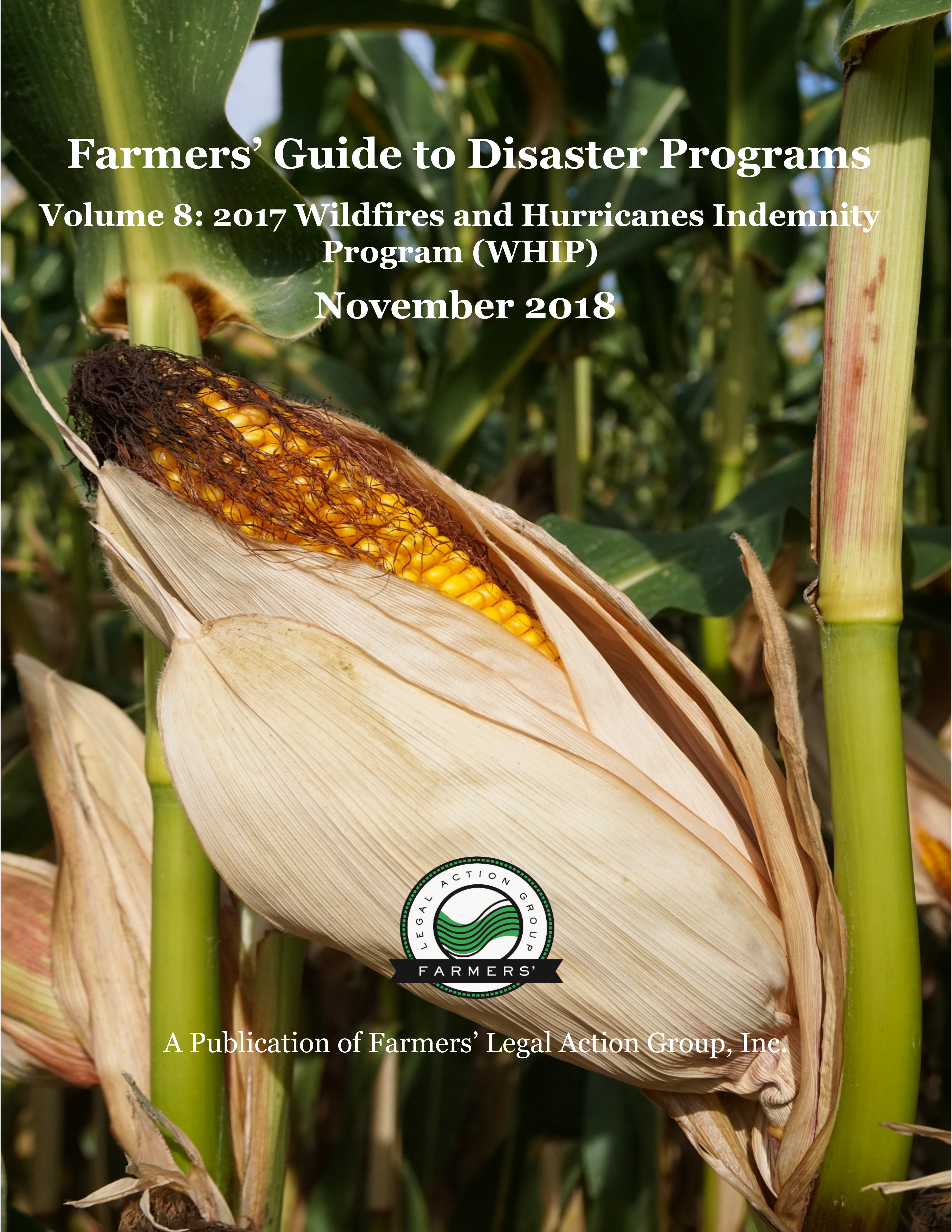

Farmers’ Guide to Disaster Programs

Volume 8: 2017 Wildfires and Hurricanes Indemnity Program (WHIP)

November 2018

A Publication of Farmers’ Legal Action Group, Inc.

Farmers' Guide to Disaster Assistance

Seventh Edition

Volume 8: 2017 Wildfires and Hurricanes Indemnity Program

November 2018

Written and edited by Stephen Carpenter and Lindsay Kuehn

Copyedited by Wendy Reid

This publication was made possible with the generous support of:

Otto Bremer Trust

Farm Aid

Individual contributions from FLAG supporters

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

This Guide to the **2017 Wildfires and Hurricanes Indemnity Program** is current through November 2018.

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

www.flaginc.org

lawyers@flaginc.org

Table of Contents

Page

I. Introduction 1
A. Deadline to Sign Up: November 16, 2018 1
B. New and Short-Term Program 1
C. Rules for WHIP 1
D. Eligibility, Calculating Benefits, and Timing of Payments 2
E. Florida Citrus 2
F. Yield-Based Crops, Value Loss Crops, and Trees, Bushes, and Vines 2
G. Plan for This Guide 3
II. Producer Eligibility: Who Can Receive Payments 3
A. Eligible Producers 3
1. Individual or Legal Entity 3
2. Ownership and Risk 4
3. Verification of Producer Eligibility 4
4. Deceased Producers, Estates, and Dissolved Entities 5
5. A Change in Crop Ownership 6
B. Other Producer Eligibility Rules 6
1. Must Comply with Conservation Rules 6
2. No Violations of Controlled Substance Rules 6
3. No Fraud 6
4. Eligible for Crop Insurance or NAP 6
III. Eligible Causes of Loss: Hurricane or Fire Loss in 2017 7
A. Hurricane or Wildfire in 2017 7
1. Hurricane Losses 7
2. Wildfire Losses 7
B. Related Conditions Count 7
C. Ineligible Causes of Loss—Not Caused by Eligible Disaster 8
Herbicide Drift 8
2. Failure to Re-seed 8
3. Storage and Losses Outside of Growing Season 8
4. Not for Current Year Harvest 8
5. Lack of Good Farming Practices or Poor Management Decisions 9

6. Wildlife—Sometimes 9

IV. General Loss Eligibility Rules 9

A. Eligible Crops 9

1. Must be Eligible for Federal Crop Insurance or NAP 9

2. Planted or Prevented Planting—Both Eligible 10

B. Ineligible Crops 10

1. Crops Intended for Grazing–Not Eligible 10

2. Volunteer Crops—Not Eligible 10

3. Crops Not Intended for Harvest 10

C. Quantity Losses Only 10

D. All Acreage in Unit Eligible 10

E. Year of Loss 11

V. Eligible Acres 11

A. Eligible Acres Defined 11

1. Production on Eligible Acres 11

2. Planted or Prevent Planting Acres 11

3. Determining Eligible Acres for Insured Crops 11

4. Based on a Unit 12

5. Prevented Planting—Sometimes Eligible 12

B. Ineligible Acres 12

1. Crop Insurance and NAP Not Available 13

2. Intended for Grazing 13

3. First-Year Seeding of Perennial Forage Crop 13

4. Double Cropping 13

5. No Qualifying Loss on Unit 13

6. Prevented Planting—In Some Cases Ineligible 13

a. Not Planted Due to Management Decisions 13

b. Not Cropland 14

c. Forage Crop Already in Place 14

d. Tree Crops or Other Perennials 14

e. Conservation Purposes 14

f. Chemical Drift 14

g. Required by Agreement to be Unharvested 14

h. Another Person Makes Claim for Same Acres 14

i. Wildlife Damage 15

j. No Market Available 15

k. Water from Dams or Reservoirs 15

l. Cover Crop or Volunteer Crop 15

m. Value Loss Crops 15

n. Irrigation Problems 15

o. Quarantine 16

p. Tropical Regions 16

VI. Eligibility Rules for Yield-Based Crops 16

A. Definition of Yield-Based Crops 16

B. Data Used to Calculate WHIP Payments 16

1. Expected Value 16

a. Expected Yield 17

(i) Insured by Crop Insurance—Established Yield from Crop Insurance 17

(ii) Covered by Noninsured Assistance Program (NAP)—NAP Approved Yield 18

(iii) Not Covered by Either Crop Insurance or NAP—County Expected Yield 18

(iv) Other Unique Expected Yield Issues 18

(a) Puerto Rico 19

(b) Native Sod 19

(c) Yield in Late Planting Situations 19

b. Prices for WHIP 19

(i) Insured Crops—RMA Data Used 19

(ii) NAP Covered Crops—NAP Data Used 19

(iii) Uninsured Crops—NCT Data Used 19

(iv) Puerto Rico—NCT Data Used 20

2. WHIP Factor 20

3. Units 20

a. Insured Crops 20

b. NAP-Covered Crops 21

c. Uninsured Crops 21

4. Actual Production 21

a. Acreage and Production Reports 21

b. Sources for Production Reports ... 22

(i) Insured Crops—RMA Data Used ... 22

(ii) NAP Covered Crops—NAP Data Used ... 22

(iii) Uninsured Crops—Producer Provides Records ... 22

a. Acceptable Production Records ... 23

(i) Verifiable Records ... 23

(ii) Reliable Records ... 23

b. FSA Production Record Review ... 24

c. County Disaster Yield ... 24

5. Harvested Production ... 25

a. Farm Stored Production ... 25

b. Multiple Harvest Crops ... 25

c. Production for Seed ... 25

d. Unmarketable Production ... 26

e. Co-Mingled Crops ... 26

(i) Production Co-Mingled Between Years ... 26

(ii) Production Co-Mingled Between Eligible and Not Eligible Crops ... 26

(iii) Production Co-Mingled Between Units ... 26

(iv) Production Co-Mingled Between Practice ... 27

f. Grain Crops Harvested as Other Than Grain ... 27

6. Assigned Production ... 27

a. Two Types of Assigned Production ... 27

b. When FSA Will Use Assigned Production ... 27

(i) Acceptable Harvested Acre Records Not Available ... 27

(ii) Unharvested Acres Not Appraised ... 28

(iii) Part of Loss Not Due to Disaster ... 28

(iv) Late Planting ... 29

(v) Guaranteed Contract ... 29

c. Notice to Producer ... 29

7. Secondary Use or Salvage Value ... 30

a. Secondary Use Value ... 30

b. Salvage Value ... 31

8. When RMA Data Does Not Match FSA Data ... 31

9. Organic and Direct Marketing 31
C. Steps for Calculating Yield-Based Crop Loss Payments 31
VII. Eligibility Rules for Value Loss Crops 33
A. Definition of Value Loss Crops 33
B. Eligibility of Value Loss Crops 33
C. Data Used to Calculate WHIP Payments 33
1. National Crop Table Data 34
2. Units 34
a. Insured Crops 34
b. NAP-Covered Crops 34
c. Uninsured Crops 34
3. Expected Value 35
4. Actual Value 35
5. Payment Factor 35
6. WHIP Factor 35
7. Price 36
a. Insured Crops 36
b. NAP-Covered Crops 36
c. Uninsured Crops 36
d. Exception for Puerto Rico—Average Market Price Used 36
8. Secondary Use Value 36
9. Salvage Value 37
10. Organic and Direct Marketing 37
D. Calculating Payments for Value Loss Crops 37
VIII. Eligibility Rules for Trees, Bushes, and Vines 39
A. Definition of Tree, Bush, and Vine 39
1. Tree 39
2. Bush 39
3. Vine 39
B. Eligibility of Trees, Bushes, and Vines 39
1. General Requirements for Eligible Trees, Bushes, and Vines 39
a. Grown for Commercial Production 40
b. Damaged or Destroyed 40

c. Spacing 40
2. Ineligible Trees, Bushes, and Vines 41
a. Cucurbits, Pineapple Not Eligible 41
b. Perennial Plants 41
c. Nursery Crops Not Eligible 41
d. Florida Citrus Trees 41
e. Trees Grown for Pulp or Timber 41
f. Certain Perennial and Biennial Vines 42
g. Abandoned Groves 42
h. Nursery Plants and Ornamental Plants 42
i. Non-Commercial Plants 42
j. Bananas and Plantains 42
C. Data Used to Calculate WHIP Payments 42
1. National Crop Table Data 42
2. Growth Stage 43
3. Expected Value 43
4. Actual Value 43
5. WHIP Factor 44
6. Damage Factor—Damaged Trees, Bushes, and Vines Only 44
7. Price 44
a. Assigned on a Statewide Basis 45
b. Follow Price-Setting Rules of RMA and NAP 45
(i) Insured Trees, Bushes, and Vines 45
(ii) NAP-Covered Trees, Bushes, and Vines 45
(iii) Uninsured Trees, Bushes, and Vines 45
c. Exception for Puerto Rico—Average Market Price Used 46
d. Average Market Price 46
e. Organic and Direct Marketing Trees, Bushes, and Vines 46
8. Secondary Use Value 46
9. Salvage Value 47
D. Payment Calculation for Tree, Bush, and Vine Losses 47
IX. WHIP Application Requirements 48
A. Application Form (FSA-890) 48

B. Crop Insurance or NAP 48
C. Conservation Compliance Certification 49
D. Acreage Reporting 49
X. WHIP Payments 49
A. Timing of WHIP Payments: Two Payouts 49
B. Payment Limits 50
1. General Rule $125,000 50
2. Possible Rule $900,000 50
C. Interest 50
D. Assignment and Offset 50
XI. Linkage Requirement—Must Buy Crop Insurance or NAP for Next Two Years 50
A. Crop Insurance or NAP Likely Available 51
B. Two Years of Coverage 51
C. Rules for Coverage 51
1. Insurable Crop, Tree, Bush or Vine 51
2. NAP-Eligible Crop, Tree, Bush or Vine 52
D. Coverage Based on Producer's Interest and Pay Group 52
E. No Exception or Waivers for Linkage 52
F. If Producer Quits Farming 53
G. If Requirement Not Met—Refund WHIP Payment 53
XII. WHIP Denial Notification, Appeals, and Equitable Relief 53
A. WHIP Denial Notification 53
B. WHIP Appeals 53
1. Appealable Decisions 53
2. Non-Appealable Decisions 54
3. Letters to Producers of Non-appealable Determinations 54
C. Equitable Relief 54
D. Discrimination is Illegal 54
XIII. Special WHIP Rules for Certain Crops 54
A. Florida Citrus Producers NOT Eligible 54
B. Puerto Rico Provisions 55
C. Pasture, Rangeland, and Forage 55
D. Hybrid Seeds 55

E. Grass for Seed that is Also Harvested as Forage 55
F. Certified Seed Potato Endorsements 55
G. One-Move Cotton Exception—Hurricane Harvey Losses Only 56
H. California and Arizona Citrus 56
I. Crop Insurance Dollar Plans 56
J. Multiple Marketed Crops 56
K. Winter Wheat 57
L. Sugar Beets 57
M. Skip-Row Crops of Cotton and Sorghum 57

2017 Wildfires and Hurricanes Indemnity Program (WHIP)

I. Introduction

The 2017 Wildfires and Hurricanes Indemnity Program (WHIP) provides payments to agricultural producers that suffered crop, tree, bush, and vine losses from hurricanes and wildfires that occurred in 2017.[1]

As it stands right now, WHIP is only available for 2017 disasters.

A. Deadline to Sign Up: November 16, 2018

Sign-up for WHIP began on July 16, 2018 and will end on November 16, 2018.[2] To sign up, producers will need to fill out an application form for WHIP.[3]

Each application must have a signature by the sign-up deadline.[4] FSA will not accept late applications.

