coverage

Following the enactment of the 2014 Farm Bill, NAP began offering additional, higher levels of coverage under the NAP buy-up coverage plan.¹¹⁸ Farmers could elect coverage for 50, 55, 60, or 65 percent of production at 100 percent of the average market price for the crop.¹¹⁹ Under the 2014 Farm Bill, this buy-up coverage was available for crop years 2015 through 2018.¹²⁰

The 2018 Farm Bill re-authorized the availability of buy-up coverage under the same terms as outlined in the 2014 Farm Bill.¹²¹ At present, buy-up coverage is available for all low-yield crops and all value loss crops.¹²² Buy-up coverage is NOT available, however, for crops and grasses intended for grazing.¹²³

a. Buy-Up Coverage for Yield Losses

Under the NAP buy-up coverage plans, low yield losses must be more than 50 percent for 50/100 coverage, 45 percent for 55/100 coverage, 40 percent for 60/100 coverage, or 45 percent for 65/100 coverage.¹²⁴

b. Buy-Up Coverage for Value Loss Crops

Under the NAP buy-up coverage plans, NAP benefits are determined by comparing the value of a farmer's eligible value loss crop inventory immediately before an eligible cause of loss to the value of the inventory immediately after the loss.¹²⁵ To be eligible for buy-up coverage for value loss crops, the losses must exceed 50 percent for 50/100 coverage, 45 percent for 55/100 coverage, 40 percent for 60/100 coverage, or 45 percent for 65/100 coverage.¹²⁶

Only certain crops are eligible as value loss crops. Value loss crops include, but are not limited to, the following:¹²⁷

- Aquaculture, including ornamental fish,
- Christmas trees,
- Floriculture,
- Ginseng roots,

¹¹⁸ NAP Handbook, page 2-1, para. 50.A (Feb. 15, 2019).

¹¹⁹ 7 C.F.R. § 1437.5(f) (2019); NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

¹²⁰ FSA Notice NAP-197, 2018 Farm Bill Amendments Increase NAP Service Fees and Reinstate Buy-Up Coverage, page 4 (April 4, 2019) (expires Nov. 1, 2019).

¹²¹ FSA Notice NAP-197, 2018 Farm Bill Amendments Increase NAP Service Fees and Reinstate Buy-Up Coverage, page 4 (April 4, 2019) (expires Nov. 1, 2019).

¹²² NAP Handbook, page 12-223, para. 900.D (Feb. 15, 2019).

¹²³ NAP Handbook, page 2-1, para. 50.B (Feb. 15, 2019).

¹²⁴ 7 C.F.R. § 1437.5(d)(1) (2019); NAP Handbook, page 8-9, para. 577.B (Feb. 15, 2019).

¹²⁵ NAP Handbook, page 8-10, para. 578.B (Feb. 15, 2019).

¹²⁶ 7 C.F.R. § 1437.5(d)(1) (2019); NAP Handbook, page 8-10, para. 578.B (Feb. 15, 2019); FSA Notice NAP-197, 2018 Farm Bill Amendments Increase NAP Service Fees and Reinstate Buy-Up Coverage, page 4 (April 4, 2019) (expires Nov. 1, 2019).

¹²⁷ 7 C.F.R. §§ 1437.303-1437.310 (2019); NAP Handbook, page 12-54221, para. 900.A (Feb. 15, 2019).

Mushrooms,
 Ornamental nursery,
 Propagation stock of nonornamental nursery,
 Sea grass and sea oats, and
 Turfgrass sod.

c. Buy-Up Coverage for Prevented Planting

Prevented planting losses are calculated based on the acreage that is prevented from being planted relative to the total acreage that the farmer intended to plant in a crop year.¹²⁸ Under the NAP buy-up coverage plans, prevented planting losses must exceed 35 percent.¹²⁹ The buy-up coverage will be paid at a rate of 100 percent of the average market price for the crop for any losses that are more than 35 percent.

B. NAP Payment Rates—Prices Paid for NAP Coverage

For all coverage levels, NAP benefits are paid based on a percentage of what the FSA regulations call the “average market price.”¹³⁰

For buy-up coverage, the 2018 Farm Bill requires that FSA use the average market price, contract price, or other premium price, such as local, organic, or direct market price.¹³¹ The FSA Handbook, however, already defines average market price in a way that included organic, local, and direct market prices.¹³² It is not clear if FSA will change either regulations or the FSA Handbook as a result of the Farm Bill Changes.

1. Average Market Price Defined

The average market price means the price (or dollar equivalent) per ton, bushel, or other appropriate unit of measure for the crop.¹³³ The price is set by FSA on a harvested basis, and is comparable to prices for other FCIC insurance plans.¹³⁴ When determining the average market price, FSA considers previous average market prices in each state as well as surrounding states.¹³⁵ Average market prices do not take into account any transportation, storage, processing, marketing, or other post-harvest costs, but the prices do take into account historical data.¹³⁶

¹²⁸ NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

¹²⁹ 7 C.F.R. § 1437.5(a) (2019); NAP Handbook, page 2-25, para 55.B and page 8-9, para. 577.B (Feb. 15, 2019).

¹³⁰ 7 C.F.R. § 1437.12(a) (2019).

¹³¹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(3) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(l)(1)(C)).

¹³² In general, basic 50/55 coverage is based on average market price.

¹³³ NAP Handbook, Exhibit 2, page 5, “Average market price” (Feb. 15, 2019)

¹³⁴ 7 C.F.R. § 1437.12(a) (2019); NAP Handbook, page 4-229, para. 278.A (Feb. 15, 2019).

¹³⁵ NAP Handbook, page 4-231, para. 278.B (Feb. 15, 2019).

¹³⁶ For more detailed information on how FSA establishes average market prices—including the prices for organic and direct market crops—see NAP Handbook, pages 4-229 through 4-234.6, paras. 278.A-278.I (Feb. 15, 2019).

a. Organic Average Market Price

FSA may establish organic average market prices for certain crops in order to reflect the different prices those crops receive because of their qualification as “organic” under the National Organic Program (NOP).¹³⁷

In order for a farmer to be eligible to receive NAP payments based on an organic average market price, the farmer’s crop must be either certified organic or exempt from certification under NOP regulations.¹³⁸ The farmer must also report his or her acreage as organic. Any acreage that is transitioning to organic will be considered conventional acreage and will not be eligible for an organic average market price.

Farmers with either the basic 50/55 or buy-up NAP coverage plans are eligible to receive the organic average market price.¹³⁹

b. Average Direct Market Price

FSA may establish an average direct market price for those farmers who direct market their crops.¹⁴⁰ Direct marketing is defined as selling crops directly to consumers without the assistance of an intermediary such as a registered handler, wholesaler, retailer, packer, processor, shipper, or buyer.¹⁴¹

In order for a farmer to be eligible to receive a NAP payment based on an average direct market price, the farmer must elect buy-coverage; farmers with basic 50/55 coverage are not eligible to receive this price.¹⁴²

In addition, average direct market prices only apply to crops that have an intended use of fresh. Farmers with value loss crops cannot use the average direct market prices.¹⁴³

Finally, farmers must submit direct marketing records for the immediately preceding one to three years in order to qualify for payment based on an average direct market price.¹⁴⁴

2. Payment Rates for NAP Coverage

a. 55 Percent of Average Market Price—Basic 50/55 NAP Coverage

As described above, for basic 50/55 NAP coverage, payments are calculated at a rate of 55 percent of the established average market price for the crop.¹⁴⁵

¹³⁷ 7 C.F.R. § 1437.12(d) (2019); NAP Handbook, page 4-25, para. 208.A (Feb. 15, 2019). The regulations governing the National Organic Program can be found at 7 C.F.R. pt. 205 (2019).

¹³⁸ NAP Handbook, page 4-25, para. 208.A (Feb. 15, 2019).

¹³⁹ NAP Handbook, page 4-25, para. 208.A (Feb. 15, 2019).

¹⁴⁰ 7 C.F.R. § 1437.12(d) (2019); NAP Handbook, page 4-23, para. 207.A (Feb. 15, 2019).

¹⁴¹ NAP Handbook, Exhibit 2, page 9, “Direct marketing” (Feb. 15, 2019).

¹⁴² NAP Handbook, page 4-23, para. 207.A (Feb. 15, 2019).

¹⁴³ NAP Handbook, page 4-23, para. 207.A (Feb. 15, 2019).

¹⁴⁴ NAP Handbook, page 4-23, para. 207.A (Feb. 15, 2019).

¹⁴⁵ 7 C.F.R. § 1437.5(b) (2019).

b. 100 Percent of Average Market Price—Buy-Up Coverage

For buy-up coverage, NAP payments are calculated at a rate of 100 percent of the established average market price for the crop.¹⁴⁶ As noted above, the 2018 Farm Bill requires that for buy-up NAP coverage FSA use the average market price, contract price, or other premium price, such as local, organic, or direct market price.¹⁴⁷ It is not clear if FSA will change either regulations or the FSA Handbook as a result of the Farm Bill Changes.

c. Adjustments for Non-incurred 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 (prevented planted) or not harvested due to the eligible cause of loss.¹⁴⁸ The regulations do not explain how these adjustments will be calculated, but the NAP Handbook states that the adjustments will be made through payment factors established by the FSA state committee for each state.¹⁴⁹ 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. When a payment factor is applied, the final NAP payment will be calculated by multiplying the average market price by the applicable payment factor.¹⁵⁰

C. NAP Losses

NAP provides benefits for three main types of losses—yield-based losses, losses of value loss crops, and prevented planting. In addition, there are special rules that govern NAP-eligibility for losses of grazing forage and losses that occur in tropical regions.

The requirements for receiving NAP benefits for each of these types of losses are described below.

1. Losses of Yield-Based Crops

For yield-based crop losses, both the NAP basic 50/55 and buy-up coverage plans provide payments based upon the farmer's individual loss of actual yield compared to his or her approved expected yield.¹⁵¹ Under these plans, farmers are eligible for NAP benefits for any yield losses that exceed a certain percentage—dependent on the farmer's coverage level—of the farmer's approved expected yield.

The process for determining a farmer's approved yield and actual yield losses are described below.

¹⁴⁶ 7 C.F.R. § 1437.5(d) (2019).

¹⁴⁷ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(3) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(l)(1)(C)).

¹⁴⁸ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(3) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(d)(4)(A)); 7 C.F.R. § 1437.12(f) (2019); NAP Handbook, page 4-235, para. 279.A (Feb. 15, 2019).

¹⁴⁹ NAP Handbook, page 4-235, para. 279.B (Feb. 15, 2019).

¹⁵⁰ 7 C.F.R. § 1437.5(i) (2019).

¹⁵¹ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(3) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(d)(2)); 7 C.F.R. § 1437.5(c)(1) (2019); NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

a. Establishing Approved Yield

The first step in determining whether a farmer's yield-based crop loss qualifies for NAP coverage is to establish the farmer's approved yield.¹⁵²

(i) Approved Yield—Based on Actual Production History

Approved yields are based on the farmer's actual production history for the crop, as reported and certified by the farmer.¹⁵³

In general, the farmer's approved yield is the average of, at minimum, four consecutive years of the farmer's crop yields.¹⁵⁴ If the records are available, FSA will average up to ten consecutive years of crop yields to establish the farmer's approved yield.¹⁵⁵ Any year in which the crop was out of rotation, not planted, or prevented from being planted is not included in the average.

(ii) When Actual Production History Not Available—Initial Approved Yield Will Be Created

When first applying for NAP, if the farmer is unable to provide verifiable records of at least four consecutive years of past production, a four-year history will be calculated for the missing years in order to establish an initial approved yield.¹⁵⁶

To do this, transitional yields—or "T-yields"—will be used to establish an approved yield.¹⁵⁷ 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.¹⁵⁸ For example, for the 2019 crop year, the T-yield would be calculated using yields from crop years 2013-2017. The T-yield may be adjusted for different farming and cultural practices.¹⁵⁹

Other types of yields that are used to establish an initial approved yield if no actual production history is available include assigned yields and zero-credited yields. An assigned yield is equal to 75 percent of the farmer's approved yield, and is used in place of the most recent crop year for which

¹⁵² The provisions for approved yield are not applicable to value loss crops or grazed forage. NAP Handbook, page 7-2, para. 400.C (Feb. 15, 2019).

