

# Rules and Regulations

Federal Register

Vol. 75, No. 88

Friday, May 7, 2010

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## DEPARTMENT OF AGRICULTURE

### Farm Service Agency

#### 7 CFR Parts 760 and 783

#### Commodity Credit Corporation

#### 7 CFR Part 1416

RIN 0560-AH96

#### Tree Assistance Program

**AGENCY:** Farm Service Agency and Commodity Credit Corporation, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule implements specific requirements for the Tree Assistance Program (TAP) authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). TAP provides disaster assistance to eligible orchardists and nursery tree growers to replant or rehabilitate trees, bushes, and vines that were lost due to natural disaster. Orchardists and nursery tree growers who commercially raise trees, bushes, and vines for which there were mortality losses in excess of 15 percent, after adjustment for normal mortality, are eligible for TAP payments. Eligible losses must have occurred between January 1, 2008, and September 30, 2011. This rule specifies how the TAP payments are calculated and when producers may apply for benefits. This rule also removes regulations for prior tree disaster assistance programs.

**DATES:** Effective Date: May 7, 2010.

#### FOR FURTHER INFORMATION CONTACT:

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means for communication (Braille, large print, audiotape, *etc.*) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

#### SUPPLEMENTARY INFORMATION:

**Background:** This rule implements the specific requirements for TAP as authorized by the 2008 Farm Bill (Pub. L. 110-246). Sections 12033 and 15101 of the 2008 Farm Bill authorize the Secretary of Agriculture (Secretary) to assist eligible orchardists and nursery tree growers that have incurred tree, bush, or vine mortality losses in excess of 15 percent, adjusted for normal mortality, due to natural disaster. TAP is a cost-reimbursement program, which means that payments are calculated based on estimated actual costs to replace or rehabilitate lost or damaged trees, bushes, or vines. The replacement and rehabilitation activities must take place within 12 months after the application is approved. Payment is not made until the activities are completed.

Amendments to the 2008 Farm Bill contained in the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Pub. L. 110-329), an Act to Amend the Commodity Provisions of the Food, Conservation, and Energy Act of 2008 and for other purposes (Pub. L. 110-398), and the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5, the Recovery Act) authorized minor changes in how TAP and the other standing disaster assistance programs are implemented. The basic core of the TAP is specified in the 2008 Farm Bill. The amendments extend the deadline for the required risk management "buy-in," discussed later in this document, exempt this rule from notice and comment rulemaking and Paperwork Reduction Act requirements, and allow the Secretary to provide equitable relief for producers who did not have risk management coverage.

TAP will be similar in scope to the 2005 Hurricane Tree Assistance Program specified in regulations in 7 CFR part 1416 and to the previous TAP authorized by the Farm Security and Rural Investment Act of 2002 (Pub. L. 107-171, commonly known as the 2002 Farm Bill) specified in regulations in 7 CFR part 783. The 2005 Hurricane TAP and TAP (as implemented by this rule) cover tree rehabilitation losses and practices that were not covered by the TAP authorized by the 2002 Farm Bill. The 2005 Hurricane TAP applied only

in certain areas affected by hurricanes while this TAP and these regulations apply nationally. The previous programs were not subject to the adjusted gross income (AGI) limits and risk management purchase requirement that now apply to all the standing disaster programs authorized by the 2008 Farm Bill. TAP is now funded through the Agricultural Disaster Relief Trust Fund; the previous programs were limited to available funding. This rule implements the TAP regulations in 7 CFR part 760, subpart F, and removes the regulations for the previous two TAPs from 7 CFR part 783 and part 1416, subpart H.

#### General Eligibility Requirements

This rule implements the eligibility provisions for TAP, which is one of five Supplemental Agricultural Disaster Assistance programs authorized by the 2008 Farm Bill. Sections 12033 and 15101 of the 2008 Farm Bill authorize the Secretary to assist producers who have had crop and livestock losses due to adverse weather. FSA provides assistance through five different programs:

- Livestock Indemnity Program (LIP—referred to as Livestock Indemnity Payments in the 2008 Farm Bill),
- Livestock Forage Disaster Program (LFP),
- Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish (ELAP),
- Supplemental Revenue Assistance Payments Program (SURE) (which covers losses to tree crops such as apples and citrus, but not the losses to trees covered by TAP), and
- Tree Assistance Program (TAP).

This rule implements TAP in 7 CFR part 760, subpart F. The LIP final rule, which was published in the **Federal Register** on July 2, 2009 (74 FR 31567-31578), revised 7 CFR part 760, subpart B, to provide the general eligibility requirements for all the Supplemental Agricultural Disaster Assistance programs including ELAP, LFP, LIP, SURE, and TAP. Subpart B specifies administration of the programs, general requirements to be an eligible producer, risk management purchase requirement, buy-in waivers, equitable relief, payment limitations, and other generally applicable requirements. Specific provisions for the other disaster assistance programs have been

implemented through separate rulemakings.

TAP will be administered by FSA using funds from the Agricultural Disaster Relief Trust Fund established under section 902 of the Trade Act of 1974 (19 U.S.C. 2497a). The disaster assistance programs authorized by the 2008 Farm Bill are permanent or "standing" programs that have similar scope to the previous ad hoc programs. The programs are provided for in two separate places in the 2008 Farm Bill. First, there is section 12033, which adds a new section 531 to the Federal Crop Insurance Act (7 U.S.C. 1501–1524). Second, there is section 15101, which adds sections 901 through 903 to the Trade Act of 1974. The provisions of the two sections as enacted are identical except that the provisions in Title XV of the 2008 Farm Bill contain the funding provisions for the program. Since then, there have been some amendments, but the two sections of the 2008 Farm Bill are considered to be interchangeable for the purposes of this rule, and an amendment to one is, as a practical matter, an amendment to the other.