B. New and Short-Term Program

WHIP was created by an act of Congress in 2018.[5] USDA will make available more than two billion dollars for WHIP.[6] At present, WHIP funding is authorized to be spent by FSA through December 31, 2019.[7]

C. Rules for WHIP

Rules for WHIP originate in several places. First, WHIP is governed by federal statute.[8] Second, regulations for WHIP have been issued in the Federal Register and will appear in the Code of Federal Regulations.[9] Third, FSA has issued a Handbook that will control

---

1 7 C.F.R. § 760.1500 (2018); FSA Handbook 1-WHIP (Amend. 1), "Wildfires and Hurricanes Indemnity Program," page 1-11, para. 6.A (July 13, 2018).
2 WHIP Handbook, page 1-2, para. 3.B (July 13, 2018).
3 WHIP Handbook, page 1-2, para. 3.B (July 13, 2018). Officially, the form is 2017 Wildfires and Hurricanes Indemnity Program (WHIP) Application, FSA-890. A copy is at WHIP Handbook, Exhibit 4 (July 13, 2018). https://www.fsa.usda.gov/Internet/FSA_File/1-whip_r00_a02.pdf
4 WHIP Handbook, page 1-3, para. 3.C (July 13, 2018).
5 The Bipartisan Budget Act of 2018, Pub. L.115-123 authorizes WHIP.
6 83 Fed. Reg. 33795, 33795 (2018) (prefatory comments). See WHIP Handbook, page 1-2, para. 3.A (July 13, 2018).
7 WHIP Handbook, page 1-2, para. 3.A (July 13, 2018).
8 The Bipartisan Budget Act of 2018, Pub. L. No. 115-123, ---- Stat. ---- (Feb. 9, 2018) (Division B, Title I).
9 2017 Wildfires and Hurricanes Indemnity Program, 83 Fed. Reg. 33795 (July 18, 2018) (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 (2018).

WHIP implementation.[10] Fourth, FSA may issue Notices or other guidance for the program.

D. Eligibility, Calculating Benefits, and Timing of Payments

Eligibility for WHIP payments has several parts.[11] First, the producer must be an eligible producer. Second, the losses in question must be from what FSA calls yield-based crops, value loss crops, or from trees, bushes, or vines. Third, the losses must be caused by one of the major hurricanes or wildfires that took place in 2017. There are important details for each of these eligibility rules.

Calculating WHIP payments requires several steps.[12] In general, a producer 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. The WHIP factor will vary among producers. Expected production, after being reduced by the WHIP factor, is then compared to the producer's disaster yield. The difference is then reduced by crop insurance or Noninsured Crop Disaster Assistance Program (NAP) payments the producer may have received. The final result will be a WHIP payment for the producer. Along the way, there are important details within these calculations. These details are discussed in this guide.

FSA plans to make WHIP payments in two parts.[13] After the first payment, if there are funds remaining, a second payment will be made.

E. Florida Citrus

Florida citrus growers are not eligible for WHIP.[14] Instead, USDA will fund a similar program that is run by the state of Florida.

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

In general, WHIP provides assistance for crop losses that fall within any of three main categories. First, WHIP can help producers who suffer losses of what FSA calls "yield-based" crops. Although FSA does not provide a definition of yield-based crops, they cover most traditional farming crops that produce a measurable yield. In addition, WHIP helps producers of what are called "value loss crops," which—unlike yield-based crops—do not lend themselves to yield loss calculations. Instead, value loss crops are those crops for

---

10 FSA Handbook 1-WHIP (Amend. 1), "Wildfires and Hurricanes Indemnity Program" (July 31, 2018). Priority between the Handbook and regulations are discussed at WHIP Handbook, page 1-2, para. 2.C (July 13, 2018). Some rules are taken from FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).

11 7 C.F.R. §§ 760.1503(a), 760.1508 (2018); WHIP Handbook, page 1-11, para. 6.A (July 13, 2018).

12 7 C.F.R. §§ 760.1511(a), 760.1515(a), 760.1516(b) (2018); WHIP Handbook, page 11-1, para. 210.A (July 13, 2018).

13 7 C.F.R. § 760.1506(a) (2018); 83 Fed. Reg. 33795, 33795 (July 18, 2018) (prefatory remarks). This is in part because Congress created limits on the total payments that can go out to producers based on the total farm losses and based on crop insurance and other payments to producers for the disaster.

14 7 C.F.R. § 760.1516(f) (2018); WHIP Handbook, page 8-2, para. 140.B (July 13, 2018).

which the plant or commodity is sold rather than a product of the plant.[15] For example, Christmas trees, flowers, and mushrooms are all considered value loss crops. Finally, WHIP assists producers of trees, bushes, and vines.

Some WHIP rules apply to all types of crop losses, while other rules are specific to either yield-based crops, value loss crops, or trees, bushes, and vines. To help avoid confusion, this Guide will refer generally to "crops" when it is referring to crops that fall within any of the three categories. When a rule applies specifically to a certain category of crop, that category will be named.

G. 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 producers. 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 producers purchase crop insurance if wish to receive a WHIP payment. Section XII outlines the rights that producers have if their WHIP application is denied and they choose to appeal or seek other relief. Finally, Section XIII discusses includes unusual and miscellaneous rules for certain crops and regions.

II. Producer Eligibility: Who Can Receive Payments

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

A. Eligible Producers

In general, an eligible producer for WHIP is either an individual or a legal entity that assumes ownership and risk of the crop and its production, as well as market risk for producing the crop.[16]

1. Individual or Legal Entity

An eligible producer can be either an individual person or a legal entity, including a joint venture and a general partnership.[17] An individual must be a United States citizen

[15] WHIP Handbook, page 9-1, para. 160.A (July 13, 2018).
[16] WHIP Handbook, page 2-5, para. 31.A (July 13, 2018).
[17] 7 C.F.R. § 760.1503(b) (2018); WHIP Handbook, page 2-5, para. 31.A (July 13, 2018). Tax identification numbers are needed. WHIP Handbook, page 1-17, para. 8.A (July 13, 2018).

or a resident alien. [18] By resident alien, FSA means a lawful alien.[19] Any partners in a partnership must be United States citizens or resident aliens.[20] Other entities that can be considered eligible producers include corporations, limited liability companies, or other organization structures organized under state law. [21] Strict signature rules and tax identification number requirements apply.[22]

2. Ownership and Risk

An eligible producer must own some of the crop.[23] FSA says, for example, that an entity must have a valid claim of share ownership of the crop.[24] An eligible producer must also bear a share of the risk for the crop, its production, and its marketing. This means that producers growing eligible crops under contract for crop owners will not be eligible unless the producers are determined to have an ownership share of the crop.[25] In addition, a contract, either written or verbal, that prevents the producer from having an ownership share of the crop makes the producer ineligible for WHIP.[26]

3. Verification of Producer Eligibility

At the time of the disaster, producers must be able to show with "verifiable evidence" that the producer has a valid ownership share and risk in the crop and control of the crop acreage on which the commodity was grown.[27]

Producers growing under a grower contract must provide FSA with a copy of the contract. [28] Producers that are engaged in community supported agriculture (CSA) must also provide FSA with a copy of the CSA agreement.

---

18 7 C.F.R. § 760.1503(b)(1) (2018); WHIP Handbook, page 2-5, para. 31.A (July 13, 2018).
19 7 C.F.R. § 760.1503(b)(2) (2018); WHIP Handbook, page 2-5, para. 31.A (July 13, 2018).
20 7 C.F.R. § 760.1503(b)(3) (2018); WHIP Handbook, page 2-5, para. 31.A (July 13, 2018).
21 WHIP Handbook, page 2-5, para. 31.A (July 13, 2018).
22 WHIP Handbook, page 1-3, para. 3.C (July 13, 2018). FSA Handbook, 1-CM (Rev. 3), "Common Management and Operating Provisions" (May 17, 2018) provides the applicable signature requirements. Form FSA-570 is not required. WHIP Handbook, page 1-3, para. 3.D (July 13, 2018). 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 (July 13, 2018).
23 WHIP Handbook, page 2-5, para. 31.B (July 13, 2018); 7 C.F.R. §§ 760.1503(d), 760.1504(d). 760.1511(e) (2018).
24 WHIP Handbook, page 2-5, para. 31.A (July 13, 2018);
25 7 C.F.R. §§ 760.1503(d) (2018).
26 WHIP Handbook, pages 2-5 and 2-6, para. 31.B (July 13, 2018). There is a general rule against this interest in a crop. WHIP Handbook, para. 31.F, page 2-9 (July 13, 2018). 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 possible to have the same interest in the same land and crop as a different individual or entity.
27 WHIP Handbook, page 2-5, para. 31.B (July 13, 2018).
28 WHIP Handbook, page 2-5, para. 31.B (July 13, 2018).

If producers rented land, they must provide a copy of the lease or rental agreements.[29] The lease or rental arrangements must have existed before the date of the disaster. The question for FSA will be whether there was a rental or lease agreement in place at the time of the disaster. [30]

Producers claiming an ownership interest in a crop may be subject to a spot check by FSA to verify their interest.[31]

In a spot check for payments involving leased land, FSA will want to confirm that a producer had an ownership interest in the crop and was bearing the risk of the crop.[32] FSA may therefore ask to see leases or rental agreements. Written statements that confirm that there was a verbal agreement appear to be acceptable. FSA will want to know, in addition, how the landlord and the tenant shared ownership in the crop and the risk of raising the crop.

In a spot check for a crop grown under contract, FSA may want to see copies of written agreements and leases, copies of legal documents that show land ownership or control, statements signed by the landowner that the producer had control of the acreage, or a statement signed by the operator or producer that the producer had control of the acreage on the farm.[33]

4. Deceased Producers, Estates, and Dissolved Entities

A WHIP application involving a deceased producer, or an estate, is possible.[34] In addition, payments are possible if a general partnership or a joint venture was dissolved.[35]

---

29 WHIP Handbook, page 2-5, para. 31.B (July 13, 2018).

30 WHIP Handbook, page 2-5, para. 31.B (July 13, 2018). Negotiation of an existing agreement or performance of an existing rental agreement that occurs after the disaster does not affect producer eligibility.

31 7 C.F.R. § 760.1510(c) (2018); WHIP Handbook, page 2-5, para. 31.B (July 13, 2018). If a grower does not have a valid claim, WHIP payments may need to be returned.

32 WHIP Handbook, page 2-6, para. 31.B (July 13, 2018).

33 WHIP Handbook, page 2-6, para. 31.B (July 13, 2018).

34 7 C.F.R. § 760.1503(c) (2018); WHIP Handbook, page 2-6, para. 31.B (July 13, 2018). 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.

35 7 C.F.R. § 760.1503(c) (2018); WHIP Handbook, pages 2-6 and 2-7, para. 31.B-D (July 13, 2018). 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 (July 13, 2018).

5. A Change in Crop Ownership

A producer 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.[36] Producers who assume interest and ownership may be eligible.[37]

B. Other Producer Eligibility Rules

Other producer eligibility rules that are common for USDA programs also apply to WHIP.

1. Must Comply with Conservation Rules

Producers must provide evidence of compliance with federal conservation rules for highly erodible land and wetlands. [38]

2. No Violations of Controlled Substance Rules

Controlled substance rules apply, and the violation of those rules could result in WHIP ineligibility.[39]

3. No Fraud

Producers 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.[40] In addition, Federal Crop Insurance Corporation (FCIC) fraud rules apply, and if violated can make a producer ineligible for WHIP.[41]

4. Eligible for Crop Insurance or NAP

In order to be eligible for WHIP, producers must be eligible for crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage.[42]

---

36 WHIP Handbook, page 2-7, para. 31.D (July 13, 2018).

37 WHIP Handbook, page 2-7, para. 31.D (July 13, 2018). Share through a transfer or indemnity for insured crops or transfer of coverage for NAP crops may assume WHIP eligibility.

38 7 C.F.R. § 760.1503(i) (2018); WHIP Handbook, page 1-18, para. 10.A, page 12-4, para. 242.B (July 13, 2018). Rules for conservation compliance can be found at FSA Handbook, 6-CP (Rev. 4), “Highly Erodible Land Conservation and Wetland Provisions” (May 30, 2018).

39 7 C.F.R. §§ 718.6, 760.1503(h) (2018); WHIP Handbook, page 1-4, para. 3.I, page 12-4, para. 242.B (July 13, 2018).

40 7 C.F.R. § 760.1503(e) (2018); WHIP Handbook, page 1-20, para. 12.A (July 13, 2018). Any producer 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.

41 7 C.F.R. § 760.1503(e)(2) (2018); WHIP Handbook, page 1-4, para. 3.I (July 13, 2018). see 3-PL (Rev. 2)

42 7 C.F.R. § 760.1503(g) (2018); WHIP Handbook, page 2-10, para. 32.A, page 12-4, para. 242.B (July 13, 2018). For any year that the producer is not eligible for crop or insurance or NAP, that producer is not eligible for WHIP. The bases for the eligibility must stem from 7 C.F.R. §§ 400.458 or 1437.16. 7 C.F.R. § 760.1503(g) (2018).

III. Eligible Causes of Loss: Hurricane or Fire Loss in 2017

WHIP assistance is available for yield-based crops, value loss crops, as well as trees, bushes, and vines that suffered a loss due to what FSA calls a "qualifying disaster event."[43]

A. Hurricane or Wildfire in 2017

There are two main types of qualifying disaster events for WHIP: (1) a named hurricane; and (2) a wildfire.[44] Related conditions that occurred as a result of a hurricane or wildfire can also be qualifying disaster events. In all cases, the disaster event must have occurred in 2017 to be eligible for WHIP.

1. Hurricane Losses

For hurricane losses, and any related conditions, WHIP is available to eligible producers who live in one of two areas. First, it is available to producers in counties with official disaster declarations.[45] A list of declared counties is available.[46] Second, WHIP is available in a county that is not listed in an official declaration if the producer shows that a loss in 2017 was due to a hurricane or related condition.[47]

2. Wildfire Losses

For wildfire losses, and any related conditions, producers in any state or county may apply.[48] FSA must agree that the loss was because of a 2017 wildfire.

B. Related Conditions Count

A qualified disaster event includes what FSA calls "related conditions" that occur as a direct result of a hurricane or wildfire.[49]

For a hurricane, a related condition can mean the hurricane itself, as well as excessive wind, excessive rain, flooding, storm surges, and tornadoes.[50]

---

43 7 C.F.R. § 760.1503(a) (2018); WHIP Handbook, page 2-1, para. 30.A (July 13, 2018).

44 7 C.F.R. §§ 760.1500, 760.1502, "Qualifying disaster" (2018); WHIP Handbook, page 2-1, para. 30.B (July 13, 2018).

45 7 C.F.R. § 760.1508(b) (2018); WHIP Handbook, page 2-3, para. 30.G (July 13, 2018). That means either a presidential or secretarial designation of a hurricane or tropical storm.

46 WHIP Handbook, page 2-1, para. 30.B (July 13, 2018). The list is at WHIP Handbook, Exhibit 6 (July 13, 2018).

47 7 C.F.R. § 760.1508(b) (2018); WHIP Handbook, page 2-3, para. 30.G (July 13, 2018). There must be supporting documents for this claim.

48 7 C.F.R. § 760.1508(d) (2018); WHIP Handbook, page 2-3, para. 30.G (July 13, 2018).

