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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1416

[Docket ID: CCC–2024–0002]

RIN 0560–A167

Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP)

AGENCY: Commodity Credit Corporation (CCC) and Farm Service Agency (FSA), USDA.

ACTION: Final rule.

SUMMARY: This rule makes changes to ELAP to provide financial assistance to dairy producers who face milk losses due to H5N1 infection of their dairy herds.

DATES: *Effective* July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Seth Cross; telephone: (402) 309–3338; email: seth.cross@usda.gov. Individuals who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Background

As authorized by section 1501 of the Agricultural Act of 2014 (Pub. L. 113–79, 7 U.S.C. 9081(d)), ELAP provides emergency relief to eligible producers of livestock, honeybees, and farm-raised fish to aid in the reduction of losses due to disease (including cattle tick fever), adverse weather, or other conditions, such as blizzards and wildfires, as determined by the Secretary of Agriculture, that are not covered by the Livestock Forage Disaster Program

(LFP)¹ or the Livestock Indemnity Program (LIP).² FSA, which administers ELAP on behalf of CCC, identified discretionary changes to the ELAP regulations; this rule is making those changes in 7 CFR part 1416, subpart B, as described below.

Highly Pathogenic Avian Influenza (HPAI) H5N1 clade 2.3.4.4b (referred to as H5N1 hereafter) infection in dairy cattle results in milk losses for dairy producers due to removal of symptomatic dairy cattle from commercial milk production and reduced production after the dairy cattle recover from H5N1 infection.³ The Secretary has determined that ELAP is authorized to provide financial assistance to eligible dairy producers to cover a portion of the financial loss incurred because of milk production loss due to H5N1 infection in dairy cattle. Milk losses due to H5N1 that were incurred prior to the publication of this rule are eligible for payment if they meet all eligibility requirements described in this rule.

Producer Eligibility

To be eligible for milk losses due to H5N1, a producer must prove that at least one adult dairy cow in their herd has an H5N1 infection by submitting a positive test, as defined in the Animal and Plant Health Inspection Service (APHIS) H5N1 case definition,⁴ on individual animal or bulk tank samples confirmed at National Veterinary Services Laboratories (NVSL). The date of the eligible loss condition is the positive H5N1 test collection date, meaning the date the sample was taken

¹ LFP provides benefits to livestock producers who suffer eligible grazing losses due to qualifying drought or are prohibited by a federal agency from grazing on managed rangeland due to a fire. See 7 CFR part 1416, subpart C, and <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-forage/index>.

² LIP provides benefits to livestock producers for livestock deaths due to eligible adverse weather, eligible disease, or eligible attacks by animals reintroduced into the wild by the Federal Government. See 7 CFR part 1416, subpart D, and <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-indemnity/index>.

³ For more information regarding H5N1, see <https://www.cdc.gov/flu/avianflu/> and <https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza>. For biosecurity resources for detection of HPAI in livestock, see <https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/livestock>.

⁴ See <https://www.aphis.usda.gov/sites/default/files/hpai-livestock-case-definition.pdf>.

from the cow, because that is the date on which H5N1 infection was confirmed to be present in the producer's herd. Throughout this rule, "herd" refers to one or more dairy cows that are under common ownership or supervision and are grouped on a single premises (lot, farm, or ranch) or multiple premises that are geographically separated, but physically located in the same county, as shared personnel and equipment in addition to the movement of livestock are recognized risks for disease transmission.

In addition, a producer must have owned, cash-leased, purchased, or been a contract grower of eligible adult dairy cows for not less than 60 days before the positive H5N1 test collection date. Regardless of ownership type, the producer must have had financial risk in the production of milk from the eligible adult dairy cow at the time of the positive H5N1 test collection date. For example, if an owner of eligible adult dairy cows has cash leased those animals to another producer who is entitled to the milk production under the terms of the lease, the owner of the cows is not considered to have financial risk in the milk production and is not eligible, and only the producer entitled to the milk production may participate. In addition, all general ELAP eligibility rules apply to producers applying for payment for milk losses due to H5N1.⁵