The final rule uses the words "producer," "participant," and "eligible orchardist or nursery tree grower." "Producers" may apply for TAP. "Participants," who in most but not all cases are also "eligible orchardist or nursery tree growers," are those producers who meet the requirements to be eligible to receive TAP payments.

#### Payment Limitation

The 2008 Farm Bill limits how much a participant may receive from the Supplemental Agricultural Disaster Assistance programs.

In applying payment limitation for 2008 payments, subject to the provision of part 1400, no entity or individual can receive more than \$100,000 per program year under TAP. This is an increase from the previous TAPs, which had a limit of \$75,000 per year for payees who were considered separate payees under the part 1400 rules. For 2009 through 2011 payments, no individual or legal entity (excluding a joint venture or general partnership) may receive, directly or indirectly, more than \$100,000 per program year under TAP. (A separate payment limit of \$100,000 applies to total benefits that one person or legal entity may receive from LIP, LFP, ELAP, and SURE.)

For the purpose of determining payment limits, both indirect and direct benefits are counted by attribution. In the case of a legal entity, the same payment is attributed to the direct payee in the full amount, and to those that have an indirect interest in the entity

commensurate with the amount of the interest. For example, under the attribution rules that apply to TAP, assume:

- Corporation A is in line to receive a \$100,000 TAP payment,
- Corporation A is owned 50 percent by Individual A and 50 percent by Corporation B, and
- Corporation B is owned 30 percent by Individual B and 70 percent by Individual C.

If so, Corporation A, for payment limitation purposes would be considered to have received \$100,000 and Individual C (who owns 70 percent of Corporation B, which owns half of Corporation A) would be considered to have indirectly benefitted by the amount of \$35,000 (50 percent times 70 percent of the \$100,000). Even though no part of the \$100,000 was actually paid to Individual C, the amount of \$35,000 would count against individual C's overall payment limitation from TAP. Assuming Individual C was already at the maximum payment limit, Individual C would not have been eligible to receive \$35,000; as a result, the payment to Corporation A would be reduced by \$35,000.

Additionally, a person or legal entity is limited to receiving payments on a cumulative total of 500 acres planted to trees, bushes, or vines that suffered losses occurring on or after January 1, 2008, but before October 1, 2011. The previous TAP authorized by the 2002 Farm Bill had the same acreage limit.

The amount of any payment for which a participant may be eligible under TAP may be reduced by any amount received by the participant for the same or any similar loss from any other USDA disaster assistance program.

In applying the limitation on AGI for 2008 payments, an individual or entity is ineligible for payment under TAP if the individual's or entity's average AGI exceeds \$2.5 million for 2007, 2006, and 2005, under the provisions in 7 CFR part 1400 in effect for 2008. For 2009 through 2011 payments, the average AGI limitation provisions in 7 CFR part 1400 applicable to the Commodity Credit Corporation (CCC) commodity programs also apply to TAP. Specifically, for 2009 through 2011, a person or legal entity with an average adjusted gross nonfarm income, as defined in 7 CFR 1400.3, that exceeds \$500,000 for the relevant base period will not be eligible to receive payments from TAP. Likewise, if a person with an indirect interest in a legal entity has an average nonfarm AGI over \$500,000, then the payment to the legal entity will be reduced as calculated based on the percent of that person's indirect interest in the legal

entity receiving the payment. For example, continuing with the assumptions in the example above, if Individual B had an average AGI that was over the limit, then the payment to Corporation A will be reduced by 15 percent (Individual B's 30 percent interest in Corporation B times Corporation B's 50 percent interest in Corporation A).

Payment and average AGI limits will be determined under regulations specified in 7 CFR part 1400 for CCC commodity programs. TAP is an FSA program, but the CCC regulations in 7 CFR part 1400 are adopted for this program. The relevant AGI period for TAP and the other disaster assistance programs for 2008 payments is the 3 calendar years that precede the program year involved, namely, 2005, 2006, and 2007. However, beginning with 2009, the AGI period is the 3 taxable years preceding the most immediately preceding complete taxable year. Thus for 2009 TAP benefits the base period would be the same as for 2008 benefits but would slide forward year by year in the subsequent years so that the base for 2010 benefits would be tax years 2006, 2007, and 2008.

The regulations in 7 CFR 1400.5 specify how payments will be attributed and how far the attribution will go. Attribution will be tracked through four levels of ownership in legal entities. The 2008 Farm Bill removes the previous "3 entity rule," so a person can now receive benefits attributed through an unlimited number of entities, subject to the payment limitation and the rules of attribution described in 7 CFR part 1400 and the text above. In addition to these limits, the 2008 Farm Bill imposes for TAP and other programs covered in part 760 certain special limitations on payments to individuals who are not citizens or to foreign corporations and these, which appear in the previously issued subpart B of part 763, are separate from the foreign person rules in 7 CFR part 1400. The limitations that apply in part 763 can be found specifically in 7 CFR 760.103(b).

#### Risk Management Purchase Requirement

To be eligible for TAP payments, producers must meet the risk management purchase requirement. The requirement is specified in 7 CFR 760.104. This is a new requirement; neither the 2005 Hurricane TAP nor the previous TAP required the purchase of crop insurance or NAP coverage.

