

# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### 7 CFR Part 760

[Docket ID: FSA–2020–0011]

RIN 0560–AI55

### Agricultural Disaster Indemnity Programs

**AGENCY:** Farm Service Agency (FSA), Department of Agriculture (USDA).

**ACTION:** Final rule.

**SUMMARY:** This rule establishes the Quality Loss Adjustment (QLA) Program to provide assistance to producers who suffered eligible crop quality losses due to hurricanes, excessive moisture, floods, drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019. It also amends the provisions for the Wildfire and Hurricane Indemnity Program Plus (WHIP+) to be consistent with the Further Consolidated Appropriations Act, 2020, by adding excessive moisture and drought occurring in 2018 and 2019 as qualifying disaster events and clarifying eligibility of sugar beets. The changes to WHIP+ were self-enacting and were previously implemented by FSA.

**DATES:**

*Effective date:* January 6, 2021.

*Comment due date:* Comments are due by March 8, 2021.

**ADDRESSES:** We invite you to submit comments on this rule. You may submit comments by either of the following methods, although FSA prefers that you submit comments electronically through the Federal eRulemaking Portal:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and search for Docket ID FSA–2020–0011. Follow the instructions for submitting comments.

- *Mail:* Director, SND, FSA, U.S. Department of Agriculture, 1400

Independence Avenue SW, Stop 0522, Washington, DC 20250–0522. In your comment, specify the docket ID FSA–2020–0011.

Comments will be available for viewing online at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Kimberly Graham at (202) 720–6825 (voice); or by email at: [kimberly.graham@usda.gov](mailto:kimberly.graham@usda.gov). Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Additional Supplemental Appropriations for Disaster Relief Act, 2019 (“Disaster Relief Act,” Pub. L. 116–20) provided disaster assistance for necessary expenses related to losses of crops (including milk, on-farm stored commodities, crops prevented from planting in 2019, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94), makes several changes to the provisions of the Disaster Relief Act, including:

- Specifying that assistance would be provided for crop quality losses;
- Adding excessive moisture as a qualifying disaster event;
- Adding drought as a qualifying disaster event if an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year; and
- Providing that sugar beet losses in 2018 and 2019 would be paid through cooperative processors (to be paid to producer members as determined by such processors).

This rule implements those provisions of the Further Consolidated Appropriations Act, 2020, by establishing the QLA Program to provide assistance for crop quality losses and amending the WHIP+ regulations to be consistent with the changes to qualifying disaster events and eligibility of sugar beet losses.

### QLA Program

This rule establishes the QLA Program to provide disaster assistance for crop quality losses that were a consequence of hurricanes, excessive moisture, floods, qualifying drought, tornadoes, typhoons, volcanic activity, snowstorms, or wildfires occurring in calendar years 2018 and 2019. Eligible crops generally include crops for which FCIC crop insurance coverage or Noninsured Crop Disaster Assistance Program (NAP) coverage is available; however, value loss crops,<sup>1</sup> honey, and maple sap are not eligible. The QLA Program provides assistance for losses to crops that were sold or fed to livestock or are in storage; crops that were destroyed are not eligible. Assistance will be based on a producer’s harvested affected production of an eligible crop that had a quality loss due to a qualifying disaster event and had at least a 5 percent quality loss due to all eligible disaster events.

Qualifying disaster events include hurricanes, floods, tornados, typhoons, volcanic activity, snowstorms, wildfires, excessive moisture, qualifying drought, and related conditions that occurred in the 2018 or 2019 calendar year. Assistance is available for eligible producers in counties that received a qualifying Presidential Emergency Disaster Declaration (declaration) or Secretarial Disaster Designation (designation) due to one or more of the qualifying disaster events or a related condition. As required by the Further Consolidated Appropriations Act, 2020, drought is only a qualifying disaster event if an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year (referred to as “qualifying drought” in this rule). Only producers in those counties that received a disaster declaration or designation qualify for the QLA Program based on the declaration or designation. Producers in counties that did not receive a qualifying declaration or designation may still apply; however, they must also provide supporting documentation to establish that the crop was directly affected by a qualifying disaster event and suffered the same

<sup>1</sup> Value loss crops include aquaculture, floriculture, mushrooms, ginseng root, ornamental nursery, sea grass and sea oats, Christmas trees, and turfgrass sod.

minimum loss as required by a crop in a disaster declared or designated county. Lists of counties with Presidential Emergency Disaster Declarations and Secretarial Disaster Designations for all qualifying disaster events for 2018 and 2019 are available at [farmers.gov/quality-loss](https://farmers.gov/quality-loss).

FSA recognizes that a crop may suffer quality losses due to multiple disaster events in a single crop year, and the portion of a crop's quality loss that can be attributed to a specific disaster event may be difficult to determine. Therefore, while a qualifying disaster event must have caused at least a portion of the affected production's quality loss, FSA will consider the total quality loss caused by all eligible disaster events for eligibility and payment calculation purposes. Eligible disaster events for the QLA Program include those listed for NAP in 7 CFR 1437.10, except that the QLA Program does not cover losses due to insect infestation.

The QLA Program does not cover losses due to disaster events occurring after a crop was harvested or due to crop deterioration while in storage. Quality losses that could have been mitigated using good farming practices are not eligible. For example, if a producer's corn crop received a quality discount due to high moisture content, the producer could have mitigated that quality loss by using best practices for drying and storing the crop; therefore, that producer's quality loss due to high moisture is not eligible. The QLA Program does not provide assistance for losses that cannot be determined to have occurred or for losses for which a notice of loss was previously disapproved by FSA, RMA, or an approved insurance provider selling and servicing Federal crop insurance policies unless that notice of loss was disapproved solely because it was filed after the applicable deadline.

The QLA Program does not provide assistance for certain quality losses that were already compensated under a Federal crop insurance plan, NAP, or WHIP+. This includes losses to affected production of:

- Multiple market crops already compensated under crop insurance or WHIP+;
- Crops for which production used to calculate a crop insurance indemnity or WHIP+ payment was adjusted based on a comparison of the producer's sale price to the FCIC established price;
- Crops that received a crop insurance indemnity, NAP payment, or WHIP+ payment based on the quantity of production that was considered unmarketable; and

- Crops for which production was reported as salvage value or secondary use.

The QLA Program also excludes quality losses to sugar beets that were compensated through cooperative agreements with cooperative processors.

Affected production of a subsequent crop grown on double cropped acreage is only eligible if the crop has been approved as an eligible double cropping practice by the FSA State committee.

#### Application

FSA will accept QLA Program applications from January 6, 2021, through March 5, 2021. To apply, producers must submit a completed QLA Program application either in person, by mail, email, or facsimile to an FSA county office. To be eligible, a producer must submit a complete application, which includes all of the following:

- FSA-898, Quality Loss Adjustment (QLA) Program Application;
- FSA-899, Historical Nutritional Value Weighted Average Worksheet (only for forage crops with verifiable documentation of historical nutrient factors from the 3 preceding crop years);
- FSA-578, Report of Acreage;
- FSA-895, Crop Insurance and/or NAP Coverage Agreement; and
- Required documentation, as discussed below.

The FSA-578, FSA-895, and FSA-899 forms, and other required documentation must be submitted to the producer's county office by March 19, 2021.

If not already on file with FSA, producers must also submit the following eligibility forms for each crop year within 60 days of the date the producer signs the application:

- AD-1026, Highly Erodible Land Conservation (HELIC) and Wetland Conservation (WC) Certification;
- CCC-902, Farm Operating Plan for Payment Eligibility;
- CCC-941 Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information; and
- CCC-942 Certification of Income from Farming, Ranching and Forestry Operations, if applicable.