Dairy Cow Eligibility

To be considered an eligible adult dairy cow for milk losses due to H5N1 under ELAP, it must be all of the following:

- Currently in one of the lactation phases (early, mid, or late) of their lactation cycle and producing milk in which the producer had financial risk at the time of the positive H5N1 test collection date;
- Owned, cash-leased, purchased, or been raised by a contract grower or eligible livestock owner, for not less than 60 days before the positive H5N1 test collection date;
- Maintained for commercial milk production as part of the producer's farming operation on the positive H5N1 test collection date;

⁵ See 7 CFR part 1416, subpart A, and 7 CFR part 1400, subpart F.

- Part of a herd that has a minimum of one confirmed positive H5N1 test from NVSL; and
- Initially removed from commercial milk production due to confirmed or suspected H5N1 infection at some point during the time period beginning 14 days before the positive H5N1 test collection date through 120 days after the positive H5N1 test collection date.

The time period beginning 14 days before the positive H5N1 test collection date is used for dairy cow eligibility because of responses recorded by APHIS via epidemiologic surveys as of the publication of this rule: (a) 14 days before a positive H5N1 test collection date is a reasonable time for a producer to recognize symptom onset in cattle with H5N1 infections and collect samples, and (b) the maximum 120 days after a positive H5N1 collection date reflects the time after an initial positive test where H5N1 virus could be detected in the herd based on current APHIS understanding as of the time of publication of this rule, and is consistent with the time period for other APHIS support programs.

An adult dairy cow that meets all of the above requirements is considered eligible to be reported only for the month in which it is initially removed from commercial milk production due to confirmed or suspected H5N1 infection. For example, an eligible adult dairy cow that was removed from commercial milk production on April 22, 2024, and continued to remain removed from milk production through May 12, 2024, should be reported on the application as an eligible adult dairy cow only for the month of April. In order to prevent duplicate benefits for the same loss, an adult dairy cow cannot be reported as an eligible animal for any subsequent month unless the animal has returned to milk production and is later removed from milk production due to a new H5N1 infection in its herd. During the 120 day time period after the initial positive H5N1 test collection date, an animal in that herd is only eligible for payment one time, based on the positive H5N1 test for that herd.

How To Apply

To be eligible for a payment for milk losses, a dairy producer must submit all of the following to FSA:

- Proof of herd infection through a confirmed positive H5N1 test, based on the APHIS H5N1 case definition,⁶ on individual animal or bulk tank samples confirmed at NVSL (preferred individual animal sample types can be

found in the APHIS H5N1 Testing Guidance document⁷);

- A notice of loss (CCC-939) indicating the date of the eligible loss condition, which is the positive H5N1 test collection date; and
- An application for payment (CCC-939-H5N1) certifying the number of eligible adult dairy cows, the month the cows were removed from milk production, and the producer's share of the milk production.

Producers must also submit the following forms, if not already on file with FSA: AD-1026, Highly Erodible Land Conservation (HELIC) and Wetland Conservation (WC) Certification; AD-2047, Customer Data Worksheet; CCC-901, Member Information for Legal Entities (if applicable); CCC-902, Farm Operating Plan for Payment Eligibility; and CCC-941, Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information.

FSA may confirm the validity of the positive H5N1 test result with APHIS records. FSA may also request documentation to substantiate the information certified on an application, including current and prior year milk production and herd inventory records, which FSA will use to verify the number of animals in the herd that were removed from production. FSA may request other records, including but not limited to veterinary records and feed records or receipts, if required to support a producer's certifications.