The risk management purchase requirement specifies that eligible participants must have purchased insurance for each insurable crop on the

farm and for purposes of this program an individual or entity's farm is deemed to include the entirety of their farming operations no matter where located, in all counties and all states. A few exceptions allowed by the 2008 Farm Bill are discussed later in this section. An "insurable commodity" means an agricultural commodity for which the producer on the farm is eligible to obtain a policy or plan of insurance under the Federal Crop Insurance Act (FCIA) from the USDA's Risk Management Agency (RMA). A "noninsurable commodity" means a crop for which the eligible producers on a farm are eligible to obtain assistance through FSA's Noninsured Crop Disaster Assistance Program (NAP). In general, to be eligible for TAP payments, participants must have obtained crop insurance or NAP coverage, as may be applicable, for all of their crops.

Producers who did not purchase required coverage are not eligible for benefits unless an exception applies. Certain waivers for "socially disadvantaged farmers and ranchers," as well as "limited resource farmers and ranchers," and "beginning farmers or ranchers" are provided by the 2008 Farm Bill and specified in 7 CFR 760.107.

For the 2008 crop year, otherwise eligible producers who paid a certain buy-in fee were provided an exemption from the risk management purchase requirement that would otherwise apply if the buy-in fee was paid by September 16, 2008. By an amendment to the 2008 Farm Bill, a second buy-in permitted participants to buy-in for the 2008 crop year from February 17, 2009, up to May 18, 2009, to meet the risk management purchase requirement; however, the participant had to agree to buy crop insurance or NAP for the next crop year for the crops to which the buy-in applied. The 2008 buy-in fee was equal to the cost of the minimal catastrophic insurance coverage or NAP coverage, but did not, as with other buy-in exemptions in TAP, entitle the participant to such insurance or NAP coverage. Also, an amendment to the 2008 Farm Bill allows a 2009 crop buy-in if the 2009 Federal Crop Insurance Corporation (FCIC) sales closing date for a crop was prior to August 14, 2008. The deadline for the 2009 crop buy-in was January 12, 2009. In addition to these provisions, section 531(g)(5) of FCIA (and the corresponding provisions of the Trade Act of 1974; 7 U.S.C. 1531(g) and 19 U.S.C. 2497(g), respectively) have some more general provisions allowing the Secretary discretion to grant equitable relief to certain persons who lack coverage, as described below. The

buy-in fees were different for 2008 and 2009.

If a producer is ineligible or otherwise barred from the risk management insurance program or NAP because of past violations and those insurance programs would otherwise be available to that producer absent such violations, that producer will also be ineligible for TAP.

Other circumstances preventing a producer from obtaining risk management coverage may be addressed on a case-by-case basis, and the Secretary or designee may determine a participant is eligible for TAP even if FCIA or NAP coverage was not timely obtained; 7 CFR 760.106, "Equitable Relief," provides for such relief. For example, equitable relief may, at USDA's discretion, be considered for participants who failed to meet the requirements of this rule because the 2008 Farm Bill was enacted after the closing date for purchasing the applicable insurance. Another example may be relief for a participant who made a late planting decision due to weather-related causes. Relief will not be considered or granted for producers who are in the RMA ineligibility tracking system as those persons by their own actions were unable to obtain insurance. Equitable relief is not an entitlement. A grant of such relief is discretionary in nature, and USDA's refusal to consider such relief or to grant a particular form of relief that is not specifically mandated by the 2008 Farm Bill or the program regulations will not be construed to be an adverse decision under either 7 CFR parts 11 or 780 (the common appeals regulations that apply to most FSA and CCC programs). There are, however, some cases in which the USDA National Appeals Division (NAD) has authority on its own to grant equitable relief and in all cases NAD, rather than FSA or CCC, decides the extent of its jurisdiction consistent with whatever authorities apply.

If an RMA pilot or Adjusted Gross Revenue (AGR) insurance program was the only insurance available in that area for that crop, buying that insurance program for that crop will satisfy the risk management purchase requirement for that crop. However, producers are not required to purchase pilot or AGR insurance program coverage in order to meet the risk management purchase requirement. Rather, producers can elect not to obtain pilot or AGR insurance program coverage and meet the risk management purchase requirement by obtaining either NAP coverage or by paying the buy-in fee, as may be applicable.

Producers who did not obtain risk management coverage for all eligible crops on a farm are ineligible for payment under TAP even if some crops had risk management coverage, unless an exception or waiver applies. The risk management purchase required for TAP eligibility refers to insurance on the crop and production, not on the underlying trees; further, the risk management purchase requirement includes crops that are not eligible for TAP. For example, if a producer's farm produces insured blueberries, insured apples, and corn, to be eligible for TAP payment the producer must either buy coverage on the corn or have made a "buy-in," when such option was available as specified in 7 CFR part 760, subpart B. Producers, who meet all the eligibility requirements, including risk management coverage, will qualify for payment. A producer who does not meet the risk management purchase requirement will not be eligible.

#### **Eligible Losses and Eligible Producers for TAP**

The 2008 Farm Bill provisions require TAP cost share payments to be made for eligible losses due to natural disasters. TAP provides a payment based on 70 percent of the cost of replacing trees, bushes, and vines, and 50 percent of other costs including removing, pruning, or salvaging damaged trees, bushes, and vines, or preparing the land to plant new ones. The payment eligibility "trigger" is mortality losses in excess of 15 percent, adjusted for normal damage and mortality. Normal mortality losses are those associated with the normal upkeep of the orchard or nursery in the region. Damage losses are not eligible for payment unless the 15 percent mortality trigger is met. The eligible mortality must have occurred between January 1, 2008, and September 30, 2011, due to natural disaster, as determined by the Secretary or his designee, during the calendar year for which benefits are requested, including losses due to plant disease, insect infestation, drought, fire, freeze, flood, earthquake, and lightning. As the preceding sentence suggests, "plant disease" for this program is, under the terms of the 2008 Farm Bill, considered to be a natural disaster. Commercially-grown trees, vines, and bushes are eligible. All the provisions described in this paragraph, which are implemented in this rule, are provisions specified in the 2008 Farm Bill over which FSA has little or no discretion.