Payments will not be made until all necessary eligibility documentation is received. Failure of an applicant to submit documentation timely may result in FSA not issuing a payment or, in the case of legal entities, a reduced payment if the required documentation for one or more members of the entity is not submitted timely.

#### Required Documentation

To support their applications, producers must submit documentation

showing the quality loss and quantity of affected production by March 19, 2021. Documentation of the quality loss (total dollar value loss, grading factors, and nutrient factors, as applicable), must be verifiable. Verifiable documentation is documentation that can be verified by FSA through an independent source; FSA may verify the submitted records with records on file at the warehouse, gin, laboratory, or other entity that received or tested the reported production. Examples of acceptable, verifiable documentation include warehouse grading sheets, settlement sheets, sales receipts, and laboratory test results. Except for grain crops that have been sold, the documentation must be from laboratory tests or analysis completed within 30 days of harvest to be considered acceptable, unless the FSA county committee determines that the record is representative of the condition of the affected production within 30 days of harvest. For grain crops that were sold, the verifiable documentation can be from any time from harvest through the time of sale, unless the FSA county committee determines the record is not representative of the condition within 30 days of harvest. Producers who do not have acceptable, verifiable documentation are ineligible for the QLA Program.

For forage crops, all producers must submit verifiable documentation showing the nutrient factors for the affected production of the crop. Producers must also submit verifiable documentation of the historical nutrient factors for the 3 preceding crop years if available. The type of nutrient factors (such as relative feed value or total digestible nutrients) that must be documented for a particular crop will be determined by the FSA county committee based on the standard practice for the crop in that county. For all crops other than forage crops, producers must submit verifiable documentation of the total dollar value loss due to quality, if available, and verifiable documentation of grading factors due to quality.

Documentation to support the quantity of affected production included on the application must be verifiable for non-forage crops that receive a QLA payment based on the producer's total dollar value loss. For all other crops (non-forage crops without a producer's total dollar value loss and all forage crops), records to support the quantity of affected production must be reliable. Reliable production records means evidence provided by the participant that is used to substantiate the amount of production reported when verifiable

records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, invoices for custom harvesting, and records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries that are determined acceptable by the FSA county committee. To determine whether the records are acceptable, the FSA county committee will consider whether they are consistent with the records of other producers of the crop in that area.

#### Payment Calculation

QLA Program payments will be calculated using different formulas based on the type of crop (forage or non-forage) and based on the type of documentation submitted. All QLA payments, regardless of whether they are forage or non-forage, and the type of documentation submitted, will be calculated using a 70 percent payment factor. Payments calculated based on a county average loss, as described below, will be subject to an additional payment factor of 50 percent.

For forage crops with verifiable documentation of both the nutrient factors for the affected production and historical nutrient factors for the 3 preceding crop years, payment will be equal to the amount of the producer's total affected production multiplied by the producer's verifiable percentage of loss, multiplied by the average market price determined by FSA, multiplied by 70 percent. The producer's verifiable percentage of loss is determined by comparing the nutrient factor test results for the affected production to the average from the 3 preceding crop years, as documented on the FSA-899, Historical Nutritional Value Weighted Average Worksheet. The average market price for the QLA Program is the price used for NAP established according to 7 CFR 1437.12.

For forage crops with verifiable documentation of nutrient factors for the affected production but without historical nutrient factors for the 3 preceding crop years, the payment will be equal to the amount of the producer's total affected production multiplied by the county average percentage of loss, multiplied by the average market price determined by FSA, multiplied by 70 percent, multiplied by 50 percent.

For affected production of non-forage crops with verifiable documentation of the total dollar value loss due to quality, the QLA Program payment is equal to the producer's total dollar value loss on the affected production of the crop,

multiplied by a payment factor of 70 percent.

For non-forage crops without verifiable documentation of a total dollar value loss but with verifiable documentation of grading factors due to quality, the payment will be equal to the amount of producer's affected production multiplied by the county average loss per unit of measure, multiplied by 70 percent, multiplied by 50 percent.

To determine the county average percentage of loss (for forage crops) or the county average loss per unit of measure (for non-forage crops), FSA will calculate the average loss for a crop based on losses of producers applying with verifiable documentation of historical nutritional factors (for forage crops) or the total dollar value loss (for non-forage crops) if at least 5 eligible producers submitted that documentation in the county. If less than 5 eligible producers in a county submit verifiable documentation of their historical nutritional factors or their total dollar value loss, FSA will determine a county average percentage of loss or county average loss per unit of measure based on the best available data, including losses of other QLA Program participants in contiguous counties. If sufficient data is still not available after considering other sources, FSA may determine that a county average cannot be calculated and producers in that county applying for payment under the applicable calculation are ineligible.

Payments for the QLA Program will not be issued until the application period has ended in order to allow FSA to determine the county average losses, as well as the total payments requested under the QLA Program. The Further Consolidated Appropriations Act, 2020 provides funding for the QLA Program to be available until December 31, 2021, in an amount equal to the remaining funds provided under the Bipartisan Budget Act of 2018 (Pub. L. 115-123) for losses due to Hurricanes Harvey, Irma, Maria, and other hurricanes and wildfires occurring in calendar year 2017,<sup>2</sup> and remaining funds provided under the Disaster Relief Act for losses due to Hurricanes Michael and Florence, other hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in

<sup>2</sup> FSA provided assistance for losses due to Hurricanes Harvey, Irma, Maria, and other hurricanes and wildfires occurring in calendar year 2017 through the 2017 Wildfires and Hurricanes Indemnity Program (2017 WHIP) (final rule published July 18, 2018, 83 FR 33795-33809) and the Florida Citrus Recovery Grant Program.

calendar years 2018 and 2019.<sup>3</sup> If the total amount of calculated QLA Program payments exceeds the amount of funding available, FSA will prorate all payments by a national factor.

A person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, up to \$125,000 per crop year in QLA Program payments. FSA will use the notification of interest provisions in 7 CFR 1400.107 and payment attribution provisions in 7 CFR 1400.105 for attributing and limiting payments to persons and legal entities. FSA will also use provisions in 7 CFR 1400.104 when changes in a farming operation result in an increase in persons to which payment limitation applies. Payments made to a joint operation (including a general partnership or joint venture) cannot exceed \$250,000 per person or legal entity that comprise the ownership of the joint operation. Payments made to a legal entity will be reduced proportionately by an amount that represents the direct or indirect ownership in the legal entity by any person or legal entity that has otherwise reached the maximum payment limitation. These rules for attributing and limiting payments are consistent with the programs FSA administers on behalf of the Commodity Credit Corporation.

A person or legal entity, other than a joint venture or general partnership, is ineligible for a 2018, 2019, or 2020 payment if the person's or legal entity's average adjusted gross income (AGI) is more than \$900,000, unless at least 75 percent of that person's or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. The average AGI for each of the program years 2018, 2019, or 2020, is determined using the average of the adjusted gross incomes for the 3 taxable years preceding the most immediately preceding taxable year. For example, for the 2019 program year, the producer's AGI would be based on the 2015, 2016, and 2017 tax years. If at least 75 percent of the person's or legal entity's AGI is derived from farming, ranching, or forestry-related activities and the participant provides the required certification and documentation, the person or legal entity is eligible to

<sup>3</sup> FSA has previously provided assistance for losses due to Hurricanes Michael and Florence, other hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019 through the Wildfires and Hurricanes Indemnity Program Plus (WHIP+), On-Farm Storage Loss Program, and Milk Loss Program (final rule published September 13, 2019, 84 FR 48518-48537), as well as through several grants and cooperative agreements with sugar beet cooperatives.

receive QLA Program payments up to the applicable payment limitation noted above. With respect to joint ventures and general partnerships, this AGI provision will be applied to each member of the joint venture and general partnership.