Payment Calculation

FSA will calculate payments for milk loss due to H5N1 by multiplying a per head payment rate by the number of eligible adult dairy cows, multiplied by the producer's share of such dairy cows' milk production, multiplied by an ELAP payment rate of 90 percent as required by 7 U.S.C. 9081(d)(4). The per head payment rate is calculated based on national milk production per head, per month, and a typical number of days that an infected dairy cow is expected to have reduced or no production, which has been established in consultation with APHIS based on available data on the reported effects of H5N1 infection in dairy herds at the time of publication of this rule. In order to streamline delivery of assistance and minimize the reporting burden for dairy producers, FSA has determined that the estimated milk loss per cow due to H5N1 will be based on an expected 21-day period of no milk production when the cow is removed from the milking herd, followed by a period of 7 days

when it has returned to milking but produces approximately 50 percent of the normal amount of production. This approach minimizes the information that a producer would need to track and report to FSA, and it aligns with the estimated loss of milk production based on data reported to APHIS as of the time of publication of this rule. To determine the expected milk production per day, FSA will use the monthly national average production in pounds per head, per month, reported by the National Agricultural Statistics Service (NASS).⁸ FSA determined that national production data will be used because monthly data, which would allow FSA to account for more seasonal variation in milk production, is unavailable at the regional level and for some states. Collecting monthly data at the state or regional level where it is not currently available is not feasible and would delay payments. FSA will divide the NASS monthly average production per cow by 28 days to calculate an estimated average loss of milk in pounds per cow, per day. FSA will then multiply that estimated average loss per day by 21 days to account for the time period when no production is expected. FSA will also multiply the estimated average loss per day by 7 days, multiplied by 50 percent to account for the time period when the dairy cow has returned to milk production but the amount of production is reduced. FSA will add those 2 amounts (for 21 days and 7 days) to calculate the estimated average loss of milk production per cow, which will be multiplied by the all-milk price⁹ to determine the per head payment rate. FSA will use the national all-milk price, which is also used in the Dairy Margin Coverage Program, because price data is not available for all states, and collecting data in states where it is currently unavailable is not feasible and would delay payments.

For example, a dairy producer with a 100 percent share in milk production certifies that 50 eligible adult dairy

⁸ NASS milk production data is available at <https://usda.library.cornell.edu/concern/publications/h989r321c?locale=en>. To locate the national monthly production data for a specific month, open the report published for the relevant payment month and locate the milk per cow for the specific month in the table titled "Estimated Milk Cows and Production by Month—United States."

⁹ The all-milk price is published in a monthly report available at <https://usda.library.cornell.edu/concern/publications/c821gj76b>. To locate the all-milk price for a specific month, open the report published for the relevant payment month and locate the United States price in the table titled "Prices Received for All Milk—States and United States." The report provides the all-milk price in dollars per cwt, and FSA has converted it to dollars per pound for the purpose of calculating the per head payment rate.

⁶ See <https://www.aphis.usda.gov/sites/default/files/hpai-livestock-case-definition.pdf>.

⁷ See <https://www.aphis.usda.gov/sites/default/files/hpai-livestock-testing-recommendations.pdf>.

cows were removed from production in April 2024 due to H5N1 and provides the required documentation of a positive test confirming H5N1 herd infection. The per head payment rate for April is determined by multiplying the expected daily production per cow of 73.18 pounds (based on the NASS monthly national production data) by 100 percent of the milk production loss, multiplied by 21 days (for the first 21 days, which equals 1,536.78), then adding 73.18 pounds multiplied by 50 percent of the milk production loss, multiplied by 7 days (for the last 7 days, which equals 256.13), resulting in a total of 1,792.91 pounds as the estimated lost production. That amount is then multiplied by \$0.205 per pound, which is the all-milk price for April, resulting in a per head payment rate of \$367.55 for April. The producer's ELAP payment will be equal to \$367.55 multiplied by 50 cows, multiplied by a 100 percent share of the producer's milk production, multiplied by the ELAP payment rate of 90 percent, which is equal to \$16,539.75. The producer will update their application to report any animals that are removed from production in a later month within the 120 days of the positive H5N1 test. Each subsequent update must include the beginning date for the month that the cows are removed from milk production.

ELAP payments are not subject to payment limitation. General requirements for ELAP payment eligibility, including AGI limitation, apply to ELAP payments for milk loss.

Other Changes

This rule also makes minor technical corrections to fix typographical errors in paragraph references in § 1416.105(c) and (d).