The details in this rule on acceptable documentation of loss and the application process for payment are discretionary provisions. FSA based the

discretionary provisions of the program as specified in this rule on the rules and policies used for previous TAPs, because those rules and policies are known to the public and because they have worked well to provide benefits for the type of loss involved in this program.

*The scope of TAP is substantially similar to the previous TAPs, with the following exceptions:*

- Payment limitation and the risk management purchase requirement from the 2008 Farm Bill apply; the previous programs had a lower payment limit and did not have a risk management purchase requirement.

- TAP payment is now calculated based on 70 percent of the qualifying loss (the loss above 15 percent in excess of normal mortality); the previous programs provided payment based on 75 percent of that amount.

- TAP now also includes a 50 percent payment for removing or rehabilitating trees, bushes, and vines that were damaged; the previous program in 7 CFR part 783 for the TAP authorized by the 2002 Farm Bill did not have this provision but the 2005 Hurricane TAP in 7 CFR part 1416 included a 75 percent payment for such activities.

- Nursery tree losses are now eligible for TAP payments; the previous program in 7 CFR part 783 did not have this provision but the 2005 Hurricane TAP in 7 CFR part 1416 did. Nursery trees include ornamental, fruit, nut, or Christmas trees produced for commercial sale.

- TAP is funded through the Agricultural Disaster Relief Trust Fund; the previous programs were limited to available funding.

TAP payments will be calculated using cost share rates for the specific type of tree, bush, or vine lost or damaged and practice required to replant the stand or rehabilitate existing trees, bushes, or vines. The calculations will be made using FSA-approved categories of plants and practices. The categories will be the same as previous TAPs.

The threshold for TAP payment eligibility is a mortality loss to a stand of trees, bushes, or vines in excess of 15 percent above normal mortality. That is the same loss threshold as the previous programs. Normal losses, losses below the 15 percent threshold, and losses due to causes other than natural disaster will not be eligible for payment. For example, if 80 percent of the trees in the stand are lost, and normal mortality in that area for that type of tree is 2 percent, then payment will be calculated on the loss above 17 percent, which would be 63 percent. Payment

would be equal to 70 percent of the costs to replace 63 percent of the original stand. If the stand was a total loss (100 percent loss), then payment would be equal to 70 percent of the costs to replace 83 percent of that stand (100 percent minus 17 percent).

The 2008 Farm Bill specifies that TAP is for losses due to "natural disaster," which the 2008 Farm Bill defines as "plant disease, insect infestation, drought, fire, freeze, flood, earthquake, lightning, or other occurrence, as determined by the Secretary." An eligible "other occurrence" will be determined by FSA's Deputy Administrator for Farm Programs (Deputy Administrator) on behalf of the Secretary. FSA has the authority to determine the eligibility of tree, bush, or vine losses caused by or categorized as an "other occurrence" depending on the disaster event resulting in the loss. This is not a change from the previous TAPs. Loss claims will be verified based on a physical inspection of the loss by an FSA representative.

Generally under this new TAP, eligible orchardists or nursery tree growers are producers who are considered to have planted the trees, bushes, or vines for commercial purposes for the annual production of a crop and who owned the stand of trees, bushes, or vines at the time the natural disaster occurred. The owner of the orchard will be considered to be the person who had planted the trees even though some of those trees might have been planted before the orchard was purchased. For clean-up expenses, such as pruning, the eligible producer may be a party who was leasing the trees at the time of the disasters. Also, the rule provides that in the event of a transfer of the eligible tree after the disaster, the successor may qualify for benefits in lieu of the preceding party if certain conditions are met. These rules appear to be consistent with the intent of the 2008 Farm Bill to provide benefits for all nurseries with otherwise qualifying losses and to provide for the continuing health of existing orchards that have suffered those losses.

#### **Applying for TAP Payment; TAP Payment Calculations**

There are three basic steps for a producer to obtain a TAP payment. The first step is to file an application at the FSA county office within 90 calendar days of the disaster event or date upon which the loss of trees, bushes, or vines is apparent to the producer. Producers who suffered a potentially eligible loss before this rule was published in the **Federal Register** must provide an application to the FSA county office

within 60 calendar days after this rule is published.

The second step is a field visit to verify losses. After FSA receives the application, FSA staff will make a field visit and validate which practices are appropriate to address the losses. Upon verification, FSA will inform the producer of the approved eligible practices and estimated payment.

The third step is to complete the approved practices. The practices must be completed within 12 months of FSA approval. Payment will be made after the practices are completed.

Producers that suffer multiple losses during the calendar year may file multiple applications for payment. This rule specifies the documents that are required to show that practices are complete, such as receipts for labor costs, equipment rental, and purchases of seedlings or cuttings.

The TAP payment will be calculated based on the actual costs of the approved practices, or the rates established by the Deputy Administrator for the practices, whichever compensation amount is lower. The payment rate for replanting and replacement of eligible trees (those which involve greater than a 15 percent loss adjusted for normal mortality), bushes, or vines is 70 percent of the producer's actual costs so long as that 70 percent does not exceed the FSA approved rate for the practices involved and if 70 percent of the actual cost exceeds that rate then the producer will receive the FSA rate and no more. The rate for rehabilitation of eligible trees, bushes, or vines is generally 50 percent of the cost of pruning, removal, and other costs incurred for salvaging the existing plants, or in the case of plant mortality, to prepare land for replanting but here also the 50 percent amount cannot exceed the maximum allowable FSA rate. The 50 percent is only payable, however, for losses that reflect a greater than 15 percent loss taking into account normal mortality and damage.