49 7 C.F.R. §§ 760.1500, 760.1502, "Qualifying disaster" (2018); WHIP Handbook, page 2-1, par 30.B, page 2-2, para. 30.D, page 2-4, para. 30.F (July 13, 2018). The FSA WHIP Handbook says that the NAP Handbook definition of an eligible loss should be used. See NAP Handbook page 2-4 to 2-11, para. 51.A-D (August 3, 2018).

50 7 C.F.R. §§ 760.1502, "Related condition," 760.1508(c) (2018); WHIP Handbook, page 2-1, par 30.B (July 13, 2018).

For a wildfire, a related condition can mean the fire itself, as well as mud slides, and heavy smoke.[51]

FSA can approve other related conditions not listed here, so long as the related condition was directly caused by the hurricane or wildfire. [52]

C. Ineligible Causes of Loss—Not Caused by Eligible Disaster

FSA rules describe what are not eligible losses. In general, a loss that is not the result of an eligible disaster is not an eligible loss.[53] To ensure that WHIP payments reflect only WHIP-eligible losses, FSA will assign a production value for any ineligible part of the producer's loss.[54]

Ineligible causes of loss include the following.

1. Herbicide Drift

Herbicide drift is not an eligible cause of loss under WHIP. [55]

2. Failure to Re-seed

If a loss is due to the producer'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.[56]

3. Storage and Losses Outside of Growing Season

Any loss that occurs during storage of the crop is not an eligible loss. [57] In addition, losses that occur after harvest or because of conditions that occur outside the applicable crop year growing season, are not eligible.[58]

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.[59]

---

51 7 C.F.R. §§ 760.1502, "Related condition," 760.1508(d) (2018); WHIP Handbook, page 2-1, par 30.B (July 13, 2018).
52 WHIP Handbook, page 2-1, par 30.B (July 13, 2018).
53 7 C.F.R. § 760.1509(a) (2018); WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).
54 7 C.F.R. § 760.1513(f)(2) (2018); WHIP Handbook, page 2-2, para. 30.F, and pages 6-18 to 6-19, para. 113.C (July 13, 2018).
55 7 C.F.R. § 760.1509(b)(1) (2018); WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).
56 7 C.F.R. § 760.1509(b)(2) (2018); WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).
57 WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).
58 7 C.F.R. § 760.1509(b)(4) (2018); WHIP Handbook, page 2-3, para. 30.E (July 13, 2018). Under certain circumstances, cotton can be an exception to this rule. See WHIP Handbook, page 10-20, para. 189 (July 13, 2018).
59 7 C.F.R. § 760.1509(c)(4) (2018); WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).

5. Lack of Good Farming Practices or Poor Management Decisions

Any loss resulting from a producer's lack of good farming practices or poor management decisions is not an eligible loss.[60]

6. Wildlife—Sometimes

Losses caused by wildlife are an eligible loss if the producer had crop insurance.[61] They are not an eligible cause of loss if the producer had Noninsured Crop Disaster Assistance Program (NAP) coverage or had no coverage.

IV. General Loss Eligibility Rules

WHIP assistance is available to eligible producers that suffer losses of yield-based crops, value loss crops, as well as trees, bushes, and vines.[62]

Livestock are not eligible for WHIP.[63]

The following rules apply.

A. Eligible Crops

WHIP only provides assistance for losses of what FSA rules refer to as "eligible crops." These rules apply broadly to loss of yield-based crops, value loss crops, as well as trees, bushes, and vines. Two sets of requirements apply when deciding if a crop is an eligible crop under WHIP.

1. Must be Eligible for Federal Crop Insurance or NAP

Any crop for which federal crop insurance is available is an eligible crop for the purposes of WHIP.[64] A list of crops for which crop insurance is available can be found online. Similarly, any crop which is eligible for Noninsured Crop Disaster Assistance Program (NAP) is an eligible crop for the purposes of WHIP.[65]

---

[60] 7 C.F.R. § 760.1509(b)(1) (2018); WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).

[61] WHIP Handbook, page 2-3, para. 30.E (July 13, 2018).

[62] 7 C.F.R. §§ 760.1500, 760.1503(a) (2018); WHIP Handbook, page 2-1, para. 30.A, page 8-1, para. 140.A, page 9-1, para. 160.A (July 13, 2018).

[63] 83 Fed. Reg. 33795, 33796 (July 18, 2018); WHIP Handbook, page 1-13, para. 6.A (July 13, 2018). According to FSA, this is because livestock are covered by other disaster programs.

[64] 7 C.F.R. § 760. 1502, "Eligible crop" (2018); WHIP Handbook, page 2-10, para. 32.A (July 13, 2018). For a list of crops that are covered by crop insurance see https://webapp.rma.usda.gov/apps/ActuarialInformationBrowser2017/CropCriteria.aspx

[65] In general, according to FSA, NAP coverage is available for the following commercial crops when crop insurance is not available. These include: (1) crops grown for food, excluding livestock and their by-products; (2) crops planted and grown for livestock consumption, including but not limited to grain and forage crops; (3) crops grown for fiber, excluding trees grown for wood, paper, or pulp products; and (4) the production of aquacultural species (including ornamental fish), floricultural crops, ornamental nursery plants, Christmas tree crops, turfgrass sod, sweet sorghum, biomass sorghum, industrial crops, seed crops, sea grass, and sea oats. See 83 Fed. Reg. 33796. (July 18, 2018)

2. Planted or Prevented Planting—Both Eligible

Eligible crops can be crops that were either planted with the intent to harvest the crop, or were prevented from planting, as long as the intention was to plant and harvest the crop.[66]

B. Ineligible Crops

Several kinds of crops are not eligible for WHIP.

1. Crops Intended for Grazing–Not Eligible

Crops intended for grazing are not eligible for WHIP.[67] These crops may be eligible for other disaster programs.

2. Volunteer Crops—Not Eligible

Volunteer crops are not eligible.[68]

3. Crops Not Intended for Harvest

Crops not intended for harvest are not eligible.[69]

C. Quantity Losses Only

WHIP only provides payment for production or value losses.[70] It does not cover quality losses unless there is a total quality loss and the commodity no longer has any value.

D. All Acreage in Unit Eligible

When calculating WHIP assistance, all acreage in a unit is eligible. [71] Units, also known as basic units, follow the definition of unit used in crop insurance and NAP.[72]

---

66 7 C.F.R. §§ 760.1509(a), 760.1514(f) (2018); WHIP Handbook, page 2-10, para. 32.A (July 13, 2018). More rules for prevented planting can be found at FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations," pages 2-44 to 2-56, para. 37 (Sept 10, 2018).

67 7 C.F.R. § 760.1509(c)(1) (2018); WHIP Handbook, page 2-10, para. 32.B (July 13, 2018).

68 7 C.F.R. § 760.1509(c)(3) (2018); WHIP Handbook, page 2-10, para. 32.B (July 13, 2018). More rules for prevented planting can be found at FSA Handbook Acreage and Compliance Determinations, 2-CP (Rev. 16), page 60, para. 39 (Sept 10, 2018).

69 7 C.F.R. § 760.1509(c)(4) (2018).

70 7 C.F.R. § 760.1505(g) (2018); 83 Fed. Reg. 33795, 33795 (July 18, 2018) (prefatory comments).

71 WHIP Handbook, page 2-1, par 30.C (July 13, 2018).

72 7 C.F.R. § 760.1502, "Unit" (2018). For crop insurance, see 7 C.F.R. pt. 457 (2018). For NAP see 7 C.F.R. § 1437.9 (2018).

E. Year of Loss

As it stands right now, WHIP is only available for 2017 losses. That means that the year of loss is important for WHIP eligibility.

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.[73]

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. [74]

V. Eligible Acres

In order to calculate WHIP benefits—whether for a loss of yield-based crops, value loss crops, or trees, bushes or vines—the number of eligible acres must be set. This requires that producers file a report of total acres.[75]

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 for production crops, value loss crops, and trees, bushes and vines, as well as acres used for colonies of honey and taps for maple syrup.[76]

2. Planted or Prevent Planting Acres

Eligible acres can be either planted or prevented planting acres, including acres for initial crops and ay subsequent crops.[77] FSA has specific rules that describe when eligible acres include double cropping or multiple panting periods.[78]

3. Determining Eligible Acres for Insured Crops

For insured crops, FSA will get acreage information from the Risk Management Agency (RMA), which administers federal crop insurance.[79]

---

73 WHIP Handbook, page 2-4, para. 30.F (July 13, 2018).
74 WHIP Handbook, page 2-4, para. 30.F (July 13, 2018).
75 WHIP Handbook, page 4-1, para. 90.A (July 13, 2018).
76 WHIP Handbook, page 4-1, para. 90.A (July 13, 2018).
77 WHIP Handbook, page 4-1, para. 90.A (July 13, 2018).
78 WHIP Handbook, page 4-1, para. 90.A (July 13, 2018). Double cropping is discussed in FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations" (Sept. 10, 2018). Multiple cropping periods are discussed in FSA Handbook, 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Aug. 3, 2018).
79 WHIP Handbook, page 4-1, para. 90.B (July 13, 2018). If there is a difference between RMA and FSA acres, FSA will use the lesser of the two acreages. 7 C.F.R. § 760.1514(h) (2018).

4. Based on a Unit

FSA will look at the unit when setting the number of eligible acres.[80] For example, suppose a farm unit has sixty acres of cotton. In 2017, twenty acres were affected by wildfire, and sixty acres were not. Because the farm unit was affected by the wildfire, all eighty acres are eligible for WHIP benefits.

5. Prevented Planting—Sometimes Eligible

Prevented planting acres can be eligible for WHIP, but only if the loss is due to a qualifying disaster event.[81]

For insured crops, the eligible prevented planting acres will generally be those acres for which the producer received a prevented planting payment.[82] However, 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.

For NAP-covered crops, eligible prevented planting acres are the acreage of the crop for which NAP paid a prevented planting payment.[83]

For crops that are not insured, FSA will determine the prevented planting acres according to an internal Handbook.[84]

B. Ineligible Acres

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

---

80 WHIP Handbook, page 4-2, para. 90.C (July 13, 2018). For unit discussion see WHIP Handbook, page 9-1, para. 160.B (July 13, 2018). The unit that FSA uses will depend on the whether the producer has crop insurance, NAP coverage, or is uninsured. For acres that are insured with crop insurance, FSA will use units that have been set for crop insurance purposes. WHIP Handbook, page 4-5, para. 92.A (July 13, 2018). For NAP-covered crops, units are taken from FSA records, and the unit structure used for NAP will apply. WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). 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" (August 3, 2018). If a crop is not insured, basic units for the farm must be created. These will be based on NAP rules. WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). For NAP rules, see FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).

81 7 C.F.R. § 760.1514(f) (2018); WHIP Handbook, page 4-3, para. 91.A (July 13, 2018).

82 WHIP Handbook, page 4-3, para. 91.B (July 13, 2018).

83 WHIP Handbook, page 4-3, para. 91.B (July 13, 2018).

84 WHIP Handbook, page 4-3, para. 91.B (July 13, 2018). To determine prevented planting acres for uninsured crops, FSA will use FSA Handbook, 2-CP (Rev. 16), "Acreage and Compliance Determinations" (Sept. 10, 2018). However, the timeframes outlined in the Acreage and Compliance Determinations Handbook do not apply to WHIP.

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.[85]

2. Intended for Grazing

Acres that were intended for grazing are not eligible for WHIP.[86]

3. First-Year Seeding of Perennial Forage Crop

The first-year seeding of a perennial forage crop is not eligible acreage for WHIP.[87]

4. 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.[88]

5. 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.[89]

6. Prevented Planting—In Some Cases Ineligible

Although prevented planting acreage can be eligible for WHIP, there are many situations for which it will not be eligible.[90] Below are some, but not all, of the situations for which prevented planting is not covered by WHIP.

a. 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.[91] For example, FSA will deny WHIP acreage eligibility for prevented planting if other producers in the area were able to plant.

---

85 7 C.F.R. § 760.1514(g)(2) (2018); WHIP Handbook, page 4-2, para. 90.D (July 13, 2018).
86 WHIP Handbook, page 4-2, para. 90.D, page 6-30, para. 118.A (July 13, 2018).
87 WHIP Handbook, page 4-2, para. 90.D (July 13, 2018).
88 WHIP Handbook, page 4-2 para. 90.F (July 13, 2018). See, for example, FSA Handbook, Acreage and Compliance Determinations (2-CP, rev. 16), pages 2-61 to 2-65, par. 40 (April 11, 2018).
89 WHIP Handbook, page 4-2, para. 90.D (July 13, 2018).
90 WHIP Handbook, page 4-2, para. 90.D (July 13, 2018). 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 4-3 through 4-5, para. 91.C (July 13, 2018).
91 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).

b. Not Cropland

Acreage that is not devoted to cropland is not eligible for prevented planting.[92]

c. 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.[93]

d. Tree Crops or Other Perennials

If the acreage is used for tree crops or other perennials the land is not eligible for WHIP.[94] An exception to this rule applies if the producer can show that resources were available to plant, grow, and harvest the crop.

e. 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.[95] 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.

f. Chemical Drift

If the acreage is affected by chemical or herbicide residue, the acreage is not eligible for WHIP prevented planting.[96]

g. 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. [97]

h. 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 acres for the same year.[98] An exception to this rule applies if double-cropping requirements are met.

---

92 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
93 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).
94 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
95 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).
96 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
97 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).
98 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).

i. Wildlife Damage

If the crop is damaged by wildlife, the acreage is not eligible for WHIP prevented planting.[99]

j. No Market Available

If the producer is unable to find a market for the crop, the acreage is not eligible for WHIP.[100]

k. Water from Dams or Reservoirs

In some cases, prevented planting acres are not eligible for WHIP if the acreage was affected by the containment or release of water by a dam or reservoir project.[101] This will be true if there is an easement on the acreage that affected the containment or release of the water.

l. 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.[102]

m. Value Loss Crops

Prevented planting acres are not eligible for WHIP if the producer is raising value loss crops for which NAP assistance is provided under value loss procedures.[103] This includes, for example, Christmas tree, aquaculture, and ornamental nursery crops.

n. Irrigation Problems

Prevented planting acres are not eligible for WHIP if there is a failure or breakdown of irrigation equipment or facilities.[104] In addition, an acreage is not eligible for prevented planting if there is an inadequate supply of irrigation water before the crop insurance closing date for the previous crop year, or the NAP application closing date for the crop year, and continuing 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.[105] This includes, for

99 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
100 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
101 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).
102 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).
103 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
104 WHIP Handbook, page 4-4, para. 91.C (July 13, 2018).
105 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).

example, electricity buy-back programs, the sale of water, or changes in water use due to legislation.

o. Quarantine

If there is a government quarantine in effect, prevented planting acres are not eligible for WHIP.[106]

p. Tropical Regions

Prevented planting acres are not eligible for WHIP in tropical regions.[107]

VI. Eligibility Rules for Yield-Based Crops

This section describes the eligibility rules for yield-based crops.

A. Definition of Yield-Based Crops

Yield based crops will be most crops grown in the country. They cover any crop that can be covered with either federal crop insurance or Noninsured Crop Disaster Assistance Program (NAP) coverage, and that is not what FSA calls a value loss crop or a tree, bush or vine. So, corn, soybeans, wheat, and most field crops are in the yield-based crop category.

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 percentage.[108] The value of actual production is reduced from this number, as is the producer's indemnity or NAP payment received, if the producer has one. The following sections describes them. A step by step explanation is included as well.