Notice and Comment, Effective Date, and Exemptions

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 a program for payments to certain agricultural commodity producers and thus falls within the exemption for rules related to benefits. Further, as specified in 7 U.S.C. 9091(c)(2), the regulations to implement ELAP are:

- Exempt from the notice and comment provisions of 5 U.S.C. 553; and
- Exempt from the Paperwork Reduction Act (44 U.S.C. chapter 35).

In addition, 7 U.S.C. 9091(c)(3) directs the Secretary to use the authority provided in 5 U.S.C. 808 (part of the Congressional Review Act), which provides that when an agency finds there is good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the rule may take effect at such time as the agency determines. The beneficiaries of this rule have been impacted by H5N1, which has resulted in economic losses, and the availability of these ELAP payments will encourage testing. FSA finds that a delay in the effective date of the rule is contrary to the public interest and therefore this rule is effective upon publication in the **Federal Register**.

This rule is exempt from the regulatory analysis requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act) requires a delay in the effective date for 60 days from the date of publication to allow for Congressional review of rules that meet the criteria specified in 5 U.S.C. 804(2). The Office of Information and Regulatory Affairs has determined that this rule meets the criteria in 5 U.S.C. 804(2). As discussed above, FSA finds that a delay in the effective date of the rule is contrary to the public interest and therefore this rule is effective upon publication in the **Federal Register**.

Executive Orders 12866, 13563, and 14094

Executive Order 12866, “Regulatory Planning and Review,” was amended by Executive Order 13563, “Improving Regulation and Regulatory Review,” and Executive Order 14094, “Modernizing Regulatory Review.” Executive Orders 12866 and 13563 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. The assessment should include 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. The requirements in Executive Orders 12866 and 13563 for the analysis of costs and benefits apply to rules that are determined to be significant.

Executive Order 14094 requires Federal agencies to increase and improve public participation in the regulatory process. The Executive Order's objective is to improve public trust in the regulatory process by reducing the risk or appearance of unequal or unfair influence in regulatory development.

The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866, and therefore, OMB has not reviewed this rule and an analysis of costs and benefits to loans is not required under either Executive Order 12866 or 13563.

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 because USDA will be making the payments to producers, the USDA regulation for compliance with NEPA (7 CFR part 1b).

This rule makes discretionary changes to ELAP. The discretionary aspects are to improve administration of ELAP and clarify existing program requirements. FSA is providing the disaster assistance under ELAP to eligible producers. The discretionary provisions would not alter any environmental impacts resulting from implementing the mandatory changes to ELAP. Accordingly, these discretionary aspects are covered by the following Categorical Exclusion in 7 CFR 799.31(b)(6)(vi) safety net programs administered by FSA.

Through this review, FSA determined that the proposed discretionary changes in this rule fit within the categorical exclusions listed above. Categorical exclusions apply when no extraordinary circumstances (§ 799.33) exist. This rule presents only discretionary amendments that will not have an impact on the human environments, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this rule. This rule serves as documentation of the environmental compliance decision for this federal action.

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. Payments for milk losses due to H5N1 will be made retroactively for eligible

losses incurred prior to the publication of this rule, as discussed above. Before any judicial actions may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 are to be exhausted.

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.

FSA has assessed the impact of this rule on Indian Tribes and determined that this rule does not, to our knowledge, have significant Tribal implications that require ongoing adherence to Executive Order 13175 at this time. If a Tribe requests consultation, the USDA Office of Tribal Relations will ensure meaningful consultation is provided where changes, additions, and modifications 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.

Federal Assistance

The title and number of the Federal Domestic Assistance Program found in the Catalog of Federal Domestic Assistance to which this rule applies is 10.091—Emergency Assistance for Livestock, Honeybees, and Farm-raised Fish Program.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720-2600 (voice and text telephone (TTY)) dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250-9410; (2) fax: (202) 690-7442; or (3) email: program.intake@usda.gov.

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List of Subjects in 7 CFR Part 1416

Administrative practice and procedure, Agriculture, Bees, Dairy

products, Disaster assistance, Fruits, Livestock, Nursery stock, Reporting and recordkeeping requirements, Seafood.

