Farmers’ Guide to Disaster Programs

Volume 9: Wildfires and Hurricanes Indemnity Program Plus (WHIP+)

July 8, 2020

LEGAL ACTION GROUP

FARMERS’

Farmers' Guide to Disaster Assistance

Seventh Edition

Volume 9: Wildfires and Hurricanes Indemnity Program Plus
July 8, 2020

Written and edited by Stephen Carpenter and Lindsay Kuehn

Copyedited by Wendy Reid

This publication was made possible with the generous support of:

Westfield Insurance Foundation

Otto Bremer Trust

Farm Aid

Individual contributions from FLAG supporters

To help FLAG keep family farmers on the land and to support farmers' guides like this one, please consider making a tax-deductible donation by clicking here.

This Guide to the Wildfires and Hurricanes Indemnity Program Plus is current through July 8, 2020.

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.

Farmer Legal Assistance Hotline
877-860-4349

Farmers' Legal Action Group
6 West Fifth Street, Suite 650
St. Paul, Minnesota 55102
(651) 223-5400
lawyers@flaginc.org
www.flaginc.org

Scott W. Carlson
Executive Director | Attorney

Stephen Carpenter
Deputy Director | Senior Staff Attorney

Lynn A. Hayes
Program Director | Senior Staff Attorney

Lindsay R. Kuehn
Staff Attorney

Wendy Reid
Office & Grants Administrator

Dave Glenn
Financial Manager | Accountant

Table of Contents

Page

Wildfires and Hurricanes Indemnity Program Plus (WHIP+)

I. Introduction

The Wildfires and Hurricanes Indemnity Program Plus (WHIP+) provides payments to farmers that suffered crop, tree, bush, or vine losses that occurred in calendar years 2018 and 2019. The losses must be from Hurricanes Michael or Florence or other hurricanes, floods, snowstorms, tornadoes, typhoons, volcanic activity, wildfires, or related conditions.[1] As of March 23, 2020, WHIP+ is also eligible for losses due to droughts and excessive moisture that occurred in calendar years 2018 and 2019.[2] Due to the wide variety of WHIP+ eligible crops—and their different harvesting times—some eligible losses could occur during calendar year 2020.[3]

This Introduction briefly summarizes WHIP+. A more detailed explanation begins with Section II below.

A. Signup Period: Began September 11, 2019

Sign-up for WHIP+ began on September 11, 2019.[4] The ending date for the WHIP+ signup has not yet been announced. To sign up, farmers will need to file a notice of loss and fill out an application form for WHIP+.[5]

Each application must have a signature by the sign-up deadline.[6] FSA will not accept late applications.

B. New, Short-Term Program

WHIP+ was created by the Additional Supplemental Appropriations for Disaster Relief Act of 2019 (2019 Disaster Relief Act).[7] USDA will make available more than three billion dollars for WHIP+.[8] At present, FSA can spend WHIP+ funding through December 31, 2020.

---

1 7 C.F.R. § 760.1500(c) (2019); FSA Handbook 2-WHIP, "Wildfires and Hurricanes Indemnity Program+," page 1-11, para. 6.A (March 26, 2020).

2 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 1 (March 5, 2020) (expires Feb. 21, 2021).

3 84 Fed. Reg. 48,518, 48,519 (2019) (prefatory comments).

4 WHIP+ Handbook, page 1-2, para. 3.B (March 26, 2020).

5 WHIP+ Handbook, page 1-2, para. 3.B, and page 2-23, para. 34.A (March 26, 2020). Officially, the WHIP+ application is form FSA-894, Wildfire and Hurricane Indemnity Program+ Application. The notice of loss is Part A of form FSA-894. A copy is available at WHIP+ Handbook, Exhibit 4 (March 26, 2020).

6 WHIP+ Handbook, page 1-3, para. 3.C (March 26, 2020).

7 The Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. 116-20, 133 Stat. 871 (June 6, 2019) authorizes WHIP+.

8 84 Fed. Reg. 48,518 (2019) (prefatory comments). See WHIP+ Handbook, page 1-2, para. 3.A (March 26, 2020).

C. WHIP+ versus WHIP

This Guide discusses WHIP+. A different and older program, called the 2017 Wildfires and Hurricane Indemnity Program (WHIP), has been replaced by WHIP+. FLAG produced a Farmers' Guide to the original WHIP program in 2018.[9] It is still available online.

D. Rules for WHIP+

Rules for WHIP+ originate in several places. First, WHIP+ is governed by federal statute.[10] Second, regulations for WHIP+ have been issued in the Federal Register and will be published in the Code of Federal Regulations.[11] Third, FSA has issued a Handbook that will control WHIP+ implementation.[12] This Guide includes Handbook changes released to the public by USDA through July 8, 2020. Fourth, FSA may issue Notices, which provide guidance on various topics and changes to FSA programs.[13] This Guide includes Notices released to the public by USDA through July 8, 2020. Fifth, on December 20, 2019, the Further Consolidation Appropriations Act, 2020 (2020 Appropriations Act), became law. It provides for some expansions to the WHIP+ program.[14]

E. Yield-Based Crops, Value-Loss Crops, and Trees, Bushes and Vines

WHIP+ provides assistance for crop losses to a wide variety of crops. The terms used by FSA to describe these crops can be confusing. In general, they fall within three main groups: (1) yield-based crops; (2) value-loss crops; and (3) tree, bushes and vines. These different groups are important because the rules that apply to one group do not always apply to a different group.

---

9 Farmers' Guide to the 2017 Wildfires and Hurricanes Indemnity Program (WHIP). It can be found at: http://www.flaginc.org/wp-content/uploads/2018/11/Farmers%E2%80%99-Guide-to-the-2017-Wildfires-and-Hurricanes-Indemnity-Program-WHIP.pdf.

10 The Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. 116-20, 133 Stat. 871 (June 6, 2019).

11 Agricultural Disaster Indemnity Programs, 84 Fed. Reg. 48,518 (Sept. 13, 2019) (to be codified at 7 C.F.R., part 760, subpart O) (final rule). In these materials, citations will be to 7 C.F.R. part 760, subpart O (2019).

12 FSA Handbook 2-WHIP, "Wildfires and Hurricanes Indemnity Program+" (March 26, 2020). Priority between the Handbook and regulations are discussed at WHIP+ Handbook, page 1-2, para. 2.C (March 26, 2020). Some rules for WHIP+ are taken from FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

13 For example, see FSA Notice WHIP-16, "WHIP+ Policy Updates" (March 5, 2020) (expires Feb. 21, 2021).

14 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (Dec. 20, 2019). To date, neither the federal regulations, nor the WHIP+ Handbook, have been updated to reflect the changes made by this Act. USDA has published internal Notices that provide some guidance on the changes. See, for example, FSA Notice WHIP-16, "WHIP+ Policy Updates" (March 5, 2020) (expires Feb. 21, 2021). When referencing the WHIP+ changes that were made by 2020 Appropriations Act this Guide will cite to either the Act or the USDA Notice, as applicable.

1. Yield-Based Crops

WHIP+ can help farmers who suffer losses of what FSA calls "yield-based" crops.[15] Although FSA does not provide a definition of yield-based crops, they cover most traditional farming crops that have a measurable yield.

2. Value-Loss Crops

WHIP+ can assist farmers who suffer losses to what FSA calls "value-loss crops." In general, value-loss crops do not lend themselves to yield loss calculations.[16] Value-loss crops are those crops for which the plant or commodity itself is sold—rather than being a product of the plant.[17] For example, for the purposes of WHIP+, Christmas trees, flowers, and mushrooms are all value-loss crops.

3. Trees, Bushes, and Vines

WHIP+ assists farmers with losses of trees, bushes and vines.[18]

4. Why the Difference Matters Between Yield-Based Crops, Value-Loss Crops, and Trees, Bushes, and Vines

Some WHIP+ rules apply to all types of crop losses. Other rules apply only to yield-based crops, to value-loss crops, or to trees, bushes, and vines.

This Guide generally uses the word "crops" when it is referring to crops that fall within any of the three categories. When a rule applies only to a certain category of crop, that category will be named.

F. No Livestock, and No Pasture or Forage

WHIP+ is not available for losses to livestock. It is also not available for pasture or forage that is used to feed livestock. The logic here is that other disaster programs cover livestock, pasture, and forage.

G. Eligibility, Calculating Benefits, and Timing of Payments

Eligibility for WHIP+ has several parts. First, the farmer must be an eligible farmer.[19] Second, the losses in question must be losses to yield-based crops, value-loss crops, or

---

15 For example, see 84 Fed. Reg. 48,518, 48,530-531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511).

16 For example, see 7 C.F.R. § 760.1515 (2019).

17 WHIP+ Handbook, page 8-1, para. 160.A (March 26, 2020).

18 For example, see 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(b)).

19 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503; WHIP+ Handbook, page 1-11, para. 6.A (March 26, 2020).

trees, bushes or vines.[20] Third, the losses must be caused by a qualifying disaster event, which includes losses from Hurricanes Michael and Florence, as well as other hurricanes, floods, snowstorms, tornadoes, typhoons, volcanic activity, and a variety of related conditions.[21] With the passing of the 2020 Appropriations Act, qualifying disaster events also include certain droughts and excessive moisture.[22] Important details for each of these eligibility rules are discussed later in this Guide.

Calculating WHIP+ payments involves a number of steps. Although the details of the steps involved differ depending on whether the farmer suffers a loss of yield-based crops, value-loss crops, or a loss of trees, bushes or vines, WHIP+ payments generally follow a similar formula.[23] First, a farmer will have an expected value for his or her crop. That number will be reduced by a certain percentage—what FSA calls a WHIP+ factor—to ensure that no farmer receives more than 90 percent of his or her total losses. Expected production, after being reduced by the WHIP+ factor, is then compared to the value of the farmer's actual production. The difference is then reduced by crop insurance or Noninsured Crop Disaster Assistance Program (NAP) payments the farmer may have received.[24] Any secondary use or salvage value of the crop is also subtracted from the WHIP+ payment. The final result will be a WHIP+ payment for the farmer. Along the way, there are important details and differences within these calculations. These details are discussed later in this Guide.

The payment of WHIP+ benefits will differ depending on whether the loss occurred in the 2018 crop year or during the 2019 or 2020 crop years.[25] For the 2018 crop year, WHIP+ payments will be paid at 100 percent.[26] For the 2019 and 2020 crop years, the WHIP+ payments will be made in two parts.[27] A first payment of fifty percent will be made, and after that—if there are funds remaining—up to the remaining fifty percent will also be made.

---

20 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(a)); 7 C.F.R. § 760.1509(a) (2019).

21 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1508(a)); WHIP+ Handbook, page 1-11, para. 6.A, and page 2-1, para. 30.B (March 26, 2020).

22 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021). Other Notices that take into account the statutory changes are FSA Notice WHIP-17, "2018 and 2019 Sugar Beet Losses" (April 10, 2020) (expires Jan. 1, 2021); FSA Notice WHIP-18, "Approving WHIP+ Applications for Excessive Moisture and Drought" (April 29, 2020) (expires Feb. 1, 2021); FSA Notice WHIP-19, "WHIP+ Policy Update for Conditions Related to Drought" (May 22, 2020) (expires Jan. 1, 2021).

23 84 Fed. Reg. 48,518, 48,530-531 (Sept. 13, 2019) (to be codified at 7 C.F.R. §§ 760.1511(a), 760.1515(a), 760.1516(b)); WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

24 For a description of the NAP program, see FSA Handbook, 1-NAP (Revision 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

25 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1506(b)).

26 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1506(b)(1)).

27 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1506(b)(2)).

H. Florida Citrus—Eligible Under WHIP+

Losses to Florida citrus trees are eligible for assistance under WHIP+.[28] This is a change from the 2017 and 2018 Wildfires and Hurricanes Indemnity Program, which excluded Florida citrus tree losses from eligibility.[29]

I. Plan for This Guide

This Guide is divided into thirteen main sections.

WHIP+ eligibility rules are discussed in the next eight sections. Section II outlines the eligibility rules for farmers. Section III provides the rules for eligible causes of loss, and Section IV describes the general rules for eligible losses. Section V describes the rules for acreage eligibility. Section VI provides specific eligibility rules for losses of yield-based crops. Section VII provides the specific eligibility rules for losses of value-loss crops, and Section VIII outlines the specific rules for losses of trees, bushes and vines.

Following the sections on eligibility, Section IX outlines the relevant WHIP+ application rules. Section X provides information on WHIP+ payments. Section XI describes a special FSA requirement that farmers purchase crop insurance if they wish to receive a WHIP+ payment. Section XII discusses some unusual and miscellaneous rules for certain crops and regions. Finally, Section XIII outlines the rights that a farmer has if a WHIP+ application is denied, and the farmer chooses to appeal or seek other relief.

II. Farmer Eligibility: Who Can Receive Payments

To be eligible for a WHIP+ payment, a farmer must be what FSA calls an "eligible farmer."

A. Eligible Farmers

In general, an eligible farmer for WHIP+ is either an individual or a legal entity that assumes ownership and risk of the crop and its production. [30] An eligible farmer must also assume market risk for producing the crop.

1. Individual or Legal Entity

An eligible farmer can be either an individual person or a legal entity, including a joint venture or a general partnership.[31] An individual must be a United States citizen or a

[28] 84 Fed. Reg. 48,518, 48,519 (Sept. 13, 2019) (prefatory remarks).
[29] 7 C.F.R. § 760.1516(f) (2019). WHIP losses to Florida citrus trees for 2018 are covered by a grant program administered by the State of Florida. See also FSA Handbook 1-WHIP, Wildfires, and Hurricanes Indemnity Program, page 8-2, para. 140.B (Sept. 9, 2019), at: https://www.fsa.usda.gov/Internet/FSA_File/1-whip_r00_a07.pdf.
[30] WHIP+ Handbook, page 2-6, para. 31.A (March 26, 2020).
[31] 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(b)); WHIP+ Handbook, page 2-6, para. 31.A (March 26, 2020). Tax identification numbers are needed. WHIP+ Handbook, page 1-18, para. 8.A (March 26, 2020).

resident alien.[32] By resident alien, FSA means a lawful alien.[33] Any partners in a partnership must be United States citizens or resident aliens.[34] Other entities that can be considered eligible farmers include corporations, limited liability companies, or other organization structures organized under state law.[35] Members of these other entities must consist of members who are United States citizens or resident aliens. Strict signature rules and tax identification number requirements apply.[36]

2. Ownership and Risk

An eligible farmer must own some of the crop.[37] FSA says, for example, that an entity must have a valid claim of share ownership in the crop.[38] An eligible farmer must also bear a share of the risk for the crop, its production, and its marketing. This means that farmers growing eligible crops under contract for crop owners will not be eligible unless farmers have an ownership share of the crop.[39] In addition, a contract, either written or verbal, that prevents the farmer f om having an ownership share in the crop makes the farmer ineligible for WHIP+.[40]

3. Verification of Farmer Eligibility

At the time of the disaster, farmers must be able to show with "verifiable evidence" that the farmer has a valid ownership share and risk in the crop and control of the crop acreage on which the commodity was grown.[41]

---

32 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(b)(1)-(2)); WHIP+ Handbook, page 2-6, para. 31.A (March 26, 2020).

33 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(b)(2)); WHIP+ Handbook, page 2-6, para. 31.A (March 26, 2020).

34 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(b)(3)); WHIP+ Handbook, page 2-6, para. 31.A (March 26, 2020). The Handbook does not mention resident aliens.

35 WHIP+ Handbook, page 2-6, para. 31.A (March 19, 2020); 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(b)(3)-(4)).

36 WHIP+ Handbook, page 1-3, para. 3.C (March 26, 2020). FSA Handbook, 1-CM (Rev. 3), "Common Management and Operating Provisions" (Jan. 20, 2020) provides the applicable signature requirements. A general partnership must have a permanent tax ID number to receive a WHIP+ payment. WHIP+ payments will not be given to the individual members of a partnership when the general partnership does not have a permanent tax ID number. For joint ventures, payment can go to a joint venture if the joint venture has a permanent tax ID number. If the joint venture does not have a permanent tax ID number, payment can go to the individual members of the joint venture, using their individual member ID numbers. WHIP+ Handbook, page 1-3, para. 3-C (March 26, 2020).

37 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(d)); 7 C.F.R. § 760.1511(f) (2019); WHIP+ Handbook, page 2-6, para. 31.B (March 26, 2020).

38 WHIP+ Handbook, page 2-6, para. 31.A-B (March 26, 2020).

39 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(d)).

40 WHIP+ Handbook, pages 2-6 and 2-7, para. 31.B (March 26, 2020). There is a general rule that prohibits one person from insuring another person's interest in a crop. WHIP+ Handbook, page 2-11, para. 31.F (March 26, 2020). Where federal crop insurance allows it, however, WHIP+ does as well. This involves a number of different possibilities—for example, with spouses, and when landlords and tenants insure both parties' share of the crop. In some, but not all, cases, it is also possible to have the same interest in the same land and crop as a different individual or entity.

41 WHIP+ Handbook, page 2-6, para. 31.B (March 26, 2020).

Farmers growing under a grower contract must provide FSA with a copy of the contract. [42] Farmers that are engaged in community supported agriculture (CSA) must also provide FSA with a copy of the CSA agreement.

If a farmer rents land, FSA is required to determine the farmer's interest and risk in the crop's production.[43] This could include looking at lease or rental agreements. The lease or rental arrangements must have existed before the date of the disaster. Therefore, the question for FSA will be whether there was a rental or lease agreement in place at the time of the disaster.[44]

Farmers claiming an ownership interest in a crop and a portion of a WHIP+ payment may be subject to a spot check by FSA to verify their interest.[45] If agreements or contracts are discovered that show the farmer did not have a valid interest in the crop, any WHIP+ payments already received may need to be returned.[46]

For farmers who lease land, FSA may review, on a case-by-case basis, any relevant leases or rental agreements. [47] Written statements that confirm that there was a verbal agreement appear to be acceptable. FSA will want to confirm that the farmer had an ownership interest in the crop and was bearing the risk of the crop.[48]

For a crop grown under contract, FSA is required to obtain one of the following: (1) copies of written agreements and leases; (2) copies of legal documents that show land ownership or control; (3) statements signed by the landowner stating that the farmer had control of the acreage; or (4) statements signed by the operator or producer stating that the farmer had control of the acreage on the farm.[49]

4. Deceased Farmers, Estates, and Dissolved Entities

A WHIP+ application involving a deceased farmer, or an estate, is possible.[50] In addition, payments are possible if a general partnership or a joint venture was dissolved.[51]

---

42 WHIP+ Handbook, page 2-6, para. 31.B (March 26, 2020).
43 WHIP+ Handbook, page 2-7, para. 31.B (March 26, 2020).
44 WHIP+ Handbook, page 2-7, para. 31.B (March26, 2020). Negotiation of an existing agreement or performance of an existing rental agreement that occurs after the disaster does not affect farmer eligibility.
45 7 C.F.R. § 760.1510(c) (2019); WHIP+ Handbook, page 2-6, para. 31.B (March26, 2020).
46 WHIP+ Handbook, page 2-6, para. 31.B (March 26, 2020).
47 WHIP+ Handbook, page 2-7, para. 31.B (March 26, 2020).
48 WHIP+ Handbook, page 2-6, para. 31.B (March 26, 2020).
49 WHIP+ Handbook, page 2-7, para. 31.B (March 26, 2020).
50 7 C.F.R. § 760.1503(c) (2019); WHIP+ Handbook, page 2-7, para. 31.B (March 26, 2020). An authorized individual must sign the application. Payments will then be made to the eligible person, or the estate. Payments may be issued in the name of heirs.
51 7 C.F.R. § 760.1503(c) (2019); WHIP+ Handbook, pages 2-8 and 2-9, para. 31.B-C (March 26, 2020). All members of the general partnership or joint venture at the time of the dissolution, or their representatives, must sign the WHIP+ application and associated forms. Only one application is used for a dissolved general partnership or joint venture, but all members, or their representatives, must sign the application. WHIP+ Handbook, page 2-6, para. 31.B (March 26, 2020).

5. Change in Crop Ownership

A farmer who loses control or ownership interest of a crop during the growing season is not eligible for WHIP+ for the crop for which ownership was lost.[52] Farmers who assume interest and ownership may be eligible.

B. Other Farmer Eligibility Rules

Additional farmer eligibility rules that are common to other USDA programs also apply to WHIP+.

1. Must Comply with Conservation Rules

Farmers must provide evidence of compliance with federal conservation rules for highly erodible land and wetlands.[53]

2. Must be Eligible for Crop Insurance or NAP

In order to qualify for WHIP+, farmers must be eligible for crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage.[54] Farmers do not need to have actually obtained crop insurance or NAP coverage before a loss in order to receive a WHIP+ payment.[55] A farmer can be uninsured and still receive a WHIP+ payment, so long as the farmer was eligible for insurance or NAP coverage.[56]

3. No Violations of Controlled Substance Rules

Controlled substance rules apply, and the violation of those rules could result in WHIP+ ineligibility.[57]

---

52 WHIP+ Handbook, page 2-9, para. 31.D (March 26, 2020).

53 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(i)); WHIP+ Handbook, page 1-19, para. 10.A, page 11-5, para. 242.B (March 26, 2020). Rules for conservation compliance can be found at FSA Handbook, 6-CP (Rev. 4), "Highly Erodible Land Conservation and Wetland Provisions" (June 21, 2019).

54 7 C.F.R. § 760.1503(g) (2019); WHIP+ Handbook, page 2-12, para. 32.A, page 11-5, para. 242.B (March 26, 2020). For any year that the farmer is not eligible for crop or insurance or NAP, that farmer is not eligible for WHIP+. The bases for the ineligibility must stem from 7 C.F.R. §§ 400.458 or 1437.16. See 7 C.F.R. § 760.1503(g) (2019).