#### **Requirement to Purchase Crop Insurance or NAP Coverage**

The Disaster Relief Act requires all participants who receive QLA Program payments to purchase crop insurance or NAP coverage for the next 2 available crop years. The latest year for meeting compliance with this provision will be the 2023 crop year. In other words, if the 2 consecutive years of coverage are not met by 2023 coverage year, the participant is ineligible for and must refund QLP Program payments. Participants must obtain crop insurance or NAP, as may be applicable, at the 60 percent coverage level or higher. In situations where crop insurance is unavailable for a crop, the Disaster Relief Act requires that a QLA Program participant obtain NAP coverage. Section 1001D of the Food Security Act of 1985 (1985 Farm Bill) provides that a person or entity with AGI in amount greater than \$900,000 is not eligible to participate in NAP; however, producers with an AGI greater than \$900,000 may be eligible for the QLA Program if at least 75 percent of that person's or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. Accordingly, in order to reconcile this restriction in the 1985 Farm Bill and the Disaster Relief Act's requirement to obtain NAP or crop insurance coverage, QLA Program participants may meet the Disaster Relief Act's purchase requirement by purchasing Whole-Farm Revenue Protection crop insurance coverage, if eligible, or they may pay the applicable NAP service fee and premium for the 60 percent coverage level despite their ineligibility for a NAP payment. In other words, the service fee and premium must be paid even though no NAP payment may be made because the AGI of the person or entity exceeds the 1985 Farm Bill limitation.

The crop insurance and NAP coverage requirements are specific to the crop and county (county where the crop is physically located for insurance and administrative county for NAP) for which QLA Program payments are paid. This means that a producer is required to purchase crop insurance or NAP coverage for the crop in the county for which the producer was issued a QLA Program payment. Producers who receive a payment on a crop in a county and who have the crop or crop acreage

in subsequent years, as provided in this rule, and who fail to obtain the 2 years of crop insurance or NAP coverage must refund all QLA Program payments for that crop in that county with interest from the date of disbursement. This is a condition of payment eligibility specified by Disaster Relief Act and is therefore not subject to partial payment eligibility or other types of equitable relief. Producers who were paid under the QLA Program for a crop in a county but do not plant that crop in a subsequent year are not subject to the crop insurance or NAP purchase requirement. WHIP+ participants who already met the requirement to purchase crop insurance or NAP coverage as specified in 7 CFR 760.1517 are considered to have also met the requirement to purchase crop insurance or NAP coverage for QLA Program purposes, and they are not required to obtain additional years of crop insurance or NAP coverage as a result of also receiving a QLA Program payment for that crop.

Applicable general eligibility requirements, including recordkeeping requirements and required compliance with HELC and Wetland Conservation provisions, are similar to those for the previous ad hoc crop disaster programs and current permanent disaster programs. All information provided to FSA for program eligibility and payment calculation purposes, including production records, is subject to spot check.

#### **WHIP+**

FSA, on behalf of the Secretary of Agriculture, previously implemented provisions of the Disaster Relief Act by establishing WHIP+ through a final rule published on September 19, 2019 (84 FR 48518–48537). The Disaster Relief Act provided assistance for losses of crops, trees, bushes, and vines, as a consequence of hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019. WHIP+ covers only production losses of crops except in specific circumstances discussed previously in this document when the producer may have also been compensated for quality losses.

This rule amends 7 CFR 760.1500(c) and the definition of “qualifying disaster event” in § 760.1502 to include excessive moisture and qualifying drought. As under the QLA Program, drought is only considered a qualifying disaster event if an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar

year. This rule adds definitions of “qualifying drought” and “U.S. Drought Monitor” in § 760.1502.

The addition of these qualifying disaster events for WHIP+ was self-enacting as the text in the law clearly specified the required changes without need for interpretation; therefore, FSA began the sign-up period for losses due to excessive moisture and qualifying drought on March 23, 2020, and sign-up ended on October 30, 2020. Producers applying for WHIP+ assistance for losses due to excessive moisture or qualifying drought were required to meet all requirements in 7 CFR part 760, subpart O, including the requirement to purchase crop insurance for 2 years as specified in § 760.1517.

The Further Consolidated Appropriations Act, 2020 also directed the Secretary to pay sugar beet losses in 2018 and 2019 through cooperative processors. FSA has established cooperative agreements with sugar beet processors; those processors will be responsible for distributing assistance to their members. This rule amends the eligibility provisions in § 760.1517 to specify that members of cooperatives are not eligible for a WHIP+ payment for sugar beet losses.

FSA is also updating § 760.1510(a) to reflect the application deadline of October 30, 2020, and correcting references in §§ 760.1508(c) and (f) and 760.1511(a)(6).

#### **Notice and Comment and Effective Date**

The Administrative Procedure Act (5 U.S.C. 553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. This rule involves programs for payments to certain agricultural commodity producers and therefore falls within that exemption. Due to the nature of the rule and the need to implement the regulations expeditiously to provide assistance to agricultural producers, FSA finds that notice and public procedure are contrary to the public interest. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act, FSA is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Therefore, this rule is effective upon publication in the **Federal Register**.

#### **Executive Orders 12866, 13563, 13771 and 13777**

Executive Order 12866, “Regulatory Planning and Review,” and Executive

Order 13563, "Improving Regulation and Regulatory Review," direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13777, "Enforcing the Regulatory Reform Agenda," established a Federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this rule as economically significant under Executive Order 12866, and therefore, OMB has reviewed this rule. The costs and benefits of this rule are summarized below. The full cost benefit analysis is available on [regulations.gov](https://www.regulations.gov).

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. The OMB guidance in M-17-21, dated April 5, 2017, specifies that "transfers" are not covered by Executive Order 13771 but that requirements imposed apart from transfers in transfer rules may qualify as costs or cost savings under Executive Order 13771, for example the information collection requirements in this rule. This rule is not subject to the requirements of E.O. 13771 because this rule results in no more than de minimis costs.

#### Cost Benefit Analysis Summary

WHIP+ initially provided approximately \$3 billion in

supplemental assistance to producers for qualifying agricultural production losses. In the Further Consolidated Appropriations Act, 2020, Congress changed provisions of the Disaster Relief Act as follows:

1. Extended eligibility under WHIP+ to also cover<sup>4</sup>—

a. Crop production losses due to excessive moisture in calendar years 2018 and 2019;

b. Crop production losses due to drought in calendar years 2018 and 2019 if the area within the county in which the loss occurred was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year;

2. Provided assistance for sugar beet losses in 2018 and 2019 to be paid through cooperative processors;<sup>5</sup> and

3. Authorized assistance for crop quality losses that occurred in calendar years 2018 and 2019 through the QLA Program (implemented by this rule).

Eligible crops under the QLA Program include crops for which Federal crop insurance or NAP coverage is available. To be eligible for the QLA Program, a crop must have suffered a quality loss due to a qualifying disaster event and had at least a 5 percent quality discount due to a combination of the qualifying disaster event and any other QLA-eligible causes of loss. Eligible crops may have been sold, fed on farm to

<sup>4</sup> The addition of excessive moisture and certain drought conditions as qualifying causes of loss under WHIP+ is specific, not open to interpretation, and is therefore self-enacting. Accordingly, the provision was previously implemented. FSA began the sign-up period on March 23, 2020, and sign-up ended on October 30, 2020.