¹⁵³ 7 C.F.R. §§ 1437.8(a), 1437.101, 1437.102(e) (2019); NAP Handbook, page 7-10, para. 402.C (Feb. 15, 2019).

¹⁵⁴ 7 C.F.R. § 1437.102(e)(2) (2019); NAP Handbook, page 7-9, para. 402.A (Feb. 15, 2019).

¹⁵⁵ 7 C.F.R. § 1437.102(e)(2) (2019); NAP Handbook, page 7-10, para. 402.C (Feb. 15, 2019). For apples and peaches, CCC will average up to five consecutive crop years.

¹⁵⁶ 7 C.F.R. § 1437.102(e)(3) (2019); NAP Handbook, pages 7-10 and 7-11, para. 402.C (Feb. 15, 2019).

¹⁵⁷ 7 C.F.R. § 1437.102(e)(3) (2019); NAP Handbook, pages 7-10 and 7-11, para. 402.C (Feb. 15, 2019). The Farm Bill changed the language from "transitional yield" to "county expected yield." See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(4)(C) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(a)(4)(B)(iii)).

¹⁵⁸ 7 C.F.R. § 1437.102(b)(1) (2019).

¹⁵⁹ 7 C.F.R. § 1437.102(b)(5) (2019); NAP Handbook, page 7-20, para. 407.C (Feb. 15, 2019).

a report of production is not provided.¹⁶⁰ When a farmer receives an assigned yield for a crop year, a zero-credited yield—meaning a yield of zero—will be used for each additional crop year for which the farmer does not provide a certification of production.¹⁶¹

The various methods by which initial approved yields will be established are described immediately below.

(a) If No Production Records Exist 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 farmer'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 crop years.¹⁶²

(b) 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 farmer's history, then the farmer'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.¹⁶³

(c) 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 farmer's history, then the farmer'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.¹⁶⁴

(d) 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 farmer's history, then the farmer's approved yield for the current crop year will be based on the simple average of the three

¹⁶⁰ 7 C.F.R. § 1437.102(c)(1) (2019); NAP Handbook, page 7-14, para. 404.A (Feb. 15, 2019).

¹⁶¹ 7 C.F.R. § 1437.102(d) (2019); NAP Handbook, page 7-16, para. 405.A (Feb. 15, 2019).

¹⁶² 7 C.F.R. § 1437.102(e)(3)(i) (2019); NAP Handbook, page 7-11, para. 402.C (Feb. 15, 2019).

¹⁶³ 7 C.F.R. § 1437.102(e)(3)(ii) (2019); NAP Handbook, page 7-11, para. 402.C (Feb. 15, 2019).

¹⁶⁴ 7 C.F.R. § 1437.102(e)(3)(iii) (2019); NAP Handbook, page 7-11, para. 402.C (Feb. 15, 2019).

actual yields plus 100 percent of the applicable T-yield for the missing crop year.¹⁶⁵

(e) If Farmer Is a “New Farmer”

If the farmer qualifies as a “new farmer,” the approved yield may be based on unadjusted T-Yields or a combination of actual yields and unadjusted T-Yields.¹⁶⁶

A new farmer 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 crop years.¹⁶⁷

(iii) 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 calculated production history), then an assigned yield will be used to update or extend the farmer’s actual production history when a farmer fails to certify a report of production.¹⁶⁸ The assigned yield will be equal to 75 percent of the approved yield calculated for the most recent crop year for which the farmer does not certify a report of production. Farmers may have only one assigned yield in their actual production history.

However, 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 farmer of that crop in that county will be able to have an assigned yield.¹⁶⁹ In general, in order to receive an assigned yield, the farmer will be required to provide detailed documentation of production costs, acreage planted, and yields for the year in which assistance is being requested.¹⁷⁰ The farmer may also be required to document that the crop, if harvested, could have been marketed at a reasonable price.¹⁷¹

¹⁶⁵ 7 C.F.R. § 1437.102(e)(3)(iv) (2019); NAP Handbook, page 7-11, para. 402.C (Feb. 15, 2019).

¹⁶⁶ 7 C.F.R. § 1437.102(i) (2019); NAP Handbook, page 7-2, para. 400.C, page 7-158, para. 477.A, B (Feb. 15, 2019). An entity which includes individuals with more than two crop years of production history during the base period will not qualify as a new farmer for purposes of establishing the approved yield. For an explanation of adjusted T-yields, see NAP Handbook, page 7-20, para. 407.C (Feb. 15, 2019).

¹⁶⁷ NAP Handbook, page 7-158, para. 477.A (Feb. 15, 2019).

¹⁶⁸ 7 C.F.R. § 1437.102(c)(2) (2019); NAP Handbook, page 7-14, para. 404.A (Feb. 15, 2019).

¹⁶⁹ 7 C.F.R. § 1437.102(c)(4), (c)(5) (2019). If data is not available but it appears that the acreage increased significantly from previous years, the same requirements may apply.

¹⁷⁰ 7 C.F.R. § 1437.102(c)(4) (2019).

¹⁷¹ A farmer may avoid these extra record requirements if the farmer had the crop inspected by a third party acceptable to FSA before the loss occurred or if FSA approves an exemption from the reporting. 7 C.F.R. § 1437.102(c)(5) (2019); NAP Handbook, page 7-22, para. 409.B (Feb. 15, 2019).

(iv) Zero-Credited Yield Used When Farmer Received an Assigned Yield in the Past and Did Not Report Yields

If a farmer receives an assigned yield for one crop year because he or she had not submitted production records, the farmer 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.¹⁷² The farmer will receive a zero yield for those years he or she is ineligible to receive an assigned yield.

By providing a certification of production and supporting documents and production records, farmers may replace an assigned yield with an actual yield and restore eligibility for another assigned yield.¹⁷³

(v) Replacement Yield Used when Yield is Low Due to Disaster

If a farmer'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 farmer may request that FSA replace that yield in the farmer's actual production history with a yield equal to 65 percent of the current crop year T-yield for purposes of determining the farmer's approved yield.¹⁷⁴ As long as the farmer filed an acceptable production report for the disaster year by the application closing date, the replacement yield is not considered an assigned yield.¹⁷⁵

b. Determining Actual Yield Loss

Once a farmer's approved yield has been established, the farmer's actual yield loss must be determined in order to calculate whether the farmer has exceeded the loss threshold under his or her coverage plan—and therefore whether the farmer is eligible for NAP benefits. The process for determining a farmer's actual yield loss is described below.

(i) Entire Unit Used to Calculate Yield Loss

Determining the farmer's actual yield requires calculating the farmer's entire production from what FSA call's each of the farmer's "units."¹⁷⁶ Identifying a farmer's units can be confusing, but because they are the foundation for most of NAP's coverage calculations, it is important to understand how they are created.

As an example, if a farmer 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 farmer would not qualify for NAP.

¹⁷² 7 C.F.R. § 1437.102(d)(1) (2019); NAP Handbook, page 7-16, para. 405.A (Feb. 15, 2019).

¹⁷³ 7 C.F.R. § 1437.102(d)(2) (2019); NAP Handbook, page 7-16, para. 405.B (Feb. 15, 2019).

¹⁷⁴ 7 C.F.R. § 1437.102(f) (2019). NAP Handbook, page 7-13, para. 403.B (Feb. 15, 2019).

¹⁷⁵ By definition, an assigned yield is a yield that is assigned for a crop year for which the farmer did not file an acceptable production report by the application closing date. NAP Handbook, Exhibit 2, page 5, "Assigned Yield" (Feb. 15, 2019).

¹⁷⁶ 7 C.F.R. § 1437.9 (2019); NAP Handbook, page 3-4, para. 101.A (Feb. 15, 2019).

However, if the fields were part of separate units, it might mean that the loss in the first field would qualify for NAP coverage.

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

(a) All 100 Percent Crop Share Acreage

All acreage of an eligible crop in an administrative county in which the farmer has a 100 percent crop share constitutes a single unit.¹⁷⁷ This includes land that the farmer owned and farmed himself or herself. It also includes, as a part of the same unit, land that the same farmer 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 farmer grew a crop on land that he or she owned, and also rented land from two different landlords—each for cash—and grew the same crop on all of this land, all of the fields together would be a single unit for purposes of NAP.

(b) 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.¹⁷⁸ If a farmer 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 farmer could have several units of the same crop—one with each landlord from whom the farmer is renting land on a share basis.

(c) 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.¹⁷⁹ Acreage rented out on a share basis to a different tenant will represent a separate unit.

(d) Example of Unit Calculation

The NAP Handbook offers the following example of how a unit calculation might work. If, in addition to land a farmer owns, the farmer rents land from five landlords—three on a crop share basis and two on a cash basis—the farmer would be entitled to four units,

¹⁷⁷ 7 C.F.R. § 1437.9(b)(1) (2019); NAP Handbook, page 3-4, para. 101.A (Feb. 15, 2019).

¹⁷⁸ 7 C.F.R. § 1437.9(b)(2) (2019); NAP Handbook, page 3-4, para. 101.A (Feb. 15, 2019).

¹⁷⁹ 7 C.F.R. § 1437.9(b)(3) (2019); NAP Handbook, page 3-4, para. 101.A (Feb. 15, 2019).

one unit each for each crop share lease and one unit that includes the two cash leases and the land owned by the farmer.¹⁸⁰

(ii) Quality Losses Generally Not Taken Into Account

The quantity of a farmer's yield is not reduced for quality considerations unless the production has a zero value or the farmer has elected buy-up coverage for the crop and satisfies other requirements.¹⁸¹

(iii) Some Guaranteed Contract Payments Affect Yield Calculations

Farmers who have a contract to receive a guaranteed payment for producing a crop—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 the farmer received.¹⁸²

When making this adjustment, local FSA offices will use the following calculation.¹⁸³

Step One: Divide the total amount of the guaranteed payment by the approved average market price for the crop in order to determine the production that is associated with the guarantee.

Step Two: Subtract from Step One the amount of any actual or other assigned production for the acreage, other than that due to the guaranteed contract.

Total Additional Production: The result of Step Two—if greater than zero—is the amount of assigned production yield that will be added to the farmer's total unit yield.

The NAP Handbook provides the following example.¹⁸⁴ Assume that a farmer has a guaranteed payment of \$4,000 for producing a crop that has an average market price of \$1.00 per pound. The farmer's actual production ends up being 3,000 pounds. The farmer's assigned production yield would be calculated in the following way.

Step One: \$4,000 (guaranteed payment) ÷ \$1.00 (market price per pound) = 4,000 pounds.

¹⁸⁰ NAP Handbook, page 3-4, para. 101.A (Feb. 15, 2019).

¹⁸¹ 7 C.F.R. § 1437.5(e) (2019); NAP Handbook, page 4-27, para. 209.A (Feb. 15, 2019). Some farmers with buy-up coverage (and NOT basic 55/50 coverage) may be eligible to receive a quality loss adjustment when the quality loss results from an eligible cause of loss. For more details, see NAP Handbook, pages 4-27 and 4-28, para. 209.A-C (Feb. 15, 2019).

¹⁸² 7 U.S.C. § 7333(f); 7 C.F.R. § 1437.8(e) (2019); NAP Handbook, page 9-23, para. 611.B (Feb. 15, 2019). The regulation addresses contract payments for “planted acreage,” while the statute addresses contract payments for “producing” a crop.

¹⁸³ NAP Handbook, page 9-23, para. 611.B (Feb. 15, 2019).

¹⁸⁴ NAP Handbook, page 9-23, para. 611.B (Feb. 15, 2019).

Step Two: 4,000 pounds (production associated with guarantee) – 3,000 pounds (actual yield) = 1,000 pounds

Total Additional Production: The farmer's assigned production yield is 1,000 pounds.

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

2. Losses of Value Loss Crops

NAP also provides coverage for what it calls "value loss crops." In general, value loss crops are those crops that do not easily lend themselves to yield-based production losses.¹⁸⁵ For this reason, NAP payments for value loss crop losses are determined by comparing the value of the farmer's crop inventory immediately before an eligible cause to loss, to the value of the inventory immediately after the cause of loss.¹⁸⁶

The following rules apply to NAP coverage of value loss crops.

a. Eligible Value Loss Crops

Only certain crops are eligible as value loss crops. Currently, value loss crops include, but are not limited to, the following:¹⁸⁷

- Aquaculture, including ornamental fish,
- Christmas trees,
- Floriculture,
- Ginseng roots,
- Mushrooms,
- Ornamental nursery,
- Propagation stock of nonornamental nursery, and
- Turfgrass sod.