B. Data Used to Calculate WHIP Payments

In order to calculate WHIP benefits for producers, FSA will rely on various sources for information and use several different terms for describing data.

1. Expected Value

Expected value is what FSA thinks the producer should have expected from the crop in a normal year.[109] It therefore is the revenue the producer would have received if the crop were harvested based on the producer's historical yield.[110] It is expressed as a dollar amount. Expected value is calculated by multiplying the applicable acreage by both the price per acre and the crop's yield.

---

106 WHIP Handbook, page 4-5, para. 91.C (July 13, 2018).
107 7 C.F.R. § 760.1514(f) (2018); WHIP Handbook, page 4-3, para. 91.B (July 13, 2018).
108 WHIP Handbook, page 11-1, para. 210.A (July 13, 2018).
109 7 C.F.R. § 760.1511(a)(1) (2018); WHIP Handbook, page 11-4, para. 211.B (July 13, 2018).
110 WHIP Handbook, page 11-2, para. 210.B (July 13, 2018).

In general, therefore, to figure expected value, FSA will decide how much the producer will produce (the expected yield) and will assign an expected price for that production.

a. Expected Yield

For yield-based crops, FSA will establish what it calls expected yields that will be the yield that was expected for the producer.[111] In general, expected yields are based on whether the crop is insured, covered by NAP, or uninsured.[112] Each commodity raised on eligible acreage will have a general expected WHIP yield that will apply based on the (1) county, (2) crop type, and (3) the intended use of the crop.[113]

If the producer has crop insurance or NAP coverage, the expected yield will come from prices based on those coverage plans.[114]

If the producer is not uninsured with either federal crop insurance or NAP, or if the crops were grown in Puerto Rico, the yield will be based on the county expected yield.[115]

A more detailed explanation is below.

(i) Insured by Crop Insurance—Established Yield from Crop Insurance

If the crop has crop insurance, FSA will first look to the RMA crop insurance information to determine expected yield.[116] 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 producer's production history, FSA will look to the county expected yields established according to NAP rules.[117] FSA may also assign a yield if the yield is not available from RMA due to the type of coverage elected.[118]

---

111 See 7 C.F.R. § 760.1502, "Approved yield," "2017 WHIP yield" (2018); WHIP Handbook, page 5-1, para. 100.A (July 13, 2018).
112 WHIP Handbook, page 5-2, para. 100.C (July 13, 2018).
113 WHIP Handbook, page 5-1, para. 100.A (July 13, 2018). Eligible acreage can include planted or prevented planting acres, as well as acreage used for maple syrup taps and honey colonies.
114 7 C.F.R. § 760.1511(c)(1) (2018).
115 7 C.F.R. § 760.1511(c)(2) (2018).
116 7 C.F.R. § 760.1511(c)(1) (2018); WHIP Handbook, page 5-1, para. 100.B, page 5-2, para. 100.C (July 13, 2018).
117 WHIP Handbook, page 5-2, para. 100.C (July 13, 2018). The applicable NAP rules can be found in FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).
118 WHIP Handbook, page 5-2, para. 100.C (July 13, 2018). See part 6 of handbook on assigning yield.

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

If the producer has NAP coverage, the expected yield will come from information based on yields established by FSA for NAP-covered crops.[119] The expected yield will be the NAP approved yield based on the FSA NAP rules.[120]

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

For crops that have neither crop insurance nor NAP coverage, FSA will use a county expected yield that is based on the method that is used for NAP and is set by FSA.[121] The county expected yield will reflect the production of the crop in the county by practice and intended use.

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.[122] First, FSA will reduce the county expected yield when FSA believes the practice used by the producer is not capable of producing the county expected yield in a normal year. Second, FSA will reduce the county expected yield when FSA think the area, regional climate, soil type, or other environmental factors do not normally allow a producer 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.[123]

(iv) Other Unique Expected Yield Issues

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

---

119 7 C.F.R. § 760.1511(c)(1) (2018); WHIP Handbook, page 5-1, para. 100.B (July 13, 2018). NAP-approved yields will be established according to FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).

120 WHIP Handbook, page 5-2, para. 100.C (July 13, 2018). The applicable NAP rules for determining yield can be found in FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).

121 WHIP Handbook, page 3-1, para. 61, "County expected yield," page 5-2, para. 100.C (July 13, 2018). County in this case means the administrative county. Yield source information is the same as would be used for NAP. See 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years," page 4-222, para. 276.B (Aug. 3, 2018).

122 WHIP Handbook, page 5-3, para. 100.F (July 13, 2018).

123 Age may include both crops that are in decline due to overage and those that are immature and underage. WHIP Handbook, page 5-3, para. 100.F (July 13, 2018).

(a) Puerto Rico

For all Puerto Rico producers, the expected yield will be a county expected yield set based on the method used in the NAP Handbook.[124]

(b) Native Sod

Any eligible crop planted on native sod acreage will be limited to an expected yield of 65 percent of county expected yield as applicable to the specific crop year for the administrative county.[125]

(c) Yield in Late Planting Situations

Late planting can also reduce the expected yield. For crops with crop insurance RMA will make the adjustment before FSA receives the information.[126] For uninsured and NAP crops, FSA will adjust the yield for late planting.[127]

b. Prices for WHIP

WHIP rules explain how FSA will set the prices used when WHIP benefits are calculated.

(i) Insured Crops—RMA Data Used

If the producer has federal crop insurance on the crop, FSA will use the price used by RMA for crop insurance.[128] If a crop insurance price is not available, FSA will use information from what it calls the National 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 producer had NAP coverage on the crop, FSA will use information from what it calls the National Crop Table (NCT).[129] 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 producer did not have either federal crop insurance or NAP coverage on the crop, FSA will use information from what it calls the

[124] 7 C.F.R. § 760.1511(c)(2) (2018); WHIP Handbook, page 5-2, para. 100.C (July 13, 2018).
[125] WHIP Handbook, page 5-2, para. 100.D (July 13, 2018).
[126] WHIP Handbook, page 5-3, para. 100.G (July 13, 2018).
[127] WHIP Handbook, page 5-3, para. 100.G (July 13, 2018).
[128] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[129] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).

National Crop Table (NCT).[130] 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).[131] The NCT has data for all crops that will be covered by WHIP.

2. WHIP Factor

When calculating WHIP benefits, FSA applies what it calls a "WHIP factor"—a percentage by which the producer's otherwise-eligible payment is multiplied in order to determine the producer's final WHIP payment.[132]

The WHIP factor for each producer is based on the level of crop insurance or NAP coverage the producer has for the crop. The WHIP factor usually falls somewhere between 70 and 95 percent.[133] If the producer does not have either crop insurance or NAP coverage, the WHIP factor is 65 percent.

3. Units

Units are an important part of the way FSA calculates WHIP benefits for yield-based crops.[134] The unit that FSA uses will depend on the whether the producer has crop insurance, NAP coverage, or is uninsured.

a. Insured Crops

For acres that are insured with crop insurance, FSA will use units that have been set for crop insurance purposes.[135] That unit structure may include optional units.

[130] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[131] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[132] 7 C.F.R. § 760.1511(a)(2) (2018); WHIP Handbook, page 11-4, para. 211.B (July 13, 2018). For a list of the applicable WHIP factors, see WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).
[133] 7 C.F.R. §§ 760.1502, "2017 WHIP factor," 760.1511(b) (2018); WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).
[134] WHIP Handbook, page 9-1, para. 160.B (July 13, 2018).
[135] WHIP Handbook, page 4-5, para. 92.A (July 13, 2018). It is possible for a producer 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 is not. In such a case, FSA will create two different units. WHIP Handbook, page 4-6, para. 92.D (July 13, 2018).

b. *NAP-Covered Crops*

For NAP-covered crops, units are taken from FSA records, and the unit structure used for NAP will apply.[136]

c. *Uninsured Crops*

If a crop is not insured, basic units for the farm must be created. These will be based on NAP rules.[137] In general, a basic unit is all of the acreage of the eligible crop in what FSA calls an administrative county.[138]

4. Actual Production

Actual production is the total quantity of the crop. It includes crops that are appraised, harvested, or assigned by FSA.[139] After actual production is determined, FSA can calculate the crop's actual value by multiplying the crop's price by its production.[140]

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

a. *Acreage and Production Reports*

Producers that apply for WHIP must provide acreage and production reports. The reports must include production for all WHIP-eligible crops for the agricultural unit.[141] For the purposes of this report, the producer must keep verifiable or reliable production evidence for all crops on the producer's unit. The producer must be willing to provide these records to FSA.[142] Producers are responsible for errors in the production reports. When producers apply for WHIP, they are certifying that the records are correct, accurate, and include the total production for the farm unit.

---

136 WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). 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" (August 3, 2018).

137 WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). For NAP rules, see FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).

138 WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). What is administrative county.

139 7 C.F.R. §§ 760.1502, "Actual production" (2018).

140 7 C.F.R. § 760.1511(a)(3)-(a)(4) (2018); WHIP Handbook, page 11-5, para. 211.C (July 13, 2018). 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 7 C.F.R. § 760.1513 (2018).

141 WHIP Handbook, page 6-2, para. 110.C (July 13, 2018).

142 WHIP Handbook, page 6-2, para. 110.C (July 13, 2018). The records must be in a manner that can be understood by FSA.

b. Sources for Production Reports

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

(i) Insured Crops—RMA Data Used

If the crop is insured by federal crop insurance, RMA data is used if it is available.[143] For many producers, needed records will already be on file with RMA. If all of the information needed is already with RMA do not need to give FSA more records unless FSA asks them to.[144]

If RMA production data is not available, the producer must provide acceptable production records.[145] Acceptable production records are discussed below.

(ii) 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.[146] If all of the information needed is already with FSA, producers do not need to give FSA more records unless FSA asks them to.[147]

If the producer has not certified actual production history or filed a notice of loss form for NAP, the producer must provide acceptable production records.[148]

(iii) Uninsured Crops—Producer Provides Records

If the crop is not covered by either crop insurance or NAP, and no production source is available from crop insurance or NAP, the producer must provide acceptable production records to FSA.[149]

---

143 WHIP Handbook, page 6-3, para. 110.D (July 13, 2018).

144 WHIP Handbook, page 6-6, para. 110.F (July 13, 2018). USDA will allow shared RMA records to be used if producer share an interest in the crop.

145 FSA has a list of various crop insurance plans and whether or not the coverage will result in RMA records of production for the farm unit. See WHIP Handbook, page 6-4 to 6-5, para. 110.D (July 13, 2018). Some crop insurance policies require production records to be report for loss, or to actual production history, but not all do so. If RMA has subsequent year records of acreage and reported production, that information can be used. Subsequent year records cannot be based on collar amounts.

146 WHIP Handbook, page 6-3, para. 110.D (July 13, 2018).

147 WHIP Handbook, page 6-6, para. 110.F (July 13, 2018). USDA will allow shared RMA records to be used if producer share an interest in the crop.

148 WHIP Handbook, page 6-3, para. 110.D (July 13, 2018). That is form CCC-576, Notice of Loss and Application for Payment Noninsured Crop Disaster Assistance Program.

149 WHIP Handbook, page 6-3, para. 110.D (July 13, 2018).

a. Acceptable Production Records

As noted above, FSA sometimes requires producers to use acceptable production records.[150] 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.

(i) Verifiable Records

Verifiable records are production records that can be verified by FSA though a source that is independent of the producer.[151] They are used by FSA to substantiate the production reported by the producer.

To be a verifiable record, the record must have a date.[152] The record must show what FSA calls the final disposition of the production. 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 producer 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 for a verifiable production record.[153] 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, producer certificates, estimates, producer ledgers, or diaries.

(ii) Reliable Records

By reliable production records, FSA means records that the producer provides to FSA that FSA decides are adequate to substantiate the amount of production reported by the producer.[154] In some cases, reliable records can be used when verifiable records are not available.

Reliable records can include things like: (1) producer ledgers of commodity sales volume or income; (2) producer income statements of deposits; (3) records that verify production input costs; (3) producer

---

150 WHIP Handbook, page 6-6, para. 110.F (July 13, 2018).
151 WHIP Handbook, page 6-7, para. 110.G (July 13, 2018).
152 WHIP Handbook, page 6-7, para. 110.G (July 13, 2018).
153 WHIP Handbook, page 6-7, para. 110.G, page 6-1, para. 110.A (July 13, 2018).
154 WHIP Handbook, page 6-8, para. 110.I (July 13, 2018).

diaries, ledgers, or receipts; (4) pick records; and (5) other USDA program information, from other programs such as the FSA Farm Loan Program.[155]

b. FSA Production Record Review

FSA will review producer records.[156] If the records are verifiable or reliable, the records are acceptable.

FSA may compare a producer's records to the producers of neighbors that raise the same crop and have provided acceptable production records, to see if the records seem reasonable to FSA.

If similar levels of production appear on reports from other producers of the crop in the county, the producer's certification supported by records may be considered reliable and acceptable for WHIP purposes.[157]

If production of the same crop on a summary of reports from other producers of the crop in the county vary significantly from the producer's certification, FSA will tell the producer that the certification records cannot be substantiated.[158] The producer certification will not be considered to be supported by acceptable records. 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.[159]

If FSA cannot determine that the records are verifiable or reliable, the higher of either the producer's certified production or the county disaster yield will be assigned to the producer.[160]

c. County Disaster Yield

If the records are not verifiable and are not reliable, the producer will receive the higher of either the production level that was certified by the producer, or the county disaster yield set by FSA for that crop.[161]

---

155 WHIP Handbook, page 6-8, para. 110.J (July 13, 2018).
156 WHIP Handbook, page 6-9 to 6-10, para. 110.K (July 13, 2018).
157 WHIP Handbook, page 6-9, para. 110.K (July 13, 2018).
158 WHIP Handbook, page 6-9, para. 110.K (July 13, 2018).
159 WHIP Handbook, page 6-9, para. 110.K (July 13, 2018).
160 WHIP Handbook, page 6-9, para. 110.K (July 13, 2018).
161 7 C.F.R. § 760.1513(g) (2018); WHIP Handbook, page 6-26, para. 115.A, para. 110.K, page 6-10 (July 13, 2018).

A county disaster yield as the average yield per acre for a county for the current year, based on the natural disaster that occurred.[162] County disaster yields are intended to reflect the amount of production a producer would be expected to have produced based on the eligible disaster conditions in the county.[163] County disaster yields are set for each crop, crop type, intended use, practice, and planting period. [164]

Organic and transitional organic county disaster yield values are calculated When FSA thinks it has enough information to set a value.[165]

5. Harvested Production

In many cases, a harvest will not have been possible. In other situations, the producer will have been able to harvest. Several rules apply if the producer was able to harvest the production and are discussed below.

a. Farm Stored Production

For farm stored production, the producer can do one of two things.[166] First, the producer can certify the amount of production stored. Second, the producer 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.[167]

c. Production for Seed

For crops used for the producer's own seed, FSA may accept the producer's certification that the disposition of the crop was to use it as seed in a planting.[168] The producer must indicate the pounds of seed per acre and number of acres planted with the seed. FSA will determine if the amount of seed is reasonable for the acres harvested and planted.

---

162 7 C.F.R. § 760.1502, "County disaster yield" (2018); WHIP Handbook, page 6-26, para. 115.A (July 13, 2018). 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.

163 FSA's goal in determining county disaster yields is to capture the average impact the 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 producers 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 condition on a representative amount of acreage for that crop. WHIP Handbook, page 6-26, para. 115.A (July 13, 2018).