A producer can be eligible for both categories of payment. For example, a producer who replaces lost trees can apply for both a 50 percent cost share payment to remove the lost trees and prepare the land, and a 70 percent cost share for the seedlings and labor to plant the new ones. If, for example, not all the vines in a stand are lost, a producer can apply for the 70 percent cost share to replace lost vines and the 50 percent cost share to prune and rehabilitate less severely damaged ones. If a practice, such as site preparation, is needed to both replant and rehabilitate trees, bushes, or vines, the producer must document the expenses

attributable to replanting versus rehabilitation. If that is not possible because, for example, the activity took place several years ago and the contractor who performed the work cannot provide a detailed breakdown, the FSA county committee will pro-rate payment based on physical inspection of the loss, damage, replanting, and rehabilitation. Producers who did not plant the trees, bushes, or vines that were lost, but have a history of commercial production, can be eligible for the 50 percent cost share category to remove lost trees and rehabilitate the damaged ones.

FSA, through the FSA State offices, will obtain recommendations from applicable State orchard and nursery organizations, State Cooperative Extension Services or, as applicable, the National Institute of Food and Agriculture, and other knowledgeable and credible sources, as FSA deems necessary and appropriate, to establish the normal mortality rate and damage rate for each type of tree, bush, or vine on a State-by-State basis. (Under the previous TAPs, normal mortality rates established for most eligible plant species were about one to three percent per year.)

#### **SURE and TAP**

In some cases, losses that are not eligible under TAP may be eligible for SURE payments, and vice versa. The SURE program covers losses to tree, vine, and bush crops that were covered by insurance or NAP, while TAP provides cost reimbursement payments to offset the cost of replacing or rehabilitating lost or damaged trees, vines, and bushes. The two programs pay for different types of losses, but if there were any overlap, benefits could be adjusted as needed.

The risk management purchase requirement for SURE includes some exceptions, such as not requiring risk management coverage for minor crops that do not apply to TAP. Therefore, risk management coverage that qualifies a producer for SURE may not qualify that same producer for TAP. If the risk management purchase does meet the requirements of both SURE and TAP, the producer may be eligible for payment under both programs.

#### **Miscellaneous TAP Provisions**

All owners, stands, and losses must meet the eligibility requirements provided in this rule. False certifications can carry serious consequences. FSA will validate information provided on applications through random spot-checks.

As specified in 7 CFR part 760 subpart B, participants receiving disaster assistance payments must keep records and supporting documentation for 3 years following the end of the year in which the application for payment was filed. This discretionary recordkeeping requirement is consistent with other FSA rules and programs, as well as with previous similar disaster assistance programs. Participants must allow FSA representatives to conduct a site inspection to verify that the TAP-funded practices have been completed.

Section 760.110 specifies that the appeal regulations specified in 7 CFR parts 11 and 780 apply. It also specifies that for all the new standing disaster programs, matters requiring FSA determinations that are not in response to, or result from, an individual disputable set of facts in a specific individual participant's application, are not matters that can be appealed under 7 CFR parts 11 or 780. These include, but are not limited to, general statutory or regulatory provisions that apply to similarly situated participants, national average payment prices, regions, crop definition, average yields, or similar items.

As specified in 7 CFR part 760 subpart B, restrictions apply to TAP including, but not limited to, benefit ineligibility resulting from violations of the highly erodible land and wetland conservation provisions specified in 7 CFR part 12.

#### **Notice and Comment**

The Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 made the exemption from notice and comments provisions, contained in section 1601(c)(2) of the 2008 Farm Bill, applicable in implementing section 12033 of the 2008 Farm Bill. To the extent relevant, the exemption applies, we believe, to the corresponding provisions enacted in section 15101 since they are identical excerpt for the provisions for funding in 15101, which do not appear at all in section 12033. Otherwise, the provisions of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 would have no meaning. Therefore, these regulations are exempt from the notice and comment requirements of the Administrative Procedures Act (5 U.S.C. 553), as specified in section 1601(c)(2) of the 2008 Farm Bill, which requires that the regulations be promulgated and administered without regard to the notice and comment provisions of 5 U.S.C. 553 or the Statement of Policy of the Secretary of Agriculture effective

July 24, 1971, (36 FR 13804) relating to notices of proposed rulemaking and public participation in rulemaking.

#### **Effective Date**

In making this final rule exempt from notice and comment through section 1601(c)(2) of the 2008 Farm Bill, using the administrative procedure provisions in 5 U.S.C. 553, FSA finds that there is good cause for making this rule effective less than 30 days after publication in the **Federal Register**. This rule allows FSA to provide benefits to producers who suffered tree, bush, or vine losses caused by natural disasters. Therefore, to begin providing benefits to producers as soon as possible, this final rule is effective when published in the **Federal Register**.

#### **Executive Order 12866**

This rule has been designated as not significant under Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

#### **Regulatory Flexibility Act**

This rule is not subject to the Regulatory Flexibility Act since FSA is not required to publish a notice of proposed rulemaking for this rule.