Flowers for seed, and ginseng seed, are not eligible value loss crops for NAP purposes.¹⁸⁸

b. Crops Must be Unmarketable

Only that portion of a value loss crop that is unmarketable now or in the future will count as a loss for purposes of NAP.¹⁸⁹

¹⁸⁵ 7 C.F.R. § 1437.301(a) (2019).

¹⁸⁶ NAP Handbook, page 8-10, para. 578.B (Feb. 15, 2019).

¹⁸⁷ 7 C.F.R. §§ 1437.303-1437.310 (2019); NAP Handbook, page 12-221, para. 900.A (Feb. 15, 2019).

¹⁸⁸ NAP Handbook, page 12-221, para. 900.A (Feb. 15, 2019).

¹⁸⁹ NAP Handbook, page 8-10, para. 578.B and page 12-222, para 900.B (Feb. 15, 2019).

c. Value Loss Crops Not Eligible for Prevented Planting Payments

NAP provisions related to prevented planting do NOT apply to value loss crops.¹⁹⁰

d. Determining the NAP Payment

NAP payments for value loss crops differ slightly depending on whether the farmer elects basic 50/55 coverage or buy-up coverage.

(i) Basic 50/55 Coverage

For farmers with basic 50/55 coverage, the NAP payments for value loss crop losses are based on the difference in value of the crops before and after the occurrence of an eligible cause of loss.¹⁹¹ To establish the eligible loss, farmers must provide documentation of their inventory prior to the loss, such as inventory records, so long as they are accurate.¹⁹² An appraisal from a certified loss adjuster can also be used.¹⁹³

(ii) Buy-Up Coverage

When farmers select NAP buy-up coverage, they must also elect a total maximum dollar value (MDV) for which buy-up coverage may be considered for a loss of a value loss crop.¹⁹⁴ This amount is set by the farmer and reflects the highest amount of field market value of the crop before the occurrence of an eligible cause of loss. When calculating NAP payments under the buy-up coverage plan, the lesser value of either the actual value of the lost inventory or the MDV will be used.¹⁹⁵

3. Losses from Prevented Planting

Production losses due to prevented planting are eligible for NAP assistance.¹⁹⁶

Prevented planting means the farmer is unable to plant a crop with proper equipment during the planting period for that crop as a result of an eligible cause of loss.¹⁹⁷

The following conditions apply to NAP prevented planting coverage.

a. Not Applicable to the U.S. Virgin Islands

According to the NAP Handbook, prevented planting provisions are NOT applicable to farmers in the U.S. Virgin Islands.¹⁹⁸ However, prevented planting

¹⁹⁰ NAP Handbook, page 12-223, para. 900.E (Feb. 15, 2019).

¹⁹¹ NAP Handbook, page 12-222, para. 900.B (Feb. 15, 2019).

¹⁹² NAP Handbook, page 8-10, para. 578.B (Feb. 15, 2019).

¹⁹³ 7 C.F.R. § 1437.5(d)(2) (2019).

¹⁹⁴ NAP Handbook, Exhibit 2, page 14, “Maximum dollar value for coverage sought” (Feb. 15, 2019).

¹⁹⁵ 7 C.F.R. § 1437.5(d)(2) (2019); NAP Handbook, page 12-222, para. 900.B (Feb. 15, 2019).

¹⁹⁶ 7 C.F.R. § 1437.5(a) (2019); NAP Handbook, page 1-1, para. 1.B (Feb. 15, 2019).

¹⁹⁷ 7 C.F.R. §§ 1437.201(a); 718.103(a) (2019).

¹⁹⁸ NAP Handbook, page 12-183, para. 876.I (Feb. 15, 2019). The Handbook states that prevented planting does not apply to the U.S. Virgin Islands “because of the unique planting and harvesting practices in these areas and the limited eligible causes of loss.”

provisions do apply to farmers in American Samoa, Guam, Hawaii, Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

b. At least 35 Percent of Total Acreage Unplanted

A farmer is eligible for NAP benefits if an eligible cause of loss prevented the farmer from planting more than 35 percent of the total acreage intended for the crop, or—in the case of multiple planting—more than 35 percent of the total acreage intended to be planted within the applicable planting period.¹⁹⁹

c. Timing of Eligible Cause of Loss

For the prevented planting losses to be eligible for NAP, the timing of the eligible cause of loss is important.

For crops with single plantings, the loss must have occurred after a previous planting period for the crop, but before the final planting date for the crop in the applicable crop year.²⁰⁰ In addition, the eligible cause of loss must have similarly affected other farmers in the area, as determined by FSA.²⁰¹

For crops with multiple plantings in a single crop year, the loss must have occurred after a previous planting period for the crop, but before the final harvest date of the first planting of the crop in the applicable crop year.²⁰²

d. Demonstrate Intent to Plant

To qualify for prevented planting coverage, the farmer 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.²⁰³

e. Prevented Planting Due to Drought—Special Rules

As a general rule, when drought causes prevented planting, coverage is not available under NAP unless three conditions are met.²⁰⁴ First, on the final planting date for acreage that is non-irrigated, the acreage that is prevented from being planted must have insufficient soil moisture for seed germination and progress towards crop maturity because of a prolonged period of dry weather, as determined by FSA. Second, the prolonged precipitation deficiencies must exceed the D2 level, as recorded by the U.S. Drought Monitor. Third, verifiable information must be collected from sources whose business is to provide weather conditions. FSA will determine whether a source qualifies under this rule. Examples of eligible sources include, but are not limited to: the U.S. National

¹⁹⁹ 7 U.S.C. § 7333(c)(3); 7 C.F.R. § 1437.201(b)(1) (2019).

²⁰⁰ 7 C.F.R. § 718.103(a)(1), (2) (2019); FSA Handbook 2-CP (Revision 16), Acreage and Compliance Determinations, page 2-45, para. 37.B (Aug. 20, 2019).

²⁰¹ 7 C.F.R. § 718.103(a)(3) (2019); FSA Handbook 2-CP (Revision 16), Acreage and Compliance Determinations, page 2-45, para. 37.B (Aug. 20, 2019).

²⁰² 7 C.F.R. § 718.103(a)(2) (2019); FSA Handbook 2-CP (Revision 16), Acreage and Compliance Determinations, page 2-45, para. 37.B (Aug. 20, 2019).

²⁰³ 7 C.F.R. § 718.103(c) (2019); FSA Handbook 2-CP (Revision 16), Acreage and Compliance Determinations, page 2-45, para. 37.B (Aug. 20, 2019).

²⁰⁴ 7 C.F.R. § 718.103(d) (2019); FSA Handbook 2-CP (Revision 16), Acreage and Compliance Determinations, page 2-46, para. 37.C (Aug. 20, 2019).

Weather Service; Bureau of Reclamation; U.S. Army Corps of Engineers; NIFA; NRCS; State Department of Water Resources; and local water irrigation authorities responsible for water allocation.²⁰⁵

f. Ineligible Crops and Acreage for Prevented Planting Coverage

In addition to the circumstances leading to ineligible losses described above, the following crops and acreages are ineligible for prevented planting coverage under NAP.

(i) Value-Loss Crops

Value-loss crops, including Christmas trees, aquaculture, and ornamental nurseries, among others, are not eligible for prevented planting coverage.²⁰⁶

(ii) Tree Crops and Other Perennials

As a general rule, tree crops and other perennials are ineligible for prevented planting coverage.²⁰⁷ However, if FSA has approved the planting period for the tree crop or perennials, and the farmer can prove that there were resources unique to the planting of the crops available to the farmer for planting, growing, and harvesting the crops, they may still be eligible for prevented planting coverage under NAP.

(iii) Uninsured Crop Acreage

Any uninsured crop acreage that is unclassified for insurance purposes is ineligible for prevented planting coverage under NAP.²⁰⁸

(iv) Acreage Planted During Late-Planting Period

Any acreage planted during the late-planting period is ineligible for prevented planting coverage under NAP.²⁰⁹

(v) Acreage that was Harvested, Grazed, or Hayed

Any acreage on which a crop, including a volunteer cover crop, was harvested, grazed, or hayed during the crop year is ineligible for prevented planting coverage under NAP.²¹⁰

²⁰⁵ FSA Handbook 2-CP (Revision 16), Acreage and Compliance Determinations, page 2-46, para. 37.C (Aug. 20, 2019).

²⁰⁶ 7 C.F.R. §§ 718.103(f)(15), 1437.201(c)(1) (2019); NAP Handbook, page 6-11, para. 378.C (Feb. 15, 2019).

²⁰⁷ 7 C.F.R. §§ 718.103(f)(16), 1437.201(c)(2) (2019).

²⁰⁸ 7 C.F.R. § 1437.201(c)(3) (2019); NAP Handbook, page 6-11, para. 378.C (Feb. 15, 2019).

²⁰⁹ 7 C.F.R. § 1437.201(c)(6) (2019); NAP Handbook, page 6-11, para. 378.C (Feb. 15, 2019).

²¹⁰ 7 C.F.R. §§ 718.103(f)(8), 1437.201(c)(4) (2019).

(vi) Planned Fallow Land

If the farmer's planting history or 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.²¹¹

(vii) Acreage Affected by Chemical or Herbicide Residue

Acreage that is affected by chemical or herbicide residue is not eligible for prevented planting coverage under NAP, unless the residue is the result of a natural disaster.²¹²

(viii) Acreage Used for Conservation Purposes

Acreage that is used for conservation purposes or intended to be unplanted under any USDA program, including the Conservation Reserve and Wetland Reserve Programs, is ineligible for prevented planting coverage under NAP.²¹³

(ix) Reduced Water Supply that is NOT the Result of a Natural Disaster

Acreage for which there was a reduction in available water for irrigation as a result of any cause other than an eligible cause of loss is not eligible for prevented planting coverage under NAP.²¹⁴ This could include, for example, a reduction in water due to the farmer's participation in an electricity buy-back program, the sale of water under a water buy-back, or legislative changes related to water usage.

(x) Lack of Adequate Irrigation on NAP Application Closing Date

When there is an inadequate supply of irrigation water beginning on either the NAP application closing date or the federal crop insurance sale closing date, the acreage is ineligible for prevented planting coverage under NAP.²¹⁵

(xi) Acreage Not Planted Due to Management Decisions

Acreage that was not planted due to management decisions is not eligible for prevented planting coverage under NAP.²¹⁶

²¹¹ 7 C.F.R. § 718.103(f)(1) (2019).

²¹² 7 C.F.R. § 718.103(f)(12) (2019); NAP Handbook, page 2-12.5, para. 51.E (Feb. 15, 2019). The FSA Handbook suggests that the acreage is ineligible even if the residue is due to a natural disaster.

²¹³ 7 C.F.R. § 718.103(f)(2) (2019).

²¹⁴ 7 C.F.R. § 718.103(f)(18) (2019).

²¹⁵ 7 C.F.R. § 718.103(f)(9) (2019).

²¹⁶ 7 C.F.R. § 718.103(f)(3) (2019).

(xii) Acreage Covered with Pasture or other Forage Crops During Normal Planting Time

Acreage on which there is pasture or other forage crops during the crop's normal planting time is ineligible for prevented planting coverage under NAP.²¹⁷

(xiii) Ineligible Double-Cropped Acreage

When another crop is planted on the acreage, either previous or subsequent, that does not meet NAP's requirements for double-cropped acreage, the acreage will be ineligible for prevented planting coverage under NAP.²¹⁸

FSA defines double cropping as the consecutive planting—on the same acreage—of two different crops that have the capability to be planted and carried to maturity for their intended uses within a twelve-month period.²¹⁹ For example, winter wheat followed by corn or soybeans.²²⁰ The practice of double cropping must be considered normal for the area, as well as a good farming practice, in order for it to be eligible under NAP.²²¹

(xiv) Acreage for Which Another Person Receives a Prevented Planting Payment

Unless the acreage meets all of the requirements for double-cropping or is under a share agreement, when the farmer, or any other person, has received a prevented planting payment for any crop on the acreage, the acreage will be ineligible for prevented planting coverage under NAP.²²²

(xv) Acreage that is Devoted to Non-Cropland

Acreage that is devoted to non-cropland is not eligible for prevented planting coverage under NAP.²²³

4. Losses of Forage for Animal Consumption

The loss of forage that was intended for animal consumption can be eligible for NAP benefits.²²⁴ The following rules apply.