164 WHIP Handbook, page 6-26, para. 115.A (July 13, 2018).

165 WHIP Handbook, page 3-18, para. 67.C (July 13, 2018).

166 WHIP Handbook, page 6-11, para. 111.B (July 13, 2018).

167 WHIP Handbook, page 6-11, para. 111.B (July 13, 2018).

168 WHIP Handbook, page 6-11, para. 111.C (July 13, 2018).

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.[169]

e. Co-Mingled Crops

The co-mingling of crops creates problems for determining production for that year. The following sections discuss some of the forms of co-mingling and how FSA deals with them for WHIP purposes.

(i) Production Co-Mingled Between Years

FSA will generally consider production that is comingled between years as harvested in the current year.[170] An exception to this rule applies if the production from a previous year was recorded before the co-mingling. This means that in general FSA will not try to pro-rate which crop comes from which year. Records showing the origin of the crop based on its year must be verifiable and acceptable to FSA.

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

FSA will prorate acreage that comingle eligible and ineligible acreage.[171]

(iii) 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.[172]

---

169 WHIP Handbook, page 6-12, para. 111.D (July 13, 2018). No adjustment is made to the quantity of the crop because of quality losses unless the dollar value of the crop is zero.
170 WHIP Handbook, page 6-12, para. 111.E (July 13, 2018). No adjustment is made to the quantity of the crop because of quality losses unless the dollar value of the crop is zero.
171 WHIP Handbook, page 6-13, para. 111.F (July 13, 2018). The FSA WHIP Handbook gibes examples as to how this works.
172 WHIP Handbook, page 6-14, para. 111.G (July 13, 2018). The FSA WHIP Handbook gives a formula for how this is done.

(iv) Production Co-Mingled Between Practice

Production from different practices with separate established yields, which is co-mingled before it is a matter of record, is prorated to its respective practices in proportion to the county expected yield.[173]

f. 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.[174]

6. Assigned Production

FSA will sometimes assign production numbers to a producer for WHIP purposes.[175]

a. Two Types of Assigned Production

Under FSA rules, there are two types of assigned production.[176] Assigned production is sometimes used to replace production from RMA, NAP, or the producer. In addition, assigned production is sometimes used to add production to that reported by RMA, NAP, or the producer.

b. When FSA Will Use Assigned Production

FSA will use assigned production in the following cases.[177] 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.[178]

(i) Acceptable Harvested Acre Records Not Available

FSA may use assigned production when production records for harvested acres that are acceptable to FSA are not available from any source.[179] When no such records are available, the producer will first certify the production numbers. That means that the producer officially tells FSA how much was produced. FSA will then assign production based on the higher of the county disaster yield or the producer's certification. If the county disaster yield is higher than the producer's certified production, FSA must notify the producer.

173 WHIP Handbook, page 6-14, para. 111.H (July 13, 2018). The FSA WHIP Handbook gives formulas for how this is done and an example.
174 WHIP Handbook, page 6-15, para. 111.I (July 13, 2018).
175 WHIP Handbook, page 6-1, para. 110.A (July 13, 2018).
176 WHIP Handbook, page 6-16, para. 113.A (July 13, 2018).
177 WHIP Handbook, page 6-16, para. 113.A (July 13, 2018).
178 WHIP Handbook, page 6-16, para. 113.A (July 13, 2018).
179 WHIP Handbook, page 6-16, para. 113.A, page 6-17, para. 113.B (July 13, 2018). The FSA handbook has examples of how this assignment works.

(ii) 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 FSA, RMA, a crop insurance company, or an appraiser acceptable to FSA, FSA will assign production to those acres.[180] FSA may ask to the producer to provide information to substantiate the loss. When the production was covered by NAP, FSA will use the county disaster yield as the production. 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.

(iii) 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.[181] For this purpose 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.[182] First, FSA will require the producer to provide information to substantiate the loss. Second, FSA will assign production for any loss that FSA decides is not attributable by a qualifying or eligible cause of loss. FSA rules say that FSA should document these decisions.

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 applied.[183] 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; (5) if a close-sown crop was planted without use of preemergent herbicides or herbicide resistant seed; and (6) whether the crop type or variety was not suitable for a non-irrigation practice. If a producer failed to use such cultural practices, FSA may decide that the loss is not eligible. In addition, FSA may look to see if

180 WHIP Handbook, page 6-16, para. 113.A, page 6-23, para 113.E (July 13, 2018). The FSA Handbook says not acceptable to CCC, which could mean Commodity Credit Corporation. FSA probably meant to write COC, which is the FSA county committee. WHIP Handbook, page 6-16, para. 113.A (July 13, 2018). FSA provides an example of how this would work with there is a total loss of production. WHIP Handbook, page 6-23, para. 113.E (July 13, 2018).

181 WHIP Handbook, page 6-16, para. 113.A, page 6-18 para. 113.C (July 13, 2018).

182 WHIP Handbook, page 6-18, para. 113.C (July 13, 2018).

183 WHIP Handbook, page 6-18, para. 113.C (July 13, 2018). The FSA 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 (July 13, 2018).

an organically grown crop had been expected to yield production as if it was a conventional crop.

(iv) Late Planting

FSA will assign production when the producer plants the crop after the final planting date.[184] The planting dates are those set by RMA or are FSA final planting dates. 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.[185] For late planting purposes, planted acres is land where seeds or plants have been placed appropriately for the crop and planting period, and at the correct depth ad into a seedbed that has been properly prepared for the planting method and practice.[186]

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.[187] Second, they do not apply to what FSA call value loss crops. Third, they do not apply for fall-planted small grain crops that are intended for grain.

If late planting may have occurred, FSA requires that producer provide information that FSA thinks it needs to substantiate the loss, the late planting, and the crops days to maturity.[188]

(v) Guaranteed Contract

When the producer 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.[189]

c. *Notice to Producer*

FSA rules say FSA must notify a producer in writing if his or her production is assigned.[190] The notice should describe the level of production assigned, say why

[184] WHIP Handbook, page 6-16, para. 113.A, page 6-20, para. 113.D (July 13, 2018).
[185] WHIP Handbook, page 6-20, para. 113.D (July 13, 2018). For an example see WHIP Handbook, page 6-22 , para. 113.D (July 13, 2018).
[186] WHIP Handbook, page 6-21, para. 113.D (July 13, 2018). Planted, for the purposes of WHIP, means when the seed comes into contact with the soil on which growth can begin. For transplants it means the seed is placed into soil, rather than the date the plants were planted in the field. WHIP Handbook, page 6-20, para. 113.D (July 13, 2018).
[187] WHIP Handbook, page 6-21, para. 113.D (July 13, 2018). They will also apply when there is a gap of 60 or more days between harvest and the beginning of the next planting period.
[188] WHIP Handbook, page 6-21, para. 113.D (July 13, 2018).
[189] WHIP Handbook, page 6-16, para. 113.A (July 13, 2018). Details are discussed at WHIP Handbook, page 6-24, para. 113.F (July 13, 2018).
[190] WHIP Handbook, page 6-25, para. 114.A (July 13, 2018).

production was assigned, how the numbers were set, and how the assigned production will be used.

In some cases, the producer will have a right to appeal the decision.[191] The producer can appeal when there is what USDA calls a question of fact. For example, the producer's assigned amount of production, or number of acres, could be appealed. The producer can also appeal if the producer feels the WHIP rules were not applied properly.

Some FSA decision are not appealable, however.[192] In particular decision that are a matter of what USDA calls general applicability are not appealable. This can include, for example, eligibility rules, prices set by FSA, signature requirements, and payment calculations.

7. Secondary Use or Salvage Value

Secondary use or salvage value from the production are used by FSA to determine WHIP payments.[193]

a. Secondary Use Value

The idea of a secondary use value for a crop can be important in determining the level of WHIP benefits received by a producer.[194] FSA thinks a secondary use of a crop occurs 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. The loss of quality that results from a commodity being marketed in a secondary use market must be because of an eligible disaster condition.

FSA gives, as an example, an apple crop that was damaged by a hurricane.[195] The apples were not suitable for the fresh market. They could, however, be marketed as processed. This would count as a secondary use value.

Secondary use, from the FSA point of view, is not the same thing as salvage.[196] It also is not counted as production for the crop. Therefore, it is not used to determine if the farm unit suffered a loss, or how much of a loss. It also is not used to calculate the producer approved yield. The total of the dollar amount for all crops sold as a secondary use are, however, deducted from the WHIP payment.

---

[191] WHIP Handbook, page 6-25, para. 114.A-B (July 13, 2018). Appeals are governed by FSA Handbook, Program Appeals, Mediation, and Litigation, 1-APP (Rev. 2) (Sept. 12, 2016).
[192] WHIP Handbook, page 6-25, para. 114.A-B (July 13, 2018).
[193] 7 C.F.R. § 760.1511(a)(7) (2018); WHIP Handbook, page 11-5, para. 211.D (July 13, 2018).
[194] WHIP Handbook, page 6-28, para. 116.A (July 13, 2018).
[195] WHIP Handbook, page 6-28, para. 116.B (July 13, 2018).
[196] WHIP Handbook, page 6-28, para. 116.B (July 13, 2018).

b. Salvage Value

Salvage value, according to FSA, is the dollar amount for the quantity of the commodity that cannot be markets or sold in any market recognized for the crop, and as a result there is not established price for such production.[197] It is different, therefore, from secondary use.

As an example, suppose an orange producer grows for the fresh market.[198] After a hurricane, the oranges were not marketable for the intended market, and no production could be sold as fresh. The producer ended up selling the oranges for compost. Or, an apple producer who usually sells in the fresh market must, as a result of the hurricane, sell the apples as cattle feed.

Salvaged crops are not counted in production totals, but the value received is deducted from the WHIP payment.[199] The value will either be the dollar amount received for the salvage, or a value set by FSA.

8. 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.[200] A number of differences may arise, and FSA has rules for how to deal with them. Possible differences include acres, production, harvested and unharvested acres, shares of ownership, taxpayer identification numbers.

9. Organic and Direct Marketing

It appears that FSA will take into account differences in price and production for organic production, as well as price differences for direct marketers. It is not clear, however, how that information will be incorporated into WHIP calculations.[201]

C. Steps for Calculating Yield-Based Crop Loss Payments

WHIP production is the total of the farmer's production that will count in determining the WHIP benefit.[202] FSA defines WHIP production as the total amount of (1) all harvested production; (2) unharvested production that has been appraised; and (3) what FSA calls assigned production. WHIP production for a crop measures the production from the total planted acreage for that crop. WHIP production for a crop includes all of the production for what FSA calls a unit.

---

197 WHIP Handbook, page 6-29, para. 117.A (July 13, 2018).
198 WHIP Handbook, pages 6-29 to 6-30, para. 117.B (July 13, 2018).
199 WHIP Handbook, page 6-29, para. 117.A-B (July 13, 2018).
200 WHIP Handbook, pages 6-31 to 6-34, para. 119.A-H, (July 13, 2018). The Handbook provides examples.
201 See, for example, WHIP Handbook, page 3-3, para. 62.A, page 7-1, para. 131.B, Exhibit 4, page 8, para. 3 (includes ability to identify as organic) (July 13, 2018).
202 WHIP Handbook, pages 6-1 and 6-2 , para. 110.A-B (July 13, 2018).

Payments for yield-based crop losses are calculated in the following way.[203]

Step One: Determine Expected Value

To calculate the producer's payment, first determine the producer's expected value for the crop.[204] The expected value is the revenue the producer would have received if the crop were harvested based on the producer's historical yield.[205]

Expected value is calculated by multiplying the applicable acreage by both the price per acre and the crop's yield. If the producer is insured or has NAP coverage, the applicable yield will come from prices based on those coverage plans.[206] If the producer is uninsured, or for crops grown in Puerto Rico, the yield will be based on the county expected yield.[207]

Step Two: Apply WHIP Factor

After calculating the expected value of the crop, multiply that number by the applicable WHIP factor percentage.[208]

Step Three: Subtract Actual Production

Take the result from Step Two and reduce that number by the actual value of production.[209] A crop's actual value is determined by multiplying the crop's price by its production.[210]

Step Four: Adjust for Producer's Share

If the producer's share in the crop is less than 100 percent, multiply the result of Step Three by the producer's applicable share.[211]

Step Five: 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.[212]

---

[203] For a summary on WHIP payment regulations, see 83 Fed. Reg. 33795, 33797 (2018).
[204] 7 C.F.R. § 760.1511(a)(1) (2018); WHIP Handbook, page 11-4, para. 211.B (July 13, 2018).
[205] WHIP Handbook, page 11-2, para. 210.B (July 13, 2018).
[206] 7 C.F.R. § 760.1511(c)(1) (2018).
[207] 7 C.F.R. § 760.1511(c)(2) (2018).
[208] 7 C.F.R. § 760.1511(a)(2) (2018); WHIP Handbook, page 11-4, para. 211.B (July 13, 2018). For a list of the applicable WHIP factors, see WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).
[209] 7 C.F.R. § 760.1511(a)(3)-(a)(4) (2018); WHIP Handbook, page 11-5, para. 211.C (July 13, 2018).
[210] 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 7 C.F.R. § 760.1513 (2018).
[211] 7 C.F.R. § 760.1511(a)(5) (2018); WHIP Handbook, page 11-5, para. 211.D (July 13, 2018).
[212] 7 C.F.R. § 760.1511(f) (2018); WHIP Handbook, page 11-3, para. 210.F (July 13, 2018). 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 producer actually incurs or does not incur harvesting expenses.

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

Reduce the resulting payment by the value of any indemnity the producer receives from crop insurance or NAP payments.[213]

Step Seven: Reduce by any Secondary Use or Salvage

Finally, subtract any secondary use or salvage value from the production.[214]

VII. Eligibility Rules for Value Loss Crops

Value loss crops can be eligible for WHIP.[215]

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).[216] In general, value loss crops are crops for which the actual plant or commodity is sold, rather than a product of the plant.[217] Value loss crops also do not lend themselves to yield or production loss calculations.[218]

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.[219]

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.[220]

Different eligibility requirements apply for ornamental and aquaculture value loss crops.[221]

C. Data Used to Calculate WHIP Payments

In order to calculate WHIP benefits for producers, FSA will rely on various sources for information and use several different terms for describing data.

---

213 7 C.F.R. § 760.1511(a)(7) (2018); WHIP Handbook, page 11-5, para. 211.D (July 13, 2018).
214 7 C.F.R. § 760.1511(a)(7) (2018); WHIP Handbook, page 11-5, para. 211.D (July 13, 2018).
215 WHIP Handbook, page 9-1, para. 160.A (July 13, 2018).
216 7 C.F.R. §§ 760.1502, "Value loss crop," 1437, subp. D (2018).
217 WHIP Handbook, page 9-1, para. 160.A (July 13, 2018).
218 7 C.F.R. §§ 760.1502, "Value loss crops," 1437.301(a) (2018); WHIP Handbook, page 9-1, para. 160.A, page 9-2, para. 161.A (July 13, 2018).
219 WHIP Handbook, page 9-1, para. 160.A (July 13, 2018).
220 WHIP Handbook, page 9-1, para. 160.B (July 13, 2018).
221 For rules specific to aquaculture, see WHIP Handbook, page 9-2, para. 162 (July 13, 2018). For rules specific to ornamental nursery crops, see WHIP Handbook, page 9-3, para. 163 (July 13, 2018).