55 Any farmer who receives a WHIP+ payment for a loss to an uninsured crop must agree to purchase insurance or NAP coverage for that crop for the next two available, consecutive crop years. 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(a)); WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020). This requirement is known as the "linkage" requirement and it is discussed in more detail later in this Guide. The linkage requirement does not apply to losses of trees, bushes, or vines.

56 WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

57 7 C.F.R. §§ 718.6, 760.1503(h) (2019); WHIP+ Handbook, page 1-4, para. 3.I, page 11-5, para. 242.B (March 26, 2020).

4. No Fraud

Farmers are not eligible for WHIP+ if they adopt a scheme or device that tends to defeat any of the purposes of the program, make a fraudulent representation, or misrepresent any fact affecting a program determination.[58] In addition, Federal Crop Insurance Corporation (FCIC) fraud rules apply, and if violated can make a farmer ineligible for WHIP+.[59]

III. Qualifying Disaster Event and Eligible Causes of Loss

WHIP+ assistance is available for losses caused by what FSA calls a "qualifying disaster event."[60]
Sometimes the FSA rules also refer to "eligible causes of loss."[61] At other times the rules do not.[62] Finally, WHIP+ rules say that losses due to conditions that are "related" to qualifying disaster events can be eligible causes of loss under WHIP+.[63] Further, FSA has been slow to include changes in the WHIP+ Handbook to reflect congressionally mandated changes in the program, even when even the Handbook is changed to make seemingly less important revisions.[64]

The definitions for these important terms—qualifying disaster events, eligible causes of loss, and related conditions—can be confusing and are sometimes circular.[65]

The following sections set out the sorts of events that create eligibility for WHIP+.

A. Defining Qualifying Disaster Event and Eligible Cause of Loss

A qualifying disaster event creates eligibility for WHIP+ assistance.[66]

---

58 7 C.F.R. § 760.1503(e) (2019); WHIP+ Handbook, page 1-20, para. 13.A (March 26, 2020). Any farmer who misrepresents a fact that affects a program determination under 7 C.F.R. parts 12, 400, 1400, and 1437 could be found ineligible for WHIP+. 7 C.F.R. § 760.1503(e)(3) (2019).

59 7 C.F.R. § 760.1503(e)(3) (2019); WHIP+ Handbook, page 1-4, para. 3.I (March 26, 2020).

60 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1503(a)); WHIP+ Handbook, page 2-1, para. 30.A (March 26, 2020).

61 See, for example, WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020).

62 See for example, 7 C.F.R. § 760.1508(a) (2019).

63 WHIP+ Handbook, pages 2-1 to 2-3, para. 30.B-E (March 26, 2020).

64 For example, the Further Consolidated Appropriations Act added certain droughts and excessive moisture to WHIP+ eligible causes for loss on December 20, 2019, the WHIP+ Handbook, revised twice in 2020, continues not to reflect those changes. Instead, FSA has relied on Notices to create the policies for these changes.

65 For an example of that circularity, in WHIP+ regulations a qualifying disaster event is defined as including a related condition. The same regulation defines related condition as being the direct result of a qualifying disaster event. 7 C.F.R. § 760.1502, "Qualifying disaster event," "Related condition" (2019). Further, the rules sometimes seem to suggest that only seven types of qualifying disaster events are possible: (1) named hurricanes; (2) flood; (3) snowstorm; (4) tornado; (5) typhoon; (6) volcanic activity; and (7) wildfire. WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020). In addition, sometimes damaging weather and adverse natural occurrences are described as other eligible causes of loss (that themselves can have a related condition), and other times they are discussed as related conditions. See WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020) for the former, and 7 C.F.R. § 760.1502, "Related condition" (2019) for the latter.

66 WHIP+ Handbook, page 2-1, para. 30.A-B (March 26, 2020).

FSA rules discuss what counts as a qualifying disaster event. Seven different types of events can for certain be qualifying disaster events under FSA rules. They are: (1) named hurricanes; (2) flood; (3) snowstorm; (4) tornado; (5) typhoon; (6) volcanic activity; and (7) wildfire.[67]

In addition to the seven qualifying disaster events listed above, FSA appears to allow other causes of loss to be eligible for WHIP+. With the passing of the 2020 Appropriations Act, WHIP+ will now provide assistance for losses resulting from certain droughts and excessive moisture.[68] Both of these events are now considered qualifying disaster events.

FSA also considers certain damaging weather events and adverse natural occurrences to be eligible causes of loss for purposes of WHIP+.[69] These additional eligible causes of loss are discussed in more detail below.

B. Related Conditions

A number of what FSA calls "related conditions" can trigger WHIP+ eligibility. For FSA, related conditions generally mean two things. First, a related condition must occur as a result of a qualifying disaster event.[70] Second, a related condition must have occurred "concurrent" to the time of the disaster event. While FSA rules do not define concurrent, it generally means at the same time.[71]

FSA has flexibility in deciding what can count as a related condition.[72] The FSA rules describe a number of related conditions that can create WHIP+ eligibility.[73] FSA, however, can approve other related conditions.

C. Year of Loss: 2018, 2019, or Both

A qualifying disaster event must have taken place in 2018, 2019, or in both 2018 and 2019.[74]

---

67 84 Fed. Reg. 48,518, 48,528 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1500(c)); WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020). Federal regulations say "other hurricanes" and the Handbook requires that the hurricanes be named. These seven have in the past been called "eligible causes of loss" by FSA. See the September 2019 version of the handbook at WHIP+ Handbook, page 2-1, para. 30.B (Sept. 12, 2019).

68 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021); FSA Notice WHIP-18, "Approving WHIP+ Applications for Excessive Moisture and Drought," (April 29, 2020) (expires Feb. 1, 2021); FSA Notice WHIP-19, "WHIP+ Policy Update for Conditions Related to Drought (May 22, 2020) (expires Jan. 11, 2021).

69 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020).

70 WHIP+ Handbook, page 2-2, para. 30.C (March 26, 2020).

71 See "concurrent" in the Webster's Third New International Dictionary (1986).

72 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).

73 For examples of related conditions, and their corresponding qualifying disaster events, see WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).

74 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).

D. Examples of Eligible Qualifying Disaster Events, Eligible Loss Conditions, and Related Conditions

As noted above, the definitions of eligible qualifying disaster events, eligible loss conditions, and related conditions can be confusing.

One way to clarify the definitions is to look at examples of eligible disaster events and their corresponding related conditions, as well as examples of other eligible loss conditions and their related conditions. The following examples are taken from the WHIP+ Handbook.

1. Named Hurricane–and Related Conditions

A named hurricane that occurred in calendar year 2018 or 2019 is a qualifying disaster event for purposes of WHIP+.[75] This includes Hurricanes Michael and Florence.

Related conditions that occur as a direct result of a hurricane can also be eligible for WHIP+. These include the following: (1) excessive wind, (2) excessive rain or flooding, (3) storm surges, (4) tornados, (5) tropical depressions, and (6) tropical storms.[76]

2. Flooding–and Related Conditions

Flooding that occurred in calendar year 2018 or 2019 can be a qualifying disaster event.[77]

If silt or debris cause losses, and the silt or debris are related to the flooding, the resulting losses can also be eligible for WHIP+.[78]

3. Snowstorm–and Related Conditions

A snowstorm that occurred in calendar year 2018 or 2019 can be a qualifying disaster event for WHIP+.[79]

A blizzard can be an eligible related condition to a snowstorm.[80]

4. Tornado–and Related Conditions

A tornado that occurred in calendar year 2018 or 2019 can be a qualifying disaster event for WHIP+.[81]

---

75 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
76 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
77 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
78 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
79 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
80 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
81 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).

The related condition of excessive wind can also be eligible if it was directly caused by the tornado.[82]

5. Typhoon–and Related Conditions

A typhoon that occurred in calendar year 2018 or 2019 can be a qualifying disaster event for WHIP+.[83]

The following related conditions to a typhoon can be eligible: (1) excessive wind, (2) excessive rain or flooding, (3) hurricanes, (4) storm surges, (5) tornados, (6) tropical depressions, and (7) tropical storms.[84]

6. Volcanic Activity–and Related Conditions

Volcanic activity that occurred in calendar year 2018 or 2019 can be a qualifying disaster event.[85]

The related conditions of ash, fire, vog, lava, and earthquake can also be eligible for WHIP+.[86]

7. Wildfire–and Related Conditions

A wildfire that occurred in calendar year 2018 or 2019 can be a qualifying disaster event.[87]

The related condition of heavy smoke can also be eligible if it was directly caused by the wildfire.[88]

E. Drought and Excessive Moisture—New Eligible Qualifying Disaster Events as of March 23, 2020

With the passing of the Further Consolidated Appropriations Act of 2020, WHIP+ began accepting applications for losses resulting from droughts and excessive moisture that occurred in years 2018 or 2019.[89] The sign-up began on March 23, 2020.[90]

---

82 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
83 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
84 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
85 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
86 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
87 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
88 WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020).
89 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019).
90 FSA Notice WHIP-16, “WHIP+ Policy Updates,” at 2 (March 5, 2020) (expires Feb. 21, 2021).

1. Treated as Qualifying Disaster Events

FSA published internal Notices providing some details about how drought and excessive moisture are considered qualifying disaster events.[91] Droughts and excessive moisture are therefore additions to the seven qualifying disaster events listed above.[92]

2. May Need to Apply Again

Farmers who applied for WHIP+ and their applications were denied because drought and excessive moisture were not qualifying disaster events must apply again.[93]

3. Drought

Drought is now available as an eligible qualifying disaster event under WHIP+. The following rules apply.

a. D3 Drought or Worse Required

WHIP+ is available for farmers in counties rated by the U.S. Drought Monitor as having a D3 (Extreme Drought) or higher level of drought.[94]

b. Drought Level Based on Counties

The farmer must be in a county with a drought level of D3 or higher.[95] FSA has maps that show 2018 and 2019 droughts that would qualify.[96] Farmers not in a primary county with a D3 drought or higher are not eligible for WHIP+ for drought losses.

c. 2018 and 2019 Droughts

The drought must have occurred between January 1, 2018 and December 31, 2019.[97]

---

91 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).
92 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021); see also USDA News Release, "USDA Opens Signup March 23 for Added Causes of Loss Under WHIP+ and Announces Disaster Assistance for Sugar Beet Producers" (Feb. 28, 2020), available at: https://www.fsa.usda.gov/news-room/news-releases/2020/usda-opens-wildfires-and-hurricane-indemnity-program-plus?utm_campaign=whip+0228&utm_medium=email&utm_source=govdelivery.
93 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).
94 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).
95 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).
96 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2, Exhibit 1 (March 5, 2020) (expires Feb. 21, 2021).
97 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).

d. *Direct Cause of Loss*

Crop losses must have been the direct result of the drought during the period there was a D3 or higher level of drought intensity.

e. *Related Conditions*

Heat, hot wind, and excessive wind are eligible related conditions for a drought.[98] The drought must still have been D3 or higher level of drought. The farmer's loss must have occurred within the same county as the D3 or higher drought occurred.

4. Excessive Moisture

To be eligible for WHIP+ assistance due to excessive moisture, the farmer must be located in a county that has received an official disaster declaration for excessive moisture.[99]

If the farmer is not located in a county that has received the required declaration, the farmer may still be eligible for WHIP+ so long as the farmer submits "satisfactory documentation" that the loss was due to excessive moisture.[100] FSA does not define or expand upon the meaning of satisfactory documentation.

F. Damaging Weather, Adverse Natural Occurrences, and Related Conditions

The FSA WHIP+ Handbook says that damaging weather and adverse natural occurrences can also create eligible losses under WHIP+ because they are "other eligible causes of loss."[101] As noted above, the FSA rules sometimes treat a qualifying disaster event as the same thing as an eligible cause of loss, and at other times it is not so clear.[102] The WHIP+

---

98 FSA Notice WHIP-19, "WHIP+ Policy Update for Conditions Related to Drought," at 2 (May 22, 2020) (expires Jan. 21, 2021). These related conditions were only allowed by FSA beginning on May 22, 2020. Farmers who applied for drought assistance under WHIP+ do not need to apply again.

99 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021). That means a Presidential or Secretarial-designated disaster. See, as well, FSA Notice WHIP-18, "Approving WHIP+ Applications for Excessive Moisture and Drought" (April 29, 2020) (expires Feb. 1, 2021).

100 Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).

101 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020).

102 FSA regulations, for example, define WHIP+ qualifying disaster events as the seven events and their related conditions. 7 C.F.R. § 760.1502, "Qualifying disaster event" (2019). The same regulation also says that damaging weather and adverse natural occurrences are related conditions that occur as a result of a qualifying disaster event, while the WHIP+ Handbook refers to damaging weather and adverse natural occurrences as "other eligible causes of loss." 7 C.F.R. § 760.1502, "Related condition" (2019); WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020).

Handbook, however, is clear that damaging weather and adverse natural occurrences can trigger WHIP+ benefits.[103]

Notably, the FSA WHIP+ Handbook seems to say that eligible causes of loss for the NAP program can also automatically become eligible causes of loss for WHIP+.[104] This could increase the types of losses that are eligible for WHIP+. Accordingly, where appropriate, the NAP Handbook is also cited below.

1. Damaging Weather

Damaging weather can be an eligible cause of loss.[105] This can include, but is not limited to, hail, freezing, excessive wind, insufficient chill hours–or any combination of these events.[106] Other forms of damaging weather may also be considered eligible causes of loss.

The list of WHIP+ eligible damaging weather, including things like hail and wind, is important because the damaging weather events seem not to depend on the seven qualifying disaster events described above.

2. Adverse Natural Occurrences

Adverse natural occurrences can be an eligible cause of loss for WHIP+.[107] These include earthquake, flood, volcanic eruptions or any combination of these.

---

103 Less clear is how damaging weather and adverse natural occurrences fit into FSA categories. Sometimes they seem to be related conditions. WHIP+ Handbook, page 2-1, para. 30. C (March 26, 2020). But sometimes they seem to be "other eligible causes of loss." WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020). These other eligible causes of loss are also described in the NAP Handbook, 1-NAP (Rev. 2) (December 17, 2019). Other eligible causes of loss are sometimes discussed as being in addition to the qualifying disaster events listed above. See WHIP+ Handbook, page 2-2, para. 30.D (March 26, 2020). Further, the listing of the seven qualifying disaster events in the Handbook says that that qualifying disaster events include, but are not limited to, the seven listed. WHIP+ Handbook, page 2-1, para. 30.B (March 26, 2020). At other times, the Handbook seems to suggest that all eligible losses must be traced back to one of the seven qualifying disaster events described above. Presumably to those seven should be added drought and excessive moisture.

104 Under a section called "Other Eligible Causes of Loss," the WHIP+ Handbook says that "other eligible causes of loss are defined in 1-NAP (Rev. 2)." WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020). For NAP rules that apply see, NAP Handbook, page 2-9, para. 51.B (Dec. 17, 2019); 7 C.F.R. § 1437.10(c) (2019).

105 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020).

106 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020). For the NAP rules on damaging weather events, see NAP Handbook, pages 2-9 to 2-11, para. 51.B-D (Dec. 17, 2019) and 7 C.F.R. § 1437.10(b)(viii) (2019). Drought and excessive moisture are also listed in the WHIP+ Handbook as being types of damaging weather. Because FSA is now treating drought and excessive moisture as types of qualifying disaster events (due to the passing of the 2020 Further Consolidated Appropriations Act), it seems likely that they will no longer be considered damaging weather. See FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).

107 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020). For the NAP rules on adverse natural occurrences, see NAP Handbook, page 2-9, para. 51.B (Dec. 17, 2019); 7 C.F.R. § 1437.10(c) (2019).

3. Related Conditions to Damaging Weather and Adverse Natural Occurrences

Related conditions, including but not limited to, heat, insect infestation, disease, or insufficient chill hours that occur because of an adverse natural occurrence or damaging weather can be eligible causes of loss for WHIP+.[108]

FSA says damaging weather or adverse natural occurrences must have occurred for a related condition to be an eligible cause of loss.[109] The NAP rules, which also create WHIP+ eligibility, also say that the related conditions must result from either damaging weather or adverse natural occurrences.[110] For example, heat, insect infestation, insufficient chill house, or a combination of these events can be related conditions so long as they occurred because of an adverse natural occurrence or damaging weather.

G. Timing Can Matter

The timing of disaster events matters for WHIP+ benefits. This is true in two ways. First, as noted above, the disasters must have been in calendar years 2018 or 2019.

Second, WHIP+ rules draw sharp lines between things that are qualifying disaster events–such as named hurricanes–and weather conditions that might have occurred before the hurricane. The storms before the hurricane, for example, might not trigger WHIP+ benefits. Storms, such as a tornado or a tropical storm, that come in the wake of a hurricane, are more likely to be considered eligible causes of loss for WHIP+. The logic of this difference appears to be whether FSA thinks there was an underling qualifying disaster event that caused the related condition.[111]

FSA provides some examples of the way that eligible disaster events, related conditions, and the timing of both can create possible eligibility for WHIP+.

1. Hurricane, Then Tropical Storm, Then Tropical Depression

Suppose a named hurricane makes landfall. It then becomes a tropical storm, and then becomes a tropical depression. According to FSA, losses caused by the tropical storm and tropical depression are eligible for WHIP+ because the tropical storm and tropical depression were related conditions to the hurricane.[112]

---

108 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020). For the NAP rules on related conditions of adverse natural occurrences or damaging weather, see NAP Handbook, page 2-9, para. 51.B (Dec. 17, 2019); 7 C.F.R. § 1437.10(c) (2019).

109 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020).

110 WHIP+ Handbook, page 2-3, para. 30.E (March 26, 2020). For the NAP rules, see NAP Handbook, page 2-9, para. 51.B (Dec. 17, 2019); 7 C.F.R. § 1437.10(c) (2019).

111 WHIP+ Handbook, page 2-2, para. 30.C (March 26, 2020). FSA may think that concurrent to the disaster includes things that took place after the event, but not before. If so, this would not be consistent with the normal definition of concurrent. See, for example, "concurrent" in the Webster's Third New International Dictionary (1986).

112 WHIP+ Handbook, page 2-2, para. 30.C (March 26, 2020).

2. Tropical Storm, Then Hurricane, Then Tropical Storm and Depression

Suppose a tropical storm forms and then becomes a named hurricane. Then the named hurricane's path becomes a tropical storm and a tropical depression. According to FSA, losses from the hurricane itself are eligible because the named hurricane is a qualifying disaster event. In addition, the losses from the subsequent tropical storm and tropical depression are eligible. Any losses that took place due to the tropical storm *before* it became a hurricane are not eligible for WHIP+ because at that point the tropical storm was not a related condition to the hurricane.[113] In other words, because a related condition must occur as a result of a qualifying disaster event, any losses that occurred before the tropical storm became a hurricane would not be eligible for WHIP+, but losses that occur after the storm turns into a hurricane and weakens back to a tropical storm would be eligible.

3. Wildfire, Rain, Mudslide

Suppose a wildfire occurs in September. Later it rains, and the rain causes a mudslide that damages crops. According to FSA, the mudslide would not be a related condition to the wildfire. As a result, the losses from the mudslide would not be eligible for WHIP+.[114]

4. Winter Snowstorm, Melting, and Saturated Ground

Suppose that there was a winter snowstorm. Later, the melting snow creates saturated ground or excessive moisture that damages a crop. According to the FSA Handbook, that loss would not be eligible for WHIP+ because the saturation or moisture is not a related condition to the winter snowstorm.[115] Because FSA now is treating excessive moisture as a qualifying disaster event, this Handbook example is probably outdated.[116]

H. Identifying Qualifying Disaster Events

Qualifying disaster events will often result in an official disaster declaration. However, benefits under WHIP+ may be available even if there is not an official disaster declaration.

1. Official Disaster Declaration in Calendar Year 2018 or 2019

WHIP+ is available if there is an official disaster declaration for the county where the loss occurred.[117] That means either a Presidential-declared disaster designation, or a

[113] WHIP+ Handbook, page 2-2, para. 30.C (March 26, 2020).
[114] WHIP+ Handbook, page 2-2, para. 30.C (March 26, 2020).
[115] WHIP+ Handbook, page 2-2, para. 30.C (March 26, 2020).
[116] See Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021); FSA Notice WHIP-18, "Approving WHIP+ Applications for Excessive Moisture and Drought" (April 29, 2020) (expires Feb. 1, 2021).
[117] WHIP+ Handbook, page 2-5, para. 30.H (March 26, 2020).

Secretarial-declared disaster designation for one of the eligible WHIP+ qualifying disaster events.[118] The qualifying disaster event must have occurred in calendar year 2018 or 2019. A list of counties with declared disasters is available online.[119] Farmers whose losses occurred in a disaster-declared county must certify that their losses were due to that disaster.[120]

A farmer can also be eligible for WHIP+ if the farmer's loss results from a related condition caused by a qualifying disaster event for which there was an official disaster declaration.[121]

2. Documentation Showing a Qualifying Disaster Event or Related Condition

Even if the farmer's loss did not occur in a county that was officially designated as a disaster county, the farmer may still be eligible for WHIP+ if the farmer can provide FSA with supporting documentation showing that the loss was due to a qualifying disaster event or related condition.[122] In other words, the farmer must be able to document that the loss was the result of 2018 or 2019 qualifying disaster event or related condition.

FSA states that the supporting documentation must be "acceptable" to FSA or to its "satisfaction."[123] According to FSA, sufficient supporting documentation could include climatological data from a reputable source, or other information to support that the loss was due to a qualifying disaster event or related conditions.[124]

I. Ineligible Cause of Loss

FSA rules describe what are not eligible causes of loss. In general, a loss that is not the result of a qualifying disaster event or related condition is not an eligible loss.[125] In order to ensure that WHIP+ payments reflect only losses resulting from qualifying disaster events

118 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1508(e)); WHIP+ Handbook, page 2-5, para. 30.H (March 26, 2020).

119 For a list of presidential and secretarial disaster designations, visit: https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/disaster-designation-information/index.