²¹⁷ 7 C.F.R. § 718.103(f)(6) (2019).

²¹⁸ 7 C.F.R. § 718.103(f)(7) (2019).

²¹⁹ 7 C.F.R. § 718.2, "Double cropping" (2019).

²²⁰ NAP Handbook, page 4-15, para. 204.A (Feb. 15, 2019).

²²¹ 7 C.F.R. § 718.2, "Double cropping" (2019); NAP Handbook, page 4-15, para. 204.A (Feb. 15, 2019). For additional requirements for double cropping, see NAP Handbook, pages 4-15 and 4-16, paras. 204.A and 204.B (Feb. 15, 2019).

²²² 7 C.F.R. §§ 718.103(f)(5), 1437.201(c)(5) (2019).

²²³ 7 C.F.R. § 718.103(f)(19) (2019).

²²⁴ See generally 7 C.F.R. subpt. E (2019); see also NAP Handbook, page 12-1 through 12-4, para. 800 (Feb. 15, 2019).

a. Forage Defined

To be eligible for NAP benefits, the forage must be mature vegetation that is produced in a commercial operation for either animal consumption or for seed for the propagation of forage for animal consumption.²²⁵ The commercial operation must use acceptable farming, pasture, and range management practices for the area.²²⁶ This includes utilizing practices that sustain sufficient quality and quantity of forage for it to be grazed or harvested.

Eligible forage can include, but is not limited to, annual, biennial, and perennial grasses, as well as small grains²²⁷ and legumes.²²⁸

b. Method of Harvest—Grazed or Mechanically Harvested

NAP provides benefits for losses to forage that is grazed as well forage that is mechanically harvested.²²⁹ This distinction is very important.

In general, for purposes of NAP, what matters is the *intended* method of harvest of the forage, as opposed to the actual method of harvest. For example, forage that is intended to be mechanically harvested, but which is subsequently grazed, will generally be considered as mechanically harvested forage.²³⁰ Similarly, forage that is intended to be grazed, but which is subsequently mechanically harvested, will be treated as grazed forage for purposes of NAP.²³¹ Farmers should therefore maintain separate production records for the intended and actual uses of forage acreage.²³²

Because the intended method of harvest is an important factor when determining eligibility for forage losses under NAP, farmers must certify—when filing their reports of acreage—which method of harvest they intend to use.²³³ The “intended use” that is listed on a report of acreage, whether grazing acreage or mechanically harvested acreage, cannot later be revised.²³⁴ However, the farmer’s actual use of the acreage will ultimately affect how NAP loss determinations are made.²³⁵

²²⁵ 7 C.F.R. § 1437.401(a) (2019); NAP Handbook, page 21-1, para. 800.A (Feb. 15, 2019).

²²⁶ 7 C.F.R. § 1437.401(a) (2019); NAP Handbook, page 21-1, para. 800.B (Feb. 15, 2019).

²²⁷ Small grain forage is considered a separate crop from other forage crops. 7 C.F.R. § 1437.401(e) (2019). Additional rules for small grain forage may apply. See NAP Handbook, pages 12-54 through 12-57, para. 805.A-E (Feb. 15, 2019).

²²⁸ NAP Handbook, page 21-1, para. 800.A (Feb. 15, 2019). For more detailed definitions of eligible forage, see NAP Handbook, pages 21-5 and 12-6, para. 801.A, B. (Feb. 15, 2019).

²²⁹ 7 C.F.R. § 1437.401(a) (2019).

²³⁰ 7 C.F.R. § 1437.401(d) (2019). See also NAP Handbook, page 12-13, para. 802.E and page 12-23, para. 803.D (Feb. 15, 2019).

²³¹ NAP Handbook, page 12-30, para. 804.A (Feb. 15, 2019).

²³² See, for example, NAP Handbook, page 12-11 and 12-12, para. 802.B-D (Feb. 15, 2019).

²³³ 7 C.F.R. § 1437.401(b) (2019).

²³⁴ See, for example, NAP Handbook, pages 12-26, para. 803.E, and page 12-30, 804.A (Feb. 15, 2019).

²³⁵ For example, the NAP Handbook provides a chart of how loss determinations are made for acreage that was intended to be mechanically harvested for seed but was actually grazed. See NAP Handbook, pages 12-26 through 12-28, para. 803.E (Feb. 15, 2019).

c. Eligible Forage Loss Determinations

The process for establishing a loss of forage that was intended to be grazed is different from the process for establishing a loss of forage that was intended to be mechanically harvested. Those differences are described below.²³⁶

(i) Losses of Forage Acreage Intended for Grazing

The following are the main rules related to NAP coverage for a loss of forage that was intended for grazing.

(a) Buy-Up Coverage NOT Available for Grazing Losses

Buy-up coverage is NOT available for losses of forage acreage that is intended to be grazed.²³⁷ Instead, to be eligible for NAP benefits, farmers must suffer a loss of animal unit days (AUDs) in excess of 50 percent of expected AUDs.²³⁸ This determination is made on the basis of acreage, carrying capacity, and grazing period.

(b) Determining the Loss of Forage Acreage

The loss of forage that was intended to be grazed is generally determined in one of two ways.²³⁹

First, the loss may be determined based on the percentage of loss for similar mechanically-harvested forage crops on the same farm, or on similar farms in the area when approved yields have been calculated for those farms.²⁴⁰

Second, in the absence of such evidence, FSA may determine a collective percentage of loss for the region based upon at least two independent assessments.²⁴¹

(c) Carrying Capacity

For purposes of loss determinations on grazing lands, state FSA offices will establish a carrying capacity for all forage in every county in the state.²⁴² Carrying capacity means a stocking rate, expressed in Animal Unit Days (AUDs), that grazing can normally be sustained in an area without detrimental effect on the land's resources.²⁴³ As described later in this Guide, carrying capacity is used when

²³⁶ The NAP Handbook also includes specific rules for mechanically harvested forage for seed, mechanically harvested forage for "other than seed," and small grain forage, among others. For a more detailed description of the NAP rules governing forage, see NAP Handbook, Part 12, Section 1, "Forage Provisions" (Feb. 15, 2019).

²³⁷ NAP Handbook, page 12-30, para. 804.A (Feb. 15, 2019).

²³⁸ 7 C.F.R. § 1437.5(f) (2019); NAP Handbook, page 2-2, para. 50.B (Feb. 15, 2019).

²³⁹ FSA has the discretion to use alternative methods for making loss determinations of acreage intended for grazing. NAP Handbook, page 12-46, para. 804.I (Feb. 15, 2019).

²⁴⁰ 7 C.F.R. § 1437.401(f)(1) (2019); NAP Handbook, page 12-46, para. 804.I (Feb. 15, 2019).

²⁴¹ 7 C.F.R. § 1437.401(f)(2) (2019); NAP Handbook, page 12-46, para. 804.I (Feb. 15, 2019).

²⁴² 7 C.F.R. § 1437.402(a) (2019); NAP Handbook, page 4-228.5, para. 277.B (Feb. 15, 2019).

²⁴³ NAP Handbook, page 4-228.5, para. 277.A (Feb. 15, 2019).

calculating a farmer's NAP payment for a loss of forage that was intended for grazing.

Under certain circumstances, the carrying capacity (AUDs) of a farmer's acreage may be adjusted upwards.²⁴⁴ For this to happen, farmers must request an increase in carrying capacity and provide evidence that their forage management and maintenance practices are improvements over those practices generally associated with the established carrying capacity for the area.²⁴⁵

(ii) Losses of Mechanically-Harvested Forage

In general, when establishing losses of forage that is intended to be mechanically harvested, the rules that govern NAP yield-based losses apply.²⁴⁶

Farmers must notify FSA anytime acreage that is intended for mechanical harvest is to be grazed, abandoned or destroyed.²⁴⁷ If acreage intended for mechanical harvest is grazed instead, loss determinations will be affected.²⁴⁸ More detailed information on such loss determinations can be found in the NAP Handbook.²⁴⁹

5. Losses in Tropical Regions

FSA has recognized that agricultural farmers in tropical regions have unique growing climates that typically allow for the continuous year-round planting and harvesting of annual crops.²⁵⁰ Historically, this reality clashed with NAP rules—such as the rule requiring that crops with multiple plantings be treated as separate crops with separate record requirements and service fees—making it more difficult for farmers in tropical regions to obtain NAP coverage. FSA has modified the NAP rules in order to eliminate multiple planting periods for crops in the tropical regions.

The following rules apply only to those farmers of covered crops in tropical regions. It is important to note, however, that farmers in tropical regions must still meet the other NAP requirements, including NAP application requirements, farmer eligibility requirements, and the rules for loss and payment determinations.²⁵¹

a. Tropical Region Defined

Under NAP, the tropical region is defined to include the following:²⁵²

²⁴⁴ 7 C.F.R. § 1437.402(b) (2019).

²⁴⁵ For a more detailed description of what information and evidence a farmer must provide when requesting an increase in the carrying capacity of acreage, see NAP Handbook, page 12-40, para. 804.F (Feb. 15, 2019).

²⁴⁶ 7 C.F.R. § 1437.401(a) (2019); NAP Handbook, page 12-19, para. 803.A (Feb. 15, 2019).

²⁴⁷ NAP Handbook, page 12-11, para. 802.B, and page 12-20, para. 803.B (Feb. 15, 2019).

²⁴⁸ NAP Handbook, page 12-17, para. 802.F, and page 12-26, para. 803.E (Feb. 15, 2019).

²⁴⁹ See generally NAP Handbook, paras. 802 and 803 (Feb. 15, 2019).

²⁵⁰ NAP Handbook, page 12-181, para. 875.A (Feb. 15, 2019).

²⁵¹ 7 C.F.R. § 1437.501(a) (2019).

²⁵² 7 C.F.R. § 1437.501(b)(1) (2019); NAP Handbook, page 12-181, para. 875.B (Feb. 15, 2019).

America Samoa,
 Guam,
 Hawaii,
 Puerto Rico,
 U.S. Virgin Islands, and
 The territories and possessions of the United States.

FSA has the discretion to add other areas to this list.²⁵³

b. Covered Crops

In general, covered tropical crops can be any NAP-eligible crops that are grown in a tropical region, including annual crops and perennial or biennial crops.²⁵⁴ Covered tropical crops must be crops for which all plantings of the same pay crop and pay type are planted during the same crop year, or all acreage of the pay crop and pay type is existing during the crop year.²⁵⁵

The regulations and Handbook provide conflicting information with respect to whether value loss crops are eligible as tropical covered crops. The regulations state that covered tropical crops do not include value loss crops.²⁵⁶ The NAP Handbook, however, suggests that FSA county offices can follow the procedures for value loss crops when evaluating losses of tropical crops.²⁵⁷

c. Eligible Causes of Loss

The eligible causes of loss for NAP purposes are different for certain tropical regions.

(i) U.S. Virgin Islands

The eligible causes of loss for the U.S. Virgin Islands include only hurricanes, typhoons, and named tropical storms.²⁵⁸ FSA has the discretion to add any related natural disasters to this list of eligible causes of loss.

(ii) All other Tropical Regions

The eligible causes of loss for all other tropical regions, except the U.S. Virgin Islands, include the same natural weather-related disasters that are eligible under the general NAP provisions for eligible causes of loss.²⁵⁹

²⁵³ 7 C.F.R. § 1437.501(b)(1) (2019); NAP Handbook, page 12-181, para. 875.B (Feb. 15, 2019).

²⁵⁴ 7 C.F.R. § 1437.501(b)(2) (2019).

²⁵⁵ NAP Handbook, page 12-182, para. 876.B (Feb. 15, 2019).

²⁵⁶ 7 C.F.R. § 1437.501(a), (b)(2) (2019).

²⁵⁷ NAP Handbook, page 12-182, para. 876.B (Feb. 15, 2019).

²⁵⁸ 7 C.F.R. § 1437.503(b) (2019); NAP Handbook, page 12-183, para. 876.H (Feb. 15, 2019).