For the reasons discussed above, this final rule amends 7 CFR part 1416 as follows:

PART 1416—EMERGENCY AGRICULTURAL DISASTER ASSISTANCE PROGRAMS

- 1. The authority citation for part 1416 continues to read as follows:

Authority: Title I, Pub. L. 113-79, 128 Stat. 649; Title I, Pub. L. 115-123; Title VII, Pub. L. 115-141; and Title I, Pub. L. 116-20.

Subpart B—Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program

- 2. In § 1416.102, add the definitions of "All-milk price", "H5N1", "H5N1 test", "Herd", "NVSL", and "Positive H5N1 test collection date" in alphabetical order to read as follows:

§ 1416.102 Definitions.

* * * * *

All-milk price means the national average price received, per hundredweight of milk, by dairy operations for all milk sold to dairy plants and milk dealers in the United States, as determined by the Secretary.

* * * * *

H5N1 means Highly Pathogenic Avian Influenza A (HPAI) H5N1 virus as either detected in milk and other bovine-origin samples associated with illness in dairy cattle, or, when pertaining to infection in cattle themselves, as confirmed by means of an H5N1 test.

H5N1 test means a test, as defined in the APHIS H5N1 case definition, on individual animal or bulk tank samples confirmed at NVSL.

Herd means, for milk losses due to H5N1, one or more dairy cows that are under common ownership or supervision and are grouped on a single premises (lot, farm, or ranch) or multiple premises which are geographically separated but physically located in the same county.

* * * * *

NVSL means the APHIS National Veterinary Services Laboratories.

Positive H5N1 test collection date means the date of sample collection for a positive H5N1 test that is reported to an NVSL and indicated on the H5N1 test result.

* * * * *

- 3. In § 1416.103, add paragraph (j) to read as follows.

§ 1416.103 Eligible losses, adverse weather, and other loss conditions.

* * * * *

(j) For milk losses due to H5N1 to be considered eligible, the producer must have had reduced milk production as a result of removal of adult dairy cows from daily milking due to H5N1 infection. Such infection must be confirmed for the herd by at least one positive H5N1 test for a dairy cow within that herd. The date of the eligible loss condition for milk losses due to H5N1 is the positive H5N1 test collection date.

■ 4. In § 1416.104, add paragraphs (g) and (h) to read as follows.

§ 1416.104 Eligible livestock, honeybees, and farm-raised fish.

* * * * *

(g) To be considered eligible for milk losses due to H5N1, livestock must be adult dairy cows that are:

(1) Currently in one of the lactation phases (early, mid, or late) of their lactation cycle and producing milk in which the producer had financial risk at the time of the positive H5N1 test collection date;

(2) Owned, cash-leased, purchased, or been raised by a contract grower or eligible livestock owner, for not less than 60 days before the date of the eligible loss condition;

(3) Maintained for commercial milk production as part of the producer's farming operation on the positive H5N1 test collection date;

(4) Part of a herd that has a minimum of one positive H5N1 test; and

(5) Initially removed from commercial milk production due to confirmed or suspected H5N1 infection at some point during the time period beginning 14 days before the positive H5N1 test collection date through 120 days after the positive H5N1 test collection date.

(h) An adult dairy cow that meets the requirements of paragraph (g) of this section is considered eligible to be reported for payment only for the month in which it is initially removed from commercial milk production due to confirmed or suspected H5N1 infection. In order to prevent duplicate benefits for the same loss, an adult dairy cow cannot be reported as an eligible animal for any subsequent month after the initial month of eligibility unless the animal has returned to milk production and is later removed from milk production due to a new infection after the initial 120 day eligibility from an APHIS confirmed positive test within the herd. During the 120 day time period after a positive H5N1 test collection date, an animal is only eligible for payment one time,

based on the positive H5N1 test for that herd.

■ 5. Amend § 1416.105 by:

■ a. In paragraph (c), removing “§ 1416.104(g)” and adding “§ 1416.104(e)” in its place and removing “§ 1416.103(h) or (i)” and adding “§ 1416.103(h)” in its place;

■ b. In paragraph (d), removing “§ 1416.104(h)” and adding “§ 1416.104(f)” in its place and removing “§ 1416.103(h) or (j)” and adding “§ 1416.103(i)” in its place; and

■ c. Adding paragraph (f).