120 WHIP+ Handbook, page 2-5, para. 30.H (March 26, 2020).

121 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1502, "Qualifying disaster event"); WHIP+ Handbook, pages 2-1 and 2-2, para. 30.B-C, and page 2-5, para. 30.H (March 26, 2020).

122 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1508(f)); WHIP+ Handbook, page 2-5, para. 30.H (March 19, 2020).

123 The federal regulations state that the supporting documentation must be "acceptable" to FSA. See 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1508(f)). The WHIP+ Handbook states that the supporting documentation must be to FSA's "satisfaction." See WHIP+ Handbook, page 2-5, para. 30.H (March 26, 2020).

124 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1508(f)); WHIP+ Handbook, page 2-5, para. 30.H (March 26, 2020).

125 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)); WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).

and related conditions, FSA will assign a production value for any ineligible part of the farmer's loss.[126]

Ineligible causes of loss include the following.

1. Herbicide Drift

Herbicide drift is not an eligible cause of loss under WHIP+.[127]

2. Failure to Re-Seed or Re-Plant

If a loss is due to the farmer's failure to re-seed or replant to the same crop after a qualifying disaster—and it is typical in the county to re-seed or replant after a loss but before the final planting date—that loss will not be eligible for WHIP+.[128]

3. Storage and Losses Outside of Growing Season

Any loss that occurs during storage of the crop is not an eligible loss.[129] In addition, losses that occur after harvest or because of conditions that occur outside the applicable crop year growing season, are not eligible.[130]

4. Not for Current Year Harvest

Losses to crops that were not intended for harvest in the applicable crop year are not eligible for WHIP+.[131]

5. Lack of Good Farming Practices or Poor Management Decisions

Any loss resulting from a farmer's lack of good farming practices or poor management decisions is not an eligible loss.[132]

6. Brownout or Failure of a Power Supply

Losses caused by a brownout or the failure of a power supply are not eligible for WHIP+.[133]

---

[126] 7 C.F.R. § 760.1513(f)(2) (2019); WHIP+ Handbook, page 2-4, para. 30.G, and pages 5-17 to 5-18, para. 113.C (March 26, 2020).
[127] 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(1)); WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).
[128] 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(2)); WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020). The Handbook does not mention the typical county.
[129] WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).
[130] 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(4), (c)(8)); WHIP+ Handbook, page 2-4, para. 30.F (March 19, 2020).
[131] 7 C.F.R. § 760.1509(c)(4) (2019); WHIP+ Handbook, page 2-4, para. 30.F (March 19, 2020).
[132] c, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(1)); WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).
[133] 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(5)).

7. Water from Dams or Reservoirs

A loss caused by the containment of water or release of water by a dam or reservoir project will not be eligible for WHIP+ if there is an easement on the acreage that was affected by the containment or release of the water.[134]

8. Wildlife—Sometimes

Losses caused by wildlife are an eligible loss if the farmer had crop insurance.[135] Wildlife is not an eligible cause of loss if the farmer had Noninsured Crop Disaster Assistance Program (NAP) coverage or no coverage at all.

IV. Eligible Losses—General Rules

WHIP+ assistance is available to eligible farmers that suffer losses to crops, trees, bushes and vines.[136] The following rules apply generally to all WHIP+ losses. More detailed eligibility rules for each type of loss are described later in this Guide.

A. Types of Eligible Losses—Crops, Trees, Bushes, and Vines

WHIP+ provides assistance for losses to yield-based crops and value-loss crops, as well as losses to trees, bushes, and vines.[137] Livestock losses are not eligible for WHIP+.[138]

B. Must be Eligible for Federal Crop Insurance or NAP Coverage

To qualify for WHIP+, the crop, tree, bush, or vine must eligible for either federal crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage. [139]

A list of crops for which crop insurance is available can be found online.[140]

---

134 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(3)).

135 WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).

136 84 Fed. Reg. 48,518, 48,528-529 (Sept. 13, 2019) (to be codified at 7 C.F.R. §§ 760.1500, 760.1503(a)); WHIP+ Handbook, page 2-1, para. 30.A, page 7-1, para. 140.A, page 8-1, para. 160.A (March 26, 2020).

137 7 C.F.R. § 760.1509(a) (2019); WHIP+ Handbook, page 10-4, para. 211.A, page 10-6, para. 121.A, and page 10-8, para. 213.A (March 26, 2020).

138 84 Fed. Reg. 48,518 (Sept. 13, 2019) (prefatory remarks). According to FSA, this is because livestock are covered by other disaster programs.

139 7 C.F.R. § 760. 1502, "Eligible crop" (2019); WHIP+ Handbook, page 2-12, para. 32.A (March 26, 2020).

140 For a list of crops that are covered by crop insurance, see https://webapp.rma.usda.gov/apps/ActuarialInformationBrowser2019/CropCriteria.aspx

C. Quantity Losses Covered and Quality Losses Most Likely Covered

Before the Further Consolidated Appropriations Act of 2020 became law, WHIP+ only provided payments for production losses or value losses.[141] The only exception to this rule was if there was a total quality loss and the commodity no longer had any value, in which case WHIP+ would cover the quality loss. Now, however, with the enactment of the 2020 Further Consolidated Appropriations Act, it appears that WHIP+ assistance will be available for quality losses of crops.[142] Although there have not been any specific rules or WHIP+ Handbook amendments published as of yet, USDA did release an internal Notice stating that the policy for quality losses will be "forthcoming."[143]

D. Year of Loss

The year of loss is important for WHIP+ eligibility. WHIP+ is only available for crop, tree, bush, and vine losses that result from disasters occurring in calendar years 2018 and 2019. This means that for some crops—because of their harvest date—a 2019 qualifying disaster event could result in an eligible crop loss occurring during the 2020 crop year. [144]

For insured and NAP-covered crops, the year of loss used to determine WHIP+ benefits is based on the coverage period in effect on the date of the disaster event.[145] The loss must have occurred during the coverage period in order to qualify for WHIP+.

For uninsured crops, when no coverage period is available, the year of loss is the crop year for the crop in the field on the date of the disaster event. [146]

As an example, suppose a wildfire began on October 15, 2018 and destroyed 50 percent of a farmer's grape vines.[147] If the farmer had 2019 insurance coverage for the grapes that began on September 1, 2018, the year of loss for the farmer's grapes would be 2019. If not, because the vines were uninsured, the year of loss for the vines would be 2018.

V. Eligible Acres

In order to calculate WHIP+ benefits, the number of eligible acres must be determined. This requires that farmers file a report of total acres.[148]

---

141 7 C.F.R. § 760.1505(g) (2019); 84 Fed. Reg. 48,518, 48,519 (Sept. 13, 2019) (prefatory comments). The only exception to this rule was for quality losses of adulterated wine grapes, which were to be taken into account under certain circumstances for purposes of WHIP+ payments.

142 See the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, Sec. 791(b), 133 Stat. 2534, 2658 (Dec. 20, 2019); see also FSA Notice WHIP-16, "WHIP+ Policy Updates," at 1 (March 5, 2020) (expires Feb. 21, 2021).

143 FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021).

144 84 Fed. Reg. 48,518, 48,519 (Sept. 13, 2019) (prefatory remarks).

145 WHIP+ Handbook, page 2-5, para. 30.I (March 26, 2020).

146 WHIP+ Handbook, page 2-5, para. 30.I (March 26, 2020).

147 WHIP+ Handbook, page 2-5, para. 30.I (March 26, 2020).

148 WHIP+ Handbook, page 3-1, para. 90.A (March 19, 2020). This report is called a Report of Acreage, form FSA-578. Any revisions to form FSA-578 must follow the rules outlined in FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations" (March 16, 2020).

A. Eligible Acres Defined

FSA outlines the following rules and factors that affect how eligible acres are defined.

1. Production on Eligible Acres

Eligible acres include acres of (1) yield-based crops, (2) value-loss crops, (3) trees, bushes and vines, and (4) acres used for colonies of honey and used for maple syrup taps.[149]

2. Initial and Subsequent Crops–Eligible

Eligible acres include acres both for initial crops and any subsequent crops.[150] FSA rules that describe eligible acres include double cropping or multiple panting periods.[151]

3. Prevented Planting Acres—Sometimes Eligible

Prevented planting acres can be eligible for WHIP+, but only if the loss is due to a qualifying disaster event.[152] Eligible prevented planting acres can include acres for initial crops, subsequent crops, double-cropping acres and acres with multiple planting periods. Prevented planting acres are not eligible in tropical regions.

Eligible prevented planting acres will generally be those acres for which the farmer received a prevented planting payment.[153] If there is documented evidence that supports the conclusion that prevented planting conditions did not occur, FSA may not approve the acres as prevented planting.[154]

For insured crops, prevented planting acres are eligible for WHIP+ for crop years 2018 and 2020.[155] They are not eligible for 2019.[156] This is probably because a separate RMA

149 WHIP+ Handbook, page 3-1, para. 90.A (March 26, 2020).
150 WHIP+ Handbook, page 3-1, para. 90.B (March 26, 2020).
151 WHIP+ Handbook, page 3-1, para. 90.B (March 26, 2020). Double cropping is discussed in FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations" (March 16, 2020). Multiple cropping periods are discussed in FSA Handbook, 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).
152 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(f)); WHIP+ Handbook, page 3-4, para. 91.A (March 26, 2020). The Handbook says prevented planting acres are eligible for qualifying losses.
153 WHIP+ Handbook, page 3-4, para. 91.B (March 26, 2020). In some cases, such as when a farmer does not have an adequate history of eligible prevented planting acreage for a specific crop, RMA can use acreage from another crop, called "rolled acres," in order to determine the prevented planting indemnity payment. For purposes of WHIP+, however, FSA will use the crop that was listed on the Report of Acreage (form FSA-578) as being prevented from planting.
154 WHIP+ Handbook, page 3-4, para. 91.A (March 26, 2020).
155 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(j)).
156 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(j)); WHIP+ Handbook, page 3-4, para. 91.B (March 26, 2020).

program provides prevented planting disaster payments for insured crops for the 2019 crop year.[157]

For NAP-covered crops, prevented planting acres are eligible for WHIP+ for crop years 2018, 2019, and 2020.[158] For NAP-covered crops, eligible prevented planting acres are the acreage of the crop for which NAP paid a prevented planting payment.

For crops that are not covered by either crop insurance or NAP, prevented planting acres are eligible for WHIP+ for crop years 2018, 2019, and 2020. For crops that are not insured, FSA will determine the prevented planting acres.[159]

4. Uninsured Acres—Sometimes Eligible

If acres are uninsurable or uninsured, they can be eligible for WHIP+, but only if the acres actually turned out to be uninsured.[160]

5. Based on a Unit

FSA will look to what is called a "unit" when setting the number of eligible acres.[161] For purposes of WHIP+, units follow the same definition that is used in crop insurance or NAP coverage.[162]

---

157 The 2019 Disaster Relief Act authorized separate financial assistance for insured crops that were prevented from being planted in calendar year 2019. See the Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. 116-20, 133 Stat. 871 (June 6, 2019). For information on RMA's Prevented Planting Disaster Payments program, visit: https://www.rma.usda.gov/en/News-Room/Frequently-Asked-Questions/Prevented-Planting-Disaster-Payments. RMA developed a program for providing those prevented planting disaster payments, and therefore the WHIP+ program appears not authorized to issue payments for any insured prevented planting crops that had a final planting date of January 1, 2019 or later. The FSA handbook says that for the 2019 crop year prevented planting acreage planted after January 2019 is not eligible. WHIP+ Handbook, page 3-4, para. 91.B (March 26, 2020). This probably means that for the 2019 crop year, insured acreage planted before January 1, 2019 is eligible.

158 WHIP+ Handbook, page 3-4, para. 91.B (March 26, 2020).

159 WHIP+ Handbook, page 3-4, para. 91.B (March 26, 2020). To determine prevented planting acres for uninsured crops, FSA will use FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations" (March 16, 2020). The timeframes outlined in the Acreage and Compliance Determinations Handbook do not apply to WHIP+.

160 WHIP+ Handbook, page 3-3, para. 90.D (March 26, 2020).

161 WHIP+ Handbook, page 2-2, para. 30.D (March 26, 2020). The unit that FSA uses will depend on whether the farmer has crop insurance, NAP coverage, or is uninsured. WHIP+ Handbook, pages 3-6.6 and 3-7, para. 92.A-D (March 26, 2020). For acres that are insured with crop insurance, FSA will use units that have been set for crop insurance purposes. For NAP-covered crops, units are taken from FSA records, and the unit structure used for NAP will apply. The unit structure for NAP can be found in FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019). If a crop is not insured, basic units for the farm must be created. These will be based on NAP rules. For NAP rules, see FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

162 7 C.F.R. § 760.1505(a) (2019); 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1502, "Unit"). For crop insurance, see 7 C.F.R. pt. 457 (2019). For NAP see 7 C.F.R. § 1437.9 (2019).

6. Eligible Acres for Insured Crops—Based on RMA Information

For insured crops, FSA will get acreage information from the Risk Management Agency (RMA), which administers federal crop insurance.[163]

B. Ineligible Acres

FSA rules describe a number of types of farm acreage that are not eligible for WHIP+. These include the following.

1. Crop Insurance and NAP Not Available

If crop insurance and NAP are both not available for an acreage, the acres are not eligible for WHIP+.[164]

2. Uninsured or Uninsurable Acres of a Crop Covered by Insurance

If there are uninsured or uninsurable acres for a crop that is otherwise covered by crop insurance, those uninsured or uninsurable acres are not eligible for WHIP+.[165]

For example, suppose a farm contains 80 acres of cotton. Cotton is insurable, but only sixty of those acres were insured by RMA.[166] The remaining twenty acres are not eligible for WHIP+ and will not be considered when calculating the farmer's WHIP+ payment.

3. Intended for Grazing

Acres that were intended for grazing are not eligible for WHIP+.[167]

4. Home Gardens

Losses that occur to home gardens are not eligible for WHIP+.[168]

5. First-Year Seeding of Perennial Forage Crop

The first-year seeding of a perennial forage crop is not eligible acreage for WHIP+.[169]

---

163 WHIP+ Handbook, page 3-1, para. 90.B (March 26, 2020). If there is a difference between RMA and FSA acres, FSA will use the lesser of the two acreages. 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(h)).

164 7 C.F.R. §§ 760.1509(c)(2), 760.1514(g)(2) (2019); WHIP+ Handbook, page 3-3, para. 90.D (March 26, 2020).

165 WHIP+ Handbook, page 3-3, para. 90.D (March 26, 2020).

166 WHIP+ Handbook, page 3-2, para. 90.C, Example 2 (March 26, 2020).

167 WHIP+ Handbook, page 3-3, para. 90.D, page 10-1, para. 210.A (March 26, 2020).

168 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(6)).

169 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(7)); WHIP+ Handbook, page 3-3, para. 90.D (March 26, 2020).

6. Double Cropping

The second crop in a double cropping combination will not be eligible unless it is an approved combination of double cropping under FSA rules.[170]

7. No Qualifying Loss on Unit

If there is no qualifying loss on any part of the farm unit, the acres in the farm unit are not eligible for WHIP+.[171]

8. Prevented Planting Acres—In Some Cases Ineligible

Although prevented planting acreage can be eligible for WHIP+, there are many situations for which it will not be eligible. Below are some, but not all, of the situations for which prevented planting is not covered by WHIP+.[172]

a. Insured 2019 Crop Year Crops with a Final Planting Date of January 1, 2019 or Later

If an insured prevented planting crop had a final planting date of January 1, 2019 or later, those prevented planting acres are not eligible for WHIP+.[173] As noted above, for insured crops, prevented planting acres are eligible for WHIP+ for crop years 2018 and 2020.[174] They are not eligible for 2019.[175] This is probably because a separate RMA program provides prevented planting disaster payments for insured crops for the 2019 crop year.[176]

---

170 WHIP+ Handbook, page 3-1, para. 90.B, and page 3-3, para. 90.D (March 26, 2020). The rules for double cropping can be found at FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations," pages 2-61 to 2-64, para. 40 (March 16, 2020).

171 WHIP+ Handbook, page 3-3, para. 90.D (March 26, 2020).

172 For a more detailed list of all of the situations for which prevented planting acres will not be eligible for WHIP+, see WHIP+ Handbook, pages 3-5 and 3-6, para. 91.C (March 26, 2020).

173 WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).

174 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(j)).

175 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(j)).

176 The 2019 Disaster Relief Act authorized separate financial assistance for insured crops that were prevented from being planted in calendar year 2019. See the Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. 116-20, 133 Stat. 871 (June 6, 2019). For information on RMA's Prevented Planting Disaster Payments program, visit: https://www.rma.usda.gov/en/News-Room/Frequently-Asked-Questions/Prevented-Planting-Disaster-Payments. RMA developed a program for providing those prevented planting disaster payments, and therefore the WHIP+ program appears not authorized to issue payments for any insured prevented planting crops that had a final planting date of January 1, 2019 or later. The FSA handbook says that for the 2019 crop year prevented planting acreage planted after January 2019 is not eligible. WHIP+ Handbook, page 3-4, para. 91.B (March 26, 2020). This probably means that for the 2019 crop year, insured acreage planted before January 1, 2019 is eligible.

b. Not Planted Due to Management Decisions

Prevented planting acreage is not eligible for WHIP+ if the acres actually were not planted because of a management decision.[177] For example, FSA will deny WHIP+ acreage eligibility for prevented planting if other farmers in the area were able to plant.

c. Not Cropland

Acreage that is not devoted to cropland is not eligible for prevented planting.[178]

d. Forage Crop Already in Place

Prevented planting acres are not eligible for WHIP+ if a forage crop, such as pasture, is in place on the acreage at the time the crop usually would be planted in that area.[179]

e. Tree Crops or Other Perennials

If the acreage is used for tree crops or other perennials the land is not eligible for WHIP+.[180] An exception to this rule applies if the farmer can show that resources were available to plant, grow, and harvest the crop.

f. Conservation Purposes

Prevented planting acres are not eligible for WHIP+ if the acres are used for conservation purposes or are intended to be (or considered to have been) left unplanted under a USDA program.[181] For example, an acreage would be ineligible for WHIP+ if CRP planting history or conservation plans showed the acreage would remain fallow for crop rotation purposes.

g. Chemical Drift

If the acreage is affected by chemical or herbicide residue, the acreage is not eligible for WHIP+ prevented planting.[182]

h. Required by Agreement to be Unharvested

Prevented planting acres are not eligible for WHIP+ if a lease or other agreement required the acreage to be left unharvested.[183]

---

[177] WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
[178] WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
[179] WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
[180] WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
[181] WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
[182] WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
[183] WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).

i. Another Person Makes Claim for Same Acres

Prevented planting acres are not eligible for WHIP+ if another person received a prevented planting payment for a crop on the same acreage for the same year.[184] An exception to this rule applies if double-cropping requirements are met.

j. Wildlife Damage

If the crop is damaged by wildlife, the acreage is not eligible for WHIP+ prevented planting.[185]

k. No Market Available

If the farmer is unable to find a market for the crop, the acreage is not eligible for WHIP+.[186]

l. Water from Dams or Reservoirs

In some cases, prevented planting acres are not eligible for WHIP+ if the acreage was affected by the containment of water or release of water by a dam or reservoir project.[187] This will be true if there is an easement on the acreage that was affected by the containment or release of the water.

m. Cover Crop or Volunteer Crop

Prevented planting acres are not eligible for WHIP+ if a cover crop or a volunteer crop is on the acreage and is hayed, grazed or otherwise harvested during the same crop year.[188]

n. Value-Loss Crops

Prevented planting acres are not eligible for WHIP+ if the farmer is raising value-loss crops for which NAP assistance is provided under value-loss rules.[189] This includes, for example, Christmas tree, aquaculture, and ornamental nursery crops.

o. Irrigation Problems

Prevented planting acres are not eligible for WHIP+ if there is a failure or breakdown of irrigation equipment or facilities.[190]

---

184 WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
185 WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
186 WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
187 WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
188 WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
189 WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
190 WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).

Acreage is not eligible for prevented planting if there was an inadequate supply of irrigation water before the crop insurance closing date for the previous crop year through the final planting date for the current year.[191] It is also not available for prevented planting if there was an inadequate water supply before the NAP application closing date for the crop through the final planting date of the current year.

If a reduction in irrigation water supply is caused by something other than a natural disaster, the acreage is not eligible for WHIP+.[192] This includes, for example, electricity buy-back programs, the sale of water, or changes in water use due to legislation.

p. Quarantine

If there is a government quarantine in effect, prevented planting acres are not eligible for WHIP+.[193]

q. Tropical Regions

Prevented planting acres are not eligible for WHIP+ in tropical regions.[194]

VI. Eligibility Rules for Yield-Based Crops

This section describes the eligibility rules for yield-based crop losses. Different rules apply to other types of crops.

A. Definition of Yield-Based Crops

Yield based crops will be most crops grown in the country. FSA has a two part definition for yield-based crops. First, they must be covered with either federal crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage. Second, they must not be what calls a value-loss crop. Third, they must not be a tree, bush or vine.

So, corn, soybeans, wheat, and most field crops are in the yield-based crop category.

Yield-based crops can be planted crops or prevented-planted crops, so long as the crops were intended to be planted and harvested.[195]

B. Ineligible Yield-Based Crops

Several types of crops are ineligible for WHIP+. If a yield-based crop falls into any of the following categories it will be ineligible to receive WHIP+ assistance.

---

191 WHIP+ Handbook, page 3-5, para. 91.C (March 26, 2020).
192 WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
193 WHIP+ Handbook, page 3-6, para. 91.C (March 26, 2020).
194 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1514(f)); WHIP+ Handbook, page 3-4, para. 91.A (March 26, 2020).
195 WHIP+ Handbook, page 2-12, para. 32.A (March 26, 2020).