²⁵⁹ 7 C.F.R. § 1437.503(b) (2019); NAP Handbook, page 12-183, para. 876.H (Feb. 15, 2019).

d. Prevented Planting—NOT Applicable to the U.S. Virgin Islands

NAP prevented planting coverage is available in the tropical regions of American Samoa, Guam, Hawaii, Puerto Rico, and the Commonwealth of Northern Mariana Islands.²⁶⁰ However, prevented planting coverage is NOT available in the U.S. Virgin Islands.²⁶¹

e. Multiple Planting Periods—NOT Applicable to Tropical Crops

The NAP provisions governing multiple planting periods do NOT apply to covered tropical crops.²⁶² Rules for expected yields are, however, different in tropical regions.

f. Loss Calculations for Tropical Regions

The loss calculations for various tropical crops are described below. These calculations are used to determine whether a farmer has met the applicable loss threshold for the farmer's elected coverage (Basic 50/55 or one of the buy-up coverage plans), and therefore they also determine whether the farmer is eligible for NAP benefits.²⁶³

(i) Loss Calculation for Annual and Multiple Planting Tropical Crops

When the farmer in a tropical region has suffered a loss of a covered annual tropical crop, or a multiple planting tropical crop (such as cucumber, squash, or cabbage), the loss calculation is based upon acres that exist at the time of the eligible cause of loss.²⁶⁴ The loss calculation is made in the following way.

- **Step One:** Multiply the acres that existed at the time of the loss by the approved yield for the crop, in order to get the expected production.
- **Step Two:** Multiply the result of Step One by the farmer's applicable coverage level, as follows:
 - 50 percent, for Basic 50/55 coverage or 50/100 buy-up coverage;
 - 45 percent, for 55/100 buy-up coverage;
 - 40 percent, for 60/100 buy-up coverage; or

²⁶⁰ 7 C.F.R. § 1437.503(a) (2019); NAP Handbook, page 12-183, para. 876.I (Feb. 15, 2019).

²⁶¹ FSA states that prevented planting is not applicable to the U.S. Virgin Islands "because of the unique planting and harvesting practices in these areas and the limited eligible causes of loss." NAP Handbook, page 12-183, para. 876.I (Feb. 15, 2019).

²⁶² 7 C.F.R. § 1437.502(d) (2019); NAP Handbook, page 12-182, para. 876.E (Feb. 15, 2019).

²⁶³ The NAP Handbook appears not to reflect a Farm Bill change that would take into account the producer's share of the total acres devoted to the crop. See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601 (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(1)(L)(a)).

²⁶⁴ NAP Handbook, page 12-187, para. 880.A (Feb. 15, 2019). Rules for the U.S. Virgin Islands are somewhat different.

- 35 percent, for 65/100 buy-up coverage.
- **Step Three:** Subtract from the result of Step Two any production that was harvested or appraised in order to determine if the farmer's loss exceeds the loss threshold for the applicable NAP coverage. For example, a farmer with 60/100 buy-up coverage must have a loss of at least 40 percent.

(ii) Loss Calculation for Perennial and Biennial Tropical Crops

When the farmer in a tropical region has suffered a loss of a covered perennial tropical crop (such as grasses), or a biennial tropical crop (such as plantain, banana, or pineapple), the loss calculation is based upon the acreage in existence during the crop year.²⁶⁵ The loss determination for perennial and biennial tropical crops is typically made after harvest is complete, at the end of the growing season, or when the acreage is released by a CCC representative. The loss calculation is made in the following way

- **Step One:** Multiply the acreage in existence during the crop year by the farmer's approved yield in order to get the expected production.
- **Step Two:** Multiply the result of Step One by the farmer's applicable coverage level, as follows:
 - 50 percent, for Basic 50/55 coverage or 50/100 buy-up coverage;
 - 45 percent, for 55/100 buy-up coverage;
 - 40 percent, for 60/100 buy-up coverage; or
 - 35 percent, for 65/100 buy-up coverage.
- **Step Three:** Subtract from the result of Step Two any production that was harvested or appraised in order to determine if the farmer's loss exceeds the loss threshold for the applicable NAP coverage. For example, a farmer with 55/100 buy-up coverage must have a loss of at least 45 percent.

(iii) Loss Calculation for Grazing and Yield-Based Tropical Crops

When the farmer in a tropical region has suffered a loss of a covered grazing or yield-based tropical crop, the loss calculation is determined manually by FSA.²⁶⁶

²⁶⁵ NAP Handbook, page 12-188, para. 880.B (Feb. 15, 2019).

²⁶⁶ NAP Handbook, page 12-188, para. 880.B (Feb. 15, 2019). For a description of how FSA manually calculates a loss, see NAP Handbook, page 10-55, para. 702.A (Feb. 15, 2019).

D. NAP Coverage Periods

The coverage period is the time during which NAP coverage is available for yield-based losses, losses of value loss crops, or prevented planting because of an eligible cause of loss.²⁶⁷

1. Coverage Period for Annual Crops

The NAP coverage period for annual crops, including annual forage crops, begins on the later of either thirty calendar days after the date the farmer files an application for NAP coverage, or the date the crop is planted (but not exceeding the final planting date established for the crop).²⁶⁸

The coverage period for annual crops ends the *earliest* of the following four dates: (1) the date harvest is complete; (2) the normal harvest date for the crop in the area; (3) the date of the farmer's total abandonment of the crop; or (4) the date of total destruction of the crop.²⁶⁹

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

The NAP coverage period for biennial and perennial crops that are not intended as forage begins the later of either thirty calendar days after the date the farmer files an application for NAP coverage, or thirty calendar days after the closing date for filing applications for NAP coverage.²⁷⁰ However, no coverage is provided for immature perennial fruit, vegetable, or nut crops.²⁷¹

The coverage period for biennial and perennial crops not intended as forage ends the *earliest* of the following five dates:²⁷² (1) the date harvest is complete; (2) the final harvest date for the crop, as determined by FSA; (3) the date of the farmer's abandonment of the crop; (4) the date of total destruction of the crop; or (5) ten months from the NAP application closing date (unless a longer period is specifically allowed by FSA).

3. Coverage Period for Biennial and Perennial Forage Crops

The NAP coverage period for biennial and perennial forage crops begins the *latest* of the following three dates: (1) thirty calendar days after the closing date for filing applications for NAP coverage; (2) thirty calendar days after the date the farmer files an application for NAP coverage; or (3) the date following the final harvest date of the previous crop year.²⁷³

The NAP coverage period for biennial and perennial forage crops ends the *earlier* of either the crop's final harvest date, as determined by FSA, or the date the crop is abandoned or destroyed.²⁷⁴

The Federal Regulations and NAP Handbook have conflicting rules for first-year biennial and perennial seedlings. Although the regulation states that NAP coverage

²⁶⁷ 7 C.F.R. § 1437.6(a) (2019); NAP Handbook, page 2-19, para. 54.A (Feb. 15, 2019).

²⁶⁸ 7 C.F.R. § 1437.6(b)(1) (2019); NAP Handbook, page 2-19, para. 54.B (Feb. 15, 2019).

²⁶⁹ 7 C.F.R. § 1437.6(b)(2) (2019); NAP Handbook, page 2-19, para. 54.B (Feb. 15, 2019).

²⁷⁰ 7 C.F.R. § 1437.6(c) (2019); NAP Handbook, page 2-21, para. 54.B (Feb. 15, 2019).

²⁷¹ NAP Handbook, page 2-21, para. 54.B (Feb. 15, 2019).

²⁷² NAP Handbook, page 2-21, para. 54.B (Feb. 15, 2019).

²⁷³ 7 C.F.R. § 1437.6(g) (2019); NAP Handbook, page 2-23, para. 54.B (Feb. 15, 2019).

²⁷⁴ 7 C.F.R. § 1437.6(g) (2019); NAP Handbook, page 2-24, para. 54.B (Feb. 15, 2019).

may begin on either the date the first-year seedlings are planted, or the final harvest date for the seedlings, the NAP Handbook states that no coverage will be provided for first-year seedlings.²⁷⁵

4. Coverage Period for Multiple Planted Crops

The NAP coverage period for multiple planted crops begins the later of either thirty calendar days after the application for NAP coverage is filed, or the date the crop is planted within the specific planting period.²⁷⁶

The NAP coverage period for a multiple planted crop ends for the specific planting period the earliest of the following four dates: (1) the date harvest is complete; (2) the final harvest date for the crop, as determined by FSA;²⁷⁷ (3) the date of the farmer's abandonment of the crop; or (4) the date of destruction of the crop.²⁷⁸

5. Coverage Period for Covered Tropical Region Crops

The coverage period for all annual, perennial, and biennial covered tropical crops and commodities begins the later of either January 1, or the date the crop acreage is planted.²⁷⁹

The coverage period for covered tropical crops ends the earlier of either December 31, or the date the crop acreage is harvested, abandoned, or destroyed.²⁸⁰

6. Coverage Period for Value Loss Crops

The NAP coverage period for value loss crops, including ornamental nursery, aquaculture, Christmas trees, ginseng, floriculture, mushrooms, and turfgrass sod, begins the later of the following two dates: (1) June 1 (for ornamental nursery) or October 1 (for value loss crops other than ornamental nursery); or (2) thirty calendar days after the date the farmer files an application for NAP coverage.²⁸¹

The NAP coverage period for value loss crops ends the earliest of the following three dates: (1) May 31 (for ornamental nursery) or September 30 (for value loss crops other than ornamental nursery); (2) the date the crop, inventory, or product for which NAP coverage was purchased is disposed of or destroyed; or (3) the date of abandonment of the crop, inventory, product, or facility.²⁸²

7. Coverage Periods for Other Crops

The coverage periods for honey, maple sap, and biomass crops are described below.

²⁷⁵ 7 C.F.R. § 1437.6(g) (2019); NAP Handbook, page 2-23, para. 54.B (Feb. 15, 2019).

²⁷⁶ NAP Handbook, page 2-20, para. 54.B (Feb. 15, 2019).

²⁷⁷ According to the NAP Handbook, the final harvest date must correlate to the number of days necessary for the crop to mature. NAP Handbook, page 2-20, para. 54.B (Feb. 15, 2019).

²⁷⁸ NAP Handbook, page 2-20, para. 54.B (Feb. 15, 2019).

²⁷⁹ 7 C.F.R. § 1437.502(e) (2019); NAP Handbook, page 12-183, para. 876.G (Feb. 15, 2019).

²⁸⁰ 7 C.F.R. § 1437.502(e) (2019); NAP Handbook, page 12-183, para. 876.G (Feb. 15, 2019).

²⁸¹ 7 C.F.R. § 1437.6(d) (2019); NAP Handbook, page 2-22, para. 54.B (Feb. 15, 2019).

²⁸² 7 C.F.R. § 1437.6(d) (2019); NAP Handbook, page 2-22, para. 54.B (Feb. 15, 2019).

a. Honey

The NAP coverage period for honey begins on the later of either January 1, or thirty calendar days after the application for NAP coverage is filed.²⁸³

The NAP coverage period for honey ends the earliest of the following three dates: (1) December 31; (2) the date all honeybee colonies have had final harvest; or (3) the date the colonies are abandoned.²⁸⁴

b. Maple Sap

The NAP coverage period for maple sap begins the later of the following three dates: (1) thirty days after the application for NAP coverage is filed; (2) thirty days after the application closing date for NAP coverage; or (3) the date the crop comes out of dormancy.²⁸⁵

The NAP coverage period for maple sap ends on the earlier of the following three dates: (1) date maple tree harvest is complete; (2) the final harvest date, as determined by FSA; or (3) the date trees are abandoned.²⁸⁶

c. Biomass Crops

The NAP coverage period for biomass crops begins the *later* of the following three dates: (1) thirty calendar days after the date the farmer files an application for NAP coverage; (2) thirty calendar days after the closing date for filing applications for NAP coverage; or (3) the date following the final harvest date of the previous crop year.²⁸⁷

The NAP coverage period for biomass crops ends the earliest of the following three dates: (1) the final harvest date for the crop, as determined by FSA; (2) the date of the farmer's abandonment of the crop; or (3) the date of the destruction of the crop.²⁸⁸

First year biennial and perennial seeding of biomass crops are not eligible for NAP coverage.²⁸⁹

E. The Amount Paid on the Loss

In general, payments under NAP are based on the percentage loss of the farmer's crop. This section explains how the calculations are made.

²⁸³ NAP Handbook, page 2-22, para. 54.B (Feb. 15, 2019). The FSA Handbook says thirty days after the application closing date." 7 C.F.R. § 1437.6(e)(2019).

²⁸⁴ 7 C.F.R. § 1437.6(e) (2019); NAP Handbook, page 2-22, para. 54.B (Feb. 15, 2019). The regulations say coverage ends the last day of the crop year. 7 C.F.R. § 1437.6(e)(2019).