1. National Crop Table Data

FSA has directed that state FSA offices establish crop data for crops that are eligible for WHIP.[222] FSA will set the approved crop data based on procedures FSA uses for the Noninsured Crop Disaster Assistance Program (NAP).[223] The crop data will include historical prices, average prices, and unharvested payment factors, as well as yields, and county disaster yields. The crop data is compiled into what is called the National Crop Table (NCT).

2. Units

Units are an important part of the way FSA calculates WHIP benefits for value loss crops.[224] The unit that FSA uses will depend on the whether the producer has crop insurance, NAP coverage, or is uninsured.

a. Insured Crops

For acres that are insured with crop insurance, FSA will use units that have been set for crop insurance purposes. [225] That unit structure may include optional units.

b. NAP-Covered Crops

For NAP-covered crops, units are taken from FSA records, and the unit structure used for NAP will apply.[226]

c. Uninsured Crops

If a crop is not insured, basic units for the farm must be created. These will be based on NAP rules.[227] In general, a basic unit is all of the acreage of the eligible crop in what FSA calls an administrative county.[228]

---

[222] WHIP Handbook, page 3-1, para. 60.A (July 13, 2018).

[223] WHIP Handbook, page 3-2, para. 62.A (July 13, 2018).

[224] WHIP Handbook, page 9-1, para. 160.B (July 13, 2018).

[225] WHIP Handbook, page 4-5, para. 92.A (July 13, 2018). It is possible for a producer 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 is not. In such a case, FSA will create two different units. WHIP Handbook, page 4-6, para. 92.D (July 13, 2018).

[226] WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). 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" (August 3, 2018).

[227] WHIP Handbook, page 4-6, para. 92.B (July 13, 2018). For NAP rules, see FSA Handbook 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (August 3, 2018).

[228] WHIP Handbook, page 4-6, para. 92.B (July 13, 2018).

3. Expected Value

Payment calculations for WHIP require that the expected value of the crop be determined. Expected value is the revenue the producer would have received if the crop were harvested based on the producer's historical yield.[229] For value loss crops, the expected value is the same as the field market value of the crop immediately before the qualifying disaster.[230]

4. Actual Value

The actual value of a value loss crop is the revenue that is actually received for the crop's production for its intended use and coverage period.[231]

For value loss crops, actual value is calculated by adding together the field market value of the crop immediately after the disaster and the dollar value of any ineligible causes of loss (such as the value of crops that were lost due to a disease caused by management decisions rather than a qualifying disaster event).[232]

5. Payment Factor

If the value loss 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.[233] This factor is expressed as a percentage.

6. WHIP Factor

When calculating WHIP benefits, FSA applies what it calls a "WHIP factor"—a percentage by which the producer's otherwise-eligible payment is multiplied in order to determine the producer's final WHIP payment. The WHIP factor is based on the level of crop insurance or NAP coverage the producer elected for the crop, and typically falls somewhere between 70 and 95 percent.[234] If the producer does not have insurance, the WHIP factor defaults to 65 percent.

[229] WHIP Handbook, page 11-2, para. 210.B (July 13, 2018).
[230] WHIP Handbook, page 11-6, para. 212.B (July 13, 2018).
[231] WHIP Handbook, page 11-3, para. 210.D (July 13, 2018).
[232] 7 C.F.R. § 760.1515(a)(2) (2018); WHIP Handbook, page 11-6, para. 212.A, C (July 13, 2018).
[233] 7 C.F.R. § 760.1515(a)(4) (2018); WHIP Handbook, page 11-3, para. 210.F (July 13, 2018). 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 producer actually incurs or does not incur harvesting expenses.
[234] 7 C.F.R. §§ 760.1502, "2017 WHIP factor," 760.1511(b) (2018); WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).

7. Price

Under WHIP, price means the price per unit of the crop or commodity.[235] WHIP rules explain how FSA will set the prices used when WHIP benefits are calculated.

a. Insured Crops

If the producer had federal crop insurance on the crop, FSA will use the price used by RMA for crop insurance. [236] If it is not available FSA will use information from what it calls the National Crop Table (NCT). The NCT has data for all crops that will be covered by WHIP.

b. NAP-Covered Crops

If the producer had NAP coverage on the crop, FSA will use information from what it calls the National Crop Table (NCT). [237] The NCT has data for all crops that will be covered by WHIP.

c. Uninsured Crops

If the producer 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). [238] The NCT has data for all crops that will be covered by WHIP.

d. Exception for Puerto Rico—Average Market Price Used

For all crops in Puerto Rico, FSA will use information from what it calls the National Crop Table (NCT). [239] The NCT has data for all crops that will be covered by WHIP.

8. Secondary Use Value

The idea of a secondary use value for a crop can be important in determining the level of benefits received by a producer for WHIP.[240] FSA thinks a secondary use of a crop occurs 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. The loss of quality that results from a commodity being marketed in a secondary use market must be because of an eligible disaster event.

---

[235] 7 C.F.R. § 760.1502, "Price" (2018).
[236] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[237] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[238] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[239] WHIP Handbook, page 7-1, para. 131.A-B (July 13, 2018).
[240] WHIP Handbook, page 6-28, para. 116.A (July 13, 2018).

FSA gives, as an example, an apple crop that was damaged by a hurricane.[241] The apples were not suitable for the fresh market. They could, however, be marketed as processed. This would count as a secondary use value.

Secondary use, from the FSA point of view, is not the same thing as salvage. [242] It also is not counted as production for the crop. Therefore, it is not used to determine if the farm unit suffered a loss, or how much of a loss. It also is not used to calculate the producer's approved yield. The total of the dollar amount for all crops sold as a secondary use are, however, deducted from the WHIP payment.

9. Salvage Value

Salvage value, according to FSA, is the dollar amount for the quantity of the commodity that cannot be marketed or sold in any market recognized for the crop, and as a result there is no established price for such production.[243] Salvage value is different, therefore, from secondary use.

As an example, suppose an orange producer grows for the fresh market.[244] After a hurricane, the oranges were not marketable for their intended market. No production could be sold as fresh. The producer ended up selling the oranges for compost. Or, an apple producer who usually sells in the fresh market must, as a result of the hurricane, sell the apples as cattle feed.

Salvaged crops are not counted in production totals, but the value received is deducted from the WHIP payment.[245] The value will either be the dollar amount received for the salvage, or a value set by FSA.

10. Organic and Direct Marketing

It appears that FSA will take into account differences in price and production for organic production and will take into account price differences for direct marketers. It is not clear, however, how that information will be incorporated into WHIP calculations.[246]

D. Calculating Payments 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.[247]

---

241 WHIP Handbook, page 6-28, para. 116.B (July 13, 2018).
242 WHIP Handbook, page 6-28, para. 116.B (July 13, 2018).
243 WHIP Handbook, page 6-29, para. 117.A (July 13, 2018).
244 WHIP Handbook, pages 6-29 to 6-30, para. 117.B (July 13, 2018).
245 WHIP Handbook, page 6-29, para. 117.A-B (July 13, 2018).
246 See, for example, WHIP Handbook, page 3-3, para. 62.A, page 7-1, para. 131.B, Exhibit 4, page 8, para. 3 (includes ability to identify as organic) (July 13, 2018).
247 WHIP Handbook, page 9-1, para. 160.B (July 13, 2018).

There are a variety of methods that can be used to determine the dollar value of a value loss crop immediately before a disaster.[248] These include, but are not limited to, using an appraisal, looking at accurate producer inventory records, or extrapolating the producer's beginning inventory from FSA-established mortality rates for the crops, based on size, age, and days of growth.

The following are the steps used to determine the WHIP payment for a loss of value loss crops. The WHIP payment is not rounded until the calculation is complete.[249]

Step One: Determine WHIP Value

First, the WHIP value of the value loss crop must be determined. To do this, take the expected value of the crop and multiply it by the applicable WHIP factor percentage.[250]

Step Two: Subtract Actual Value

Next, subtract the crop's actual value from the result of Step One.[251]

Step Three: Adjust for Producer's Share

If the producer's share in the crop is less than 100 percent, multiply the result of Step Two by the producer's applicable share.[252]

Step Four: Adjust for any Applicable Payment Factor

If the value loss crop was not harvested, either because it was prevented from being planted or planted but not harvested, multiply the applicable payment factor by the result of Step Three.[253]

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

Reduce the resulting payment by the value of any indemnity the producer receives from crop insurance or NAP payments.[254]

Step Six: Reduce by any Secondary Use or Salvage

Finally, subtract any secondary use or salvage value from the total of Step Five.[255] The result will be the producer's WHIP payment.

---

248 WHIP Handbook, page 9-1, para. 160.B (July 13, 2018).
249 WHIP Handbook, page 11-1, para. 210.A (July 13, 2018).
250 7 C.F.R. § 760.1515(a)(1) (2018); WHIP Handbook, page 11-6, para. 212.A (July 13, 2018). For a list of the applicable WHIP factors, see WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).
251 7 C.F.R. § 760.1515(a)(2) (2018); WHIP Handbook, page 11-6, para. 212.A, C (July 13, 2018).
252 7 C.F.R. § 760.1515(a)(3) (2018); WHIP Handbook, page 11-6, para. 212.D (July 13, 2018).
253 7 C.F.R. § 760.1515(a)(4) (2018); WHIP Handbook, page 11-6, para. 212.D (July 13, 2018).
254 7 C.F.R. § 760.1515(a)(5) (2018); WHIP Handbook, page 11-6, para. 212.D (July 13, 2018).
255 7 C.F.R. § 760.1515(a)(7) (2018); WHIP Handbook, page 11-6, para. 212.D (July 13, 2018).

VIII. Eligibility Rules for Trees, Bushes, and Vines

Trees, bushes, and vines can be eligible for WHIP.[256]

A. Definition of Tree, Bush, and Vine

In general, trees, bushes, and vines that are eligible for WHIP produce crops that are NAP-eligible crops.[257] WHIP also provides the following specific 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.[258]

Because WHIP addresses the loss of value for tree crops, and the Tree Assistance Program (TAP) helps producers rehabilitate or replace trees, the two programs can be applied to the same acreage but for different losses.[259]

2. Bush

A bush, for the purposes of WHIP, is a low, branching, woody plant.[260] 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 has a flexible stem supported by climbing, twining, or creeping along a surface.[261]

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.

---

256 WHIP Handbook, page 2-11, para. 32.C (July 13, 2018). The definitions of trees, bushes, and vines that are applicable to FSA's Tree Assistance Program (TAP) also apply to WHIP.

257 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.

258 7 C.F.R. § 760.1502, "Tree" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).

259 83 Fed. Reg. 33795, 33796 (July 18, 2018).

260 7 C.F.R. § 760.1502, "Bush" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).

261 7 C.F.R. § 760.1502, "Vine" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).

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 that are intended for human consumption.[262]

As examples, a maple tree for syrup, papaya tree, or orchard tree all meet this requirement.[263] Similarly, a blueberry bush is also eligible.[264] Finally, grapes, kiwis, and passion fruit are all vines that satisfy this WHIP requirement.[265]

b. *Damaged or Destroyed*

Trees, bushes, or vines must have been damaged or destroyed as a result of a qualifying disaster event in order to be eligible for WHIP benefits.[266] Producers must provide acceptable evidence of losses if a tree, bush, or vine no longer exists.[267]

FSA rules describe how to tell if trees are damaged or destroyed.[268] In general, FSA rules describe damage to a tree, bush or vine as including limb breakage, dead wood, or significant canopy loss. [269]

By contrast, 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. [270]

c. *Spacing*

FSA sets rules for the maximum number of trees, bushes, and vines per acre that can be eligible for WHIP.[271] To make this determination, FSA uses either the normal spacing identified in the Noninsured Crop Disaster Assistance Program (NAP) Handbook, or it may set a maximum number of trees, bushes, or vines per acre based upon normal agricultural practices within the state.[272] Spacing differing from what FSA decides is normal spacing for the tree, bush, or vine may be subject to yield reductions for purposes of WHIP.[273]

---

262 WHIP Handbook, page 2-11, para. 32.C-D, page 8-1, para. 140.A (July 13, 2018).
263 7 C.F.R. § 760.1502, "Tree" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).
264 7 C.F.R. § 760.1502, "Bush" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018
265 7 C.F.R. § 760.1502, "Vine" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).
266 WHIP Handbook, page 8-1, para. 140.A (July 13, 2018).
267 WHIP Handbook, page 8-11, para. 144.B (July 13, 2018).
268 WHIP Handbook, pages 8-12 to 8-14, para. 144.C-F (July 13, 2018).
269 WHIP Handbook, page 8-11, para. 144.A (July 13, 2018).
270 WHIP Handbook, page 8-12, para. 144.C (July 13, 2018).
271 WHIP Handbook, page 8-2, par 140.C (July 13, 2018).
272 See FSA Handbook, 1-NAP (Rev. 2), "Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years" (Aug. 3, 2018).
273 WHIP Handbook, page 8-2, par 140.C (July 13, 2018).

Producers must report tree spacing as part of form FSA-578, the Report of Acreage.[274]

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. Cucurbits, Pineapple Not Eligible

Cucurbits, such as cucumbers, pumpkins, and watermelons are not eligible for WHIP.[275] Also not eligible are pineapples.

b. Perennial Plants

Perennial plants that are harvested for edible roots, such as ginseng and ginger, are not eligible as a tree, bush or vine under WHIP.[276] They may, however, still qualify for WHIP benefits if they meet the requirements of eligible losses of yield-based crops.

c. Nursery Crops Not Eligible

Nursery crops are not eligible as a tree, bush, or vine.[277] They may be eligible for WHIP under the provisions governing yield-based crops or value loss crops.

d. Florida Citrus Trees

Florida citrus trees are not eligible for WHIP.[278] This includes grapefruit, lemon, lime, mandarin, murcott, pineapple, and orange trees. Florida citrus trees can qualify for assistance through a separate program administered by the State of Florida.[279]

e. Trees Grown for Pulp or Timber

Trees grown for pulp or timber are not eligible for WHIP.[280]

---

274 WHIP Handbook, page 8-9 to 8-10, par 143.A-D (July 13, 2018).
275 WHIP Handbook, page 2-11, para. 32.D (July 13, 2018).
276 WHIP Handbook, page 8-1, para. 140.B (July 13, 2018).
277 WHIP Handbook, page 2-11, para. 32.D (July 13, 2018).
278 7 C.F.R. § 760.1516(f) (2018); 83 Fed. Reg. 33795, 33796 (July 18, 2018); WHIP Handbook, page 8-2, para. 140.B (July 13, 2018).
279 7 C.F.R. § 760.1516(f) (2018); WHIP Handbook, page 8-2, para. 140.B (July 13, 2018).
280 WHIP Handbook, page 2-11, para. 32.C-D (July 13, 2018).

f. Certain Perennial and Biennial Vines

Perennials that are normally raised as annuals are not vines for purposes of NAP.[281]

Biennials, such as strawberries, and annuals, such as pumpkins, squash, cucumbers, watermelons, and other melons, are not eligible as vines for the purposes of WHIP.[282]

g. Abandoned Groves

Any tree, bush, or vine grown in an abandoned grove cannot qualify as a WHIP-eligible tree, bush, or vine.[283]

h. Nursery Plants and Ornamental Plants

Nursery plants and ornamental plants are not eligible under WHIP as trees, bushes, or vines.[284]

i. Non-Commercial Plants

Any plant grown for a non-commercial purpose are not eligible for WHIP as a tree, bush, or vine.[285]

j. Bananas and Plantains

Bananas and plantains do not qualify as trees, bushes, or vines for purposes of WHIP.[286]

C. Data Used to Calculate WHIP Payments

In order to calculate WHIP benefits for producers, FSA will rely on various sources for information and use several different terms for describing data.