1. Crops Intended for Grazing–Not Eligible

Crops intended for grazing are not eligible for WHIP+.[196] These crops may be eligible for other disaster programs.[197]

2. Volunteer Crops—Not Eligible

Volunteer crops are not eligible for WHIP+.[198] For purposes of WHIP+, a volunteer crop is one that was either planted in a previous crop year on the applicable acreage, or one that drifted from other acreage and successfully self-seeded and is growing in the current crop year on the applicable acreage, without being intentionally sown or managed.[199]

3. Crops Not Intended for Harvest

Crops not intended for harvest in the applicable crop year are not eligible for WHIP+.[200]

4. Crop By-Products

The by-products that result from processing or harvesting a crop are not eligible for WHIP+.[201] This includes, among other things, cotton seed, peanut shells, wheat or oat straw, and corn stalks or stovers.

5. Tobacco—Sometimes Not Eligible

Tobacco grown in a county where crop insurance for the tobacco is not available is not eligible for WHIP+.[202]

C. How WHIP+ Payments are Calculated for Yield-Based Crop Losses

In general, WHIP+ assistance for yield-based crop losses will be calculated based on the crop's expected value multiplied by what FSA calls a "WHIP+ factor"—a percentage used to ensure that the farmer's WHIP+ payment does not exceed 90 percent of the farmer's loss.[203] The value of actual production is reduced from this number. The value of any secondary use or salvage values of the crop reduces this number, as do any other

---

196 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(1)); WHIP+ Handbook, page 2-12, para. 32.B (March 26, 2020).

197 Two such programs are the Livestock Forage Program (LFP) and the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP).

198 7 C.F.R. § 760.1509(c)(3) (2019); WHIP+ Handbook, page 2-12, para. 32.B (March 26, 2020).

199 FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations," page 60, para. 39.A (March 16, 2020).

200 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(4)); WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).

201 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(5)).

202 WHIP+ Handbook, page 2-12, para. 32.B (March 26, 2020).

203 WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

indemnity or NAP payments the farmer may have received. The final result is the WHIP+ payment.

D. Data Used to Calculate WHIP+ Payments for Yield-Based Crop Losses

In order to calculate WHIP+ benefits for farmers, FSA relies on various sources of information and uses several different terms for describing the data needed.

1. Expected Value

Expected value is the amount FSA thinks the farmer should have expected to earn from the crop in a normal year.[204] It therefore is the revenue the farmer would have received if the crop were harvested based on the farmer's historical yield.[205] Expected value is expressed as a dollar amount.

In general, therefore, to determine expected value, the amount of the crop the farmer would produce per acre (the expected yield) is multiplied by the expected price for that production, the number of applicable acres, as well as any guarantee adjustment factor (such as late planting reductions or multiple planting reductions).[206]

a. Expected Yield—the WHIP+ Yield

For yield-based crops, FSA will establish what it calls a "WHIP+ yield."[207] A Whip+ yield is the expected yield for the farmer's crop. In general, WHIP+ yields are based on whether the crop is insured, covered by NAP, or uninsured.[208] Each commodity raised on eligible acreage will have a general expected WHIP+ yield that will apply based on the county, crop type, and the intended use of the crop.[209]

(i) Insured by Crop Insurance—WHIP+ Yield from Crop Insurance

If the farmer has crop insurance or NAP coverage for the crop, the expected WHIP+ yield will come from prices based on those coverage plans.[210] For insured crops FSA will first look to the RMA crop insurance information to determine expected yield. RMA may adjust and weight the production history they receive from the crop insurance provider. If there is no RMA established yield based on the farmer's production history, FSA will look to the county expected yields established according to NAP

---

204 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(1)); WHIP+ Handbook, page 10-4, para. 211.B (March 26, 2020).
205 WHIP+ Handbook, page 10-2, para. 210.B (March 26, 2020).
206 WHIP+ Handbook, page 10-2, para. 210.B (March 26, 2020).
207 See 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1502, "Approved yield," "2017 WHIP+ yield"); WHIP+ Handbook, page 4-1, para. 100.A (March 26, 2020).
208 WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020).
209 WHIP+ Handbook, page 4-1, para. 100.A (March 26, 2020). Eligible acreage can include planted or prevented planting acres, as well as acreage used for maple syrup taps and honey colonies.
210 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(d)(1)); WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020).

rules.[211] FSA may also assign a yield if the yield is not available from RMA due to the type of coverage elected.[212]

(ii) Covered by Noninsured Crop Disaster Assistance Program (NAP)—NAP Approved Yield

If the farmer has NAP coverage, the expected WHIP+ yield will be the approved yield determined using NAP rules.[213]

(iii) Not Covered by Either Crop Insurance or NAP—Usually County Expected Yield

In general, if the farmer is not insured with either federal crop insurance, and does not have NAP, the expected yield will be based on the county expected yield.[214] To determine the county expected yield, FSA will follow the rules outlined in the NAP Handbook.[215] The county expected yield will reflect the production of the crop in the county by practice and intended use.[216]

In some cases, FSA will adjust the county expected yield downward when setting the WHIP+ expected yield. This will happen for one of three reasons.[217] First, FSA will reduce the county expected yield when FSA believes the practice used by the farmer is not capable of producing the county expected yield in a normal year. Second, FSA will reduce the county expected yield when FSA thinks the area, regional climate, soil type, or other environmental factors do not normally allow a farmer to obtain the county expected yield. Third, for fruit and nut crops, FSA may reduce the county expected yield because of age, spacing, tree count, or management.[218]

---

[211] WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020). The NAP rules can be found in FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

[212] WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020). See Part 6 of the WHIP+ Handbook for more information on assigning yield.

[213] 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(d)(1)); WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020). NAP-approved yields will be established according to FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

[214] 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(d)(2)); WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020).

[215] See WHIP+ Handbook, page 4-2, para. 100.B (March 19, 2020); see also 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years," pages 4-222 to 4-228.5, para. 276 (Dec. 17, 2019).

[216] 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years," page 4-222, para. 276.A (Dec. 17, 2019).

[217] WHIP+ Handbook, page 4-3, para. 100.F (March 26, 2020).

[218] Age may include both crops that are in decline due to being overage and those that are immature and underage. WHIP+ Handbook, page 5-3, para. 100.F (March 26, 2020).

In few cases in which the crop is not covered by either crops insurance or NAP, FSA will not use county expected yields.[219] Instead it will use the average of the past five years of production and acreage history. At present, the only crop for which average production will be used is Georgia pecans.

(iv) Other Unique Expected WHIP+ Yield Issues

A few other circumstances can affect the expected WHIP+ yield that will be used.

(a) Puerto Rico

For all Puerto Rico farmers, the expected yield will be a county expected yield that is determined based on the method used in the NAP Handbook.[220]

(b) Native Sod

Any eligible crop planted on native sod acreage will be limited to an expected yield of 65 percent of the county expected yield, as applicable to the specific crop year for the county.[221]

(c) Yield in Late Planting Situations

Late planting can reduce the expected yield. For crops with crop insurance, RMA will make the adjustment before FSA receives the crop data.[222] For uninsured and NAP crops, FSA will adjust the yield for late planting.

b. Prices for WHIP+

WHIP+ rules explain how FSA will set the prices used when calculating the expected value of a farmers' crop.

(i) Insured Crops—RMA Data Used

If the farmer has federal crop insurance on the crop, FSA will use the same price that RMA uses for crop insurance.[223] If a crop insurance price is not available, FSA will use information from what it calls the National

---

[219] WHIP+ Handbook, page 10-4, para. 211.B (March 26, 2020).

[220] 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(d)(2)); WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020).

[221] WHIP+ Handbook, page 4-2, para. 100.D (March 26, 2020).

[222] WHIP+ Handbook, page 4-3, para. 100.G (March 26, 2020).

[223] WHIP+ Handbook, page 6-1, para. 131.A (March 26, 2020).

Crop Table (NCT). The NCT is set up by FSA and has data for all crops that will be covered by WHIP+.

(ii) NAP Covered Crops—NAP Data Used

If the farmer had NAP coverage on the crop, FSA will use information from what it calls the National Crop Table (NCT).[224] The NCT is set up by FSA and has data for all crops that will be covered by WHIP+.

(iii) Uninsured Crops—NCT Data Used

If the farmer did not have either federal crop insurance or NAP coverage on the crop, FSA will use information from what it calls the National Crop Table (NCT).[225] The NCT has data for all crops that will be covered by WHIP+.

(iv) Puerto Rico—NCT Data Used

For all crops in Puerto Rico, FSA will use information from what it calls the National Crop Table (NCT).[226] The NCT has data for all crops that will be covered by WHIP+.

(v) Organic Crops

It appears that FSA takes into account differences in price for organic production, based on the crop's organic status in the NCT.[227] If a farmer's acreage report shows a crop as organic, but FSA has not approved an organic price for the crop, FSA will use the average market price.[228]

c. *Guarantee Adjustment Factor*

When calculating the expected value of a farmers' crop, FSA takes into account what it calls the "guarantee adjustment factor."[229] The guarantee adjustment factor represents any applicable reductions for late planting or multiple cropping.

---

224 WHIP+ Handbook, page 6-1, para. 131.A (March 26, 2020).
225 WHIP+ Handbook, page 6-1, para. 131.A (March 26, 2020).
226 WHIP+ Handbook, page 6-1, para. 131.A (March 26, 2020).
227 See, for example, WHIP+ Handbook, page 6-1, para. 131.A, Exhibit 4, page 4 (March 26, 2020). The WHIP+ production loss calculation worksheet (form FSA-894A) also has a column to indicate the "organic status" of the crop.
228 WHIP+ Handbook, page 6-1, para. 131.A (March 26, 2020).
229 WHIP+ Handbook, page 10-4, para. 211.B (March 26, 2020).

2. WHIP+ Factor

WHIP+ payments cannot exceed 90 percent of the farmer's loss.[230] For this reason, when calculating WHIP+ benefits, FSA applies what it calls a "WHIP+ factor"—a percentage by which the farmer's expected value is multiplied in order to determine the farmer's final WHIP+ payment.[231]

The WHIP+ factor for each farmer is based on the level of crop insurance or NAP coverage the farmer has for the crop.[232] The WHIP+ factor usually falls somewhere between 75 and 95 percent. If the farmer does not have crop insurance or NAP coverage, the WHIP+ factor is 70 percent.

3. Units

Units are an important part of the way FSA calculates WHIP+ benefits for yield-based crop losses. Units follow the definition of unit used in crop insurance and NAP.[233] Most units are what FSA calls basic units.[234] Rather than providing payment for only the acreage that was directly affected by a qualifying disaster event, WHIP+ provides payments based on all acreage within the same unit.[235]

For example, suppose a farm unit has eighty acres of cotton.[236] In 2018, twenty of the acres were affected by a wildfire, while the remaining sixty acres were not harmed. Because at least part of the farm unit was affected by the wildfire, all eighty acres were eligible for WHIP+ benefits.

The unit that FSA uses will depend on the whether the farmer has crop insurance, NAP coverage, or is uninsured.[237]

---

230 See 84 Fed. Reg. 48,518, 48,520 (Sept. 13, 2019) (prefatory remarks), referring to the 2019 Disaster Relief Act.

231 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(2)); WHIP+ Handbook, page 10-4, para. 211.B (March 26, 2020). For a list of the applicable WHIP+ factors, see WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

232 84 Fed. Reg. 48,518, 48,529, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. §§ 760.1502, "WHIP+ factor," 7 C.F.R. § 760.1511(b)); WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

233 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1502, "Unit"). For crop insurance, see 7 C.F.R. pt. 457 (2019). For NAP, see 7 C.F.R. § 1437.9 (2019).

234 For discussion of units, see WHIP+ Handbook, page 3-6.5 para. 91.E (March 26, 2020) (rolled acres); WHIP+ Handbook, pages 3-6.6 to 3-7, para. 92.A-D (March 26, 2020) (defining units); WHIP+ Handbook, pages 3-8 to 3-10, para. 92.E-G (March 26, 2020) (effect).

235 WHIP+ Handbook, page 2-2, para. 30.D and page 10-1, para. 210.A (March 26, 2020). Technically, they do so for all of the acreage within the same pay group within the same unit.

236 WHIP+ Handbook, page 3-2, para. 90.C, Example 1 (March 26, 2020).

237 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1505(a)); WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

a. *Insured Crops*

For acres that are insured with crop insurance, FSA will use units that have been set for crop insurance purposes.[238]

b. *NAP-Covered Crops*

For NAP-covered crops, units are taken from FSA records, and the unit structure used for NAP will apply.[239]

c. *Uninsured Crops*

If a crop is not insured, basic units for the farm must be created. These will be based on NAP rules.[240] In general, a basic unit is all of the acreage of the eligible crop in the county.[241]

4. Actual Production

Actual production is the total quantity of the crop that will count in determining the WHIP+ payment. Actual production for a crop includes all of the post-disaster production for a unit. It includes crops that are appraised, harvested, or assigned by FSA.[242] After actual production is determined, FSA can calculate the crop's actual value by multiplying the crop's price by its production.[243]

---

[238] WHIP+ Handbook, page 3-6.6, para. 92.A (March 26, 2020). It is possible for a farmer to have a crop, such as soybeans, for which some practices can be insured under crop insurance, and some cannot. For example, single-cropping soybeans might be insurable in a county, but double-cropping may not be insurable. In such a case, FSA will create two different units. WHIP+ Handbook, page 3-7, para. 92.D (March 26, 2020). That unit structure may include optional units. See WHIP+ Handbook, page 3-11, para. 92.H (March 26, 2020).

[239] WHIP+ Handbook, page 3-7, para. 92.B (March 26, 2020). The unit structure for NAP (and therefore, for WHIP+) can be found in FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

[240] WHIP+ Handbook, page 3-7, para. 92.C (March 26, 2020). For NAP rules, see FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

[241] WHIP+ Handbook, page 3-7, para. 92.C (March 26, 2020). The rules refer to an administrative county. An administrative county is the location where a farm's FSA records are stored. Typically, but not always, this is the same physical county as where the farm is located. When a farm is located in a county without an FSA office, FSA will designate an administrative county for the farm. For more information on administrative counties, see 7 C.F.R. § 718.8 (2019).

[242] 7 C.F.R. §§ 760.1502, "Actual production" (2019); WHIP+ Handbook, Exhibit 2, page 1, "Actual production" (March 26, 2020).

[243] 7 C.F.R. § 760.1511(a)(3)-(4) (2019); WHIP+ Handbook, page 10-5, para. 211.C (March 19, 2020). Figuring out what a crop's production is can be tricky, and it depends on a variety of factors. Federal Regulations set rules for determining a crop's production. See 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1513)).

a. Specific Types of Production

FSA has detailed rules for determining both harvested production and assigned production.

(i) Harvested Production

In many cases where a natural disaster strikes, a harvest will not have been possible. In other situations, the farmer will have been able to harvest. Several rules apply if the farmer was able to harvest the production. These rules are discussed below.

(a) Farm-Stored Production

For farm-stored production, the farmer can do one of two things.[244] First, the farmer can certify the amount of production stored. Second, the farmer can request a measurement service and pay a fee to have the amount of production determined by FSA.

(b) Multiple Harvest Crops

The harvested production of a crop harvested more than once in a crop year includes the total harvested production of all harvests for that crop year.[245]

(c) Production for Seed

For crops used for the farmer's own seed, FSA may accept the farmer's certification that the final use of the crop was as seed in a planting.[246] The farmer must describe the pounds of seed per acre and number of acres planted with the seed. FSA will decide if the amount of seed is reasonable for the acres harvested and planted.

(d) Unmarketable Production

Unmarketable production, for WHIP+ purposes, includes appraised or harvested production that cannot be marketed through normal channels because of eligible disaster conditions.[247]

(e) Co-Mingled Crops

The co-mingling of crops creates problems for determining production for that year. The following sections discuss some of the

---

244 WHIP+ Handbook, page 5-10, para. 111.B (March 26, 2020).
245 WHIP+ Handbook, page 5-10, para. 111.A (March 26, 2020).
246 WHIP+ Handbook, page 5-10, para. 111.C (March 26, 2020).
247 WHIP+ Handbook, page 5-11, para. 111.D (March 26, 2020). No adjustment is made to the quantity of the crop because of quality losses unless the dollar value of the crop is zero.

forms of co-mingling and how FSA deals with them for WHIP+ purposes.

(1) Production Co-Mingled Between Years

FSA will generally consider production that is comingled between years as harvested in the current year.[248] An exception to this rule applies if the production from a previous year was recorded before the co-mingling. In other words, FSA will not try to pro-rate which crops come from which year, unless there are sufficient records to support such a determination. Records showing the origin of the crop based on its year must be verifiable and acceptable to FSA.

(2) Production Co-Mingled Between Eligible and Not Eligible Crops

FSA will prorate acreage that comingles eligible and ineligible acreage.[249]

(3) Production Co-Mingled Between Units

Production that was comingled between farm units before it was a matter of record, and which cannot not be separated using records or other means, will be pro-rated to each unit based on its harvested crop acreage.[250]

(4) Production Co-Mingled Between Practices

Production from different practices will sometimes have separate established yields. If the yields are co-mingled yields are prorated in proportion to the county expected yield.[251]

(5) Grain Crops Harvested as Other Than Grain

If a crop is intended to be used as grain, but is harvested as silage, ensilage, cobbage, hay, or is cracked, rolled, crimped, or used for other purposes, the production is adjusted by FSA.[252]

---

248 WHIP+ Handbook, page 5-11, para. 111.E (March 26, 2020).
249 WHIP+ Handbook, page 5-12, para. 111.F (March 26, 2020). The WHIP+ Handbook gives examples of how the acreage will be prorated.
250 WHIP+ Handbook, page 5-13, para. 111.G (March 26, 2020). The WHIP+ Handbook gives a formula for how the acreage will be prorated.
251 WHIP+ Handbook, page 5-13, para. 111.H (March 26, 2020). The WHIP+ Handbook gives formulas for how this is done and provides an example.
252 WHIP+ Handbook, page 5-14, para. 111.I (March 26, 2020).

(ii) Assigned Production

FSA will sometimes assign production numbers to a farmer for WHIP+ purposes.[253]

(a) Two Types of Assigned Production

Under FSA rules, there are two ways that assigned production can be used.[254] First, assigned production is sometimes used to replace production from RMA, NAP, or the farmer. Second, assigned production is sometimes used to add production to that reported by RMA, NAP, or the farmer.

(b) When FSA Will Use Assigned Production

FSA will use assigned production in the following cases.[255] FSA does not appear to have the authority to use it in other cases. Assigned acres can be used by FSA for crop acreage, acreage of crop type, and intended use acres.

(1) Acceptable Harvested Acres Records Not Available

FSA may use assigned production when acceptable production records for harvested acres are not available from any source.[256] When no such records are available, the farmer will first certify the production numbers. That means that the farmer officially tells FSA how much was produced. FSA will then assign production based on the higher of the farmer's certification or the county disaster yield. If the county disaster yield is higher than the farmer's certified production, FSA must notify the farmer.

(2) Unharvested Acres Not Appraised

In some cases, the disaster will create a total loss for the crop and no acres will be harvested. If the acreage has not been appraised by FSA, RMA, a crop insurance company, or an appraiser acceptable to FSA, FSA will assign production to those acres.[257]

---

253 WHIP+ Handbook, page 5-1, para. 110.A (March 26, 2020).
254 WHIP+ Handbook, page 5-15, para. 113.A (March 26, 2020).
255 WHIP+ Handbook, page 5-15, para. 113.A (March 26, 2020).
256 WHIP+ Handbook, pages 5-15 to 5-16, para. 113.A-B (March 26, 2020). The WHIP+ Handbook provides examples of how this assignment works.
257 The WHIP+ Handbook is confusing. In one place it says not acceptable to FSA, but in another section it says not acceptable to CCC, which normally means the Commodity Credit Corporation. FSA probably meant to write COC, which is the FSA county committee. See WHIP+ Handbook, page 5-15, para. 113.A, and 5-22, para. 113.E (March 26, 2020). WHIP+ Handbook, page 5-15, para. 113.A, and page 5-22, para 113.E (March 26, 2020). FSA provides an example of how this would work when there is a total loss of production. WHIP+ Handbook, page 5-22, para. 113.E (March 26, 2020).

FSA may ask to the farmer to provide information to substantiate the loss. When the production was covered by NAP, FSA will use the county disaster yield as the production value. Similarly, if the acres were not insured with either NAP or crop insurance, and was not appraised, unharvested acreage production will be assigned based on the county disaster yield.

(3) Part of Loss Not Due to Disaster

FSA may decide that at least part of the loss is because of an ineligible disaster condition or circumstances other than natural disaster. If that cause of loss has not been accounted for in the available production records, FSA may assign production to the farmer's crop.[258] When production is assigned for this reason, it will not matter whether the production was covered with crop insurance, covered by NAP, or was uninsured.

If FSA believes part of the loss is not due to the disaster, FSA will take several steps.[259] First, FSA will require the farmer to provide information to substantiate the loss. Second, FSA will assign production for any loss that FSA decides is not attributable to a qualifying or eligible cause of loss.

FSA rules are especially concerned with one type of ineligible cause of loss—whether what FSA calls "cultural practices" needed to produce the yields for the crop were used by the farmer.[260] These cultural practices include: (1) seeding rates and seed quality, and the possibility of low germination seed; (2) fertilization; (3) weed control;(4) whether the crop type or variety was not suitable for the soil type or for non-irrigation practice; (5) if a close-sown crop was planted without use of preemergent herbicides or herbicide resistant seed; and (6) whether it was an organically grown crop that had been expected to yield production as if it was a conventional crop. If a farmer used an improper cultural practice, FSA may decide that the loss is not eligible.

(4) Late Planting

FSA will assign production when the farmer plants the crop after the final planting date.[261] The final planting dates are those set by RMA or FSA.