²⁸⁵ 7 C.F.R. § 1437.6(f) (2019); NAP Handbook, page 2-23, para. 54.B (Feb. 15, 2019). The regulations do not include the date the crop comes out of dormancy.

²⁸⁶ 7 C.F.R. § 1437.6(f) (2019); NAP Handbook, page 2-23, para. 54.B (Feb. 15, 2019). The regulations do not mention the date the trees are abandoned.

²⁸⁷ NAP Handbook, page 2-24, para. 54.B (Feb. 15, 2019).

²⁸⁸ NAP Handbook, page 2-24, para. 54.B (Feb. 15, 2019).

²⁸⁹ NAP Handbook, page 2-24, para. 54.B (Feb. 15, 2019). After the first year, if the seeding or planting does not have an adequate stand (representing a majority of the seeds or sets planted), it will not be eligible for NAP coverage.

1. Farmer's Share of NAP Benefits the Same as Farmer's Crop Share

The farmer's NAP benefits are based on his or her share of the crop. A share is the farmer's percentage interest in the eligible crop—as an owner, operator, or tenant—at the time of planting or beginning of the crop year.²⁹⁰ For purposes of NAP payments, a farmer's share cannot exceed the share the farmer had at the earlier of either the time of loss or the beginning of harvest.

The farmer's share of the crop is the same as the farmer's share of the NAP benefits.²⁹¹ For example, if a farmer had a 50 percent share in the crop, the farmer would be entitled to 50 percent of the NAP benefits available for the loss.

2. How to Calculate Loss Benefits

The federal regulations describe how to calculate NAP benefits step-by-step.²⁹² The calculations differ depending on whether the farmer suffers a yield-based loss, prevented planting loss, a loss of value loss crops, or a loss of forage intended to be grazed.

a. Benefits Calculation for Yield-Based Losses and Losses to Forage Intended to be Mechanically Harvested

For farmers who sustain yield-based losses that exceed the loss threshold for their coverage level, the NAP payment will be determined by the following calculation.²⁹³ Losses to forage that was intended to be mechanically harvested also use the following calculation.²⁹⁴

- **Step One:** Multiply the farmer's total eligible acreage planted to the eligible crop by the farmer's share.²⁹⁵
- **Step Two:** Take the farmer's applicable coverage level (either 50, 55, 60, or 65 percent) and multiply that percentage by the farmer's approved yield.²⁹⁶
- **Step Three:** Multiply the result of Step Two by the result of Step One.²⁹⁷
- **Step Four:** Multiply the net production on the total eligible acreage by the farmer's share.²⁹⁸
- **Step Five:** Subtract the result of Step Four from the result of Step Three.²⁹⁹

²⁹⁰ NAP Handbook, Exhibit 2, page 20, "Share" (Feb. 15, 2019).

²⁹¹ See, for example, 7 C.F.R. §§ 1437.105(a) (for yield-based losses), 1437.202(a) (for prevented planting), 1437.302(a) (for losses of value loss crops) (2019).

²⁹² 7 C.F.R. pt. 1437, subpts. B-F (2019).

²⁹³ 7 C.F.R. § 1437.105(a) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

²⁹⁴ 7 C.F.R. § 1437.401(a) (2019).

²⁹⁵ 7 C.F.R. § 1437.105(a)(1) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

²⁹⁶ 7 C.F.R. § 1437.105(a)(2) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

²⁹⁷ 7 C.F.R. § 1437.105(a)(2) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

²⁹⁸ 7 C.F.R. § 1437.105(a)(3) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

²⁹⁹ 7 C.F.R. § 1437.105(a)(4) (2019);

- **Step Six:** Determine the final payment price by multiplying the average market price of the crop by any applicable payment factors, and then multiply that result by 55 percent or 100 percent (depending on the farmer's coverage plan).³⁰⁰
- **Step Seven:** Multiply the result of Step Five by the final payment price determined in Step Six.³⁰¹
- **Step Eight:** Multiply any applicable salvage value³⁰² or secondary use³⁰³ of the crop by the farmer's share.³⁰⁴
- **Step Nine:** Subtract the amount of Step Eight from the result of Step Seven.³⁰⁵

b. Benefits Calculation for Prevented Planting

When the farmer 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.³⁰⁶

- **Step One:** Add together the total acres planted and prevented from being planted.³⁰⁷
- **Step Two:** Multiply the result of Step One by 35 percent.³⁰⁸
- **Step Three:** Subtract the result of Step Two from the total prevented planted acres.³⁰⁹
- **Step Four:** Multiply the farmer's share by the result from Step Three.³¹⁰

³⁰⁰ 7 C.F.R. § 1437.12(i) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019). For buy-up coverage, the 2018 Farm Bill requires that FSA use the average market price, contract price, or other premium price, such as local, organic, or direct market price. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(3) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(l)(1)(C)). The FSA Handbook, however, already defined average market price in a way that included organic, local, and direct market prices. It is not clear if FSA will change either regulations or the FSA Handbook as a result of the Farm Bill Changes.

³⁰¹ 7 C.F.R. § 1437.105(a)(5) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

³⁰² The salvage value of a crop is the dollar amount (or equivalent) received by or available to the farmer for the quantity of the crop that cannot be marketed or sold in any market for which a price or yield is established by FSA. NAP Handbook, page 9-24, para. 612.A (Feb. 15, 2019).

³⁰³ Secondary use occurs when the intended use of a crop acreage bears little resemblance to its actual harvested production. If this occurs, FSA will assign a value to the secondary use and that value will be deducted from the farmer's NAP payment. NAP Handbook, page 4-9, para. 202.C (Feb. 15, 2019).

³⁰⁴ 7 C.F.R. § 1437.105(a)(6) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

³⁰⁵ 7 C.F.R. § 1437.103(a)(6) (2019); NAP Handbook, page 10-3, para. 676.A (Feb. 15, 2019).

³⁰⁶ 7 C.F.R. § 1437.202 (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³⁰⁷ 7 C.F.R. § 1437.202(a)(1) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³⁰⁸ 7 C.F.R. § 1437.202(a)(2) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³⁰⁹ 7 C.F.R. § 1437.202(a)(3) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³¹⁰ 7 C.F.R. § 1437.202(a)(4) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

- **Step Five:** Multiply the result from Step Four by the approved yield.³¹¹
- **Step Six:** Multiply the farmer's share by the assigned production.³¹²
- **Step Seven:** Subtract the result of Step Six from the result in Step Five.³¹³
- **Step Eight:** Determine the final payment price for the farmer for the crop by multiplying the average market price by the appropriate payment factor, if applicable, and then multiply that number by 55 or 100 percent (depending on the farmer's coverage plan).³¹⁴
- **Step Nine:** Multiply the result in Step Seven by the result in Step Eight.³¹⁵

c. Benefits Calculation for Loss of Value Loss Crops

For farmers who sustain losses of value loss crops that exceed the loss threshold for their coverage level, the NAP value loss payment will be determined by the following calculation.³¹⁶

- **Step One:** Multiply the lesser of either the field market value of the crop before the disaster, or the maximum dollar value sought (if the farmer selected buy-up coverage), by the farmer's applicable coverage level—either 50, 55, 60, or 65 percent.³¹⁷
- **Step Two:** Subtract from the result of Step One the sum of the field market value after the disaster and the value of any ineligible causes of loss.³¹⁸
- **Step Three:** Multiply the result from Step Two by the farmer's share.³¹⁹

³¹¹ 7 C.F.R. § 1437.202(a)(4) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³¹² 7 C.F.R. § 1437.202(a)(5) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³¹³ 7 C.F.R. § 1437.202(a)(6) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³¹⁴ 7 C.F.R. §§ 1437.202(a)(7), 1437.12(i) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019). The 2018 Farm Bill requires that for buy-up NAP coverage FSA use the average market price, contract price, or other premium price, such as local, organic, or direct market price. As noted above, the FSA Handbook defined average market price in a way that includes these other prices. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(3) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(l)(1)(C)). It is not clear if FSA will change internal either regulations or the FSA Handbook as a result of the Farm Bill Changes.

³¹⁵ 7 C.F.R. § 1437.202(a)(7) (2019); NAP Handbook, page 6-11, para. 378.D (Feb. 15, 2019).

³¹⁶ 7 C.F.R. § 1437.302 (2019); NAP Handbook, page 103, para. 676.B (Feb. 15, 2019).

³¹⁷ 7 C.F.R. § 1437.302(a)(1) (2019); NAP Handbook, page 10-3, para. 676.B (Feb. 15, 2019). The regulations say to multiply the field market value of the crop by the farmer's applicable coverage level—either 50, 55, 60, or 65 percent. Or, if the farmer selected buy-up coverage, multiply the lesser of the field market value of the crop before the disaster, or the maximum dollar value sought, by the farmer's applicable coverage level—either 50, 55, 60, or 65 percent.

³¹⁸ 7 C.F.R. § 1437.302(a)(2) (2019); NAP Handbook, page 10-3, para. 676.B (Feb. 15, 2019).

³¹⁹ 7 C.F.R. § 1437.302(a)(3) (2019); NAP Handbook, page 10-3, para. 676.B (Feb. 15, 2019).

- **Step Four:** Multiply the result from Step Three by both the unharvested factor (as determined by FSA) and either 55 or 100 percent (depending on the farmer's coverage plan).³²⁰
- **Step Five:** Multiply the salvage value by the farmer's share, if applicable.³²¹
- **Step Six:** Subtract the result from Step Five from the result of Step Four.³²²

d. Benefits Calculation for Losses of Forage Intended to be Grazed

When the farmer suffers a loss of forage that was intended for grazing, and that loss exceeds 50 percent of the expected animal unit days (AUDs) for the area, the NAP payment calculation is made in the following way.³²³

- **Step One:** Multiply the eligible acreage by the farmer's share.³²⁴
- **Step Two:** Divide the result from Step One by the carrying capacity (or the adjusted per day carrying capacity) established for the specific acreage, as determined by FSA.³²⁵
- **Step Three:** Multiply the result from Step Two by the number of days established as the grazing period.³²⁶
- **Step Four:** Add any adjustments of animal-unit-days (AUD) for forage management and maintenance practices to the result from Step Three.³²⁷
- **Step Five:** Multiply the result from Step Four by the applicable percentage of loss, as determined by FSA.³²⁸
- **Step Six:** Multiply the amount of assigned AUD, as determined by FSA, by the farmer's share.³²⁹
- **Step Seven:** Subtract the result of Step Six from the result of Step Five.³³⁰
- **Step Eight:** Multiply the result of Step Four by 50 percent.³³¹

³²⁰ 7 C.F.R. § 1437.302(a)(4) (2019); NAP Handbook, page 10-3, para. 676.B (Feb. 15, 2019).

³²¹ 7 C.F.R. § 1437.302(a)(5) (2019).

³²² 7 C.F.R. § 1437.302(a)(5) (2019); NAP Handbook, page 10-4, para. 677.A (Feb. 15, 2019).

³²³ 7 C.F.R. pt. 1437, subpt. E (2019). For losses of forage intended to be mechanically harvested, the rules governing payment calculations for yield-based losses apply.

³²⁴ 7 C.F.R. § 1437.403(a)(1) (2019).

³²⁵ 7 C.F.R. § 1437.403(a)(2) (2019). Carrying capacity is established according to rules set forth in 7 C.F.R. § 1437.402 (2019).

³²⁶ 7 C.F.R. § 1437.403(a)(3) (2019).

³²⁷ 7 C.F.R. § 1437.403(a)(4) (2019).

³²⁸ 7 C.F.R. § 1437.403(a)(5) (2019).

³²⁹ 7 C.F.R. § 1437.403(a)(6) (2019).

³³⁰ 7 C.F.R. § 1437.403(a)(7) (2019).

³³¹ 7 C.F.R. § 1437.403(a)(8) (2019).