1. National Crop Table Data

FSA will establish crop data for crops that are eligible for WHIP.[287] It will set the approved crop data based on rules FSA uses for the Noninsured Crop Disaster Assistance Program (NAP).[288] The crop data will include historical prices, average

---

281 7 C.F.R. § 760.1502, "Vine" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).
282 7 C.F.R. § 760.1502, "Vine" (2018); WHIP Handbook, page 2-11, para. 32.C (July 13, 2018).
283 WHIP Handbook, page 8-1, par 140.B (July 13, 2018).
284 WHIP Handbook, page 8-1, par 140.B (July 13, 2018).
285 WHIP Handbook, page 8-1, par 140.B (July 13, 2018).
286 WHIP Handbook, page 8-1, par 140.B (July 13, 2018).
287 WHIP Handbook, page 3-1, para. 60.A (July 13, 2018).
288 WHIP Handbook, page 3-2, para. 62.A (July 13, 2018).

prices, and unharvested payment factors, as well as yields, and 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.[289] The aim is to better capture the value lost for plants given their stage of growth. [290] FSA rules explain how stages are defined and established. [291]

3. Expected Value

Payment calculations for WHIP require that the expected value of the crop be determined. Expected value is the revenue the producer would have received if the crop were harvested based on the producer's historical yield.[292] 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.[293]

4. Actual Value

WHIP payments also require calculating the actual value of the trees, bushes, or vines that were damaged or destroyed.[294] The actual value of a tree, bush, or vine is the revenue that is actually received for the crop's production for its intended use and coverage period.[295]

To determine the actual value of a tree, bush, or vine, FSA will 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.[296] Add that number to the total number of any destroyed trees, bushes, or vines multiplied by their respective prices.[297] Finally, take that result and subtract it from the expected value of the trees, bushes, or vines.[298] The resulting value is the actual value of the trees, bushes, or vines.

[289] WHIP Handbook, page 8-7, para. 142.A (July 13, 2018).
[290] WHIP Handbook, page 8-3, para. 141.A (July 13, 2018).
[291] For more details on how FSA determines the stages of trees, bushes, and vines, see WHIP Handbook, pages 8-3 to 8-4, para. 141.B, and pages 8-7 to 8-8, para. 142.A-B (July 13, 2018).
[292] WHIP Handbook, page 11-2, para. 210.B (July 13, 2018).
[293] WHIP Handbook, page 11-7, para. 213.B (July 13, 2018).
[294] 7 C.F.R. § 760.1516(b)(2) (2018); WHIP Handbook, page 11-7, para. 213.C (July 13, 2018).
[295] WHIP Handbook, page 11-3, para. 210.D (July 13, 2018).
[296] 7 C.F.R. § 760.1516(d)(1) (2018); WHIP Handbook, page 11-7, para. 213.C (July 13, 2018). For more information on how FSA determines partial damage factors, see WHIP Handbook, page 8-6, para. 141.E. (July 13, 2018).
[297] 7 C.F.R. § 760.1516(d)(2) (2018); WHIP Handbook, page 11-7, para. 213.C (July 13, 2018).
[298] 7 C.F.R. § 760.1516(d)(4) (2018); WHIP Handbook, page 11-7, para. 213.C (July 13, 2018).

5. WHIP Factor

When calculating WHIP benefits, FSA applies what it calls a "WHIP factor"—a percentage by which the producer's otherwise-eligible payment is multiplied in order to determine the producer's final WHIP payment. The WHIP factor is based on the level of crop insurance or NAP coverage the producer elected for the crop, and typically falls somewhere between 70 and 95 percent.[299] If the producer does not have insurance, the WHIP factor defaults to 65 percent.

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

For losses of trees, bushes, or vines, FSA will use what it calls a "damage factor" or "partial damage factor" when determining the WHIP payment. A damage factor is the percentage of value of the tree, bush, or vine that is lost when the plant is damaged and requires rehabilitation.[300] Damage factors are not applied to trees, bushes, or vines that are destroyed.

When the crop, bush, or vine is insured, WHIP will use damage factors that have been assigned by RMA.[301] The RMA damage factors apply on a national basis, without regard to the producer's specific location.

When trees, bushes, and vines are not insured, damage factors will be assigned by FSA on a state-wide basis for each growth stage of the crop, up to three stages.[302] The damage factor values will be the same for each growth stage across all counties within the state. Unlike RMA damage factors, however, when FSA assigns damage factors to uninsured trees, bushes, or vines, those factors may differ between states. State FSA offices will consult with local universities, extension agents, and horticulturalists, and other industry experts to determine the appropriate damage factors.[303]

7. Price

Under WHIP, price means the price per unit of the crop or commodity.[304] FSA establishes the prices for trees, bushes, and vines based upon both the species and stage of growth of the crop. WHIP rules explain how FSA determines those prices when WHIP benefits are calculated.

---

[299] 7 C.F.R. §§ 760.1502, "2017 WHIP factor," 760.1511(b) (2018); WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).

[300] 7 C.F.R. § 760.1502, "Damage factor" (2018); WHIP Handbook, page 3-a, para. 61.A, "Tree/bush/vine damage factor," page 8-6, para. 141.E (July 13, 2018).

[301] WHIP Handbook, page 8-3, para. 141.A, page 8-6, para. 141.E (July 13, 2018).

[302] WHIP Handbook, page 8-5, para. 141.C (July 13, 2018).

[303] WHIP Handbook, page 8-6, para. 141.E (July 13, 2018).

[304] 7 C.F.R. § 760.1502, "Price" (2018).

a. *Assigned on a Statewide Basis*

FSA will assign prices for trees, bushes, and vines on a state-wide basis for each growth stage, up to three stages. For trees, the prices must be the same statewide for each tree crop.[305] For bushes and vines, the prices must be the same statewide for both the crop and crop type. When assigning prices, state FSA offices will consult with local universities, extension agents, and other reliable sources.[306]

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 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.[307] For destroyed trees, bushes, and vines, the WHIP price also accounts for the cost of removal of a destroyed tree, bush, or vine of a similar tree stage.

b. *Follow Price-Setting Rules of RMA and NAP*

When available, the prices for trees, bushes, and vines follow the price-setting rules used for insurance indemnities or NAP.[308]

(i) Insured Trees, Bushes, and Vines

If the producer had federal crop insurance on the crop, FSA will use the price used by RMA for crop insurance. [309]I f it is not available FSA will use information from what it calls the National Crop Table (NCT). The NCT has data for all crops that will be covered by WHIP.

(ii) NAP-Covered Trees, Bushes, and Vines

If the producer had NAP coverage on the crop, FSA will use information from what it calls the National Crop Table (NCT). [310] The NCT has data for all crops that will be covered by WHIP.

(iii) Uninsured Trees, Bushes, and Vines

If the producer did not have either federal crop insurance or NAP coverage on the crop, FSA will use information from what it calls the

---

305 WHIP Handbook, page 3-14, para. 65.C, page 3-18, para. 67.C (July 13, 2018).
306 WHIP Handbook, page 8-4, para. 141.C (July 13, 2018).
307 WHIP Handbook, page 8-5, para. 141.C (July 13, 2018).
307 WHIP Handbook, page 8-5, para. 141.C (July 13, 2018). WHIP only covers those costs that exceed what would have been required had the tree, bush, or vine not been damaged or destroyed.
308 WHIP Handbook, page 7-1, para. 131.A, page 8-5, para. 141.C (July 13, 2018).
309 WHIP Handbook, page 7-1, par. 131.A-B (July 13, 2018).
310 WHIP Handbook, page 7-1, par. 131.A-B (July 13, 2018).

National Crop Table (NCT). [311] The NCT has data for all crops that will be covered by WHIP.

c. *Exception for Puerto Rico—Average Market Price Used*

For all trees, bushes, and vines in Puerto Rico, FSA will use the average market price as the applicable price for WHIP purposes. [312]

d. *Average Market Price*

Average market price is the price or dollar value—based on bushel, ton or whatever measure is usually used—for an eligible commodity.[313] This value, which is based, at least in part, on historical data, is set by FSA, and is also used to calculate NAP payments. It is measured based on the commodity's harvest, and does not take into account transportation, storage, processing, packing, marketing or other post-harvest expenses.

e. *Organic and Direct Marketing Trees, Bushes, and Vines*

It appears that FSA will take into account differences in price and production for organic production, as well as price differences for direct marketers. It is not clear, however, how that information will be incorporated into WHIP calculations.[314]

8. Secondary Use Value

The idea of a secondary use value for a crop can be important in determining the level of benefits received by a producer for WHIP.[315] FSA thinks a secondary use of a crop occurs when an eligible crop acreage is reported with a particular intended use. The acreage is then harvested and the production is sold through a different market for a different use. The loss of quality that results from a commodity being marketed in a secondary use market must be because of an eligible disaster condition.

FSA gives as an example, an apple crop that was damaged by a hurricane. [316] The apples were not suitable for the fresh market. They could, however, be marketed as processed. This would count as a secondary use value.

Secondary use, from the FSA point of view, is not the same thing as selvage. [317] It also is not counted as production for the crop. Therefore, it is not used to determine if the

---

[311] WHIP Handbook, page 7-1, par. 131.A-B (July 13, 2018).
[312] WHIP Handbook, page 10-21, par. 191.B (July 13, 2018).
[313] WHIP Handbook, page 3-1, par. 60.A, "Average market price," page 8-4, para. 141.C (July 13, 2018). These prices may vary by state.
[314] See, for example, WHIP Handbook, page 3-3, para. 62.A, page 7-1, para. 131.B, Exhibit 4, page 8, para. 3 (includes ability to identify as organic) (July 13, 2018).
[315] WHIP Handbook, par. 116.A, page 6-28 (July 13, 2018).
[316] WHIP Handbook, par. 116.B, page 6-28 (July 13, 2018).
[317] WHIP Handbook, par. 116.B, page 6-28 (July 13, 2018).

farm unit suffered a loss, or how much of a loss. It also is not used to calculate the producer approved yield. The total of the dollar amount for all crops sold as a secondary use are, however, deducted from the WHIP payment.

9. Salvage Value

Salvage value, according to FSA, is the dollar amount for the quantity of the commodity that cannot be marketed or sold in any market recognized for the crop, and as a result there is not established price for such production.[318] It is different, therefore, from secondary use.

As an example, suppose an orange producer grows for the fresh market. [319] After a hurricane, the oranges were not marketable for the intended market. No production could be sold as fresh. The producer ended up selling the oranges for compost. Or, an apple producer who usually sells in the fresh market must, as a result of the hurricane, sell the apples as cattle feed.

Salvaged crops are not counted in production totals, but the value received is deducted from the WHIP payment. [320] The value will either be the dollar amount received for the salvage, or a value set by FSA.

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

In general, however, WHIP assistance for all types of losses will be calculated based on the crop's expected value multiplied by the WHIP percentage, minus the actual value and the producer's indemnity or NAP payment received, if applicable.

Payments for losses of trees, bushes, and vines are determined by looking at the number of affected plants within each stage.[321] The calculation looks as follows.[322] The WHIP payment is not rounded until the calculation is complete.[323]

Step One: Determine Expected Value

The first step in calculating the WHIP payment for trees, bushes, or vines, is to determine their expected value.[324] To do this, multiply the total number of damaged or destroyed trees, bushes, or vines by their price immediately before the disaster.

Step Two: Multiply by WHIP Factor

[318] WHIP Handbook, par. 117.A, page 6-29 (July 13, 2018).
[319] WHIP Handbook, par. 117.B, pages 6-29 to 6-30 (July 13, 2018).
[320] WHIP Handbook, par. 117.A-B, page 6-29 (July 13, 2018).
[321] WHIP Handbook, page 8-14, para. 145.A, page 8-14, para. 145.A (July 13, 2018).
[322] Citrus trees located in Florida are not eligible for WHIP, but instead are eligible for a separate state-run program.
[323] WHIP Handbook, page 11-1, para. 210.A (July 13, 2018).
[324] 7 C.F.R. § 760.1516(b)(1) (2018); WHIP Handbook, page 11-7, para. 213.B (July 13, 2018).

Next, multiply the result of Step One by the applicable WHIP factor percentage.[325]

Step Three: Subtract Actual Value

Next, determine the actual value of the trees, bushes, or vines that were damaged or destroyed, and subtract that value from the result of Step Two.[326]

Step Four: Adjust for Producer's Share

If the producer's share in the trees, bushes, or vines is less than 100 percent, multiply the result of Step Three by the producer's applicable share.[327]

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

Reduce the resulting payment by the value of any indemnity the producer receives from crop insurance or NAP payments.[328]

Step Six: Reduce by any Secondary Use or Salvage

Finally, subtract any secondary use or salvage value from the production.[329]

IX. WHIP Application Requirements

Several documents will be needed when a producer applies for WHIP.

A. Application Form (FSA-890)

The producer will need to fill out a WHIP application form, known as FSA-890.[330]

B. Crop Insurance or NAP

If the producer bought either federal crop insurance or Noninsured Crop Disaster Assistance Program (NAP), the producer must provide those records to FSA and complete form FSA-891.[331]

---

[325] 7 C.F.R. § 760.1516(b)(1) (2018); WHIP Handbook, page 11-7, para. 213.A, B, D (July 13, 2018). For a list of the applicable WHIP factors, see WHIP Handbook, page 11-2, para. 210.C (July 13, 2018).
[326] 7 C.F.R. § 760.1516(b)(2) (2018); WHIP Handbook, page 11-7, para. 213.C (July 13, 2018).
[327] 7 C.F.R. § 760.1516(b)(3) (2018); WHIP Handbook, page 11-8, para. 213.D (July 13, 2018).
[328] 7 C.F.R. § 760.1516(b)(4) (2018); WHIP Handbook, page 11-8, para. 213.D (July 13, 2018).
[329] 7 C.F.R. § 760.1516(b)(5) (2018); WHIP Handbook, page 11-8, para. 213.D (July 13, 2018).
[330] WHIP Handbook, page 1-2, para. 3.B (July 13, 2018). Instructions for completing form FSA-890 can be found at WHIP Handbook, Exhibit 4 (July 13, 2018).
[331] 7 C.F.R. § 760.1510(d)(1) (2018). Instructions for completing form FSA-891 can be found at WHIP Handbook, Exhibit 7 (July 13, 2018)

C. Conservation Compliance Certification

Producers must provide evidence of compliance with federal conservation rules for highly erodible land and wetlands. [332] In some cases, NRCS decisions about highly erodible land or wetlands may not have been completed for the land in question when a producer applies for WHIP.[333] In such a case, WHIP payments will not be delayed. If the producer takes the payment, however, and it is later determined that there is a conservation compliance violation, the WHIP payments will need to be returned to FSA.

D. Acreage Reporting

Each producer will need to file an Acreage Report for all crops for which the producer is requesting WHIP benefits.[334] 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 producer, and must be supported by evidence that shows the existence of, or disposition of, the crop that suffered a loss.[335] 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: Two Payouts

WHIP payments will go to producers in two phases.