[258] WHIP+ Handbook, page 5-15, para. 113.A and page 5-17, para. 113.C (March 26, 2020).
[259] WHIP+ Handbook, page 5-17, para. 113.C (March 26, 2020).
[260] WHIP+ Handbook, page 5-17, para. 113.C (March 26, 2020). The WHIP+ Handbook includes examples of how FSA will assign yields. One example describes the situation where the crop is affected by herbicide drift. WHIP+ Handbook, page 6-19, para. 113.C (March 26, 2020).
[261] WHIP+ Handbook, page 5-15, para. 113.A, and page 5-19, para. 113.D (March 26, 2020).

FSA has a complicated formula that assigns reductions in yield based on how long it usually takes the crop to mature, and how long after the final planting date the crop was planted.[262] For late planting purposes, planted acreage means land where seeds or plants have been placed appropriately for the crop and planting period, and at the correct depth into a seedbed that has been properly prepared for the planting method and practice.[263] If late planting may have occurred, FSA requires that the farmer provide information that FSA thinks it needs to substantiate the loss, the late planting, and the crop's days to maturity.[264]

These late planting rules do not apply in several cases. First, they generally do not apply when crops have multiple planting periods, although they will continue to apply for the last planting period for the crop.[265] Second, they do not apply to value-loss crops. Third, they do not apply to fall-planted small grain crops that are intended for grain. Finally, the late-planting provisions do not apply to crops with a growing season of sixty calendar days or less.

(5) Guaranteed Contract

When the farmer has a guaranteed contract to receive a guaranteed payment for all or a portion of the crop, as opposed to, or regardless of, delivery, FSA may use assigned production.[266]

(c) Notice to Farmer if Production Assigned

FSA rules say FSA must notify a farmer in writing if his or her production is assigned.[267] The notice should describe the level of production assigned, say why production was assigned, how the numbers were set, and how the assigned production will be used.

In some cases, the farmer will have a right to appeal the decision.[268] The farmer can appeal when there is what USDA calls a question of

262 WHIP+ Handbook, page 5-19, para. 113.D (March 26, 2020).
263 WHIP+ Handbook, page 5-20, para. 113.D (March 26, 2020). Planted acreage, for the purposes of WHIP+, means land in which seed, plants, or trees have been placed during the crop's appropriate planting period, at the correct depth, and into a properly prepared seedbed for the planting and production practice. See FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years," page 6-7, para. 377.B (Dec. 17, 2019).
264 WHIP+ Handbook, page 5-20, para. 113.D (March 26, 2020).
265 WHIP+ Handbook, page 5-20, para. 113.D (March 26, 2020). Late planting rules will apply when there is a gap of 60 or more days between harvest and the beginning of the next planting period.
266 WHIP+ Handbook, page 5-15, para. 113.A (March 26, 2020). Details are discussed at WHIP+ Handbook, page 5-23, para. 113.F (March 19, 2020).
267 WHIP+ Handbook, page 5-24, para. 114.A (March 26, 2020).
268 WHIP+ Handbook, page 5-24, para. 114.A-B (March 26, 2020). Appeals are governed by FSA Handbook, 1-APP (Rev. 2), "Program Appeals, Mediation, and Litigation" (Sept. 12, 2016).

fact. For example, the farmer's assigned amount of production, or number of acres, could be appealed. The farmer can also appeal if the farmer feels the WHIP+ rules were not applied properly.

Some FSA decision are not appealable, however.[269] In particular, decisions that are a matter of what USDA calls "general applicability" are not appealable. This can include, for example, eligibility rules, prices set by FSA (including the county disaster yield value), signature requirements, and payment calculations.

b. Factors in Determining Production

A number of factors can make determining the farmer's actual production complicated. Some are discussed below.

(i) Acreage and Production Reports

Farmers that apply for WHIP+ must provide acreage and production reports.[270] The reports must include production for all WHIP+-eligible crops for the agricultural unit. For the purposes of this report, the farmer must keep verifiable or reliable production evidence for all crops on the farmer's unit. The farmer must be willing to provide these records to FSA.[271] Farmers are responsible for errors in the production reports. When farmers apply for WHIP+, they must certify that the records are correct, accurate, and include the total production for the farm unit.

(ii) Sources for Production Reports

Sources that are allowed to be used for production reports include the following.[272]

(a) Insured Crops—RMA Data Used

If the crop is insured by federal crop insurance, RMA data is used if it is available.[273] For many farmers, needed records will already be on file with RMA. If all of the information needed is already with RMA, there is no need to give FSA more records unless FSA asks for them.[274]

---

269 WHIP+ Handbook, page 5-24, para. 114.A-C (March 26, 2020).
270 WHIP+ Handbook, page 5-1, para. 110.B (March 26, 2020).
271 WHIP+ Handbook, page 5-1, para. 110.B (March 26, 2020). The records must be in a manner that can be understood by FSA.
272 FSA provides a list of various crop insurance plans and the types and sources of production records that must be provided. See WHIP+ Handbook, Exhibit 10, pages 1-3 (March 26, 2020).
273 WHIP+ Handbook, page 5-2, para. 110.D (March 26, 2020).
274 WHIP+ Handbook, page 5-5, para. 110.F (March 26, 2020). USDA will allow another producer's RMA records to be used if the farmer shares an interest in the crop.

If RMA production data is not available, the farmer must provide acceptable production records.[275] Acceptable production records are discussed below.

(b) NAP Covered Crops—NAP Data Used

If the crop is covered by NAP, and NAP production data is available, those NAP production records should be used.[276] If all of the information needed is already with FSA, farmers do not need to give FSA more records unless FSA asks them to.[277]

If the farmer has not certified actual production history or filed a notice of loss form for NAP, FSA will use the NAP-approved yield.[278]

(c) Uninsured Crops—Farmer Provides Records

If the crop is not covered by either crop insurance or NAP, but the farmer provides verifiable or reliable production records, FSA will use those records. [279] If the farmer does not provide acceptable records, FSA will use the higher of either the established and approved county disaster yield (CDY) or the farmer's certification.

(iii) Acceptable Production Records

As noted above, FSA sometimes requires farmers to use acceptable production records.[280] In general, there are two types of records that FSA says qualify as acceptable production records: verifiable records and reliable records. These two types of records are discussed below.

(a) Verifiable Records

Verifiable records should we provided when available. Verifiable records are production records that can be verified by FSA though a source that is independent of the farmer.[281] They are used by FSA to substantiate the production reported by the farmer.

To be a verifiable record, the record must have a date.[282] The record must show what FSA calls the "final disposition" of the production.

---

275 WHIP+ Handbook, page 5-2, para. 110.D (March 26, 2020).
276 WHIP+ Handbook, page 5-2, para. 110.D (March 26, 2020).
277 WHIP+ Handbook, page 5-5, para. 110.F (March 26, 2020). USDA will allow another producer's RMA records to be used if the farmer shares an interest in the crop.
278 WHIP+ Handbook, page 5-2, para. 110.D (March 26, 2020). The NAP notice of loss is on form CCC-576, Notice of Loss and Application for Payment Noninsured Crop Disaster Assistance Program.
279 WHIP+ Handbook, page 5-2, para. 110.D (March 26, 2020).
280 WHIP+ Handbook, page 5-5, para. 110.F (March 26, 2020).
281 WHIP+ Handbook, page 5-6, para. 110.G (March 26, 2020).
282 WHIP+ Handbook, page 5-6, para. 110.G (March 26, 2020).

That means a specific quantity and price for the end use of the production. If the crop is produced more than once in a calendar year, the record must be seasonal or specific to the commodity. To qualify as a verifiable record, the farmer must be willing to provide the record to FSA if FSA asks for it.

FSA provides several examples of the kinds of records that it has in mind as being verifiable production records.[283] These include: (1) sales receipts from buyers of the production; (2) settlement sheets; (3) invoices from custom harvesting; (4) truck or warehouse scale tickets; and (5) actual measurements or appraisals by FSA, RMA, crop insurance companies, feed company representatives, crop insurance loss adjusters, consultants that are approved by FSA, and other USDA employees if the measurement or appraisal is part of the USDA employees, work duties. In addition, similar records that provide actual and specific production data can count as verifiable records. Verifiable records do not include, however, farmer certificates, estimates, farmer ledgers, or diaries.

(b) Reliable Records

When verifiable records are unavailable, farmers should provide reliable production records.[284] Reliable production records are records that the farmer provides to FSA that FSA decides are adequate to substantiate the amount of production reported by the farmer.

Reliable records can include things like: (1) farmer ledgers of commodity sales volume or income; (2) income statements of deposits; (3) records that verify production input costs; (3) farmer diaries, ledgers, or receipts; (4) pick records; and (5) other USDA program information from programs such as the FSA Farm Loan Program.[285]

(iv) When Acceptable Records Unavailable—County Disaster Yield

In order to set a production value when a farmer's production records are not verifiable or reliable, FSA will use what it calls the "county disaster yield" (CDY).[286] The CDY is the average yield per acre for a county or an area of a county, for the current year, based on the natural disaster that

283 WHIP+ Handbook, page 5-6, para. 110.H (March 26, 2020).
284 WHIP+ Handbook, page 5-7, para. 110.I (March 26, 2020).
285 WHIP+ Handbook, page 5-7, para. 110.J (March 26, 2020).
286 7 C.F.R. § 760.1513(g)(2) (2019); WHIP+ Handbook, pages 5-8 and 5-9, para. 110.K (March 26, 2020).

occurred.[287] County disaster yields are intended to reflect the amount of production a farmer would be expected to have produced in light of the qualifying disaster event.[288] County disaster yields are set for each crop, crop type, intended use, practice, and planting period.[289] They are only used if there are no other verifiable or reliable production records available.

(v) FSA Production Record Review

FSA will review farmers' records.[290] If the records are verifiable or reliable, the records will be acceptable.[291]

When looking at the farmer's records, FSA may compare them to the records of neighboring farmers that raise the same crop and have provided acceptable production records.[292]

If similar levels of production appear on reports from other farmers of the same crop in the county, a farmer's certification supported by records may be considered reliable, and therefore acceptable for WHIP+ purposes.[293] However, if reports show that the production of the same crop by other farmers in the county varies significantly from a farmer's certification, FSA will tell the farmer that the certification of records cannot be substantiated.[294] The farmer's certification will therefore not be considered supported by acceptable records, and the county disaster yield will instead be used for the crop.

If there are not similar crops on other farms in the county, FSA will compare loss levels to reports of other crops with similar growing characteristics within the county or a next-door count.[295]

---

287 7 C.F.R. §§ 760.1502, "County disaster yield," 760.1513(g) (2019); WHIP+ Handbook, page 5-25, para. 115.A (March 26, 2020). FSA also says the definition can mean per acre "of a county." This seems to mean that a part of a county might have a separate county disaster yield.

288 In theory, the point of using county disaster yields is to capture the average impact a natural disaster had on a crop in the county. This yield should be consistent with the normal yield per acre for a substantial number of farmers facing similar disasters. The county disaster yield for the specific crop or areas should be based on the losses incurred directly by the qualifying disaster event on a representative amount of acreage for that crop. WHIP+ Handbook, page 5-25, para. 115.A (March 26, 2020).

289 WHIP+ Handbook, page 5-25, para. 115.A (March 26, 2020).

290 WHIP+ Handbook, pages 5-7 to 5-9, para. 110.K (March 26, 2020).

291 WHIP+ Handbook, page 5-9, para. 110.K (March 26, 2020).

292 WHIP+ Handbook, page 5-8, para. 110.K (March 26, 2020).

293 WHIP+ Handbook, page 5-8, para. 110.K (March 26, 2020).

294 WHIP+ Handbook, page 5-8, para. 110.K (March 26, 2020).

295 WHIP+ Handbook, page 5-8, para. 110.K (March 26, 2020).

If FSA cannot determine that the records are verifiable or reliable, the higher of either the farmer's certified production or the county disaster yield will be assigned to the farmer.[296]

5. Secondary Use and Salvage Value

Any secondary use or salvage value from the production will be subtracted from the farmer' otherwise-eligible payment.[297]

a. Secondary Use Value

The secondary use value for a crop can be important in determining the amount of WHIP+ benefits received by a farmer.[298] FSA defines secondary use of a crop as being when an eligible crop acreage is reported with a particular intended use, but the acreage is then harvested and the production is sold through a different market for a different use. To qualify as a secondary use for WHIP+, the crop must have been marketed in the different market because of an eligible disaster condition; it is not a secondary use if the farmer makes a purely management decision to sell in a different market.

FSA gives, as an example, an apple crop that was damaged by a hurricane.[299] Although the apples were not suitable for the fresh market, they could be marketed as processed. The amount received for the apples when marketed as processed would count as a secondary use value.

Secondary use, from the FSA point of view, is not the same thing as salvage value.[300] It also is not counted as production for the crop. Therefore, secondary use cannot be used when determining if the farm unit suffered a loss, or how much of a loss. It also is not used to calculate the farmer's approved yield. The total of the dollar amount for all crops sold as a secondary use are, however, deducted from the farmer's otherwise-eligible WHIP+ payment in order to get the farmer's actual payment.

b. Salvage Value

Salvage value, according to FSA, is the dollar amount received for the quantity of a commodity that cannot be marketed or sold in any market recognized for the crop.[301] In such a situation, there is not an established price or expected yield for the commodity's production. It is different, therefore, from secondary use.

---

296 WHIP+ Handbook, page 5-9, para. 110.K (March 26, 2020).
297 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(8)); WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020).
298 WHIP+ Handbook, page 5-27, para. 116.A (March 26, 2020).
299 WHIP+ Handbook, page 5-27, para. 116.B (March 26, 2020).
300 WHIP+ Handbook, page 5-27, para. 116.A (March 26, 2020).
301 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).

To qualify as salvage value, the loss of quality that results in the crop becoming salvage must have been due to an eligible disaster condition.[302] Salvaged crops are not counted in production totals, but the value received is deducted from the farmer's otherwise-eligible payment to determine the farmer's actual WHIP+ payment. The value will either be the dollar amount received for the salvage, or a value set by FSA.[303] The farmer's share in the crop will also be factored in when determining the applicable salvage value.

As an example, suppose an orange farmer grows for the fresh market.[304] After a hurricane, the oranges were all on the ground and not marketable for the intended market, and no production could be sold as fresh. The farmer ended up selling the oranges for compost. Or, an apple farmer who usually sells in the fresh market must, as a result of the hurricane, sell the apples as cattle feed.[305] In both cases, the crops (oranges or apples) would be considered "salvage" and not included when determining the farmer's production totals, but the value received from the crops would be subtracted from the farmer's WHIP+ payment.

6. Payment Factor

If the yield-based crop was not harvested, either because it was prevented from being planted or planted but not harvested, FSA will apply what it calls a "payment factor" in order to account for harvesting expenses that are not incurred.[306] This factor is expressed as a percentage and will reduce the WHIP+ payment. On February 12, 2020, FSA issued a Notice that changed payment factors somewhat.[307] The change is intended to take into account the fact that some insurance prices do not include harvest costs. For these crops, there would be no payment factor applied and no reduction to the WHIP+ payment.[308]

7. When RMA Data Does Not Match FSA Data?

In general, if RMA data does not match FSA data, FSA will use RMA data if it meets WHIP+ requirements.[309] A number of differences may arise, and FSA has rules for how to deal with them. Possible differences include differences to the eligible acres,

---

302 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).
303 WHIP+ Handbook, page 5-28, para. 117.B (March 26, 2020).
304 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).
305 WHIP+ Handbook, page 5-29, para. 117.B (March 26, 2020).
306 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(6)); WHIP+ Handbook, page 10-3, para. 210.G (March 26, 2020). Although the rationale for the application of a payment factor is based on situations in which harvesting expenses are not incurred, the actual application of a payment factor is only based on whether an acreage is unharvested or prevented planted, and not whether the farmer actually incurs or does not incur harvesting expenses.
307 Notice WHIP-15, "Unharvested Payment Factor Policy Change" (February 14, 2020) (expires Feb. 1, 2021).
308 For a list of crops for which payment factors will not be applied because insurance prices do not include harvesting costs, see Notice WHIP-15, "Unharvested Payment Factor Policy Change," at 2-3 (February 14, 2020) (expires Feb. 1, 2021).
309 WHIP+ Handbook, pages 5-30 to 5-33, para. 119 (March 26, 2020). The WHIP+ Handbook provides examples of how FSA will treat differences between RMA data and FSA data.

production, stage of crop (harvested and unharvested), shares of ownership, and taxpayer identification numbers.

E. Steps for Calculating Yield-Based Crop Loss Payments

The following steps outline how FSA calculates a WHIP+ payment for yield-based crop losses.[310] It appears that FSA's process for calculating WHIP+ payments is somewhat different than the process outlined in the Federal Register, specifically in terms of when reductions for the salvage value or secondary use of a crop are taken into account.[311] For some farmers, this difference could impact the final WHIP+ payment. The steps outlined below are taken from FSA's WHIP+ Handbook. Farmers can also use form FSA-894A, the WHIP+ Production Loss Calculation Worksheet, to help determine what their WHIP+ payment might be.[312]

The WHIP+ payment is not rounded until the calculation is complete.[313]

Step One: Determine Expected Value

To calculate the farmer's payment, first determine the farmer's expected value for the crop.[314] The expected value is the revenue the farmer would have received if the crop were harvested based on the farmer's historical yield.[315]

Expected value is calculated by multiplying the applicable acres by the price per acre, the crop's yield, as well as the guarantee adjustment factor if it applies. [316] If the farmer is insured or has NAP coverage, the yield will generally come from prices based on those coverage plans.[317] If the farmer is uninsured, or for crops grown in Puerto Rico, the yield will be based on the county expected yield.[318]

---

310 For a summary on WHIP+ payment regulations, see 84 Fed. Reg. 48,518, 48,520-522 (Sept. 13, 2019) (prefatory remarks).

311 The FSA process described in the Handbook and on Form FSA-894A provides for the reduction of secondary use and salvage value immediately after the crop's actual value is accounted for, but before the farmer's share or the payment factor are taken into account. See WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020). The Federal Regulations, on the other hand, state that secondary use and salvage value should not be reduced until the very last step of the payment calculation. See 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(8)).

312 An example of form FSA-894A, along with detailed instructions for how to fill it out, can be found in WHIP+ Handbook, Exhibit 14 (March 26, 2020).

313 WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

314 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(1)); WHIP+ Handbook, page 10-4, para. 211.A-B (March 26, 2020).

315 WHIP+ Handbook, page 10-2, para. 210.B (March 26, 2020).

316 WHIP+ Handbook, page 10-4, para. 211.B (March 26, 2020).

317 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(d)(1)); WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020).

318 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(d)(2)); WHIP+ Handbook, page 4-2, para. 100.B (March 26, 2020).

Step Two: Apply WHIP+ Factor

After calculating the expected value of the crop, multiply that number by the applicable WHIP+ factor percentage.[319] This total is what FSA calls the "WHIP+ value."[320]

Step Three: Subtract Actual Production

Take the result from Step Two and reduce that number by the actual value of production.[321] A crop's actual value is determined by multiplying the crop's price by its production.[322]

Step Four: Reduce by any Secondary Use or Salvage

Next, subtract any secondary use or salvage value from the production.[323]

Step Five: Adjust for Farmer's Share

If the farmer's share in the crop is less than 100 percent, multiply the result of Step Three by the farmer's applicable share.[324]

Step Six: Adjust for any Applicable Payment Factor

If the crop was not harvested, either because it was prevented from being planted or planted but not harvested, FSA will apply what it calls a "payment factor" in order to account for harvesting expenses that are not incurred.[325]

Step Seven: Reduce by Indemnities for Crop Insurance and NAP Payments

Finally, reduce the resulting payment by the value of any indemnity the farmer receives from crop insurance or NAP payments.[326]

---

319 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(2)); WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020). For a list of the applicable WHIP+ factors, see WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

320 WHIP+ Handbook, page 10-4, para. 211.B (March 26, 2020).

321 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(3)-(4)); WHIP+ Handbook, page 10-5, para. 211.C (March 26, 2020).

322 Figuring out what a crop's production is can be tricky and depends on a variety of factors. The Federal Regulations outline specific rules for determining a crop's production. See 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1513)).

323 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(8)); WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020). The WHIP+ Handbook states that any secondary use or salvage value should be subtracted before the farmer's share, the payment factor, or any indemnities are taken into account. The federal regulations, however, subtract secondary use and salvage value during the last step of the WHIP+ calculation.

324 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(5)); WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020).

325 84 Fed. Reg. 48,518, 48,530-531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(g)); WHIP+ Handbook, page 10-3, para. 210.G (March 26, 2020). Although the rationale for the application of a payment factor is based on situations in which harvesting expenses are not incurred, the actual application of a payment factor is only based on whether an acreage is unharvested or prevented planted, and not whether the farmer actually incurs or does not incur harvesting expenses.

326 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(7)); WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020).

VII. Eligibility Rules for Value-Loss Crops

Losses to value-loss crops can be eligible for WHIP+[327]

A. Definition of Value-Loss Crops

Eligible value-loss crops under WHIP+ have the same meaning as value-loss crops under the Noninsured Crop Disaster Assistance Program (NAP).[328] In general, value-loss crops are crops for which the actual plant or commodity is sold, rather than a product of the plant.[329] For this reason, value-loss crops also do not lend themselves to yield or production loss calculations.[330]

Value-loss crops can be planted crops or prevented-planted crops, so long as the crops were intended to be planted and harvested.[331]

Examples of value-loss crops include, but are not limited to, aquaculture, Christmas trees, flowers, mushrooms, ornamental nursery crops, crustaceans, tropical fish and turfgrass sod.[332]

B. Eligibility of Value-Loss Crops

In order for a value-loss crop to be eligible for WHIP+ assistance, the crop must be unmarketable as a result of the qualifying disaster event.[333]

Different eligibility requirements apply for ornamental and aquaculture value-loss crops.[334]

C. Ineligible Value-Loss Crops

Several types of crops are ineligible for WHIP+. If a value-loss crop falls into any of the following categories it will be ineligible to receive WHIP+ assistance.