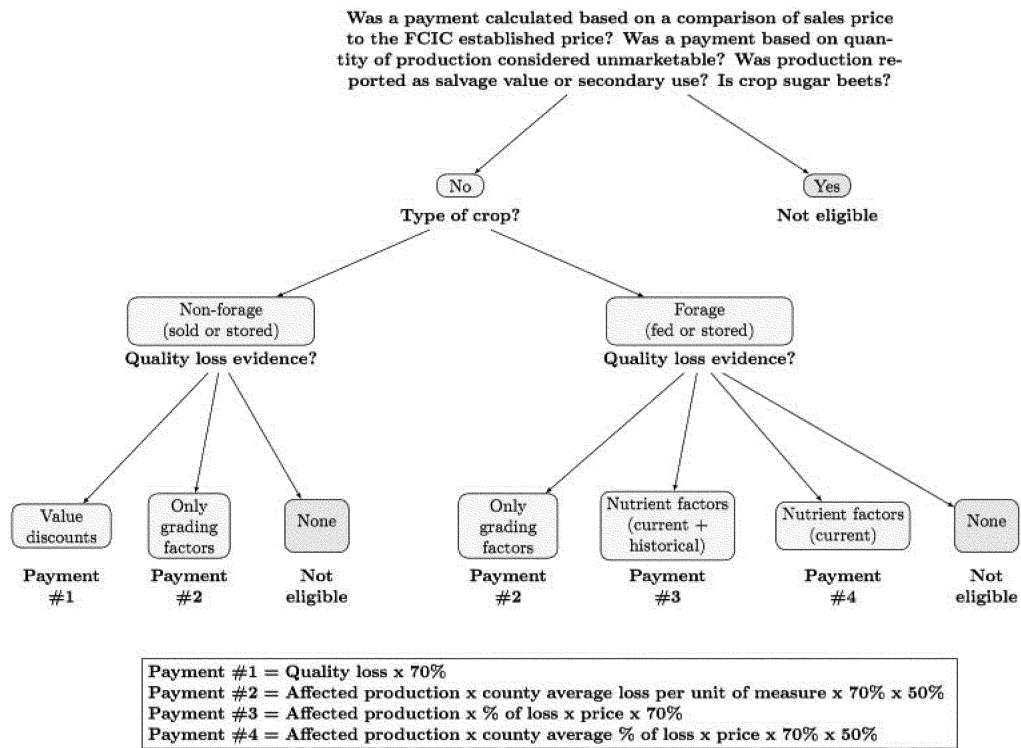
<sup>5</sup> Assistance for sugar beet losses for members of cooperative processors is provided through a separate program.

livestock, or been in storage at the time of application.

USDA estimates the Further Consolidated Appropriations Act, 2020 will provide approximately \$950 million for the continuation of disaster assistance program delivery, including payments to eligible producers for production losses due to excessive moisture and extreme drought under WHIP+ and for quality losses covered by the QLA Program. Of that amount, USDA anticipates that an estimated \$500 million will be available for QLA Program payments. However, the amount of funding ultimately available for the QLA Program will not be known until other payments, for example for excessive moisture and drought under WHIP+, are finalized.

The QLA Program payment calculation depends on several factors, as shown in Figure 1. A producer is ineligible for a QLA Program payment if they received a crop insurance indemnity, NAP payment, or WHIP+ payment for a crop that was unmarketable, sold for salvage value or secondary use, or if the payment was based on a comparison of the sales price of the affected production and the applicable reference price. Otherwise, payments or benefits received under the Federal crop insurance, NAP or WHIP+ do not affect a producer's eligibility or payment received from the QLA Program. The payment calculation depends on the use of production (non-forage or forage) and evidence at hand of the crop quality loss. Producers who do not have evidence of the quality loss are ineligible.

**Figure 1. Eligibility and Payment Calculation**



**Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA, Pub. L. 104–121), generally requires an agency to prepare a regulatory flexibility analysis of any rule whenever an agency is required by the Administrative Procedure Act or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because USDA is not required by Administrative Procedure Act or any law to publish a proposed rule for this rulemaking.

**Environmental Review**

The environmental impacts of this final rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulation for compliance with NEPA (7 CFR part 799). The legislative intent for implementing the QLA Program is to

provide assistance to producers who suffered eligible crop quality losses due to hurricanes, excessive moisture, floods, drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.

While OMB has designated this rule as “economically significant” under Executive Order 12866, “economic or social effects are not intended by themselves to require preparation of an environmental impact statement” (see 40 CFR 1502.16(b)), when not interrelated to natural or physical environmental effects.

For this rule, the FSA Categorical Exclusions found in 7 CFR 799.31 apply, specifically 7 CFR 799.31(b)(6)(iii), (iv), and (vi) (that is, § 799.31(b)(6)(iii) Financial assistance to supplement income, manage the supply of agricultural commodities, or influence the cost or supply of such commodities or programs of a similar nature or intent (that is, price support programs); § 799.31(b)(6)(iv) Individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) Safety net programs

administered by FSA). No Extraordinary Circumstances (7 CFR 799.33) exist.

For the outlined reasons, FSA has determined that the implementation of the QLA Program and the participation in the QLA Program does not constitute a major Federal action that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this regulatory action.

**Executive Order 12372**

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials that would be directly affect by proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons specified in the final rule related notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities

within this rule are excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, "Civil Justice Reform." This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The rule will not have retroactive effect. Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

#### Executive Order 13132

This rule has been reviewed under Executive Order 13132, "Federalism." The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

#### Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule may have significant Tribal implications that require ongoing adherence to Executive Order 13175. OTR notes that the programs are similar to programs that have been administered by FSA and RMA in the past; having not heard any concerns regarding the administration of these in the past, and the fact that provisions are mandated in the Disaster Relief Act, OTR recommended that consultation is not required at this time. Tribes can

request consultation at any time. FSA will work with OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by law.

#### The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104-4) requires Federal agencies to assess the effects of their regulatory actions on State local, and Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of \$100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, FSA submitted the QLA Program information collection request to OMB for emergency approval. OMB approved the 6-month emergency information collection.

#### E-Government Act Compliance

FSA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### Federal Assistance Programs

The titles and numbers of the Federal Domestic Assistance Program found in the Catalog of Federal Domestic Assistance to which this rule applies are:

- 10.129—Wildfire and Hurricanes Indemnity Program Plus
- 10.133—Quality Loss Adjustment Program

#### List of Subjects in 7 CFR Part 760

Dairy products, Indemnity payments, Reporting and recordkeeping requirements.

For the reasons discussed above, FSA amends 7 CFR part 760 as follows:

#### PART 760—INDEMNITY PAYMENT PROGRAMS

- 1. Revise the authority citation for part 760 to read as follows:

**Authority:** 7 U.S.C. 4501 and 1531; 16 U.S.C. 3801, note; 19 U.S.C. 2497; Title III, Pub. L. 109-234, 120 Stat. 474; Title IX, Pub. L. 110-28, 121 Stat. 211; Sec. 748, Pub. L. 111-80, 123 Stat. 2131; Title I, Pub. L. 115-123, 132 Stat. 65; Title I, Pub. L. 116-20, 133 Stat. 871; and Division B, Title VII, Pub. L. 116-94, 133 Stat. 2658.

#### Subpart O—Agricultural Disaster Indemnity Programs

##### § 760.1500 [Amended]

- 2. In § 760.1500(c), remove the words "and wildfires" and add "wildfires, excessive moisture, and qualifying drought" in their place.
- 3. Amend § 760.1502 as follows:
  - a. In the definition of "Qualifying disaster event", in paragraph (2) of remove the word "wildfire" and add "wildfire, excessive moisture, qualifying drought" in its place; and
  - b. Add the definitions of "Qualifying drought" and "U.S. Drought Monitor" in alphabetical order.

The additions read as follows:

##### § 760.1502 Definitions.

\* \* \* \* \*

*Qualifying drought* means an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year.