- **Step Nine:** Subtract the result of Step Eight from the result of Step Seven.³³²
- **Step Ten:** Determine the final payment price by multiplying the average market price by the appropriate payment factor, if applicable, and then multiply that number by 55 percent.³³³
- **Step Eleven:** Multiply the result of Step Ten by the result of Step Nine.³³⁴

VI. NAP Benefit Limitations

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

A. Payment Limitation for Farmers with Basic 50/55 Coverage—\$125,000 Per Person

No person or legal entity with Basic 50/55 coverage may receive NAP payments in excess of \$125,000 per crop year, regardless of the level of loss incurred.³³⁵

B. Payment Limitation for Farmers with Buy-Up Coverage—\$300,000 Per Person

No person or legal entity with buy-up coverage may receive NAP payments in excess of \$300,000 per crop year, regardless of the level of loss incurred.³³⁶

C. Limitation on Multiple Benefits from USDA for Same Disaster Loss

Multiple benefits from USDA for the same disaster loss are restricted. In general, if a farmer is eligible to receive NAP benefits and also any other USDA program benefits for the same crop loss, the farmer must choose which benefits to accept.³³⁷ This restriction prevents a farmer from receiving benefits from more than one USDA program for the same loss.

However, the restriction against receiving multiple benefits for the same loss does NOT apply to payments received from the following four programs:³³⁸ (1) the Livestock Disaster Forage Program (LFP); (2) the Tree Assistance Program (TAP); (3) the Emergency

³³² 7 C.F.R. § 1437.403(a)(9) (2019).

³³³ 7 C.F.R. §§ 1437.403(a)(10), 1437.12(i) (2019).

³³⁴ 7 C.F.R. § 1437.403(a)(10) (2019).

³³⁵ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(5) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(i)(2)); 7 C.F.R. §§ 1400.1(f), 1437.15(a) (2019); NAP Handbook, page 10-52, para. 700.F (Feb. 15, 2019). In the case of a general partnership or joint operation, the payment limitation of \$125,000 applies to each person who is a first level member. For example, a general partnership consisting of two individuals has a payment limitation of \$250,000. See NAP Handbook, Exhibit 2, “Applicable payment limitation” (Feb. 15, 2019).

³³⁶ Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(5) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(i)(2)). In the case of a general partnership or joint operation, the payment limitation of \$300,000 applies to each person who is a first level member. For example, a general partnership consisting of two individuals has a payment limitation of \$600,000. See Noninsured Crop Disaster Assistance” 2019 and Subsequent Years Basic Provisions, CCC-471 NAP BP, ¶ 26(c) (April 22, 2019).

³³⁷ 7 U.S.C. § 7333(i)(3); 7 C.F.R. § 1437.14(a) (2019); NAP Handbook, page 3-51, para. 150.A (Feb. 15, 2019).

³³⁸ 7 C.F.R. § 1437.14(b) (2019); NAP Handbook, page 3-51, para. 150.A (Feb. 15, 2019).

Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP); and (4) certain Emergency Loans (EM) made by FSA.³³⁹ In other words, farmers may receive benefits for the same crop loss under any of these programs as well as under NAP.

If other USDA disaster benefits do not become available to the farmer until after the farmer has received NAP benefits, the NAP regulations allow the farmer to take the other benefit and refund the total amount of the NAP payment to the local FSA county administrative office.³⁴⁰ Farmers 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.³⁴¹

D. Creditor Claims on NAP Payments

Generally, NAP payments will be made to the farmer without taking into account any interest or lien claimed by the farmer's creditors.³⁴² 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 farmer may receive a check that does not name the secured creditor. In this situation, farmers 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 farmer's creditor will have direct access to the NAP payment. The first is when the farmer has assigned his or her payment to the creditor in accordance with USDA regulations.³⁴³ If this is done according to the payment assignment regulations, USDA will recognize the assignment and issue the NAP payment check to both the farmer and the creditor.

The second is when the creditor is a government agency that offsets the payment to pay a delinquent debt owed by the farmer.³⁴⁴

VII. Applying for NAP Coverage

In order to participate in NAP, farmers are required to file an application for NAP coverage (Form CCC-471) in the local FSA administrative office for the county where the acreage is located.³⁴⁵ The application must be filed no later than the application closing date for the area, and it must be accompanied by a service fee.³⁴⁶

A. Administrative County

An "administrative county" is the area covered by a local FSA service office, which may include more than one actual county.³⁴⁷ For example, if all acreage in Charles County and St.

³³⁹ The emergency loans for which the prohibition against multiple benefits do not apply can be found at 7 U.S.C. §§ 1961-1970. See NAP Handbook, page 3-51, para. 150.A (Feb. 15, 2019).

³⁴⁰ 7 C.F.R. § 1437.14(d) (2019); NAP Handbook, page 3-52, para. 150.B (Feb. 15, 2019).

³⁴¹ 7 C.F.R. § 1437.14(c) (2019); NAP Handbook, page 3-51, para. 150.A (Feb. 15, 2019).

³⁴² 7 C.F.R. § 1437.16(i) (2019); NAP Handbook, page 10-51, para. 700.C (Feb. 15, 2019).

³⁴³ 7 C.F.R. pt. 1404 (2019); NAP Handbook, page 10-52, para. 700.D (Feb. 15, 2019).

³⁴⁴ CCC offset regulations apply to NAP payments and can be found at 7 C.F.R. § 1403.7 (2019). See NAP Handbook, page 10-51, para. 700.C (Feb. 15, 2019).

³⁴⁵ 7 C.F.R. § 1437.7(a) (2019); NAP Handbook, page 5-4, para. 301.A (Feb. 15, 2019).

³⁴⁶ 7 C.F.R. § 1437.7(a), (b) (2019). NAP Handbook, page 5-4, para. 301.A (Feb. 15, 2019).

³⁴⁷ 7 C.F.R. § 1437.3, "Administrative county office" (2019); NAP Handbook, Exhibit 2, page 2, "Administrative county," "Administrative county office" (Feb. 15, 2019).

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.

B. NAP Application Closing Dates

The application closing date means the last date that farmers can submit an application for NAP coverage for the specified crop year.³⁴⁸ NAP application closing dates are established by FSA state committees and should correspond to the crop insurance sales closing dates for similar crops.³⁴⁹ The NAP application closing date for annual crops must be at least thirty days before the date FSA would permit coverage to begin for either prevented planting or low yield losses.³⁵⁰ Crops without final planting dates must have a NAP application closing date corresponding to the beginning of the crop year.³⁵¹ For value loss crops, except ornamental nursery, the closing date must be established before September 1.

C. NAP Service Fees

Farmers are required to pay a nonrefundable service fee to receive coverage under NAP.³⁵² The total service fee required is based on how many different crops the farmer has and in how many counties.³⁵³

The NAP service fees increased with the passing of the 2018 Farm Bill.³⁵⁴ The service fee for NAP coverage is now the lesser of either \$325 per crop per administrative county, or \$825 per farmer in each administrative county per year, not to exceed \$1,950 per farmer. The Handbook does not yet reflect the changes made in the 2018 Farm Bill.³⁵⁵

1. Service Fees for Covered Tropical Crops

According to FSA rules, for covered tropical annual and biennial crops, the \$250 service fee maximum applies to all plantings of the same crop in the same crop year.³⁵⁶

For covered tropical perennial crops, according to the same rules, the \$250 service fee maximum applies to all acreage of the crop existing during the crop year.³⁵⁷

This may change as a result of the 2018 Farm Bill.³⁵⁸

³⁴⁸ 7 C.F.R. § 1437.3, "Application closing date" (2019).

³⁴⁹ NAP Handbook, page 5-2, para. 300.A (Feb. 15, 2019).

³⁵⁰ NAP Handbook, page 5-1, para. 300.A (Feb. 15, 2019).

³⁵¹ NAP Handbook, page 5-3, para. 300.A (Feb. 15, 2019).

³⁵² 7 C.F.R. § 1437.7(b) (2019); NAP Handbook, page 5-18, para. 303.A (Feb. 15, 2019).

³⁵³ NAP Handbook, page 5-18, para. 303.B (Feb. 15, 2019).

³⁵⁴ See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(6) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(k)(1)).

³⁵⁵ The NAP Handbook appears to not yet be updated to reflect the 2018 Farm Bill changes. The existing Handbook states the previous service fees of either \$250 per crop per county, or \$750 per farmer per county, not to exceed \$1,875 per farmer. See NAP Handbook, page 5-18, para. 303.A (Feb. 15, 2019).

³⁵⁶ 7 C.F.R. § 1437.502(c)(i) (2019); NAP Handbook, page 12-183, para. 876.F (Feb. 15, 2019).

³⁵⁷ 7 C.F.R. § 1437.502(c)(ii) (2019); NAP Handbook, page 12-183, para. 876.F (Feb. 15, 2019).

³⁵⁸ See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(6) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(k)(1)).

2. Service Fee for Honey

All honey is considered to be one crop, regardless of its intended use or the type or variety of floral use.³⁵⁹ According to FSA rules, that would mean that the service fee for honey would not be more than \$250.

This may change as a result of the 2018 Farm Bill.³⁶⁰

3. Fee Waiver for Certain Farmers

The requirement to pay a service fee for NAP coverage may be waived for some farmers, including limited resource farmers and ranchers, beginning farmers and ranchers, and socially disadvantaged farmers and ranchers.³⁶¹ With the passing of the 2018 Farm Bill, this waiver was extended to include veteran farmers or ranchers.³⁶²

The NAP fee waiver is not automatic. It must be requested by the farmer no later than the date the application for coverage is submitted.³⁶³

Any farmer who requests a waiver of service fees as a limited resource farmer or rancher must maintain records for the two preceding tax years to provide evidence of eligibility for a waiver if needed.³⁶⁴

D. Documentation Requirements for NAP Coverage

There are various documentation requirements for farmers who apply for NAP coverage. In general, for every crop for which an application for coverage is filed, farmers must maintain records of crop acreage, acreage yields, and production yields.³⁶⁵ These records must be maintained for a minimum of three years.³⁶⁶ At FSA's discretion, farmers may be required to provide additional records to support any certified documents the farmers provide.

1. Documentation of Production

For every crop that is covered by NAP, farmers are required to provide documentary evidence of production.³⁶⁷ If a notice of loss was not filed on the crop, the evidence of production must be provided by no later than the acreage reporting date for the crop

³⁵⁹ NAP Handbook, page 12-393, para. 976.A (Feb. 15, 2019).

³⁶⁰ See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 1601(6) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(k)(1)).

³⁶¹ 7 C.F.R. § 1437.7(g) (2019); NAP Handbook, page 5-19, para. 303.C (Feb. 15, 2019). For complete definitions of limited resource, beginning, and socially-disadvantaged farmers and ranchers, see form CCC-471 NAP BP, "Noninsured Crop Disaster Assistance, 2016 and Subsequent Years, Basic Provisions," available here: https://www.fsa.usda.gov/Internet/FSA_File/ccc_471_nap_bp.pdf.

³⁶² See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12306(f)(1)-(f)(2) (Dec. 20, 2018) (to be codified at 7 U.S.C. § 7333(k)(2)). In order to qualify for the fee waiver, a veteran farmer or rancher must have served in the Armed Forces, and must have either (1) operated a farm or ranch for not more than ten years, or (2) first obtained the status of veteran during the previous ten years. See FSA Notice NAP-197, 2018 Farm Bill Amendments Increase NAP Service Fees and Reinstate Buy-Up Coverage, page 5 (April 4, 2019) (expires Nov. 1, 2019).

³⁶³ 7 C.F.R. § 1437.7(g) (2019); NAP Handbook, page 5-19, para. 303.C (Feb. 15, 2019).

³⁶⁴ 7 C.F.R. § 1437.8(h) (2019).

³⁶⁵ 7 C.F.R. § 1437.8(a) (2019); NAP Handbook, page 10-2, para. 675.B (Feb. 15, 2019).

³⁶⁶ 7 C.F.R. § 1437.8(a) (2019).

³⁶⁷ 7 C.F.R. § 1437.8(a) (2019); NAP Handbook, page 9-8, para. 602.A (Feb. 15, 2019).

year following the crop year they file an application for payment.³⁶⁸ For crops with a coverage period of more than twelve months, the deadline for providing documentary evidence of production is sixty days after the normal harvest date. If a notice of loss is filed for the crop, the documentation of production must be provided by the farmer's deadline for the application for payment on the loss.³⁶⁹

a. Records Acceptable to FSA

FSA has somewhat strict standards regarding the type of records that are acceptable to support a farmer's yield certification.³⁷⁰ The following describes records that the regulations say FSA may find acceptable. The regulations do not prohibit specific types of records or evidence, but instead seem to give FSA significant discretion in determining what is an acceptable record.³⁷¹

(i) Commercial Documents—If Crop Sold Through Commercial Channels

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, pick records, or load summaries—provided that the records are reliable or verifiable.³⁷²

(ii) Other Documentary Evidence—If Crop Disposed of Through Non-Commercial Channels

Other documentary evidence may be used to verify the information provided by the farmer if the crop has been sold, fed to livestock, or

³⁶⁸ 7 C.F.R. § 1437.8(a) (2019). The Handbook says the later of the following if a notice of loss was not filed: the subsequent year's acreage reporting date for the crop, or 60 days after the normal harvest date for the crop." NAP Handbook, page 9-8, para. 602.A (Feb. 15, 2019).