327 WHIP+ Handbook, page 8-1, para. 160.A (March 26, 2020).
328 7 C.F.R. § 760.1502, "Value-loss crop," pt. 1437, subp. D (2019).
329 WHIP+ Handbook, page 8-1, para. 160.A (March 26, 2020).
330 7 C.F.R. §§ 760.1502, "Value-loss crops," 1437.301(a) (2019); WHIP+ Handbook, page 8-1, para. 160.A, and page 8-2, para. 161.A (March 26, 2020).
331 WHIP+ Handbook, page 2-12, para. 32.A (March 26, 2020).
332 WHIP+ Handbook, page 8-1, para. 160.A (March 26, 2020).
333 WHIP+ Handbook, page 8-1, para. 160.B (March 26, 2020).
334 For rules specific to aquaculture, see WHIP+ Handbook, page 8-2, para. 161 (March 26, 2020). For rules specific to ornamental nursery crops, see WHIP+ Handbook, page 8-3, para. 162 (March 26, 2020).

1. Crops Intended for Grazing–Not Eligible

Crops intended for grazing are not eligible for WHIP+.[335] These crops may be eligible for other disaster programs.[336]

2. Volunteer Crops—Not Eligible

Volunteer crops are not eligible for WHIP+.[337] For purposes of WHIP+, a volunteer crop is one that was either planted in a previous crop year on the applicable acreage, or one that drifted from other acreage and successfully self-seeded and is growing in the current crop year on the applicable acreage, without being intentionally sown or managed.[338]

3. Crops Not Intended for Harvest

Crops not intended for harvest in the applicable crop year are not eligible for WHIP+.[339]

4. Crop By-Products

The by-products that result from processing or harvesting a crop are not eligible for WHIP+.[340] This includes, among other things, cotton seed, peanut shells, wheat or oat straw, and corn stalks or stovers.

D. How WHIP+ Payments are Calculated for Value-Loss Crops

In general, WHIP+ payments for losses of value-loss crops are determined by comparing the value of the crop's inventory immediately before a disaster to the value of the inventory immediately after the disaster.[341]

E. Data Used to Calculate WHIP+ Payments for Value-Loss Crops

In order to calculate WHIP+ payments for value-loss crops, FSA will rely on various sources for information and use several different terms for describing data.

335 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(1)); WHIP+ Handbook, page 2-12, para. 32.B (March 26, 2020).

336 Two such programs are the Livestock Forage Program (LFP) and the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP).

337 7 C.F.R. § 760.1509(c)(3) (2019); WHIP+ Handbook, page 2-12, para. 32.B (March 26, 2020).

338 FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations," page 60, para. 39.A (March 16, 2020).

339 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(4)); WHIP+ Handbook, page 2-4, para. 30.F (March 26, 2020).

340 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(c)(5)).

341 WHIP+ Handbook, page 8-1, para. 160.B (March 26, 2020).

1. Units

Units are an important part of the way FSA calculates WHIP+ benefits for value-loss crops.[342] Units follow the definition used in crop insurance and NAP.[343] Most units are what FSA calls basic units.[344] Rather than providing payment for only the acreage that was directly affected by a qualifying disaster event, WHIP+ provides payments for value-loss crops based on all acreage within the same unit.[345]

The unit that FSA uses will depend on the whether the farmer has crop insurance, NAP coverage, or is uninsured.[346]

a. Insured Crops

For acres that are insured with crop insurance, FSA will use units that have been set for crop insurance purposes.[347]

b. NAP-Covered Crops

For NAP-covered crops, units are taken from FSA records, and the unit structure used for NAP will apply.[348]

c. Uninsured Crops

If a crop is not insured, basic units for the farm must be created. These will be based on NAP rules.[349] In general, a basic unit is all of the acreage of the eligible crop in the county.[350]

---

342 WHIP+ Handbook, page 8-1, para. 160.B (March 26, 2020).

343 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1502, "Unit"). For crop insurance, see 7 C.F.R. pt. 457 (2019). For NAP see 7 C.F.R. § 1437.9 (2019).

344 For discussion of units, see WHIP+ Handbook, page 3-6 para. 92.A (March 26, 2020); WHIP+ Handbook, page 3-8 to 3-10, para. 92.G (March 26, 2020) (basic units); WHIP+ Handbook, page 3-8 to 3-9, para. 92.E (March 26, 2020) (enterprise units); WHIP+ Handbook, page 3-9 to 3-10, para. 92.F (March 26, 2020) (enterprise units); WHIP+ Handbook, page 3-11 para. 92.H (March 26, 2020) (optional units).

345 WHIP+ Handbook, page 2-2, para. 30.D and page 10-1, para. 210.A (March 26, 2020). Technically, they do so for all of the acreage within the same pay group within the same unit.

346 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1505(a)); WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

347 WHIP+ Handbook, page 3-6.6, para. 92.A (March 26, 2020). It is possible for a farmer to have a crop for which some practices can be insured under crop insurance, and some cannot. In such a case, FSA will create two different units. WHIP+ Handbook, page 3-7, para. 92.D (March 26, 2020). The unit structure may include optional units.

348 WHIP+ Handbook, page 3-7, para. 92.B (March 26, 2020). The unit structure for NAP (and therefore, for WHIP+) can be found in FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

349 WHIP+ Handbook, page 3-7, para. 92.C (March 26, 2020). For NAP rules, see FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Dec. 17, 2019).

350 WHIP+ Handbook, page 3-7, para. 92.C (March 26, 2020). Technically it is all of the acreage of what FSA calls an administrative county. An administrative county is the location where a farm's FSA

2. Expected Value

Payment calculations for WHIP+ require that the expected value of the value-loss crop be determined.[351] For purposes of calculating WHIP+ payments, the expected value is the same as the field market value of the value-loss crop before the eligible disaster event.[352] Expected value for value-loss crops is expressed as a dollar amount.

There are a variety of methods that can be used to determine the dollar value of a value-loss crop immediately before a disaster.[353] These include, but are not limited to, using an appraisal, looking at accurate farmer inventory records, or extrapolating the farmer's beginning inventory from FSA-established mortality rates for the crops, based on size, age, and days of growth.

3. WHIP+ Factor

WHIP+ payments cannot exceed 90 percent of the farmer's loss.[354] For this reason, when calculating WHIP+ benefits, FSA applies what it calls a "WHIP+ factor"—a percentage by which the farmer's expected value is multiplied in order to determine the farmer's final WHIP+ payment.[355]

The WHIP+ factor for each farmer is based on the level of crop insurance or NAP coverage the farmer has for the crop.[356] The WHIP+ factor usually falls somewhere between 75 and 95 percent. If the farmer does not have crop insurance or NAP coverage, the WHIP+ factor is 70 percent.

4. Actual Value

For value-loss crops, actual value is calculated by adding together the field market value of the crop immediately after the eligible disaster, and the dollar value of any ineligible causes of loss.[357] An example of an ineligible cause of loss is a crop loss due to a disease caused by management decisions rather than a qualifying disaster event.

---

records are stored. Typically, but not always, this is the same physical county as where the farm is located. When a farm is located in a county without an FSA office, FSA will designate an administrative county for the farm. For more information on administrative counties, see 7 C.F.R. § 718.8 (2019).

351 WHIP+ Handbook, page 10-6, para. 212.A-B (March 26, 2020).

352 WHIP+ Handbook, page 10-6, para. 212.B, Exhibit 11, page 9 (March 26, 2020).

353 WHIP+ Handbook, page 8-1, para. 160.B (March 26, 2020).

354 84 Fed. Reg. 48,518, 48,520 (Sept. 13, 2019) (prefatory remarks discussing the 2019 Disaster Relief Act).

355 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(2)); WHIP+ Handbook, page 10-6, para. 212.A (March 26, 2020). For a list of the applicable WHIP+ factors, see WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

356 84 Fed. Reg. 48,518, 48,529, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. §§ 760.1502, "WHIP+ factor," 760.1511(b)); WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

357 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(2)); WHIP+ Handbook, page 10-6, para. 212.C (March 26, 2020).

5. Payment Factor

If the value-loss crop was not harvested, either because it was prevented from being planted or was planted but not harvested, FSA will apply what it calls a "payment factor" in order to account for harvesting expenses that are not incurred.[358] This factor is expressed as a percentage. The Handbook is confusing because, as noted above, payment factors are discussed as applying to crops that are not harvested, but for value-loss crops, the Handbook suggests that harvested crops might also be subject to a payment factor.[359] The Handbook does not explain this apparent inconsistency, nor does is explain when a payment factor might be applied to a harvested crop.

6. Secondary Use Value and Salvage Value

Any secondary use or salvage value of the value-loss crops will be subtracted from the farmer' otherwise-eligible payment.[360]

a. Secondary Use Value

The secondary use value for a crop can be important in determining the amount of WHIP+ benefits received by a farmer.[361] FSA defines secondary use of a crop as being when an eligible crop acreage is reported with a particular intended use, but the acreage is then harvested and the production is sold through a different market for a different use. To qualify as a secondary use for WHIP +, the crop must have been marketed in the different market because of an eligible disaster condition. It is not a secondary use if the farmer makes a purely management decision to sell in a different market.[362]

Secondary use, from the FSA point of view, is not the same thing as salvage value.[363] It also is not counted as production for the crop. Therefore, secondary use cannot be used when determining if the farm unit suffered a loss, or how much of a loss. It also is not used to calculate the farmer's approved yield. The total of the dollar amount for all crops sold as a secondary use are, however,

---

358 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(4)); WHIP+ Handbook, page 10-3, para. 210.G (March 26, 2020). Although the rationale for the application of a payment factor is based on situations in which harvesting expenses are not incurred, the actual application of a payment factor is only based on whether an acreage is unharvested or prevented planted, and not whether the farmer actually incurs or does not incur harvesting expenses.

359 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(4)); WHIP+ Handbook, page 10-7, para. 212.D (March 26, 2020).

360 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1511(a)(8)); WHIP+ Handbook, page 10-4, para. 211.A (March 26, 2020).

361 WHIP+ Handbook, page 5-27, para. 116.A (March 19, 2020).

362 FSA gives, as an example, an apple crop that was damaged by a hurricane. The example is not actually for a value-loss crop, but the general principle may still apply. The Handbook example is as follows: As a result of a hurricane, a farmer's apples were not suitable for the fresh market, but they could be marketed as processed. The amount received for the apples when marketed as processed would count as a secondary use value. WHIP+ Handbook, page 5-27, para. 116.B (March 26, 2020).

363 WHIP+ Handbook, page 5-27, para. 116.A (March 26, 2020).

deducted from the farmer's otherwise-eligible WHIP+ payment in order to get the farmer's actual payment.

b. Salvage Value

Salvage value, according to FSA, is the dollar amount received for the commodity that cannot be marketed or sold in any market recognized for the crop.[364] In such a situation, there is not an established price or expected yield for the commodity's production. It is different, therefore, from secondary use.

To qualify as salvage value, the loss of quality that results in the crop becoming salvage must have been due to an eligible disaster condition.[365] Salvaged crops are not counted in production totals, but the value received is deducted from the farmer's otherwise-eligible payment to figure the farmer's actual WHIP+ payment. The value will either be the dollar amount received for the salvage, or a value set by FSA.[366] The farmer's share in the crop will also be factored in when determining the applicable salvage value.[367]

F. Steps for Calculating Payments for Value-Loss Crops

The following are the steps used to determine the WHIP+ payment for a loss of value-loss crops.[368] It appears that FSA's process for calculating WHIP+ payments is somewhat different than the process outlined in the Code of Federal Regulations, specifically in terms of when reductions for the salvage value or secondary use of a crop are taken into account.[369] For some farmers, this difference could impact the final WHIP+ payment. The steps outlined below are taken from FSA's WHIP+ Handbook. Farmers can also use form

---

364 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).
365 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).
366 WHIP+ Handbook, page 5-28, para. 117.B (March 26, 2020).
367 The Handbook gives two examples of secondary use value. WHIP+ Handbook, page 5-28, 5-29, para. 117.A-B (March 26, 2020). The examples are confusing because neither example provided is of a value-loss crop. The first example is of an orange farmer that grows for the fresh market. After a hurricane, the oranges were all on the ground and not marketable for the intended market, and no production could be sold as fresh. The farmer ended up selling the oranges for compost. The second example: an apple farmer who usually sells in the fresh market must, as a result of the hurricane, sell the apples as cattle feed. In both cases, according to the Handbook, the crops (oranges or apples) would be considered "salvage" and not included when determining the farmer's production totals, but the value received from the crops would be subtracted from the farmer's WHIP+ payment.
368 For a summary of WHIP+ payment regulations, see 84 Fed. Reg. 48,518, 48,520-522 (Sept. 13, 2019) (prefatory remarks).
369 The FSA process described in the Handbook and on form FSA-894B provides for the reduction of secondary use and salvage value immediately after the crop's actual value is accounted for, but before the farmer's share or the payment factor are taken into account. See WHIP+ Handbook, page 10-6, para. 212.A (March 26, 2020). Conversely, the Federal Regulations state that secondary use and salvage value should not be reduced until after the farmer's share and any payment factor are accounted for. See 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(6)).

FSA-894B, the WHIP+ Value Loss Calculation Worksheet, to help determine what their WHIP+ payment might be.[370]

The WHIP+ payment is not rounded until the calculation is complete.[371]

Step One: Multiply Expected Value by WHIP+ Factor

First, take the expected value of the value-loss crop (meaning the field market value of the crop before the eligible disaster) and multiply it by any applicable WHIP+ factor percentage.[372] This total is what FSA calls the "WHIP+ value."[373]

Step Two: Determine Actual Value

Next, determine the actual value of the value-loss crop by adding together the field market value of the crop immediately after the eligible disaster and the dollar value of any ineligible causes of loss.[374]

Step Three: Subtract Actual Value

Subtract the value-loss crop's actual value in Step Two from the result of Step One.[375]

Step Four: Reduce by any Secondary Use or Salvage Value

Next, subtract any secondary use or salvage value from the result of Step Three.[376] The result will be the farmer's WHIP+ payment.

Step Five: Adjust for Farmer's Share

If the farmer's share in the value-loss crop is less than 100 percent, multiply the result of Step Four by the farmer's applicable share.[377]

---

370 An example of form FSA-894B, along with detailed instructions for how to fill it out, can be found in WHIP+ Handbook, Exhibit 15 (March 26, 2020).

371 WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

372 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(1)); WHIP+ Handbook, page 10-6, para. 212.A-B (March 19, 2020). For a list of the applicable WHIP+ factors, see WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

373 WHIP+ Handbook, page 10-6, para. 212.B (March 26, 2020).

374 WHIP+ Handbook, page 10-6, para. 212.C (March 26, 2020).

375 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(2)); WHIP+ Handbook, page 10-6, para. 212.A, C (March 26, 2020).

376 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(6)); WHIP+ Handbook, page 10-6, para. 212.A (March 26, 2020). The WHIP+ Handbook states that any secondary use or salvage value should be subtracted before the farmer's share, the payment factor, or any indemnities are taken into account. The federal regulations, however, subtract secondary use and salvage value during the last step of the WHIP+ calculation.

377 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(3)); WHIP+ Handbook, page 10-6, para. 212.A (March 26, 2020).

Step Six: Adjust for any Applicable Payment Factor

If applicable, multiply the relevant payment factor by the result of Step Five.[378]

Step Seven: Reduce by Indemnities for Crop Insurance and NAP Payments

Reduce the resulting payment by the value of any indemnity the farmer receives from crop insurance or NAP payments.[379]

Potential Step Eight—for Some Florida Citrus Growers Only

For Florida citrus growers, there is an additional step in calculating the WHIP+ payment for value-loss crops. After Step Seven, Florida Citrus growers must subtract the amount of any payment for future economic losses received under the Florida Citrus Recovery Block Grant Program, if applicable.[380]

VIII. Eligibility Rules for Trees, Bushes, and Vines

Trees, bushes, and vines can be eligible for WHIP+.[381]

A. Definition of Tree, Bush, and Vine

Often, trees, bushes, and vines that are eligible for WHIP+ produce crops that are NAP-eligible crops.[382] WHIP+ also provides the following definitions for eligible trees, bushes, and vines.

1. Tree

A tree, according to FSA, is a tall, woody plant with comparatively great height, and a single trunk from which an annual crop is produced.[383]

Because WHIP+ addresses the loss of value for tree crops, and the Tree Assistance Program (TAP) helps farmers rehabilitate or replace trees, the two programs can be applied to the same acreage but for different losses.[384]

---

378 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(4)); WHIP+ Handbook, page 10-6, para. 212.A (March 26, 2020).

379 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(5)); WHIP+ Handbook, page 10-6, para. 212.A (March 26, 2020).

380 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1515(a)(7)).

381 WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020). The definitions of trees, bushes, and vines that are applicable to FSA's Tree Assistance Program (TAP) also apply to WHIP+.

382 The crop produced by the tree, bush, or vine will likely be listed in 2-CP. If it is not, FSA will follow the NAP Handbook to request that the crop be made eligible for NAP. WHIP+ Handbook, page 7-1, para. 140.A (March 26, 2020).

383 7 C.F.R. § 760.1502, "Tree" (2019); WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020).

384 84 Fed. Reg. 48,518, 48,518-519 (Sept. 13, 2019) (prefatory remarks).

2. Bush

A bush, for the purposes of WHIP+, is a low, branching, woody plant, from which—at maturity—an annual fruit or vegetable crop is produced.[385] The definition does not cover plants that produce a bush after the normal crop is harvested, such as asparagus.

3. Vine

A vine, under WHIP+, must be a perennial plant grown in a field in normal conditions that produces an annual fruit crop with a flexible stem supported by climbing, twining, or creeping along a surface.[386] The definition of a vine does not include: (1) perennials that are normally raised as annuals, such as tomato plants; (2) biennials, such as strawberries; (3) or annuals, such as pumpkins, squash, cucumbers, watermelons, and other melons.

B. Eligibility of Trees, Bushes, and Vines

To be eligible for WHIP+, trees, bushes and vines must meet the following requirements.

1. General Requirements for Eligible Trees, Bushes, and Vines

Several general rules apply to eligibility for trees, bushes, and vines.

a. Grown for Commercial Production

In order to be eligible for WHIP+, trees, bushes, and vines must be grown for the commercial production of annual crops. [387] In addition, they must be intended for human consumption.

For example, a maple tree for syrup, papaya tree, or orchard tree all meet this requirement.[388] Similarly, a blueberry bush is also eligible.[389] Finally, grapes, kiwis, and passion fruit are all vines that satisfy this WHIP+ requirement.[390]

b. Damaged or Destroyed Due to Qualifying Disaster

Trees, bushes, or vines must have been damaged or destroyed as a result of a qualifying disaster event or related condition in order to be eligible for WHIP+ benefits.[391] Farmers must provide acceptable evidence of losses if a tree, bush, or vine no longer exists.[392]

385 7 C.F.R. § 760.1502, "Bush" (2019); WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020).
386 7 C.F.R. § 760.1502, "Vine" (2019); WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020).
387 WHIP+ Handbook, page 7-1, para. 140.A (March 26, 2020).
388 7 C.F.R. § 760.1502, "Tree" (2019); WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020).
389 7 C.F.R. § 760.1502, "Bush" (2019); WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020
390 7 C.F.R. § 760.1502, "Vine" (2019); WHIP+ Handbook, page 2-13, para. 32.C (March 26, 2020).
391 WHIP+ Handbook, page 7-1, para. 140.A (March 26, 2020).
392 WHIP+ Handbook, page 7-10, para. 144.B (March 26, 2020).

FSA rules describe how to tell if trees are damaged or destroyed.[393] In general, FSA rules describe damage to a tree, bush or vine as including: (1) limb breakage; (2) dead wood; or (3) significant canopy loss.[394]

A tree, bush or vine is considered destroyed if it is: (1) dead or dying; (2) toppled or leaning and a reset of the plant is not practical; (3) missing; or (4) damaged to the extent that rehabilitation is not practical.[395]

c. *Spacing*

FSA rules allow state FSA offices to establish a maximum number of trees, bushes, and vines per acre that can be eligible for WHIP+.[396] These maximums should be based on the normal agricultural practices within the state. It does not appear that state FSA offices are required to set maximum numbers, but rather that they can if they so choose.

2. Ineligible Trees, Bushes, and Vines

Several plants that might seem to qualify as a tree, bush, or vine are not eligible for WHIP+.

a. *Perennial Plants Harvested for Edible Roots*

Perennial plants that are harvested for edible roots, such as ginseng and ginger, are not eligible as a tree, bush or vine under WHIP+.[397] They may, however, still qualify for WHIP+ benefits if they meet the requirements of eligible losses of yield-based crops.

b. *Nursery Crops*

Nursery crops are not eligible as a tree, bush, or vine.[398] They may, however, be eligible for WHIP+ under the provisions governing yield-based crops or value-loss crops.[399]

c. *Trees Grown for Pulp or Timber*

Trees grown for pulp or timber are not eligible for WHIP+.[400]

---

393 WHIP+ Handbook, pages 7-11 to 7-13, para. 144.C-F (March 26, 2020).
394 WHIP+ Handbook, page 7-10, para. 144.A (March 26, 2020).
395 WHIP+ Handbook, page 7-11, para. 144.C (March 26, 2020).
396 WHIP+ Handbook, page 7-1, para. 140.C (March 26, 2020).
397 WHIP+ Handbook, page 7-1, para. 140.B (March 26, 2020).
398 WHIP+ Handbook, page 2-13, para. 32.D (March 26, 2020).
399 The prefatory comments in Federal Register state that nursery stock are considered value-loss crops. See 84 Fed. Reg. 48,518, 48,521 (Sept. 13, 2019) (prefatory remarks). Neither the WHIP+ Handbook, nor the actual regulations, make that distinction.
400 WHIP+ Handbook, page 2-13, para. 32.D (March 26, 2020).

d. *Abandoned Groves*

Any tree, bush, or vine grown in an abandoned grove cannot qualify as a WHIP+-eligible tree, bush, or vine.[401]

e. *Nursery Plants and Ornamental Plants*

Nursery plants and ornamental plants are not eligible under WHIP+ as trees, bushes, or vines.[402]

f. *Non-Commercial Plants*

Any plant grown for a non-commercial purpose is not eligible for WHIP+ as a tree, bush, or vine.[403]

g. *Bananas and Plantains*

Bananas and plantains are not eligible for WHIP+ as a tree, bush, or vine.[404]

h. *Cucurbits*

Cucurbits, such as cucumbers, pumpkins, and watermelon, are ineligible for WHIP+ as a tree, bush, or vine.[405]

i. *Pineapple*

Pineapple are ineligible for WHIP+ payments as a tree, bush, or vine.[406]

C. How WHIP+ Payments are Calculated for Trees, Bushes and Vines

Payments for losses of trees, bushes and vines are determined by looking at the number of affected plants.[407] Specifically, payments are based on the number of affected plants within each stage. This calculation is therefore different from the payment calculation for yield-based crop losses, which is based on the total number of crops in an entire unit.