\* \* \* \* \*

*U.S. Drought Monitor* is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at <http://droughtmonitor.unl.edu>.

\* \* \* \* \*

- 4. In § 760.1503, add paragraph (j) to read as follows.

##### § 760.1503 Eligibility.

\* \* \* \* \*

(j) Members of cooperative processors are not eligible for WHIP+ assistance for sugar beet losses.

##### § 760.1508 [Amended]

- 5. Amend § 760.1508 as follows:
  - a. In paragraph (c), remove the cross reference "paragraph (b)(1)" and add the cross reference "paragraph (b)" in its place; and



■ b. In paragraph (f), remove the cross reference “paragraph (b)(1)” and add cross reference “paragraph (e)” in its place.

**§ 760.1510 [Amended]**

■ 6. In § 760.1510(a), remove the words “a date that will be announced by the Deputy Administrator” and add “October 30, 2020” in their place.

**§ 760.1511 [Amended]**

■ 7. In § 760.1511(a)(6), remove the cross reference “paragraph (f)” and add cross reference “paragraph (g)” in its place.

■ 8. Add subpart R, consisting of §§ 760.1800 through 760.1814, to read as follows:

**Subpart R—Quality Loss Adjustment Program**

Sec.	
760.1800	Applicability.
760.1801	Administration.
760.1802	Definitions.
760.1803	Participant eligibility.
760.1804	Eligibility of affected production.
760.1805	Qualifying disaster events.
760.1806	Ineligible losses.
760.1807	Miscellaneous provisions.
760.1808	General provisions.
760.1809	Payment and adjusted gross income limitation.
760.1810	Time and method of application.
760.1811	Required documentation and verification.
760.1812	Payment calculation.
760.1813	Availability of funds and timing of payments.
760.1814	Requirement to purchase crop insurance or NAP coverage.

**§ 760.1800 Applicability.**

This subpart specifies the terms and conditions for the Quality Loss Adjustment (QLA) Program. The QLA Program provides disaster assistance for crop quality losses that were a consequence of hurricanes, excessive moisture, floods, qualifying drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.

**§ 760.1801 Administration.**

(a) The QLA Program is administered under the general supervision of the Administrator, Farm Service Agency (FSA), and the Deputy Administrator for Farm Programs, FSA. The QLA Program is carried out by FSA State and county committees with instructions issued by the Deputy Administrator.

(b) FSA State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations in this subpart or instructions issued by the Deputy Administrator.

(c) The FSA State committee will take any action required by the regulations in this subpart that the FSA county committee has not taken. The FSA State committee will also:

(1) Correct, or require an FSA county committee to correct, any action taken by the FSA county committee that is not in accordance with the regulations in this subpart; or

(2) Require an FSA county committee to withhold taking any action that is not in accordance with this subpart.

(d) No delegation to an FSA State or county committee precludes the FSA Administrator or the Deputy Administrator from determining any question arising under this subpart or from reversing or modifying any determination made by an FSA State or county committee.

(e) The Deputy Administrator has the authority to:

(1) Permit State and county committees to waive or modify a non-statutory deadline specified in this subpart; and

(2) Delegate authority to FSA State or county committees to make determinations under § 760.1812(f) and (g).

(f) Items of general applicability to program participants, including, but not limited to, application periods, application deadlines, internal operating guidelines issued to FSA State and county offices, prices, and payment factors established under this subpart, are not subject to appeal in accordance with part 780 of this chapter.

**§ 760.1802 Definitions.**

The following definitions apply to this subpart. The definitions in §§ 718.2 and 1400.3 of this title also apply, except where they conflict with the definitions in this section. In the event of conflict, the definitions in this section apply.

*Affected production* means the producer's ownership share of harvested production of an eligible crop, adjusted to standard moisture as established by the U.S. Grains Standards Act, a State regulatory agency, or industry standard, that had both:

(1) A quality loss due to a qualifying disaster event; and

(2) At least a 5 percent quality loss due to all eligible disaster events.

*Average market price* means the average market price determined according to § 1437.12 of this title.

*Coverage level* means the percentage determined by multiplying the elected yield percentage under a crop insurance policy or NAP coverage by the elected price percentage.

*Crop insurance* means an insurance policy reinsured by FCIC under the

provisions of the Federal Crop Insurance Act, as amended. It does not include private plans of insurance.

*Crop insurance indemnity* means, for the purpose of this subpart, the payment to a participant for crop losses covered under crop insurance administered by RMA in accordance with the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Crop year* means:

(1) For insurable crops, the crop year as defined according to the applicable crop insurance policy; and

(2) For NAP-eligible crops, the crop year as defined in § 1437.3 of this title.

*Eligible crop* means a crop for which coverage was available either from FCIC under part 400 of this title, or through NAP under § 1437.4 of this title.

*Eligible disaster event* means a disaster event that is an eligible cause of loss specified in § 1437.10 of this title, excluding insect infestation.

*FCIC* means the Federal Crop Insurance Corporation, a wholly owned Government Corporation of USDA, administered by RMA.

*FSA* means the Farm Service Agency, an agency of USDA.

*Grading factor* means a factor that describes the physical condition or a feature that is evaluated to determine the quality of the production, such as broken kernels and low-test weight.

*Good farming practices* means the cultural practices generally recognized as compatible with agronomic and weather conditions and used for the crop to make normal progress toward maturity, as determined by FSA. These practices are:

(1) For conventional farming practices, those generally recognized by agricultural experts for the area, which could include one or more counties; or

(2) For organic farming practices, those generally recognized by the organic agricultural experts for the area or contained in the organic system plan that is in accordance with the National Organic Program specified in part 205 of this title.

*Harvested* means:

(1) For insurable crops, harvested as defined according to the applicable crop insurance policy;

(2) For NAP-eligible single harvest crops, that a crop has been removed from the field, either by hand or mechanically;

(3) For NAP-eligible crops with potential multiple harvests in 1 year or harvested over multiple years, that the producer has, by hand or mechanically, removed at least 1 mature crop from the field during the crop year; and

(4) For mechanically harvested NAP-eligible crops, that the crop has been



removed from the field and placed in a truck or other conveyance, except hay is considered harvested when in the bale, whether removed from the field or not.

*Insurable crop* means an agricultural crop (excluding livestock) for which the producer on a farm is eligible to obtain a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

*Multiple market crop* means a crop that is delivered to a single market but can have fresh and processed prices based on grading. For example, a producer may intend to sell all production of an apple crop as fresh production; however, based on grading of the crop at the market, the producer is compensated for some production at the fresh price and for some production at the processing price.

*Multiple planting* means the planting for harvest of the same crop in more than one planting period in a crop year on different acreage.

*NAP* means the Noninsured Crop Disaster Assistance Program under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333) and part 1437 of this title.

*NAP-eligible crop* means an agricultural crop for which the producer on a farm is eligible to obtain NAP coverage.

*NAP service fee* means the amount specified in § 1437.7 of this title that the producer must pay to obtain NAP coverage.

*Nutrient factor* means a factor determined by a test that measures the nutrient value of a crop to be fed to livestock. Examples include, but are not limited to, relative feed value and total digestible nutrients.

*Production* means quantity of the crop produced, which is expressed in a specific unit of measure including, but not limited to, bushels or pounds.

*QLA Program* means the Quality Loss Adjustment Program.

*Qualifying disaster event* means a hurricane, flood, tornado, typhoon, volcanic activity, snowstorm, wildfire, excessive moisture, qualifying drought, or a related condition that occurred in the 2018 or 2019 calendar year.

*Qualifying drought* means an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year.