#### **Environmental Evaluation**

In May 2007, FSA prepared a Final Programmatic Environmental Assessment (PEA) to evaluate the environmental consequences associated with implementing the changes to the Tree Assistance Program in 2005 under Title X Subtitle C of the 2002 Farm Bill using funding authorized by Title III Section 3013 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Pub. L. 109–234). In consideration of the analysis documented in the PEA and the reasons outlined in the Finding of No Significant Impact (FONSI), which was published in the **Federal Register** on April 13, 2007 (72 FR 18622–18623), 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 FSA regulations for compliance with NEPA (7 CFR part 799), FSA has determined that the implementation of TAP consistent with the provisions of the 2008 Farm Bill, would not constitute a major Federal action that would significantly affect the quality of the human environment. Therefore, an environmental impact statement will not be prepared. The Final Programmatic Environmental Assessment (PEA) can be viewed at:

[http://www.fsa.usda.gov/Internet/FSA\\_File/final\\_tap\\_ea5\\_2007.pdf](http://www.fsa.usda.gov/Internet/FSA_File/final_tap_ea5_2007.pdf) and the FONSI can be viewed at: [http://www.fsa.usda.gov/Internet/FSA\\_File/tap\\_fonsi.pdf](http://www.fsa.usda.gov/Internet/FSA_File/tap_fonsi.pdf).

#### Executive Order 12372

This program is not subject to Executive Order 12372, which requires consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published in the **Federal Register** on June 24, 1983 (48 FR 29115).

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988. This rule is not retroactive and it does not preempt State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. 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

The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and States, or on the distribution of power and responsibilities among the various levels of government. 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

The policies contained in this rule do not impose substantial unreimbursed direct compliance costs on Indian tribal governments or have tribal implications that preempt tribal law.

#### Unfunded Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) for State, local, and tribal government or the private sector. In addition, FSA was not required to publish a notice of proposed rule making for this rule. Therefore, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

#### Federal Assistance Programs

The title and number of the Federal assistance program in the Catalog of Federal Domestic Assistance to which this rule applies is 10.082—Tree Assistance Program.

#### Paperwork Reduction Act

The regulations in this rule are exempt from the requirements of the Paperwork Reduction Act (44 U.S.C. Chapter 35), as specified in section 1601(c)(2) of the 2008 Farm Bill, which provides that these regulations be promulgated and administered without regard to the Paperwork Reduction Act.

#### 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.

#### List of Subjects

##### 7 CFR Part 760

Dairy products, Indemnity payments, Pesticides and pests, Reporting and recordkeeping requirements.

##### 7 CFR Part 783

Disaster assistance, Reporting and recordkeeping requirements, Trees.

##### 7 CFR Part 1416

Agriculture, Citrus fruits, Disaster assistance, Fish, Livestock, Nursery stock.

■ For the reasons discussed above, the Farm Service Agency and Commodity Credit Corporation, USDA, amends 7 CFR parts 760, 783, and 1416 as follows:

#### PART 760—INDEMNITY PAYMENT PROGRAMS

■ 1. The authority citation for part 760 continues to read as follows:

**Authority:** 7 U.S.C. 4501; 7 U.S.C. 1531, 16 U.S.C. 3801, note, and 19 U.S.C. 2497; Title III, Pub. L. 109–234, 120 Stat. 474; Title IX, Pub. L. 110–28, 121 Stat. 211; and Sec. 748, Pub. L. 111–80, 123 Stat. 2131.

■ 2. Add Subpart F to read as follows:

##### Subpart F—Tree Assistance Program

Sec.

760.500	Applicability.
760.501	Administration.
760.502	Definitions.
760.503	Eligible losses.
760.504	Eligible orchardists and nursery tree growers.
760.505	Application.
760.506	Payment calculation.
760.507	Obligations of a participant.

##### Subpart F—Tree Assistance Program

###### § 760.500 Applicability.

(a) This subpart establishes the terms and conditions under which the Tree Assistance Program (TAP) will be administered under Titles XII and XV of the Food, Conservation, and Energy Act

of 2008 (Pub. L. 110–246, the 2008 Farm Bill).

(b) Eligible orchardists and nursery tree growers will be compensated as specified in § 760.506 for eligible tree, bush, and vine losses in excess of 15 percent mortality, or, where applicable, 15 percent damage, adjusted for normal mortality and normal damage, that occurred in the calendar year for which benefits are being requested and as a direct result of a natural disaster.

###### § 760.501 Administration.

The program will be administered as specified in § 760.102 and in this subpart.

###### § 760.502 Definitions.

The following definitions apply to this subpart. The definitions in parts 718 and 1400 of this title also apply, except where they conflict with the definitions in this section.

*Bush* means, a low, branching, woody plant, from which at maturity of the bush, an annual fruit or vegetable crop is produced for commercial purposes, such as a blueberry bush. The definition does not cover plants that produce a bush after the normal crop is harvested such as asparagus.

*Commercial use* means used in the operation of a business activity engaged in as a means of livelihood for profit by the eligible producer.

*County committee* means the respective FSA committee.

*County office* means the FSA or U.S. Department of Agriculture (USDA) Service Center that is responsible for servicing the farm on which the trees, bushes, or vines are located.

*Cutting* means a piece of a vine which was planted in the ground to propagate a new vine for the commercial production of fruit, such as grapes, kiwi fruit, passion fruit, or similar fruit.

*Deputy Administrator* or DAFP means the Deputy Administrator for Farm Programs, FSA, USDA, or the designee.

*Eligible nursery tree grower* means a person or legal entity that produces nursery, ornamental, fruit, nut, or Christmas trees for commercial sale.

*Eligible orchardist* means a person or legal entity that produces annual crops from trees, bushes, or vines for commercial purposes.

*FSA* means the Farm Service Agency.

*Lost* means, with respect to the extent of damage to a tree or other plant, that the plant is destroyed or the damage is such that it would, as determined by FSA, be more cost effective to replace the tree or other plant than to leave it in its deteriorated, low-producing state.

*Natural disaster* means plant disease, insect infestation, drought, fire, freeze,

flood, earthquake, lightning, or other natural occurrence of such magnitude or severity so as to be considered disastrous, as determined by the Deputy Administrator.