First, there will be a payment of 50 percent of the producer's eligible payment.[336]

Second, the remaining payment will be made after the signup period has ended, and after any applicable payment factors have been established and after all administrative actions are completed.[337]

---

[332] 7 C.F.R. § 760.1503(i) (2018); WHIP Handbook, page 1-18, para. 10.A (July 13, 2018). Rules for conservation compliance can be found at FSA Handbook, 6-CP (Rev. 4), "Highly Erodible Land Conservation and Wetland Provisions" (May 30, 2018).

[333] WHIP Handbook, page 1-18, para. 10.A (July 13, 2018).

[334] 7 C.F.R. § 760.1510(d)(2) (2018); WHIP Handbook, page 2-8, para. 31.E (July 13, 2018).

[335] WHIP Handbook, page 2-8, para. 31.E (July 13, 2018).

[336] 7 C.F.R. § 760.1506(a) (2018); WHIP Handbook, page 1-2, para. 3.B (July 13, 2018).

[337] 7 C.F.R. § 760.1506(a) (2018); WHIP Handbook, page 1-2, para. 3.B (July 13, 2018).

B. Payment Limits

1. General Rule $125,000

For most producers, the WHIP payment limitation is $125,000 per person or legal entity, other than a joint venture or general partnership.[338]

2. Possible Rule $900,000

For very large operations, the payment limitation may be $900,000.[339] This limit applies if 75 percent of the adjusted gross income of the person or entity comes from farming, ranching, or forestry. Detailed FSA rules explain this possibility.[340]

Any producer who requests the payment limitation of $900,000, including members of legal entities, must provide a certification of farm income from a licensed CPA or an attorney.[341]

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.[342]

D. Assignment and Offset

WHIP payments may be assigned.[343] They may also be subject to administrative offset by the federal government.[344]

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

If a producer receives a WHIP payment, he or she must agree to purchase crop insurance or NAP coverage for the next two years for the crop, tree, bush or vine that was covered by WHIP.[345] FSA calls this the linkage requirement.

---

338 7 C.F.R. § 760.1507(a)(1) (2018); WHIP Handbook, page 1-11, para. 6.B (July 13, 2018). 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 1-11, para. 6.C (July 13, 2018). USDA direct attribution rules apply.

339 7 C.F.R. § 760.1507(a)(2) (2018); WHIP Handbook, page 1-11, para. 6.B (July 13, 2018).

340 83 Fed. Reg. 33795, 33796 (2018); WHIP Handbook, page 1-11, para. 7.A (July 13, 2018).

341 WHIP Handbook, page 1-11, para. 6.B (July 13, 2018).

342 WHIP Handbook, page 1-3, para. 3.E (July 13, 2018).

343 7 C.F.R. § 760.1504(d) (2018); WHIP Handbook, page 1-17, para. 8.B (July 13, 2018).

344 7 C.F.R. § 760.1504(c) (2018); WHIP Handbook, page 1-18, para. 9.A (July 13, 2018).

345 7 C.F.R. § 760.1517(a) (2018); WHIP Handbook, page 2-12, para. 33.A (July 13, 2018). For Form FSA-891, that covers this requirement, see WHIP Handbook, Exhibit 7 (July 13, 2018).

A. Crop Insurance or NAP Likely Available

Since every crop covered by WHIP must be among those that are eligible for crop insurance or NAP, coverage should be available.[346]

B. Two Years of Coverage

To meet the linkage requirement, the producer must buy crop insurance or NAP for the first two consecutive crop years that it is available after the enrollment period for WHIP ends.[347] The second year must have been purchased by the 2021 crop year.[348] This means that possible years for purchases of coverage are: (1) 2018 and 2019; (2) 2019 and 2020; or (3) 2020 and 2021. [349]

C. Rules for Coverage

The following rules apply for producers that need to meet the linkage requirement. The coverage rules are based on the basis of the producer's WHIP benefit, and apply regardless of whether the producer suffered a loss of yield-based crops, value loss crops, or trees, bushes, or vines.

1. Insurable Crop, Tree, Bush or Vine

If the producer got a WHIP benefits based on a crop, tree, bush or vine for which crop insurance is available, the producer must buy crop insurance for those crops, trees, bushes, or vines at a level of "60/100" or something equal to that level, if it is available.[350] By 60/100, FSA means that the producer 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 the Federal Crop Insurance Corporation (FCIC).[351]

If the producer received WHIP benefits based on an insured crop, and the insurance is then not available, the producer must buy NAP coverage at a 60/100 level of coverage or something equal to that coverage.[352]

---

346 Pilot crop insurance counts as available crop insurance. WHIP Handbook, page 2-12, para. 33.A (July 13, 2018).
347 7 C.F.R. § 760.1517(a) (2018); WHIP Handbook, page 2-12, para. 33.A, page 2-15, para. 33.C (July 13, 2018).
348 7 C.F.R. § 760.1517(b) (2018); WHIP Handbook, page 2-12, para. 33.A, page 2-15, para. 33.C (July 13, 2018).
349 WHIP Handbook, page 2-13, para. 33.A (July 13, 2018).
350 7 C.F.R. § 760.1517(a)(1) (2018); WHIP Handbook, page 2-12, para. 33.A pages 2-15 and 2-16, para. 33.C (July 13, 2018).
351 WHIP Handbook, page 2-17, para. 33.E (July 13, 2018). Whole Farm Revenue Protection (WFRP) can meet the coverage requirement.
352 WHIP Handbook, page 2-12, para. 33.A (July 13, 2018).

Crop insurance is not available to producers that owe money the Federal Crop Insurance Corporation. For purposes of the WHIP linkage requirements, FSA requires that the producer do what is necessary—including paying any FCIC debt—in order to be able to purchase the required crop insurance.[353]

2. NAP-Eligible Crop, Tree, Bush or Vine

If the producer received WHIP benefits based on a crop, tree, bush or vine for which NAP is available, the producer 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.[354] By 60/100, FSA means that the producer must buy NAP at a coverage level of 60 percent of the value of the crop. If applicable, the producer will need to pay the NAP administrative fee.[355]

If NAP coverage of 60/100 is unavailable, the producer must purchase NAP catastrophic coverage.[356]

The producer must also file an acreage report, and must file what FSA calls a CCC-471 form.[357]

If the producer received benefits on a NAP crop, and crop insurance then becomes available, the producer must buy crop insurance at a level of coverage at 60/100 or something equal to that level.[358]

D. Coverage Based on Producer's Interest and Pay Group

The linkage requirement applies to the producer'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.[359]

The linkage rule applies to each crop, type, intended use, and planting period, if that applies, on the WHIP application.[360]

E. No Exception or Waivers for Linkage

FSA rules say there are not exceptions or waivers for the linkage requirement.[361] A refund will be required by FSA from all producers that do not meet the requirement.

353 WHIP Handbook, page 2-17, para. 33.H (July 13, 2018).
354 7 C.F.R. § 760.1517(a)(2) (2018); WHIP Handbook, page 2-12, para. 33.A, page 2-15, para. 33.C-D (July 13, 2018).
355 7 C.F.R. § 760.1517(c) (2018).
356 7 C.F.R. § 760.1517(a)(2)(i) (2018).
357 WHIP Handbook, page 2-16, para. 33.D (July 13, 2018).
358 WHIP Handbook, page 2-12. para. 33.A (July 13, 2018).
359 WHIP Handbook, page 2-12, para. 33.A (July 13, 2018).
360 WHIP Handbook, page 2-14, para. 33.B (July 13, 2018).
361 WHIP Handbook, page 2-17, para. 33.G (July 13, 2018).

F. If Producer Quits Farming

If a producer quits farming, the farming entity dissolves, or a member leaves the entity but farms under a different Tax Identification number, the requirement is met if the majority of the persons receiving WHIP payments meet the crop insurance or NAP requirement.[362]

G. If Requirement Not Met—Refund WHIP Payment

If a producer receives a WHIP payment and does not meet the linkage, the producer will need to refund the WHIP payment for the crop not meeting the linkage requirement, plus interest.[363]

XII. WHIP Denial Notification, Appeals, and Equitable Relief

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

A. WHIP Denial Notification

FSA must notify a producer in writing if his or her WHIP application is not approved.[364] 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 producer's application, as well as copies of the relevant Federal Regulations and the WHIP Handbook.

B. WHIP Appeals

Producers have the right to appeal certain decisions that FSA makes with respect to WHIP applications.[365]

1. Appealable Decisions

There are two main categories of WHIP application decisions for which producers may appeal. First, producers have a right to appeal FSA decisions on WHIP applications where there is a questions of fact relating to the decision.[366] Producers also have the right to appeal when there is a disagreement as to the correct application of a WHIP rule or regulation.

---

362 WHIP Handbook, page 2-13, para. 33.A (July 13, 2018).

363 7 C.F.R. § 760.1517(c) (2018); WHIP Handbook, page 2-12, para. 33.A, page 2-16, para. 33.F (July 13, 2018).

364 WHIP Handbook, page 1-8, para. 4.D (July 13, 2018).

365 WHIP Handbook, page 1-19, para. 11.A (July 13, 2018).

366 WHIP Handbook, page 1-19, para. 11.A (July 13, 2018). 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.[367] These include the following: (1) responses to inquiries about eligibility; (2) eligibility criteria; (3) signature requirements; (4) prices; (5) payment factors; (6) payment calculations; and (7) minimum county disaster yields.

In addition, appeals are not allowed for what USDA calls "general applicability" rules.[368] These rules include deadlines for application periods, the timing of application periods, as well as internal operating guidelines issued to FSA state and county offices.

3. Letters to Producers of Non-appealable Determinations

Letters notifying participants that a decision is not appealable must clearly explain to the producer the reasons that the decision is not appealable.[369]

C. Equitable Relief

Equitable relief rules also apply to WHIP.[370] Under equitable relief, some generally applied rules for programs will not be applied to a particular producer.[371]

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.

XIII. 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 Producers NOT Eligible

Florida citrus growers are not eligible for WHIP.[372] Instead, USDA will fund a similar program that is run by the state of Florida.

---

367 WHIP Handbook, page 1-19, para. 11.B (July 13, 2018). FSA states that the unappealable decisions are based on guidance from the FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation (Sept. 12, 2016).

368 WHIP Handbook, page 1-19, para. 11.C (July 13, 2018).

369 7 C.F.R. § 760.1517(f) (2018). Notification letters follow the guidelines in FSA Handbook, 1-APP (Rev. 2), *Program Appeals, Mediation, and Litigation* (Sept. 12, 2016).

370 WHIP Handbook, page 1-4, para. 3.I (July 13, 2018).

371 See 7 C.F.R. pt 718 (2018); FSA Handbook, Finality Rule and Equitable Relief, 7-CP (Rev. 4) (March 14, 2014)

372 7 C.F.R. § 760.1516(f) (2018); WHIP Handbook, page 8-2, para. 140.B (July 13, 2018).

B. Puerto Rico Provisions

Producers in Puerto Rico who suffered crop losses as a result of the 2017 hurricanes are subject to two different WHIP rules.[373] First, yield for producers in Puerto Rico will always be the county expected yield. Second, the applicable price will be the average market price.

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

C. Pasture, Rangeland, and Forage

Producers with federal crop insurance coverage for pasture, rangeland, or forage may be subject to special WHIP rules.[374] They may be exempt from some benefit restrictions that generally apply to crop insurance benefits.

D. Hybrid Seeds

Special rules apply for crops that are produced from hybrid seeds, such as hybrid corn seed and hybrid rice seed.[375] 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.[376] Producers 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.[377]

E. Grass for Seed that is Also Harvested as Forage

If a producer raises grass that is intended for seed, and then bails the remainder of the crop for hay, special rules will apply.[378] FSA will be especially interested in the intended us 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.[379] 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. [380]

---

373 WHIP Handbook, page 10-21, para. 191 (July 13, 2018).
374 See WHIP Handbook, page 10-9, para. 184 (July 13, 2018).
375 WHIP Handbook, page 10-14 to 10-16, para. 187 (July 13, 2018).
376 WHIP Handbook, page 10-14, para. 187.A (July 13, 2018).
377 See WHIP Handbook, pages 10-14 to 10-16, para. 187 (July 13, 2018).
378 See WHIP Handbook, page 10-5, para. 182 (July 13, 2018).
379 WHIP Handbook, page 10-20, para. 190.A (July 13, 2018).
380 See WHIP Handbook, page 10-20, para. 190.A (July 13, 2018).

G. One-Move Cotton Exception—Hurricane Harvey Losses Only

An exception to the standard WHIP rules applies to some cotton producers who suffered losses as a result of Hurricane Harvey.[381] As a general rule, RMA cotton crop provisions state that insurance ends upon the removal of cotton from the field.[382] Under standard WHIP rules, therefore, assistance would not be available for producers who had already moved their cotton from their fields. Some insured producers in the Texas Gold Coast had already started to harvest cotton before Hurricane Harvey hit. Because cotton gins were unable to keep up with harvest, and modules stored in fields were at risk of being damaged, approved insurance provides allowed producers to move cotton from the field without impacting their insurability. Accordingly, cotton that was harvested, stored in modules, and damaged by Hurricane Harvey, is still eligible for WHIP under the one-move exception.[383]

H. California and Arizona Citrus

In California and Arizona, insurance is not provided for processed citrus production.[384] For this reason, the production and pricing reflected by California and Arizona insurance policies may not reflect the producer's total production.[385] If not, producers 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 producer will be used to determine secondary use.

I. Crop Insurance Dollar Plans

Some producers may have dollar plans for their crop insurance. Dollar plans are revenue-based policies that do not have established yields or prices.[386] 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.[387] To determine actual value, producers with dollar plans will be required to submit verifiable or reliable production records.[388] If no such records exist, FSA will use the applicable county disaster yield.

J. 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."[389] For example, FSA

---

381 WHIP Handbook, page 10-20, para. 189.A-B (July 13, 2018).
382 WHIP Handbook, page 10-20, para. 189.A (July 13, 2018).
383 WHIP Handbook, page 10-20, para. 189.A (July 13, 2018).
384 WHIP Handbook, page 10-13, para. 185.A (July 13, 2018).
385 WHIP Handbook, page 10-13, para. 185.B (July 13, 2018).
386 WHIP Handbook, page 10-14, para. 186.A (July 13, 2018).
387 WHIP Handbook, page 10-14, para. 186.B (July 13, 2018).
388 WHIP Handbook, page 10-14, para. 186.C (July 13, 2018).
389 WHIP Handbook, page 10-3, para. 181.A (July 13, 2018).

has identified some perennial tree fruit crops as being multiple market crops.[390] There are special WHIP rules for multiple market crops, and producers of such crops should use care to make sure the proper FSA rules are applied.[391] In general, FSA will be interested in the intended us of the crop.

K. Winter Wheat

Producers 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. [392]

L. Sugar Beets

Sugar beet production raises questions for WHIP regarding measuring production. Special rules, as a result, apply. [393]

M. Skip-Row Crops of Cotton and Sorghum

Producers raising skip-row cotton or grain sorghum have special rules for reporting their production. [394]

---

390 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 10-3, par. 181.B (July 13, 2018).

391 See WHIP Handbook, pages 10-3 and 10-4, para. 181 (July 13, 2018).

392 See WHIP Handbook, page 10-1 para. 180.C (July 13, 2018).

393 WHIP Handbook, page 10-6 para. 183 (July 13, 2018).

394 WHIP Handbook, page 10-2 para. 180.D (July 13, 2018).