*Quality loss* means:

(1) For forage crops, a reduction in an applicable nutrient factor for the crop; and

(2) For crops other than forage, a reduction in the total dollar value of the crop due to reduction in the physical

condition of the crop indicated by an applicable grading factor.

*Related condition* means damaging weather or an adverse natural occurrence that occurred as a direct result of a specified qualifying disaster event, such as excessive rain, high winds, flooding, mudslides, and heavy smoke, as determined by the Deputy Administrator. The term does not include insect infestation.

*Reliable production record* means evidence provided by the participant that is used to substantiate the amount of production reported when verifiable records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, invoices for custom harvesting, and records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries that are determined acceptable by the FSA county committee. To determine whether the records are acceptable, the FSA county committee will consider whether they are consistent with the records of other producers of the crop in that area.

*RMA* means the Risk Management Agency, an agency of USDA.

*Salvage value* means the dollar amount or equivalent for the quantity of the commodity that cannot be marketed or sold in any recognized market for the crop.

*Secondary use* means the harvesting of a crop for a use other than the intended use.

*Unit of measure* means:

(1) For insurable crops, the FCIC-

established unit of measure; and  
(2) For NAP-eligible crops, the established unit of measure used for the NAP price and yield.

*USDA* means the U.S. Department of Agriculture.

*U.S. Drought Monitor* is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at <http://droughtmonitor.unl.edu>.

*Value loss crop* has the meaning specified in subpart D of part 1437 of this title.

*Verifiable documentation* means evidence that can be verified by FSA through an independent source.

*Verifiable percentage of loss* is the percentage of loss determined by comparing the applicable nutrient

factors for a producer's affected production of a forage crop with the average of such nutrient factors from the 3 preceding crop years, as documented on FSA-899, Historical Nutritional Value Weighted Average Worksheet.

*WHIP+* means the Wildfires and Hurricanes Indemnity Program Plus under subpart O of this part.

#### § 760.1803 Participant eligibility.

(a) Participants will be eligible to receive a payment under this subpart only if they incurred a loss to an eligible crop due to a qualifying disaster event, as further specified in this subpart.

(b) To be an eligible participant under this subpart, a person or legal entity must be a:

- (1) Citizen of the United States;
- (2) Resident alien; for purposes of this subpart, resident alien means "lawful alien" (see § 1400.3 of this title);
- (3) Partnership consisting solely of citizens of the United States or resident aliens; or
- (4) Corporation, limited liability company, or other similar organizational structure organized under State law consisting solely of citizens or resident aliens of the United States.

(c) If any person who would otherwise be eligible to receive a payment dies before the payment is received, payment may be released as specified in § 707.3 of this chapter. Similarly, if any person or legal entity who would otherwise have been eligible to apply for a payment dies or is dissolved, respectively, before the payment is applied for, payment may be released in accordance with this subpart if a timely application is filed by an authorized representative. Proof of authority to sign for the deceased producer or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application. Eligibility of such participant will be determined, as it is for other participants, based upon ownership share and risk in producing the crop.

(d) An ownership share is required to be eligible for a payment under this subpart. Growers growing eligible crops under contract for crop owners are not eligible for a payment under this subpart unless the grower is also determined to have an ownership share of the crop. Any verbal or written contract that precludes the grower from having an ownership share renders the

grower ineligible for payments under this subpart.

(e) A person or legal entity is not eligible to receive assistance under this subpart if FSA determines that the person or legal entity:

(1) Adopted any scheme or other device that tends to defeat the purpose of this subpart or any of the regulations applicable to this subpart;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination under any or all of the following: This subpart and parts 12, 400, 1400, and 1437 of this title.

(f) A person who is ineligible for crop insurance or NAP under § 400.458 or § 1437.16 of this title, respectively, for any year is ineligible for payments under this subpart for the same year.

(g) The provisions of § 718.11 of this chapter, providing for ineligibility for payments for offenses involving controlled substances, apply.

(h) As a condition of eligibility to receive payments under this subpart, the participant must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of part 12 of this title for the applicable crop year for which the producer is applying for benefits under this subpart, and must not otherwise be precluded from receiving payments under part 12, 400, 1400, or 1437 of this title or any law.

#### **§ 760.1804 Eligibility of affected production.**

(a) To be eligible for the QLA Program, an eligible crop's affected production must have suffered a quality loss due to a qualifying disaster event and had at least a 5 percent quality loss due to all eligible disaster events. Whether affected production of a crop had a 5 percent loss will be determined separately for crops with different crop types, intended uses, certified organic or conventional status, county, and crop year.

(b) Affected production of the following is not eligible for the QLA Program:

(1) Crops that were not grown commercially;

(2) Crops that were intended for grazing or were grazed;

(3) Crops not intended for harvest;

(4) Volunteer crops;

(5) Value loss crops;

(6) Maple sap;

(7) Honey;

(8) By-products resulting from processing or harvesting a crop, such as, but not limited to, cotton seed, peanut shells, wheat or oat straw, or corn stalks or stovers;

(9) First-year seeding for forage production;

(10) Immature fruit crops;

(11) Crops for which FCIC coverage or NAP coverage is unavailable;

(12) Multiple market crops for which the producer previously received a crop insurance indemnity or WHIP+ payment for a quality loss;

(13) Crops for which production used to calculate a crop insurance indemnity or WHIP+ payment was adjusted based on a comparison of the producer's sale price to FCIC established price;

(14) Crops that received a crop insurance indemnity, NAP payment, or WHIP+ payment based on the quantity of production that was considered unmarketable;

(15) Crops for which the producer previously received a crop insurance indemnity, NAP payment, or WHIP+ payment for which production was reported as salvage value or secondary use;

(16) Sugar beets for which a member of a cooperative processor received a payment through a cooperative agreement; and

(17) Crops that were destroyed.

(c) Only affected production from initial crop acreage will be eligible for a QLA Program payment, unless the provisions for subsequent crops in this section are met. All plantings of an annual or biennial crop are considered the same as a planting of an initial crop in tropical regions as defined in part 1437, subpart F, of this title.

(d) In cases where there is double cropped acreage, affected production of each crop may be eligible only if the specific crops are approved by the FSA State committee as eligible double cropping practices in accordance with procedures approved by the Deputy Administrator.

(e) Participants having affected production from multiple plantings may receive payments for each planting only if the planting meets the requirements of part 1437 of this title and all other provisions of this subpart are satisfied.

#### **§ 760.1805 Qualifying disaster events.**

(a) A producer is eligible for payments under this subpart only if the producer's affected production of an eligible crop suffered a crop quality loss due to a qualifying disaster event.

(b) A crop quality loss due to a qualifying disaster event must have occurred on acreage that was physically located in a county that received a:

(1) Presidential Emergency Disaster Declaration authorizing public assistance for categories C through G or individual assistance due to a qualifying disaster event occurring in the 2018 or 2019 calendar years; or

(2) Secretarial Disaster Designation for a qualifying disaster event occurring in the 2018 or 2019 calendar years.

(c) A producer with a crop quality loss on acreage not physically located in a county that was eligible under paragraph (b) of this section will be eligible for the QLA Program for losses due to qualifying disaster events only if the producer provides supporting documentation from which the FSA county committee determines that the crop quality loss on the unit was reasonably related to a qualifying disaster event as specified in this subpart. Supporting documentation may include furnishing climatological data from a reputable source or other information substantiating the claim of loss due to a qualifying disaster event.