D. Data Used to Calculate WHIP+ Payments for Trees, Bushes, and Vines

In order to calculate WHIP+ benefits for trees, bushes and vines, FSA will rely on various sources for information and use several different terms for describing the data.

---

401 WHIP+ Handbook, page 7-1, par 140.B (March 26, 2020).
402 WHIP+ Handbook, page 7-1, par 140.B (March 26, 2020).
403 WHIP+ Handbook, page 7-1, par 140.B (March 26, 2020).
404 WHIP+ Handbook, page 7-1, par 140.B (March 26, 2020).
405 WHIP+ Handbook, page 2-13, para. 32.D (March 26, 2020).
406 WHIP+ Handbook, page 2-13, para. 32.D (March 26, 2020).
407 WHIP+ Handbook, page 7-13, para. 145.A (March 26, 2020).

1. National Crop Table Data

FSA will establish crop data for crops that are eligible for WHIP+.[408] It will set the approved crop data based on rules FSA uses for the Noninsured Crop Disaster Assistance Program (NAP). The crop data will include historical prices and yields, average prices, and unharvested payment factors, prevented planting factors, as well as county disaster yields. Information on eligible trees, bushes, and vines will also be included in the crop data. The crop data is compiled into what is called the National Crop Table (NCT).

2. Growth Stage

For purposes of calculating WHIP+ payments, tree, bush and vine losses are classified into what FSA calls "stages," which are based on the age and production capability of the tree, bush or vine.[409] The aim is to better capture the value lost for plants given their stage of growth. [410] FSA rules explain how stages are defined and established. [411] Each stage will have a corresponding price and damage factor.[412]

3. Expected Value

Payment calculations for WHIP+ require that the expected value of the tree, bush or vine be determined. Expected value is the revenue the farmer would have received if the crop were harvested based on the farmer's historical yield.[413] For trees, bushes, and vines, the expected value is calculated by adding together any damaged and destroyed trees, bushes and vines, and multiplying that number by the applicable price.[414]

4. Actual Value

WHIP+ payments also require calculating the actual value of the trees, bushes or vines that were damaged or destroyed.[415]

To determine the actual value of a tree, bush or vine, FSA will first multiply the total number of any damaged trees, bushes or vines by the applicable partial damage factor, as determined by FSA, as well as by the applicable price.[416] That number is then added to the total number of any destroyed trees, bushes or vines multiplied by their

408 WHIP+ Handbook, page 2-75, para. 60.A (March 26, 2020).
409 WHIP+ Handbook, page 7-6, para. 142.A (March 26, 2020).
410 WHIP+ Handbook, page 7-2, para. 141.A (March 26, 2020).
411 For more details on how FSA determines the stages of trees, bushes, and vines, see WHIP+ Handbook, pages 7-2 to 7-3, para. 141.B, and pages 7-6 to 7-7, para. 142.A-B (March 26, 2020).
412 84 Fed. Reg. 48,518, 48,521 (Sept. 13, 2019) (prefatory remarks).
413 WHIP+ Handbook, page 10-2, para. 210.B (March 26, 2020).
414 WHIP+ Handbook, page 10-2, para. 210.B, and page 10-8, para. 213.B (March 26, 2020).
415 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(b)(2)); WHIP+ Handbook, page 10-8, para. 213.C (March 26, 2020).
416 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(d)(1)); WHIP+ Handbook, page 10-8, para. 213.C (March 26, 2020). For more information on how FSA determines partial damage factors, see WHIP+ Handbook, page 7-5, para. 141.E. (March 26, 2020).

respective prices.[417] Finally, take that result and subtract it from the expected value of the trees, bushes or vines.[418] The resulting value is the actual value of the trees, bushes or vines.

5. WHIP+ Factor

When calculating WHIP+ benefits, FSA applies what it calls a "WHIP+ factor"—a percentage by which the farmer's otherwise-eligible payment is multiplied in order to determine the farmer's final WHIP+ payment. The WHIP+ factor is based on the level of insurance or NAP coverage the farmer elected for the tree, bush or vine, and typically falls somewhere between 75 and 95 percent.[419] If the farmer does not have insurance, the WHIP+ factor defaults to 70 percent.

6. Partial Damage Factor—Damaged Trees, Bushes and Vines Only

For losses of trees, bushes, or vines, FSA will use what it calls a "partial damage factor," or more generally a "damage factor," when determining the WHIP+ payment.

A partial damage factor represents the percentage of value that is lost when the tree, bush or vine is damaged and requires rehabilitation.[420] Partial damage factors are not applied to trees, bushes, or vines that are destroyed.

When the tree, bush, or vine is insured, WHIP+ will use partial damage factors that have been assigned by RMA.[421] The RMA damage factors apply on a national basis, without regard to the farmer's specific location.

When trees, bushes and vines are not insured, it appears that partial damage factors will be assigned by FSA on a state-by-state basis for each growth stage of the tree, bush or vine, up to three stages.[422] The damage factor values would then be the same for each growth stage across all counties within the state. It appears, therefore, that unlike RMA damage factors, when FSA assigns damage factors to uninsured trees, bushes, or vines, those factors may differ between states. FSA will consult with local universities, extension agents, and horticulturalists, and other industry experts to determine the appropriate damage factors.[423]

---

417 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(d)(2)); WHIP+ Handbook, page 10-8, para. 213.C (March 26, 2020).
418 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(d)(4)); WHIP+ Handbook, page 10-8, para. 213.C (March 26, 2020).
419 84 Fed. Reg. 48,518, 48,529-530 (Sept. 13, 2019) (to be codified at 7 C.F.R. §§ 760.1502, "WHIP+ factor," 760.1511(b)); WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).
420 WHIP+ Handbook, page 7-5, para. 141.E, Exhibit 2, page 7, "Tree/bush/vine Damage Factor" (March 26, 2020).
421 WHIP+ Handbook, page 7-2, para. 141.A, page 7-5, para. 141.E (March 26, 2020).
422 WHIP+ Handbook, page 2-79, par. 63.B, page 7-2, par. 141.A, page 7-5, para. 141.E (March 26, 2020).
423 WHIP+ Handbook, page 7-5, para. 141.E (March 26, 2020).

7. Price

Under WHIP+, price means the price per unit of the crop or commodity.[424] FSA determines the WHIP+ prices for trees, bushes and vines in a similar manner to how prices are determined by RMA.[425] The prices are based upon both the species and stage of growth of the tree, bush or vine.[426]

WHIP+ rules explain how FSA determines those prices when WHIP+ benefits are calculated.

a. Determined Based on Species and Growth Stage

Trees, bushes and vines are categorized into stages of growth in order to more accurately determine their price.[427] When available, FSA will use the stages of growth established by RMA.[428] If a tree, bush, or vine is not insured by RMA, state FSA offices will consult with local universities, extension agents, and other reliable sources.[429] Up to three stages of growth may be used to determine the WHIP+ price: (I) newly-planted or reset, non-producing plants; (II) established plants that are not yet fully producing; and (III) fully mature plants that are producing a yield typical of healthy plants of a similar age.[430] For trees, bushes and vines with shorter development cycles, there may be only two stages: (I) newly-planted or reset, non-producing plants; or (III) fully mature plants that are producing a yield typical of healthy plants of a similar age.

b. Follow Price-Setting Rules of RMA

The prices for trees, bushes and vines are determined using price-setting rules that are similar to those of RMA.[431]

In general, the price of trees, bushes and vines should account for costs that are incurred throughout the duration of the plant's existence. This includes the cost of the tree, bush or vine as a new sapling, costs associated with the installation of the sapling, watering and fertilizer costs, and any costs related to those practices used to develop the tree, bush or vine to the stage it was at before it was damaged or destroyed.[432] For destroyed trees, bushes and vines, the WHIP+ price also

[424] 7 C.F.R. § 760.1502, "Price" (2019).
[425] WHIP+ Handbook, page 7-3, 7-4, para. 141.C (March 26, 2020).
[426] 7 C.F.R. § 760.1516(a) (2019); WHIP+ Handbook, page 7-2, para. 141.A (March 26, 2020).
[427] WHIP+ Handbook, page 7-2, para. 141.A-B (March 26, 2020).
[428] In the WHIP+ Handbook, FSA refers to the stages of growth for trees, bushes, and vines collectively, as "tree stages." WHIP+ Handbook, page 7-2, para. 141.B (March 26, 2020).
[429] WHIP+ Handbook, page 7-2, para. 141.B (March 26, 2020).
[430] FSA has the discretion to decide if a plant beyond a certain age has reduced productivity and should therefore be categorized as a stage II rather than a stage III plant. WHIP+ Handbook, page 7-3, para. 141.B (March 26, 2020).
[431] WHIP+ Handbook, page 7-2, para. 141.A (March 26, 2020).
[432] WHIP+ Handbook, page 7-4, para. 141.C (March 26, 2020).
[432] WHIP+ Handbook, page 7-4, para. 141.C (March 26, 2020). WHIP+ only covers those costs that exceed what would have been required had the tree, bush, or vine not been damaged or destroyed.

accounts for the cost of the removal of a destroyed tree, bush or vine of a similar tree stage.

c. *Assigned on a Statewide Basis*

When RMA pricing data is unavailable, FSA will assign prices for trees, bushes and vines on a state-wide basis for each growth stage, up to three stages.[433] Price data may be determined at the crop level.[434] When assigning prices, state FSA offices will consult with local universities, extension agents, and other reliable sources.[435]

8. Secondary Use and Salvage Value

Any secondary use or salvage value from the trees, bushes or vines will be subtracted from the farmer' otherwise-eligible payment in order to determine the farmer's final WHIP+ payment.[436] The way salvage value affects the final payment is confusing.[437]

a. *Secondary Use Value*

The secondary use value for a crop can be important in determining the amount of WHIP+ benefits received by a farmer.[438] FSA defines secondary use of a crop as being when an eligible crop acreage is reported with a particular intended use, but the acreage is then harvested and the production is sold through a different market for a different use. To qualify as a secondary use for WHIP +, the crop must have been marketed in the different market because of an eligible disaster condition. It is not a secondary use if the farmer makes a purely management decision to sell in a different market.

FSA gives, as an example, an apple crop that was damaged by a hurricane.[439] Although the apples were not suitable for the fresh market, they could be marketed as processed. The amount received for the apples when marketed as processed would count as a secondary use value.

Secondary use, from the FSA point of view, is not the same thing as salvage value.[440] It also is not counted as production for the crop. Therefore, secondary

---

433 WHIP+ Handbook, page 7-2, para. 141.B (March 26, 2020).
434 WHIP+ Handbook, page 7-3, para. 141.C (March 26, 2020).
435 If there is no significant difference in annual costs, FSA may not include those costs in the price calculation. WHIP+ Handbook, page 7-4, para. 141.C (March 26, 2020).
436 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(b)(5)); WHIP+ Handbook, page 10-8, para. 213.A (March 26, 2020).
437 The regulations say that the last step in calculating a payment is to subtract out the salvage value, if there is one. 7 C.F.R. § 760.1511(a)(8). The Handbook, however, says the salvage value is subtracted out before multiplying by the payment factor. WHIP+ Handbook, page 10-8, para. 213.A (March 26, 2020). The two methods will often result in different payments. It seems likely that FSA will follow the Handbook method.
438 WHIP+ Handbook, page 5-27, para. 116.A (March 26, 2020).
439 WHIP+ Handbook, page 5-27, para. 116.B (March 26, 2020).
440 WHIP+ Handbook, page 5-27, para. 116.A (March 26, 2020).

use cannot be used when determining if the farm unit suffered a loss, or how much of a loss. It also is not used to calculate the farmer's approved yield. The total of the dollar amount for all crops sold as a secondary use are, however, deducted from the farmer's otherwise-eligible WHIP+ payment in order to get the farmer's actual payment.

b. Salvage Value

Salvage value, according to FSA, is the dollar amount received for the quantity of a commodity that cannot be marketed or sold in any market recognized for the crop.[441] In such a situation, there is not an established price or expected yield for the commodity's production. It is different, therefore, from secondary use.

To qualify as salvage value, the loss of quality that results in the tree, bush or vine becoming salvage must have been due to an eligible disaster condition.[442] The value will either be the dollar amount received for the salvage, or a value set by FSA.[443] The farmer's share in the crop will also be factored in when determining the applicable salvage value.

Examples of salvage uses of trees, bushes and vines include selling their byproducts as lumber, mulch, firewood, or compost.[444]

E. Payment Calculation for Tree, Bush, and Vine Losses

The following are the steps used to determine the WHIP+ payment for a loss of trees, bushes, or vines.[445] It appears that FSA's Handbook process for calculating the WHIP+ payments with regard to reductions for the salvage value or secondary use of the crop is somewhat different than the process outlined in the Code of Federal Regulations.[446] For some farmers, this difference could impact the final WHIP+ payment. The steps outlined below are taken from FSA's WHIP+ Handbook. Farmers can also use form FSA-894C, the WHIP+ Trees, Bushes, and Vines Loss Calculation Worksheet, to help determine what their WHIP+ payment might be.[447]

---

441 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).
442 WHIP+ Handbook, page 5-28, para. 117.A (March 26, 2020).
443 WHIP+ Handbook, page 5-28, para. 117.B (March 26, 2020).
444 WHIP+ Handbook, page 7-15, para. 145.F (March 26, 2020).
445 For a summary of WHIP+ payment regulations, see 84 Fed. Reg. 48,518, 48,520-522 (Sept. 13, 2019) (prefatory remarks).
446 The FSA process described in the Handbook and on form FSA-894B provides for the reduction of secondary use and salvage value immediately after the actual value of the tree, bush or vine is accounted for, but before the farmer's share or any indemnities are taken into account. See WHIP+ Handbook, page 10-8, para. 213.A (March 26, 2020). By contrast, FSA regulations state that secondary use and salvage value should not be reduced until after the farmer's share and any payment factor are accounted for. See 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(b)(5)).
447 An example of form FSA-894C, along with detailed instructions for how to fill it out, can be found in WHIP+ Handbook, Exhibit 16 (March 26, 2020).

The WHIP+ payment is not rounded until the calculation is complete.[448]

Step One: Determine Expected Value

The first step in calculating the WHIP+ payment for trees, bushes or vines, is to determine their expected value.[449] To do this, multiply the total number of damaged or destroyed trees, bushes or vines by the applicable price for that stage of tree.[450]

Step Two: Multiply by WHIP+ Factor

Multiply the result of Step One by the applicable WHIP+ factor percentage.[451]

Step Three: Determine Actual Value

Determine the actual value of the trees, bushes, or vines that were damaged or destroyed.[452] To do this, first multiply the number of destroyed trees by the reference price in the national crop table (NCT). Then multiply the number of damaged trees by their price and partial damage factor, both of which are found in the NCT. To get the actual value of the loss, add those two numbers together.

Step Four: Subtract Actual Value

Subtract the result of Step Three from the result of Step Two.[453] This total is what FSA calls the "dollar value of loss" for trees, bushes and vines.[454]

Step Five: Reduce by Any Secondary Use or Salvage

Next, subtract any secondary use or salvage value from the production.[455]

---

448 WHIP+ Handbook, page 10-1, para. 210.A (March 26, 2020).

449 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(b)(1)); WHIP+ Handbook, page 10-8, para. 213.A-B (March 26, 2020).

450 WHIP+ Handbook, page 10-8, para. 213.B (March 26, 2020). The WHIP+ Handbook provides conflicting information on where the applicable price comes from. In one section, the Handbook states that the price will come from the National Crop Table (NCT). See WHIP+ Handbook, page 7-14, para. 145.D (March 26, 2020). In another section, the Handbook states that either RMA or FSA will determine the applicable price. See WHIP+ Handbook, page 10-8, para. 213.B (March 26, 2020).

451 84 Fed. Reg. 48,518, 48,531 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1516(b)(1)); WHIP+ Handbook, page 10-8, 10-9. para. 213.A, B, D (March 26, 2020). For a list of the applicable WHIP+ factors, see WHIP+ Handbook, page 10-2, para. 210.D (March 26, 2020).

452 7 C.F.R. § 760.1516(d) (2019); WHIP+ Handbook, page 7-15, para. 145.E, and page 10-8, para. 213.C (March 26, 2020).

453 7 C.F.R. § 760.1516(b)(2) (2019); WHIP+ Handbook, page 10-8, para. 213.C (March 26, 2020).

454 WHIP+ Handbook, page 10-9, para. 213.D (March 26, 2020).

455 7 C.F.R. § 760.1516(b)(5) (2019); WHIP+ Handbook, page 10-9, para. 213.D (March 26, 2020). The WHIP+ Handbook states that any secondary use or salvage value should be subtracted before the farmer's share or any indemnities are taken into account. The federal regulations, however, subtract secondary use and salvage value during the last step of the WHIP+ calculation. It seems likely FSA will use the Handbook formula.

Step Six: Adjust for Farmer's Share

If the farmer's share in the trees, bushes or vines is less than 100 percent, multiply the result of Step Four by the farmer's applicable share.[456]

Step Seven: Reduce by Indemnities for Crop Insurance and NAP Payments

Reduce the resulting payment by the value of any indemnity the farmer receives from crop insurance or NAP payments.[457] Payments a farmer may have received under the Tree Assistance Program (TAP) are not deducted from the WHIP+ payment.[458]

IX. WHIP+ Application Requirements

Several documents will be needed when a farmer applies for WHIP+.

A. Application Form (FSA-894)

The farmer will need to fill out a WHIP+ application form, known as form FSA-894.[459]

B. Notice of Loss

Farmers must file a Notice of Loss for each crop, tree, bush, or vine for which the farmer is seeking WHIP+ benefits.[460]

If a farmer has already filed a notice of loss with either RMA or NAP—and it is related to the same qualifying disaster event for which WHIP+ benefits are being sought—the farmer does not need to file another notice of loss for WHIP+ so long as RMA or NAP approved the notice of loss.[461] If, however, RMA or NAP did not approve the notice of loss, the farmer may need to file a separate notice of loss in order to apply for WHIP+ benefits.[462]

---

456 7 C.F.R. § 760.1516(b)(3) (2019); WHIP+ Handbook, page 10-8, para. 213.A, and page 10-9, para. 213.D (March 26, 2020).

457 7 C.F.R. § 760.1516(b)(4) (2019); WHIP+ Handbook, page 10-9, para. 213.D (March 26, 2020).

458 WHIP+ Handbook, page 7-16, para. 145.G (March 26, 2020). This is because WHIP+ provides assistance for trees that were damaged or destroyed, while TAP covers expenses for new trees.

459 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1510(a)(2)); WHIP+ Handbook, page 1-2, para. 3.B (March 26, 2020). Instructions for completing form FSA-894 can be found at WHIP+ Handbook, Exhibit 4 (March 26, 2020).

460 WHIP+ Handbook, page 2-23, para. 34.A (March 26, 2020). The Notice of Loss is Part A of the WHIP+ application, form FSA-894.

461 WHIP+ Handbook, page 2-23, para. 34.A (March 26, 2020). For NAP prevented planting crops, Form CCC-576 (the NAP notice of loss form) takes the place of the WHIP+ notice of loss.

462 If the reason that RMA or NAP did not approve the notice of loss was because it was determined that the disaster did not adversely affect crops, then that disapproval will also apply to the WHIP+ program. If RMA or NAP did not approve the notice of loss for any other reason, then the farmer may file a separate notice of loss for WHIP+. See WHIP+ Handbook, page 2-23, para. 34.A (March 26, 2020); see also See 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1509(b)(6)).

C. Crop Insurance or NAP

If the farmer bought either federal crop insurance or is covered under the Noninsured Crop Disaster Assistance Program (NAP), the farmer must provide those records to FSA and complete form FSA-895.[463]

D. Conservation Compliance Certification

Farmers must provide evidence of compliance with federal conservation rules for highly erodible land and wetlands.[464] In some cases, NRCS decisions about highly erodible land or wetlands may not have been completed for the land in question when a farmer applies for WHIP+.[465] In such a case, WHIP+ payments will not be delayed. If the farmer takes the payment, however, and it is later determined that there is a conservation compliance violation, the WHIP+ payment will need to be returned to FSA.

E. Acreage Reporting

Each farmer will need to file an Acreage Report for all crops for which the farmer is requesting WHIP+ benefits.[466] FSA Acreage Reports are reported on form FSA-578. Form CCC-471 is used for NAP coverage.

Acreage Reports that are filed specifically for WHIP+ must be signed by the farmer and must be supported by evidence that shows the existence of, or disposition of, the crop that suffered a loss.[467] Acreage Reports are discussed further below.

X. WHIP+ Payments

WHIP+ payments are subject to various rules that outline when the payments will occur, limitations on the value of those payments, as well as how the payment calculations are made.