*Normal damage* means the percentage, as established for the area by the FSA State Committee, of trees, bushes, or vines in the individual stand that would normally be damaged during a calendar year for a producer.

*Normal mortality* means percentage, as established for the area by the FSA State Committee, of expected lost trees, bushes, or vines in the individual stand that normally occurs during a calendar year for a producer. This term refers to the number of whole trees, bushes, or vines that are destroyed or damaged beyond rehabilitation. Mortality does not include partial damage such as lost tree limbs.

*Seedling* means an immature tree, bush, or vine that was planted in the ground or other growing medium to grow a new tree, bush, or vine for commercial purposes.

*Stand* means a contiguous acreage of the same type of trees (including Christmas trees, ornamental trees, nursery trees, and potted trees), bushes (including shrubs), or vines.

*State committee* means the respective FSA committee.

*Tree* means a tall, woody plant having comparatively great height, and a single trunk from which an annual crop is produced for commercial purposes, such as a maple tree for syrup, papaya tree, or orchard tree. Trees used for pulp or timber are not considered eligible trees under this subpart.

*Vine* means a perennial plant grown under normal conditions from which an annual fruit crop is produced for commercial market for human consumption, such as grape, kiwi, or passion fruit, and that has a flexible stem supported by climbing, twining, or creeping along a surface. Perennials that are normally propagated as annuals such as tomato plants, biennials such as the plants that produce strawberries, and annuals such as pumpkins, squash, cucumbers, watermelon, and other melons, are excluded from the term vine in this subpart.

#### **§ 760.503 Eligible losses.**

(a) To be considered an eligible loss under this subpart:

(1) Eligible trees, bushes, or vines must have been lost or damaged as a result of natural disaster as determined by the Deputy Administrator;

(2) The individual stand must have sustained a mortality loss or damage, as the case may be, loss in excess of 15

percent after adjustment for normal mortality or damage;

(3) The loss could not have been prevented through reasonable and available measures; and

(4) The trees, bushes, or vines, in the absence of a natural disaster, would not normally have required rehabilitation or replanting within the 12-month period following the loss.

(b) The damage or loss must be visible and obvious to the county committee representative. If the damage is no longer visible, the county committee may accept other evidence of the loss as it determines is reasonable.

(c) The county committee may require information from a qualified expert, as determined by the county committee, to determine extent of loss in the case of plant disease or insect infestation.

(d) The Deputy Administrator will determine the types of trees, bushes, and vines that are eligible.

(e) An individual stand that did not sustain a sufficient loss as specified in paragraph (a)(2) of this section is not eligible for payment, regardless of the amount of loss sustained.

#### **§ 760.504 Eligible orchardists and nursery tree growers.**

(a) To be eligible for TAP payments, the eligible orchardist or nursery tree grower must:

(1) Have planted, or be considered to have planted (by purchase prior to the loss of existing stock planted for commercial purposes) trees, bushes, or vines for commercial purposes, or have a production history, for commercial purposes, of planted or existing trees, bushes, or vines;

(2) Have suffered eligible losses of eligible trees, bushes, or vines occurring between January 1, 2008, and September 30, 2011, as a result of a natural disaster or related condition;

(3) Meet the risk management purchase requirement as specified in § 760.104 or the waiver requirements in §§ 760.105 or 760.107; and

(4) Have continuously owned the stand from the time of the disaster until the time that the TAP application is submitted.

(b) A new owner of an orchard or nursery who does not meet the requirements of paragraph (a) of this section may receive TAP payments approved for the previous owner of the orchard or nursery and not paid to the previous owner, if the previous owner of the orchard or nursery agrees to the succession in writing and if the new owner:

(1) Acquires ownership of trees, bushes, or vines for which benefits have been approved;

(2) Agrees to complete all approved practices that the original owner has not completed; and

(3) Otherwise meets and assumes full responsibility for all provisions of this part, including refund of payments made to the previous owner, if applicable.

(c) A producer seeking payment must not be ineligible under the restrictions applicable to citizenship and foreign corporations contained in § 760.103(b) and must meet all other requirements of subpart B of this part.

(d) Federal, State, and local governments and agencies and political subdivisions thereof are not eligible for payment under this subpart.

#### **§ 760.505 Application.**

(a) To apply for TAP, a producer that suffered eligible tree, bush, or vine losses that occurred:

(1) During calendar years 2008, 2009, or 2010, prior to May 7, 2010, must provide an application for payment and supporting documentation to FSA no later than July 6, 2010.

(2) On or after May 7, 2010, must provide an application for payment and supporting documentation to FSA within 90 calendar days of the disaster event or date when the loss of trees, bushes, or vines is apparent to the producer.

(b) The producer must submit the application for payment within the time specified in paragraph (a) of this section to the FSA administrative county office that maintains the producer's farm records for the agricultural operation.

(c) A complete application includes all of the following:

(1) A completed application form provided by FSA;

(2) An acreage report for the farming operation as specified in part 718, subpart B, of this chapter;

(3) Subject to verification and a loss amount determined appropriate by the county committee, a written estimate of the number of trees, bushes, or vines lost or damaged that is certified by the producer or a qualified expert, including the number of acres on which the loss occurred; and

(4) Sufficient evidence of the loss to allow the county committee to calculate whether an eligible loss occurred.

(d) Before requests for payment will be approved, the county committee:

(1) Must make an eligibility determination based on a complete application for assistance;

(2) Must verify actual qualifying losses and the number of acres involved by on-site visual inspection of the land and the trees, bushes, or vines;

(3) May request additional information and may consider all



relevant information in making its determination; and

(4) Must verify actual costs to complete the practices, as documented by the producer.