#### **§ 760.1806 Ineligible losses.**

(a) A loss is not eligible under this subpart if any of the following apply:

(1) The cause of loss is determined by FSA to be the result of poor management decisions, poor farming practices, or drifting herbicides;

(2) The loss could have been mitigated using good farming practices, including losses due to high moisture content that could be mitigated by following best practices for drying and storing the crop;

(3) The qualifying disaster event occurred after the crop was harvested;

(4) FSA or RMA have previously disapproved a notice of loss for the crop and disaster event, unless that notice of loss was disapproved solely because it was filed after the applicable deadline; or

(5) The cause of loss was due to:

(i) Conditions or events occurring outside of the applicable growing season for the crop;

(ii) Insect infestation;

(iii) Water contained or released by any governmental, public, or private dam or reservoir project if an easement exists on the acreage affected by the containment or release of the water;

(iv) Failure of a power supply or brownout; or

(v) Failure to harvest or market the crop due to lack of a sufficient plan or resources.

(b) [Reserved]

#### **§ 760.1807 Miscellaneous provisions.**

(a) All persons with a financial interest in a legal entity receiving payments under this subpart are jointly and severally liable for any refund, including related charges, that is determined to be due to FSA for any reason.

(b) In the event that any application under this subpart resulted from

erroneous information or a miscalculation, the payment will be recalculated and any excess refunded to FSA with interest to be calculated from the date of the disbursement.

(c) Any payment to any participant under this subpart will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in part 3 of this chapter apply to payments made under this subpart.

(d) Any participant entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 3 of this chapter.

(e) The regulations in parts 11 and 780 of this title apply to determinations under this subpart.

**§ 760.1808 General provisions.**

(a) Eligibility and payments under this subpart will be determined based on the county where the affected production was harvested.

(b) FSA county committees will make any necessary adjustments to the applicant's affected production and other information on the application form used to calculate a payment when the county committee determines:

(1) Additional documentation has been requested by FSA but has not been provided by the participant;

(2) The loss is due to an ineligible cause; or

(3) The participant has a contract providing a guaranteed payment for all or a portion of the crop.

(c) Unless otherwise specified, all eligibility provisions of part 1437 of this title also apply to tropical crops for eligibility under this subpart.

(d) FSA will use the most reliable data available at the time payments under this subpart are calculated. If additional data or information is provided or becomes available after a payment is issued, FSA will recalculate the payment amount and the producer must return any overpayment amount to FSA. In all cases, payments can only issue based on the payment formula for losses that affirmatively occurred.

(e) Production that is commingled between counties, crop years, or ineligible and eligible acres before it was a matter of record or combination of record and cannot be separated by using records or other means acceptable to FSA will be prorated to each respective year, county, or type of acreage, respectively.

**§ 760.1809 Payment and adjusted gross income limitation.**

(a) A person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, payments of not more than \$125,000 for each of the 2018, 2019, and 2020 crop years under this subpart.

(b) Payments made to a joint operation, including a joint venture or general partnership, cannot exceed the amount determined by multiplying the maximum payment amount specified in paragraph (a) of this section by the number of persons and legal entities, other than joint operations, that comprise the ownership of the joint operation.

(c) The direct attribution provisions in § 1400.105 of this title apply to payments under this subpart.

(d) The notification of interest provisions in § 1400.107 of this title apply to payments under this subpart.

(e) The provisions for recognizing persons added to a farming operation for payment limitation purposes as described in § 1400.104 of this title apply to payments under this subpart.

(f) The \$900,000 average AGI limitation provisions in part 1400 of this title relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, apply to each applicant for the QLA Program unless at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. A person's or legal entity's average AGI for each of the program years 2018, 2019 or 2020, is determined by using the average of the adjusted gross incomes for the 3 taxable years preceding the most immediately preceding taxable year. If the person's or legal entity's average AGI is below \$900,000 or at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry-related activities, the person or legal entity, is eligible to receive payments under this subpart.

**§ 760.1810 Time and method of application.**

(a) A completed FSA-898, Quality Loss Adjustment (QLA) Program Application, must be submitted in person, by mail, email, or facsimile to any FSA county office by the close of business on March 5, 2020.

(b) An application submitted in accordance with paragraph (a) of this section is not considered valid and complete for issuance of payment under this subpart unless FSA determines all the applicable eligibility provisions have been satisfied and the producer

has submitted all of following by March 19, 2020:

(1) Documentation required by § 760.1811;

(2) FSA-578, Report of Acreage, for all acreage for any crop for which payments under this subpart are requested;

(3) FSA-895, Crop Insurance and/or NAP Coverage Agreement; and

(4) For forage crops, FSA-899, Historical Nutritional Value Weighted Average Worksheet, if verifiable documentation of historical nutrient factors is available.

(c) In addition to the forms listed in paragraph (b) of this section, applicants must also submit all the following eligibility forms within 60 days from the date of signing the QLA Program application if not already on file with FSA:

(1) AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification;

(2) CCC-902 Automated, Farm Operating Plan for Payment Eligibility 2009 and Subsequent Program Years;

(3) CCC-941 Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information; and

(4) CCC-942 Certification of Income from Farming, Ranching and Forestry Operations, if applicable.

(d) Failure to submit all required forms by the applicable deadlines in paragraphs (b) and (c) of this section may result in no payment or a reduced payment.

(e) Application approval and payment by FSA does not relieve a participant from having to submit any form required, but not filed, according to this section.

(f) Once signed by a producer, the application is considered to contain information and certifications of and pertaining to the producer regardless of who entered the information on the application.

(g) The producer applying for payment under this subpart certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information is subject to verification or spot check by FSA at any time, either before or after payment is issued. Refusal to allow FSA or any agency of the USDA to verify any information provided will result in the participant's forfeiting eligibility for payment under this subpart. FSA may at any time, including before, during, or after processing and paying an application, require the producer to submit any additional information necessary to implement or determine any eligibility

provision of this subpart. Furnishing information specified in this subpart is voluntary; however, FSA may choose not to act on the application or approve payment if the required information is not provided. Providing a false certification will result in ineligibility and can also be punishable by imprisonment, fines, and other penalties.

**§ 760.1811 Required documentation and verification.**

(a) If requested by FSA, an applicant must provide documentation that establishes the applicant's ownership share and value at risk in the crop.

(b) The applicant must provide acceptable documentation that is dated and contains all information required to substantiate the applicant's certification to the satisfaction of the FSA county committee. Verifiable documentation is required to substantiate the total dollar value loss and associated affected production, grading factors, and nutritional factors. FSA may verify the records with records on file at the warehouse, gin, or other entity that received or may have received the reported production. Reliable production records are required to substantiate the reported amount of affected production for applications not based on the total dollar value loss.

(c) To be considered acceptable, verifiable documentation for grain crops that were sold may come from any time between harvest and sale of the affected production, unless the FSA county committee determines the record is not representative of the condition within 30 days of harvest. For all other crops, the verifiable documentation must come from tests or analysis completed within 30 days of harvest, unless the FSA county committee determines that the record is representative of the condition of the affected production at time of harvest. Examples of acceptable records for purposes of this paragraph (c) include:

- (1) Warehouse grading sheets;
- (2) Settlement sheets;
- (3) Sales receipts showing grade and price or disposition to secondary market due to quality; and
- (4) Laboratory test results.

(d) For forage crops, producers must submit verifiable documentation showing the nutrient factors for the affected production. Producers must also submit verifiable documentation of the historical nutrient factors for the 3 preceding crop years if available. The nutrient factors that must be documented for a crop will be determined by the FSA county committee based on

the standard practice for the crop in that county.

(e) For all crops other than forage crops, producers must submit verifiable documentation of the total dollar value loss due to quality, if available, and verifiable documentation of grading factors due to quality.

(f) The participant is responsible for:

(1) Retaining, providing, and summarizing, at time of application and whenever required by FSA, the best available verifiable production records for the crop;

(2) Providing the information in a manner that can be easily understood by the FSA county committee; and

(3) Providing supporting documentation about the disaster event if the FSA county committee has reason to question the disaster event.