The addition reads as follows.

§ 1416.105 Eligible producers, owners, and contract growers.

* * * * *

(f) To be considered an eligible producer for the purpose of milk losses due to H5N1, the producer must have:

(1) Owned, cash-leased, purchased, or been a contract grower of eligible adult dairy cows, as specified in § 1416.104(g), for not less than 60 days before the positive H5N1 test collection date;

(2) Had financial risk in the milk production of the eligible adult dairy cows, as specified in § 1416.104(g), on the positive H5N1 test collection date; and

(3) Had an eligible loss as specified in § 1416.103(j).

■ 6. Amend § 1416.106 by:

■ a. In paragraph (a)(2), introductory text, removing “both” and adding “more” in its place;

■ b. Adding paragraph (a)(2)(iii);

■ c. In paragraph (e), adding a sentence at the end of the paragraph; and

■ d. Adding paragraph (f).

The additions read as follows.

§ 1416.106 Notice of loss and application process.

(a) * * *

(2) * * *

(iii) For milk losses due to H5N1, a completed Emergency Loss Assistance for H5N1 Application;

* * * * *

(e) * * * This paragraph does not apply to documentation for milk losses due to H5N1.

(f) For milk losses due to H5N1, the producer must provide to FSA a positive H5N1 test at the time the application for payment is filed. The producer must also provide current and prior year milk production records and herd inventory records if requested by FSA to substantiate the certified number of eligible adult dairy cows removed from production through a comparison of the per head production rates for the current and prior years. If requested by FSA, the producer must also provide

any other records necessary to substantiate the information provided on the producer's application, including the producer's share of the milk production. An eligible adult dairy cow must be reported on the application for the month it was initially removed from milk production and cannot be included in subsequent months in the same application for payment. If the producer removes adult dairy cows from commercial milk production due to H5N1 infection more than 120 days after the positive H5N1 test reported to FSA, the producer must submit another notice of loss and application for payment for the subsequent positive H5N1 test after the initial 120 day eligibility from an APHIS confirmed positive test within the herd.

■ 7. Amend § 1416.107 by:

■ a. In paragraph (a)(1), removing “honeybees” and adding “honeybees and milk” in its place;

■ b. Redesignating paragraph (a)(3) as paragraph (a)(4); and

■ c. Adding a new paragraph (a)(3).

The addition reads as follows.

§ 1416.107 Notice of loss and application period.

(a) * * *

(3) For milk losses due to H5N1, provide a notice of loss and positive H5N1 test result required by § 1416.106(f) to FSA by the application for payment deadline in paragraph (b) of this section;

* * * * *

■ 8. Amend § 1416.109 by revising the section heading and adding paragraph (d) to read as follows:

§ 1416.109 National payment rate.

* * * * *

(d) For an eligible livestock producer with milk losses due to H5N1, payments calculated in § 1416.113 will be based on a national payment rate of 90 percent.

■ 9. Add § 1416.113 to read as follows.

§ 1416.113 Milk losses due to H5N1.

(a) Payments for milk losses due to H5N1 are based on a standard number of days of lost production and the expected production for an eligible adult dairy cow. The payment for milk losses due to H5N1 is equal to the payment rate per head specified in paragraph (b) of this section, multiplied by the number of eligible adult dairy cows specified in § 1416.109(g), multiplied by the producer's share of milk production from the eligible adult dairy cows, multiplied by the national payment rate specified in § 1416.109(d).

(b) The payment rate per head varies by month and is equal to the expected

milk production loss for an eligible adult dairy cow, as determined by FSA, multiplied by the all-milk price. The applicable payment rate will be determined by the month in which an eligible adult dairy cow was removed from milk production, as reported on the application. To determine the expected milk production loss for an eligible adult dairy cow, FSA will:

(1) Determine the daily expected production by dividing the total expected production for 28 days of production, as determined by FSA based on a month-specific national production value obtained from NASS data, by 28 days; and

(2) Calculate the sum of:

(i) The result of paragraph (b)(1) of this section multiplied by 21 days, and
(ii) The result of paragraph (b)(1) of this section multiplied by 7 days, multiplied by 50 percent.