³⁶⁹ NAP Handbook, page 9-8, para. 602.A (Feb. 15, 2019).

³⁷⁰ 7 C.F.R. § 1437.8(a) (2019).

³⁷¹ 7 C.F.R. § 1437.8(a) (2019).

³⁷² 7 C.F.R. § 1437.8(a)(1) (2019); NAP Handbook, page 9-4, para. 601.B (Feb. 15, 2019). The NAP Handbook sets out a detailed definition of "verifiable." In general, verifiable records of production are records provided by the farmer 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 farmer's certification of production in support of any application for payment and whenever a record of production is otherwise required by FSA. See NAP Handbook, pages 9-4 and 9-5, para 601.C.

The Handbook also described the process FSA will use to determine whether non-verifiable evidence is nonetheless acceptable as being "reliable." FSA may accept reliable records—such as copies of receipts, income ledgers, deposit slips, register tapes, invoices, or pick records—that support the farmer's application when verifiable records are not available. But the reliable, non-verifiable records will only be considered acceptable for NAP purposes after FSA compares the farmer's record of production with neighboring farmers of the crop who have provided verifiable or reliable records of production. If similar levels of production were experienced on neighboring farms, the records will be considered acceptable. If the neighboring farmers had significantly different levels of production from the records submitted by the farmer, the records will not be considered acceptable. See NAP Handbook, page 9-7, para 601.E.

otherwise disposed of through noncommercial channels.³⁷³ Examples of acceptable documentary evidence include truck scale tickets and contemporaneous measurements or diaries—provided that these records are reliable or verifiable.³⁷⁴ 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.

b. 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 farmer that production records will not be used for purposes of actual production history or to calculate assistance.³⁷⁵ An assigned, zero-credited, or T-yield will apply instead of the production and yield reported by the farmer.³⁷⁶

E. Continuous NAP Coverage

The NAP coverage application provides continuous NAP coverage.³⁷⁷ 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 farmer continues to pay the service fee before the application closing date for each crop year.³⁷⁸ Farmers must file a new application in order to change crop shares or add or delete crop coverage.

FSA should notify farmers at least sixty days before the first application closing date of what service fees are due based on the farmers' previous crop year coverage.³⁷⁹ The notice should also remind farmers of the deadline for payment of the service fee.

VIII. Collecting NAP Benefits

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

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

In order to collect NAP benefits, farmers must report their losses by filing the notice of loss portion of form CCC-576. The notice must be filed at the local FSA administrative office serving the county where the farmer's crop is located.³⁸⁰

³⁷³ 7 C.F.R. § 1437.8(a)(2) (2019); NAP Handbook, page 9-4, para. 601.B (Feb. 15, 2019).

³⁷⁴ The meaning of “verifiable” and “reliable” is discussed above.

³⁷⁵ NAP Handbook, page 9-7, para. 601.E (Feb. 15, 2019).

³⁷⁶ NAP Handbook, page 9-3, para. 601.C (Feb. 15, 2019).

³⁷⁷ See form CCC-471 NAP BP, “Noninsured Crop Disaster Assistance, 2016 and Subsequent Years, Basic Provisions,” § 2(a).

³⁷⁸ NAP Handbook, page 5-7, para. 301.C (Feb. 15, 2019). This rule does not apply to limited resource farmers and ranchers, because their limited resource status must be certified annually. beginning farmers and ranchers and socially disadvantaged farmers and ranchers are eligible for continuous NAP coverage.

³⁷⁹ NAP Handbook, page 5-7, para. 301.C (Feb. 15, 2019).

³⁸⁰ 7 C.F.R. § 1437.11(b) (2019); NAP Handbook, page 8-1, para. 575.B (Feb. 15, 2019).

In general, a farmer must give FSA notice of any crop loss within 15 calendar days after damage to the crop.³⁸¹ The specific rules for certain types of NAP losses are described below.

1. Low-Yield and Value Loss Claims

For low yield claims and value loss claims, a notice of loss must be filed the earlier of the following two dates: (1) fifteen calendar days after the damaging weather, adverse natural occurrence, or date loss of the crop or commodity first becomes apparent; or (2) fifteen calendar days after the normal harvest date.³⁸²

2. Prevented Planting Claims

For prevented planting claims, the farmer must file the notice of loss within 15 calendar days after the final planting date.³⁸³

3. Hand-harvested Crops—NOT Applicable to the U.S. Virgin Islands

For hand-harvested crops, at least one farmer with a share in the crop must file a notice of loss within seventy-two hours of the date the damage or loss on the crop first becomes apparent.³⁸⁴

This rule does not apply to the U.S. Virgin Islands.³⁸⁵

4. Tropical Crops in the U.S. Virgin Islands

For losses that occur in the U.S. Virgin Islands, the farmer must file the notice of loss within fifteen calendar days after the occurrence of the eligible cause of loss or the damage became apparent to the farmer.³⁸⁶ All other tropical regions are subject to the general NAP rules for filing notices of loss.

5. Late-Filed Notices of Loss—NOT Applicable to the U.S. Virgin Islands

At the discretion of FSA, a notice filed beyond the fifteen 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 determining—based on the inspection—that an eligible cause of loss caused the claimed damage or loss.³⁸⁷

This rule does not apply to the U.S. Virgin Islands.³⁸⁸

B. Applying for NAP Benefits

In addition to reporting the crop loss, the farmer must also apply for NAP benefits. This process includes filing an application for payment, and—in some cases—requesting an appraisal of the acreage and providing additional documentation as required by FSA.

³⁸¹ 7 C.F.R. § 1437.11(b) (2019); NAP Handbook, page 8-1, para. 575.B (Feb. 15, 2019).

³⁸² 7 C.F.R. § 1437.11(b)(2) (2019); NAP Handbook, page 8-1, para. 575.B (Feb. 15, 2019).

³⁸³ 7 C.F.R. § 1437.11(b)(1) (2019); NAP Handbook, page 8-1, para. 575.B (Feb. 15, 2019).

³⁸⁴ 7 C.F.R. § 1437.11(a) (2019); NAP Handbook, page 8-7, para. 576.A (Feb. 15, 2019).

³⁸⁵ NAP Handbook, page 12-185, para. 878.A (Feb. 15, 2019).

³⁸⁶ NAP Handbook, page 12-185, para. 878.A (Feb. 15, 2019).

³⁸⁷ 7 C.F.R. § 1437.11(h) (2019); NAP Handbook, page 8-3, para. 575.C (Feb. 15, 2019).

³⁸⁸ NAP Handbook, page 12-185, para. 878.A (Feb. 15, 2019).

1. File Application for Payment

Farmers must file an application for NAP benefits on form CCC-576 with the local county FSA administrative office within sixty days of the last day of coverage for the crop year.³⁸⁹

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

If the farmer chooses not to harvest the crop, all eligible acres for which the farmer intends to apply for NAP benefits must be left intact until they have been appraised and released by an FCIC- or CCC-approved loss adjuster.³⁹⁰

The farmer must request this appraisal and release of the un-harvested acreage from FSA. In the case of replanting or forage originally intended to be mechanically harvested, the farmer must request the appraisal and release no less than fifteen calendar days before replanting or grazing of the crop.³⁹¹ If the crop is abandoned, the farmer must request the appraisal and release within fifteen calendar days of the abandonment.³⁹² The appraisal and release must be requested no later than the normal harvest date for the crop, as determined by FSA.³⁹³

3. If the Crop Is Harvested—Documentary Evidence

In addition to filing an application for payment, if the farmer harvests the damaged crop, FSA requires that the farmer provide documentary evidence of the crop production and harvest date.³⁹⁴ This evidence must be provided no later than the acreage reporting date for the crop in the subsequent crop year, or, for crops with a coverage period of more than twelve months, no later than sixty days after the normal harvest date.

IX. 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.³⁹⁵ 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 farmer should never plan on receiving a waiver. They are likely to be granted only very rarely. In an emergency, however, or when the

³⁸⁹ 7 C.F.R. § 1437.11(g) (2019); NAP Handbook, page 10-1, para. 675.A (Feb. 15, 2019).

³⁹⁰ 7 C.F.R. § 1437.11(d) (2019).

³⁹¹ 7 C.F.R. § 1437.11(d)(2)(i) (2019).

³⁹² 7 C.F.R. § 1437.11(d)(2)(ii) (2019).

³⁹³ 7 C.F.R. § 1437.11(d)(2)(iii) (2019).

³⁹⁴ 7 C.F.R. § 1437.8(a) (2019).

³⁹⁵ 7 C.F.R. § 1437.2(e) (2019); NAP Handbook, page 1-4, para. 1.E (Feb. 15, 2019).

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 NAP note that adjustments may be made as needed to accomplish the purposes and goals of the program. This includes adjustments made to NAP yield determinations (including yields of crops grown on organic acreage)³⁹⁶ and NAP payments for low yields.³⁹⁷

In addition, because the NAP regulations have recently changed with respect to crops grown in tropical regions, the NAP requirements related to eligible tropical crops in a tropical region may be adjusted to provide a fair transition from the previous NAP rules.³⁹⁸

C. Equitable Relief for Failure to Comply with Program Requirements

The FSA Administrator may also authorize what is known as “equitable relief” in cases where there is a farmer ineligibility or noncompliance determination.³⁹⁹ Equitable relief is authorized in two situations. First, equitable relief might be granted in cases where a farmer relied in good faith upon incorrect information or actions taken by FSA and, as a result, failed to comply with NAP program requirements.⁴⁰⁰ Second, equitable relief might be granted in cases where a farmer made a good faith effort to fully comply with program requirements, but failed to do so despite having substantially performed his or her obligations.⁴⁰¹

A farmer granted equitable relief would likely be allowed to receive NAP benefits.⁴⁰² The farmer might be required to correct any failure to comply with program requirements.

As with waivers, FSA is never required to grant equitable relief. Therefore, a farmer 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.

X. USDA Appeal Rights

Adverse decisions made by FSA are appealable when there is a question of fact or factual dispute regarding the farmer’s application for NAP benefits.⁴⁰³ For example, denial of participation in

³⁹⁶ 7 C.F.R. § 1437.102 (2019).

³⁹⁷ 7 C.F.R. § 1437.105(b) (2019).

³⁹⁸ 7 C.F.R. § 1437.501(c) (2019).

³⁹⁹ 7 C.F.R. § 1437.17(b) (2019).

⁴⁰⁰ 7 C.F.R. § 718.303 (2019).

⁴⁰¹ 7 C.F.R. § 718.304 (2019).

⁴⁰² 7 C.F.R. § 718.305 (2019).

⁴⁰³ 7 C.F.R. §§ 1437.16(h), 1437.17(a) (2019); NAP Handbook, page 3-60, para. 155.A (Feb. 15, 2019). An “adverse decision” is defined as “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” (2019).

NAP, denial of NAP benefits, or a decision that the farmer had not complied with the NAP requirements should all be adverse decisions subject to appeal.⁴⁰⁴

USDA's National Appeals Division (NAD) handles NAP appeals.⁴⁰⁵ Upon written request by the farmer, the NAD director has the authority to make an independent determination whether a NAP decision is adverse to the farmer and thus appealable, or is a matter of general applicability and thus not subject to appeal.⁴⁰⁶ If a farmer 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 farmer first receives notice of the adverse decision.⁴⁰⁷

XI. 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.⁴⁰⁸ Prohibited discrimination may include excluding a person from participation in NAP or denying program benefits.

⁴⁰⁴ 7 C.F.R. § 11.3(a) (2019); NAP Handbook, page 3-60, para. 155.A (Feb. 15, 2019). 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) (2019).

⁴⁰⁵ 7 C.F.R. pt. 11 (2019).

⁴⁰⁶ 7 C.F.R. § 11.6(a) (2019).

⁴⁰⁷ 7 C.F.R. § 11.6(a)(1) (2019).

⁴⁰⁸ 7 C.F.R. pt. 15 (2019).