(e) Participants must provide all records for any production of a crop that is grown with an arrangement, agreement, or contract for guaranteed payment.

(f) Participants are required to retain documentation in support of their application for 3 years after the date of approval.

(g) Participants receiving QLA Program payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

**§ 760.1812 Payment calculation.**

(a) Payments will be calculated separately for crops based on the crop type, intended use, certified organic or conventional status, county, and crop year.

(b) For forage crops with verifiable documentation of nutrient factors for the affected production and for the 3 preceding crop years, the payment will be equal to the producer's total affected production multiplied by the producer's verifiable percentage of loss, multiplied by the average market price, multiplied by 70 percent.

(c) For forage crops with verifiable documentation of nutrient factors for the affected production but not for the 3 preceding crop years, the payment will be equal to the producer's total affected production multiplied by the county average percentage of loss in paragraph (f) of this section, multiplied by the average market price, multiplied by 70 percent, multiplied by 50 percent.

(d) For crops other than forage with verifiable documentation of the total dollar value loss due to quality, the payment will be equal to the producer's total dollar value loss on the affected production, multiplied by 70 percent.

(e) For crops other than forage without verifiable documentation of the total dollar value loss but with verifiable documentation of grading factors, the payment will be equal to the producer's affected production multiplied by the county average loss per unit of measure in paragraph (g) of this section, multiplied by 70 percent, multiplied by 50 percent.

(f) The county average percentage of loss is the average percentage of loss from producers eligible for payment under paragraph (b) of this section if at least 5 producers in a county are eligible for payment for a crop under paragraph (b) of this section. If less than 5 producers in a county are eligible for payment for a crop under paragraph (b) of this section, the Deputy Administrator will:

(1) Determine a county average percentage of loss based on the best available data, including, but not limited to, evidence of losses in contiguous counties; or

(2) If a county average percentage of loss cannot be determined due to insufficient data, not issue payments to applicants under paragraph (c) of this section.

(g) The county average loss per unit of measure is based on the weighted average sales price from producers eligible for payment under paragraph (d) of this section if at least 5 producers in a county are eligible for payment for a crop under paragraph (d) of this section. If less than 5 producers are eligible for payment in a county under paragraph (d) of this section, the Deputy Administrator will:

(1) Determine a county average loss per unit of measure based on the best available data, including, but not limited to, evidence of losses in contiguous counties; or

(2) If a county average loss per unit of measure cannot be determined due to insufficient data, not issue payments to applicants under paragraph (e) of this section.

**§ 760.1813 Availability of funds and timing of payments.**

(a) Payments will be issued after the application period has ended and all applications have been reviewed by FSA.

(b) In the event that, within the limits of the funding made available by the Secretary, approval of eligible applications would result in payments

in excess of the amount available, FSA will prorate payments by a national factor to reduce the payments to an amount that is less than available funds as determined by the Secretary.

(c) Applications and claims that are unpaid or prorated for any reason will not be carried forward for payment under other funds for later years or otherwise, but will be considered, as to any unpaid amount, void and nonpayable.

**§ 760.1814 Requirement to purchase crop insurance or NAP coverage.**

(a) For the first 2 consecutive crop years for which crop insurance or NAP coverage is available after the enrollment period for the QLA Program ends, a participant who receives payment under this subpart for a crop loss in a county must obtain:

(1) For an insurable crop, crop insurance with at least a 60 percent coverage level for that crop in that county; or

(2) For a NAP-eligible crop, NAP coverage with a coverage level of 60 percent.

(b) Participants who exceed the average adjusted gross income limitation for NAP payment eligibility<sup>1</sup> for the applicable crop year may meet the purchase requirement specified in paragraph (a)(2) of this section by purchasing Whole-Farm Revenue Protection crop insurance coverage, if eligible, or paying the NAP service fee and premium even though the participant will not be eligible to receive a NAP payment due to the average adjusted gross income limit.

(c) The final crop year to purchase crop insurance or NAP coverage to meet the requirements of paragraph (a) of this section is the 2023 crop year.

(d) A participant who obtained crop insurance or NAP coverage for the crop in accordance with the requirements for WHIP+ in § 760.1517 is considered to have met the requirement to purchase crop insurance or NAP coverage for the QLA Program.

(e) If a producer fails to obtain crop insurance or NAP coverage as required in this section, the producer must reimburse FSA for the full amount of QLA Program payment plus interest. A producer will only be considered to have obtained NAP coverage for the purposes of this section if the participant submitted a NAP application for coverage and paid the requisite NAP service fee and any applicable premium by the applicable deadline and completed all program requirements

required under the coverage agreement, including filing an acreage report.

**Richard Fordyce,**

*Administrator, Farm Service Agency.*

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**DEPARTMENT OF ENERGY**

**10 CFR Part 1061**

**RIN 1990–AA50**

**Procedures for the Issuance of Guidance Documents**

**AGENCY:** Office of the General Counsel, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Energy (DOE) publishes this final rule to establish procedures for the issuance of DOE guidance documents in accordance with Executive Order 13891. In this final rule, DOE establishes internal agency requirements for the contents of guidance documents, and procedures for providing notice of, and soliciting public comment on, certain guidance documents. This final rule also establishes procedures for the public to petition DOE to modify or withdraw guidance documents.

**DATES:** The effective date of this rule is February 5, 2021.

**ADDRESSES:** The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at <https://www.regulations.gov>. All documents in the docket are listed in the <https://www.regulations.gov> index. However, not all documents listed in the index, such as those containing information that is exempt from public disclosure by law, may be publicly available. A link to the docket web page can be found at <https://www.regulations.gov/document?D=DOE-HQ-2020-0033-0001>. The docket web page explains how to access all documents, including public comments, in the docket.

**FOR FURTHER INFORMATION CONTACT:** Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–2555, Email: [Guidance@hq.doe.gov](mailto:Guidance@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Summary of Final Rule**

In this final rule, DOE incorporates into the Code of Federal Regulations a new 10 CFR part 1061, which

implements the requirements of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” (84 FR 55235 (Oct. 15, 2019)) Among other things, Executive Order 13891 requires agencies to provide more transparency for their guidance documents by creating a searchable online database for current guidance documents,<sup>1</sup> and by establishing procedures to allow the public to comment on significant guidance documents and to petition the agency to withdraw or modify guidance documents.<sup>2</sup> Moreover, the Executive Order requires agencies to clearly state in their guidance documents that such guidance does not have the force and effect of law and is not legally binding, except as authorized by law or as incorporated into a contract. (84 FR 55235, 55237)

This final rule applies to all DOE guidance documents, as defined by Executive Order 13891, including the exceptions listed in section 2 of the Executive Order. This final rule also lists specific types of documents and communications that fall within the broader exceptions listed in the Executive Order (*e.g.*, speeches and presentations given by DOE officials, legal positions taken in litigation or enforcement actions). (See also OMB M–20–02, Guidance Implementing Executive Order 13891, Titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (Oct. 31, 2019), available at <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>). This final rule also adopts the same definition of “significant guidance document” as section 2 of Executive Order 13891.

In accordance with Executive Order 13891, this final rule requires that all DOE guidance documents clearly state that they do not have the force and effect of law and are not legally binding on the public, and that they are only intended to provide clarity to the public

<sup>1</sup> DOE’s online database may be found at [energy.gov/guidance](https://energy.gov/guidance).

<sup>2</sup> Executive Order 13891 defines “significant guidance document” as “a guidance document that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.” (84 FR 55235, 55236)

<sup>1</sup> See §§ 1400.500(a) and 1400.1(a)(4) of this title.