**§ 760.506 Payment calculations.**

(a) Payment to an eligible orchardist or nursery tree grower for the cost of replanting or rehabilitating trees, bushes, or vines damaged or lost due to a natural disaster, in excess of 15 percent damage or mortality (adjusted for normal damage or mortality), will be calculated as follows:

(1) For the cost of planting seedlings or cuttings, to replace lost trees, bushes, or vines, the lesser of:

(i) 70 percent of the actual cost of the practice, or

(ii) The amount calculated using rates established by the Deputy Administrator for the practice.

(2) For the cost of pruning, removal, and other costs incurred for salvaging damaged trees, bushes, or vines, or in the case of mortality, to prepare the land to replant trees, bushes, or vines, the lesser of:

(i) 50 percent of the actual cost of the practice, or

(ii) The amount calculated using rates established by the Deputy Administrator for the practice.

(b) An orchardist or nursery tree grower that did not plant the trees, bushes, or vines, but has a production history for commercial purposes on planted or existing trees and lost the trees, bushes, or vines as a result of a natural disaster, in excess of 15 percent damage or mortality (adjusted for normal damage or mortality), will be eligible for the salvage, pruning, and land preparation payment calculation as specified in paragraph (a)(2) of this section. To be eligible for the replanting payment calculation as specified in paragraph (a)(1) of this section, the orchardist or nursery grower who did not plant the stock must be a new owner who meets all of the requirements of § 760.504(b) or be considered the owner of the trees under provisions appearing elsewhere in this subpart.

(c) Eligible costs for payment calculation include costs for:

(1) Seedlings or cuttings, for tree, bush, or vine replanting;

(2) Site preparation and debris handling within normal horticultural practices for the type of stand being re-established, and necessary to ensure successful plant survival;

(3) Pruning, removal, and other costs incurred to salvage damaged trees, bushes, or vines, or, in the case of tree mortality, to prepare the land to replant trees, bushes, or vines;

(4) Chemicals and nutrients necessary for successful establishment;

(5) Labor to plant seedlings or cuttings as determined reasonable by the county committee; and

(6) Labor used to transplant existing seedlings established through natural regeneration into a productive tree stand.

(d) The following costs are not eligible:

(1) Costs for fencing, irrigation, irrigation equipment, protection of seedlings from wildlife, general improvements, re-establishing structures, and windscreens.

(2) Any other costs not listed in paragraphs (c)(1) through (c)(6) of this section, unless specifically determined eligible by the Deputy Administrator.

(e) Producers must provide the county committee documentation of actual costs to complete the practices, such as receipts for labor costs, equipment rental, and purchases of seedlings or cuttings.

(f) When lost stands are replanted, the types planted may be different from those originally planted. The alternative types will be eligible for payment if the new types have the same general end use, as determined and approved by the county committee. Payments for alternative types will be based on the lesser of rates established to plant the types actually lost or the cost to establish the alternative used. If the type of plantings, seedlings, or cuttings differs significantly from the types lost, the costs may not be approved for payment.

(g) When lost stands are replanted, the types planted may be planted on the same farm in a different location than the lost stand. To be eligible for payment, site preparation costs for the new location must not exceed the cost to re-establish the original stand in the original location.

(h) Eligible orchardists or nursery tree growers may elect not to replant the entire eligible stand. If so, the county committee will calculate payment based on the number of qualifying trees, bushes, or vines actually replanted.

(i) If a practice, such as site preparation, is needed to both replant and rehabilitate trees, bushes, or vines, the producer must document the expenses attributable to replanting versus rehabilitation. The county committee will determine whether the documentation of expenses detailing the amounts attributable to replanting versus rehabilitation is acceptable. In the event that the county committee determines the documentation does not include acceptable detail of cost allocation, the county committee will

pro-rate payment based on physical inspection of the loss, damage, replanting, and rehabilitation.

(j) The cumulative total quantity of acres planted to trees, bushes, or vines for which a producer may receive payment under this part for losses that occurred between January 1, 2008, and September 30, 2011, will not exceed 500 acres.

**§ 760.507 Obligations of a participant.**

(a) Eligible orchardists and nursery tree growers must execute all required documents and complete the TAP-funded practice within 12 months of application approval.

(b) Eligible orchardist or nursery tree growers must allow representatives of FSA to visit the site for the purposes of certifying compliance with TAP requirements.

(c) Producers who do not meet all applicable requirements and obligations will not be eligible for payment.

**PART 783—[REMOVED]**

■ 3. Under the authority of 7 U.S.C. 8201 *et seq.*, 7 CFR part 783 is removed.

**PART 1416—2006 EMERGENCY AGRICULTURAL DISASTER ASSISTANCE PROGRAMS**

■ 4. The authority citation of part 1416 continues to read as follows:

**Authority:** Title III, Pub. L. 109–234, 120 Stat. 474; 16 U.S.C. 3801, note.

**Subpart H—[Removed]**

■ 5. Subpart H, consisting of §§ 1416.700 through 1416.705, is removed.

Signed in Washington, DC, on May 3, 2010.

**Jonathan W. Coppess,**  
*Administrator, Farm Service Agency, and*  
*Executive Vice President, Commodity Credit*  
*Corporation.*

[FR Doc. 2010–10800 Filed 5–6–10; 8:45 am]

**BILLING CODE 3410–05–P**

**DEPARTMENT OF JUSTICE**

**Bureau of Prisons**

**28 CFR Part 540**

**[BOP–1149]**

**RIN 1120–AB49**

**Inmate Communication With News Media: Removal of Byline Regulations**

**AGENCY:** Bureau of Prisons, Justice Department.

**ACTION:** Interim final rule; technical correction.