(c) Payments calculated in this section are subject to the adjustments and limits provided for in this part.

William Marlow,

Acting Executive Vice President, Commodity Credit Corporation, and Acting Administrator, Farm Service Agency.

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DEPARTMENT OF ENERGY

10 CFR Part 612

RIN 1901-AB57

Civil Nuclear Credit Program and Recapture of Credits

AGENCY: Grid Deployment Office, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or the Department) is adopting the interim final rule (IFR) published on January 8, 2024, as final, without change. This final rule establishes the procedure for the recapture of credits awarded under the Civil Nuclear Credit (CNC) Program in accordance with the Infrastructure Investment and Jobs Act.

DATES: This rule is effective on July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Theodore Taylor, Civil Nuclear Credit Program Manager, U.S. Department of Energy, Grid Deployment Office, 1000 Independence Avenue SW, Washington, DC 20585, (240) 477-0458, CNC_Program_Mailbox@hq.doe.gov.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices and comments, can be found at [Regulations.gov](https://www.regulations.gov)

(www.regulations.gov/document/DOE-HQ-2024-0005). The docket web page contains instruction on how to access all documents, including public comments, in the docket.

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I. Summary of the Final Rule

Section 40323 of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), codified at 42 U.S.C. 18753, also known as the Bipartisan Infrastructure Law, directs the Department to establish the Civil Nuclear Credit Program to prevent premature closures of nuclear power plants by providing financial support for existing nuclear reactors projected to cease operations due to economic factors.

The IIJA also directs the Department to promulgate a regulation to provide for the recapture of credits awarded to a nuclear reactor if either (a) the nuclear reactor terminates operations during the 4-year award period or (b) the nuclear reactor does not operate at an annual loss in the absence of an allocation of credits. The purpose of this final rule is to establish the procedure for the recapture of credits under the CNC Program. The rule provides a mechanism for the Department to enforce the obligation of the nuclear reactor to continue operation during the 4-year award period and to relinquish its rights to credits if the nuclear reactor is not operating at a loss in the absence of the credits. To minimize the

likelihood for the need to recapture credits under the rule, the Department has included in the CNC Program an audit and annual payment adjustment mechanism at the end of each award year during the 4-year award period to evaluate the financial results of operation for that year and to adjust payment of credits based on that evaluation. The recapture regulation ensures that a reactor cannot retain the value of credits if, despite the annual adjustment, the nuclear reactor would not have operated at an annual loss in the absence of an allocation of credits over the 4-year award period or if the nuclear reactor terminates operations despite its contractual obligation to operate for the entire 4-year award period.

II. Authority and Background

A. The Statute

Section 40323 of the IIJA directs the Department to establish the CNC Program to provide financial support for existing nuclear reactors projected to cease operations due to economic factors in the form of credits to be awarded for a 4-year award period. Section 40323(g)(2) of the IIJA requires that the Secretary, "by regulation, provide for the recapture of the allocation of any credit to a certified nuclear reactor that during [the 4-year award period]—(A) terminates operations; or (B) does not operate at an annual loss in the absence of an allocation of credits to the certified nuclear reactor." IIJA section 40323(g)(2). This final rule establishes the procedure for the recapture of credits in accordance with that requirement. This final rule relates only to the recapture provision. No other provision of the CNC Program is subject to implementation by regulation.

B. Interim Final Rule

On January 8, 2024, DOE published an IFR and request for comments. 89 FR 864 (Jan. 8, 2024). The IFR established an interim final rule for the recapture of credits awarded under the CNC Program. DOE accepted public comments through February 7, 2024. DOE received three comments, none of which commented on the text of the regulation itself.

III. Public Comments on the IFR

DOE received three comments from individuals in response to the IFR. These comments are available in the public docket for this rulemaking. One commenter expressed "strong support" for both the CNC Program and IFR. The commenter described the CNC Program