A. Timing of WHIP+ Payments

WHIP+ payments will go to farmers in either one single payment or in two phases, depending on the crop year in which the farmer's loss occurs.

---

463 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1510(d)(4)(i)). Instructions for completing form FSA-895 can be found at WHIP+ Handbook, Exhibit 5 (March 26, 2020)

464 84 Fed. Reg. 48,518, 48,529-530 (Sept. 13, 2019) (to be codified at 7 C.F.R. §§ 760.1503(i), 760.1510(d)(2)); WHIP+ Handbook, page 1-19, para. 10.A (March 26, 2020). Rules for conservation compliance can be found at FSA Handbook, 6-CP (Rev. 4), "Highly Erodible Land Conservation and Wetland Provisions" (June 21, 2019).

465 WHIP+ Handbook, page 1-19, para. 10.A (March 26, 2020).

466 84 Fed. Reg. 48,518, 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1510(d)(1)); WHIP+ Handbook, page 2-10, para. 31.E (March 26, 2020).

467 WHIP+ Handbook, page 2-10, para. 31.E (March 26, 2020). When providing evidence of the existence of or disposition of the crop that suffered a loss, farms should follow the FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations" (March 16, 2020)

1. Single Payment for 2018 Crop Year

For the 2018 crop year, the farmer will be paid 100 percent of his or her eligible WHIP+ payment in one lump sum.[468]

2. Two Payouts for 2019 and 2020 Crop Years

For the 2019 and 2020 crop years, WHIP+ payments will go to farmers in two phases.[469] There will be an initial payment of 50 percent of the farmer's eligible payment. Up to the remaining 50 percent of the farmer's eligible payment will be paid out only if there are funds still remaining for the program.

B. Payment Limits

The federal regulations outline various limitations on the total payments that a farmer can receive under the WHIP+ program.

1. General Rule: $125,000 Limit

For most farmers, the WHIP+ payment limitation is $125,000 per person or legal entity, other than a joint venture or general partnership.[470] This limitation applies if less than 75 percent of the farmer's average adjusted gross income is average adjusted gross farm income. The $125,000 limitation is a combined limitation for the 2018, 2019, and 2020 crop years.

2. Possible Rule: $250,000-$500,000 Limit

For very large operations, the payment limitation may be $250,000 for each of the 2018, 2019, and 2020 crop years.[471] This limit applies if 75 percent or more of the adjusted gross income of the farmer or legal entity comes from farming, ranching, or forestry. Under this rule, however, the combined payments for the 2018, 2019, and 2020 crop years cannot exceed a total of $500,000.

Farmers, including members of legal entities, who request the optional payment limitation of $250,000 per crop year must provide a certification of farm income from

---

[468] 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1506(b)(1)).

[469] 84 Fed. Reg. 48,518, 48,529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1506(b)(2)); WHIP+ Handbook, page 1-11, para. 6.B (March 26, 2020).

[470] 84 Fed. Reg. 48,518, 48,519 (prefatory remarks), 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1507(b)(1)); WHIP+ Handbook, page 1-11, para. 6.B (March 26, 2020). A limitation of $900,000 in Adjusted Gross Income (AGI), which is common to some FSA programs, does not apply to WHIP+. WHIP+ Handbook, page 1-19, para. 11.A (March 26, 2020).

[471] 84 Fed. Reg. 48,518, 48,519 (prefatory remarks), 48,530 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1507(b)(2)); WHIP+ Handbook, page 1-11, para. 6.B, and page 1-12, para. 7.A (March 26, 2020).

a licensed CPA or an attorney.[472] Other detailed rules apply to this optional payment limitation.[473]

C. Interest

Interest payments, based on what is known as the Prompt Payment Act, may mean that WHIP+ payments will include a bit of added interest.[474]

D. Assignment and Offset

WHIP+ payments may be assigned.[475] They may also be subject to administrative offset by the federal government.[476]

XI. Linkage Requirement—Must Buy Crop Insurance or NAP for Next Two Years

If a farmer receives a WHIP+ payment, he or she must agree to purchase crop insurance or NAP coverage for the next two years for the crop.[477] FSA calls this the linkage requirement. Farmers must acknowledge the linkage requirement by completing form FSA-895 at the time they apply for WHIP+.[478]

Unlike the 2017 WHIP program, under WHIP+ the linkage requirements do not apply to losses of trees, bushes, or vines. [479]

A. Crop Insurance or NAP Likely Available

Since every crop eligible for WHIP+ must be among those that are eligible for crop insurance or NAP, coverage likely is available to satisfy the linkage requirement.

B. Obtain Crop Insurance or NAP Coverage

To satisfy the linkage requirement, either crop insurance or NAP coverage must be obtained for any crop—whether a yield-based or value-loss crop—that receives a WHIP+ payment.

---

472 84 Fed. Reg. 48,518, 48,519 (prefatory remarks) (Sept. 13, 2019); WHIP+ Handbook, page 1-11, para. 6.B, and page 1-12, para. 7.A (March 26, 2020).

473 For a description of the additional rules that apply, see WHIP+ Handbook, pages 1-12 through 1-17, para. 7 (March 26, 2020).

474 WHIP+ Handbook, page 1-3, para. 3.D (March 26, 2020).

475 7 C.F.R. § 760.1504(d) (2019); WHIP+ Handbook, page 1-18, para. 8.B (March 26, 2020).

476 7 C.F.R. § 760.1504(c) (2019); WHIP+ Handbook, page 1-19, para. 9.A (March 26, 2020).

477 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(a)); WHIP+ Handbook, page 2-14, para. 33.A (March 19, 2020). When applying for WHIP+, farmers must submit form FSA-895, "Crop Insurance and/or NAP Coverage Agreement," to acknowledge the crop insurance and/or NAP linkage requirement. See WHIP+ Handbook, Exhibit 5 (March 26, 2020).

478 WHIP+ Handbook, page 2-15, para. 33.A (March 26, 2020).

479 84 Fed. Reg. 48,518, 48,522, 532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(b)); WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).

1. Insurable Crop

If the farmer received WHIP+ benefits for a crop for which crop insurance is available, the farmer must buy crop insurance for those crops at a level of "60/100" or something equal to that level, if it is available.[480] By 60/100, FSA means that the farmer must buy crop insurance that has a coverage level of 60 percent, and insures 60 percent of the value of the crop. By crop insurance, FSA means policies reinsured by the Federal Crop Insurance Corporation (FCIC).[481]

If the farmer received WHIP+ benefits based on an insured crop, and the insurance is then not available, the farmer must buy NAP coverage at a 60/100 level of coverage, or something equal to that coverage.[482]

Crop insurance is not available to farmers that owe money the Federal Crop Insurance Corporation (FCIC). For purposes of the WHIP+ linkage requirements, FSA requires that the farmer do what is necessary—including paying any FCIC debt—in order to be able to purchase the required crop insurance.[483]

2. NAP-Eligible Crop

If the farmer received WHIP+ benefits for a crop for which crop insurance is unavailable, but NAP coverage is available, the farmer must buy NAP coverage for those crops, trees, bushes, or vines at a "60/100" coverage level or something equal to that level, if it is available.[484] By 60/100, FSA means that the farmer must buy NAP at a coverage level of 60 percent of the value of the crop. If applicable, the farmer will need to pay the NAP administrative fee.[485]

If NAP coverage of 60/100 is unavailable, the farmer must purchase NAP catastrophic coverage.[486]

The farmer must also file both an acreage report and what FSA calls a CCC-471 form.[487]

If the farmer received benefits on a NAP crop, and crop insurance then becomes available, the farmer must buy crop insurance at a level of coverage at 60/100 or something equal to that level.[488]

---

480 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(a)(1)); WHIP+ Handbook, page 2-14, para. 33.A, and page 2-19, para. 33.C (March 26, 2020).
481 WHIP+ Handbook, page 2-20, para. 33.E (March 26, 2020). Whole Farm Revenue Protection (WFRP) can meet this coverage requirement.
482 WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).
483 WHIP+ Handbook, page 2-22, para. 33.H (March 26, 2020).
484 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(a)(2)); WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).
485 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(d)); WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).
486 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(a)(2)(i)).
487 WHIP+ Handbook, page 2-20, para. 33.D (March 26, 2020).
488 WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).

C. Two Years of Coverage—2022 and 2023

To meet the linkage requirement, the farmer must buy crop insurance or NAP coverage for the first two consecutive crop years that it is available after the enrollment period for WHIP+ ends.[489] The second year must have been purchased by the 2023 crop year.[490] By definition, the FSA Handbook states that to satisfy the WHIP+ linkage requirement, the two consecutive crop years must be 2022 and 2023.[491] If a farmer obtains the required two years of crop insurance or NAP coverage before the 2023 crop year, the farmer may request an exception to the 2022 and 2023 crop year requirement.[492] FSA will review all requests for exceptions on a case-by-case basis.

D. Additional Linkage Rules

The following, additional rules must be met in order to satisfy the linkage requirement. The coverage rules apply regardless of whether the farmer suffered a loss of yield-based crops or value-loss crops.

1. Coverage Based on Farmer's Interest and Pay Group

The linkage requirement applies to the farmer's interest in the crop that received a WHIP+ benefit and applies to the county where the crop was either planted or was prevented from being planted.[493]

The linkage rule applies to each crop, type, intended use, and planting period, if that applies, that are listed on the WHIP+ application.[494]

2. If Crop Insurance and NAP Coverage Become Unavailable

If WHIP+ benefits are received for a crop for which crop insurance or NAP coverage becomes unavailable, the farmer must obtain Whole-Farm Revenue Protection (WFRP) coverage.[495]

3. If the Farmer Quits Farming

If a farmer quits farming, the farming entity dissolves, or a member leaves the entity but farms under a different tax identification number, the linkage requirement is met if

---

489 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(a)); WHIP+ Handbook, page 2-14, para. 33.A, and page 2-19, para. 33.C (March 26, 2020).
490 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(b)); WHIP+ Handbook, page 2-14, para. 33.A, page 2-19, para. 33.C (March 26, 2020).
491 WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).
492 For examples of possible exceptions to the 2022 and 2023 linkage rule, see WHIP+ Handbook, page 2-19, para. 33.C (March 26, 2020).
493 WHIP+ Handbook, page 2-15, para. 33.A (March 26, 2020).
494 WHIP+ Handbook, page 2-18, para. 33.B (March 26, 2020).
495 WHIP+ Handbook, page 2-14, para. 33.A (March 26, 2020).

the majority of the persons receiving WHIP+ payments meet the crop insurance or NAP requirement.[496]

4. If Requirement Not Met—Refund WHIP+ Payment

If a farmer receives a WHIP+ payment and does not meet the linkage requirement, the farmer will need to refund the WHIP+ payment for the crop not meeting the linkage requirement, plus interest.[497]

E. No Exception or Waivers for Linkage Requirement

FSA rules say there are not exceptions or waivers for the linkage requirement.[498] A refund will be required by FSA from all farmers that do not meet the requirement.

XII. Special WHIP+ Rules for Certain Crops

FSA provides a number of rules that are specific to unique circumstances or certain crops. Some of these are briefly summarizes below.

A. Florida Citrus Trees ARE Eligible

Unlike with the 2017 WHIP program, losses to Florida citrus trees are eligible for WHIP+.[499]

B. Puerto Rico Provisions

Farmers in Puerto Rico who suffered losses as a result of qualifying disaster events in 2018 or 2019 are subject to two different WHIP+ rules.[500] First, the yield for farmers in Puerto Rico will always be the county expected yield from the NCT. Second, the applicable price will be the average market price from the NCT.

In all other respects, farmers in Puerto Rico are subject to the general WHIP+ provisions outlined in this Guide.

C. Pasture, Rangeland, and Forage

Farmers with federal crop insurance coverage for pasture, rangeland, or forage (PRF) may be subject to special WHIP+ rules.[501] The WHIP+ Handbook outlines these rules in detail.

---

496 WHIP+ Handbook, page 2-15, para. 33.A (March 26, 2020).
497 84 Fed. Reg. 48,518, 48,532 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1517(d)); WHIP+ Handbook, page 2-15, para. 33.A, page 2-21, para. 33.F (March 26, 2020).
498 WHIP+ Handbook, page 2-21, para. 33.G (March 26, 2020).
499 84 Fed. Reg. 48,518, 48,519 (Sept. 13, 2019) (prefatory remarks).
500 WHIP+ Handbook, page 9-25, para. 195.A (March 26, 2020).
501 See WHIP+ Handbook, pages 9-9 through 9-17, paras. 184-187 (March 26, 2020).

D. Hybrid Seeds

Special rules apply for crops that are produced from hybrid seeds, such as hybrid corn seed and hybrid rice seed.[502] In general, hybrid seed is produced under a contract or agreement with a hybrid seed processor or seed company, and it is insured by RMA under a specific insurance plan.[503] Farmers of hybrid seed crops should carefully read the WHIP+ Handbook in order to understand how the WHIP+ payment calculations are different for hybrid seed crops.[504]

E. Grass for Seed that is Also Harvested as Forage

If a farmer raises grass that is intended for seed, and then bails the remainder of the crop for hay, special rules will apply.[505] FSA will be especially interested in the intended use for the crop.

F. Certified Seed Potato Endorsements

RMA potato policies in some states and counties offer certified seed potato endorsements which can create unique RMA data situations that require additional clarification.[506] WHIP+ expected yield calculations and actual value calculations must contain RMA price and production information, including certified seed potato endorsements. Accordingly, FSA has outlined special rules for when a crop has a certified seed potato endorsement.[507]

G. California and Arizona Citrus

In California and Arizona, insurance is not provided for processed citrus production.[508] For this reason, the production and pricing reflected by California and Arizona insurance policies may not reflect the farmer's total production.[509] If not, farmers must submit records of any processed citrus production. RMA data for fresh production will then be used to determine actual value, while any processed production records provided by the farmer will be used to determine secondary use.

H. Crop Insurance Dollar Plans

Some farmers may have dollar plans for their crop insurance. Dollar plans are revenue-based policies that do not have established yields or prices.[510] For this reason, FSA will use the county expected yield and the average market price (as stated in the National Crop Table) for any crop covered by a dollar plan.[511] To determine actual value, farmers with

---

502 WHIP+ Handbook, pages 9-21 to 9-23, para. 191 (March 26, 2020).
503 WHIP+ Handbook, page 9-21, para. 191.A (March 26, 2020).
504 See WHIP+ Handbook, pages 9-21 to 9-23, para. 191 (March 26, 2020).
505 See WHIP+ Handbook, page 9-5, para. 182.A (March 26, 2020).
506 WHIP+ Handbook, page 9-25, para. 194.A (March 26, 2020).
507 See WHIP+ Handbook, page 9-25, para. 194.B (March 26, 2020).
508 WHIP+ Handbook, page 9-19, para. 189.A (March 26, 2020).
509 WHIP+ Handbook, page 9-19, para. 189.B (March 26, 2020).
510 WHIP+ Handbook, page 9-20, para. 190.A (March 26, 2020).
511 WHIP+ Handbook, page 9-20, para. 190.B (March 26, 2020).

dollar plans will be required to submit verifiable or reliable production records.[512] If no such records exist, FSA will use the applicable county disaster yield.

I. Multiple Marketed Crops

If a crop has multiple markets or intended uses with separate average market prices established for each use, that crop is called a "multiple market crop."[513] For example, FSA has identified some perennial tree fruit crops as being multiple market crops.[514] There are special WHIP+ rules for multiple market crops, and farmers of such crops should use care to make sure the proper FSA rules are applied.[515] For example, when determining expected value and actual value, FSA will be interested in the intended use of the crop.

J. Winter Wheat

Farmers who raise winter wheat that was lost in the winter may have a confusing WHIP+ calculation based on whether an indemnity is taken on the lost crop and whether a new crop is planted. [516]

K. Sugar Beets

Sugar beet production raises questions for WHIP+ regarding how to measure production. As a result, special rules apply. [517]

L. Harvested Adulterated Grapes

The natural adulteration of grapes prior to harvest can be an eligible loss for purposes of WHIP+.[518] Such losses most often occur as a result of wildfires or volcanic activity and are accounted for in the WHIP+ program by reduced production to count.[519] Additional special rules apply. [520]

---

512 WHIP+ Handbook, page 9-20, para. 190.C (March 26, 2020).
513 WHIP+ Handbook, page 9-3, para. 181.A (March 26, 2020).
514 Perennial tree crops that are considered multiple market crops include, but are not limited to, the following: apples, apricots, bananas, cherries, grapefruit, lemons, limes, oranges (including mandarin), peaches, pears, plums, prunes, tangelos, and tangerines. WHIP+ Handbook, page 9-3, par. 181.B (March 26, 2020).
515 See WHIP+ Handbook, pages 9-3 and 9-4, para. 181 (March 26, 2020).
516 See WHIP+ Handbook, page 9-1, para. 180.C (March 26, 2020).
517 WHIP+ Handbook, pages 9-6 to 9-8, para. 183 (March 26, 2020); FSA Notice WHIP-12, "Sugar Beet Losses in 2018 and 2019," (Jan. 3, 2020)(expires July 1, 2020); FSA Notice WHIP-16, "WHIP+ Policy Updates," at 2 (March 5, 2020) (expires Feb. 21, 2021); FSA Notice WHIP-17, "2018 and 2019 Sugar Beet Losses" (April 10, 2020) (expires Jan. 21, 2021).
518 WHIP+ Handbook, page 9-24, para. 193.A (March 26, 2020).
519 WHIP+ Handbook, page 9-24, para. 193.A (March 26, 2020).
520 See WHIP+ Handbook, page 9-24, para. 193 (March 26, 2020).

M. Pecans

For certain select crops—as approved by USDA—yields will be determined by using the simple average of the previous five years' production.[521] To date, the only crop that has been approved for this provision is pecans. Additional rules apply.

N. Apiculture

Special rules apply for farmers with a rainfall index apiculture insurance plan. [522]

O. Skip-Row Crops of Cotton and Sorghum

Farmers raising skip-row cotton, corn, or grain sorghum have special rules for reporting their production. [523]

XIII. WHIP+ Denial Notification, Appeals, and Equitable Relief

When a WHIP+ application is denied, FSA must notify the farmer and provide information on potential appeals and other relief.

A. WHIP+ Denial Notification

FSA must notify a farmer in writing if his or her WHIP+ application is not approved.[524] Notifications must explain why the application was denied and describe any factors that were considered in making the decision. Notifications must also include a copy of the farmer's application, as well as copies of the relevant Federal Regulations and the WHIP+ Handbook.

B. WHIP+ Appeals

Farmers have the right to appeal certain decisions that FSA makes with respect to WHIP+ applications.[525]

1. Appealable Decisions

There are two main categories of WHIP+ application decisions for which farmers may appeal. First, farmers have a right to appeal FSA decisions on WHIP+ applications where there are questions of fact relating to the decision.[526] Farmers also have the right to appeal when there is a disagreement as to the correct application of a WHIP+ rule or regulation.

---

[521] WHIP+ Handbook, page 9-23, para. 192 (March 26, 2020).
[522] WHIP+ Handbook, page 9-18, para. 188 (March 26, 2020).
[523] WHIP+ Handbook, page 9-2, para. 180.D (March 26, 2020).
[524] WHIP+ Handbook, page 1-7, para. 4.D (March 26, 2020).
[525] WHIP+ Handbook, page 1-20, para. 12.A (March 26, 2020).
[526] WHIP+ Handbook, page 1-20, para. 12.A (March 26, 2020). WHIP+ follows the appeals procedures outlined in FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation (Sept. 12, 2016).

2. Non-Appealable Decisions

Several types of WHIP+ decisions are not appealable.[527] These include decisions based on rules that are generally applicable to similarly-situated farmers who apply for WHIP+, as well as situations for which there are no disputes of fact. [528]

Examples of matters that are non-appealable include, but are not limited to, the following: (1) responses to inquiries about eligibility; (2) eligibility criteria; (3) the timing of application periods; (4) price; (5) signature requirements; (6) deadlines; (7) payment calculations; (8) minimum county disaster yields; and (9) internal operating guidelines issued to FSA state and county offices.[529]

3. Letters to Farmers of Non-Appealable Determinations

Letters notifying participants that a decision is not appealable must clearly explain to the farmer the reasons that the decision is not appealable.[530]

C. Equitable Relief

Equitable relief rules also apply to WHIP+.[531] Under equitable relief, some generally-applied rules for programs will not be applied to a particular farmer.[532]

D. Discrimination is Illegal

USDA prohibits discrimination on the bases of race, color, religion, sex, age, national origin, marital status, sexual orientation, familial status, disability, limited English proficiency, or because all or a part of an individual's income is derived from a public assistance program.[533]

---

527 FSA states that the non-appealable decisions are based on guidance from the FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation (Sept. 12, 2016). See WHIP+ Handbook, page 1-20, para. 12.B (March 26, 2020).

528 84 Fed. Reg. 48,518, 48,528-529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1501(f)); WHIP+ Handbook, page 5-24, para. 114.C (March 26, 2020); FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation, page 2-6, para. 11.A (Sept. 12, 2016).

529 84 Fed. Reg. 48,518, 48,528-529 (Sept. 13, 2019) (to be codified at 7 C.F.R. § 760.1501(f)); WHIP+ Handbook, page 1-20, para. 12.B, and 5-24, para. 114.C (March 26, 2020).

530 Notification letters follow the guidelines in FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation (Sept. 12, 2016). For the requirements of letters notifying farmers of non-appealable determinations, see FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation, page 2-16, para. 15.A (Sept. 12, 2016).

531 WHIP+ Handbook, page 1-4, para. 3.I (March 26, 2020).

532 See 7 C.F.R. pt 718, subpt. D (2019); FSA Handbook 7-CP, Finality Rule and Equitable Relief (Rev. 4) (Dec. 2, 2019)

533 7 C.F.R. § 15d.3(a) (2019).