Factual Summary - Disaster Programs

1. Description and Analysis of The U.S. Disaster Programs

1. From 1985 through 2005, the United States spent approximately $26 billion on disaster relief, with payments increasing by an average of $65 million a year.[1] This trend shows no signs of abating: the 2008 Farm Bill included a multi-billion dollar permanent disaster relief fund, the "Agricultural Disaster Assistance Trust Fund."[2] Proponents of the Trust Fund say this mechanism is needed because it would provide fast, certain relief for farmers when natural disasters strike, in contrast to the current system, under which it can take years for assistance to be authorized and disbursed.[3] They refused to agree to reduce or eliminate it in order to secure passage of the 2008 Farm Bill.[4]

2. In its notifications, the United States asserts that all of the disaster programs discussed below comply with the policy-specific criteria and conditions of paragraph 8 of Annex 2.

1.2. The Noninsured Crop Disaster Assistance Program

3. The United States claimed exemption for the Noninsured Crop Disaster Assistance Program (NAP) from its reduction commitments, on the basis of paragraph 8 of Annex 2, for marketing years 1999, 2000, 2001, 2002, 2004, 2005.[5]

4. This program compensates producers when natural disasters cause a catastrophic loss of production. "Production loss" is measured as low yield, prevented planting, value loss, and "AUD" (Animal Unit Day, a unit of forage) loss.

5. The reference periods used under the NAP to calculate these four types of loss are longer or shorter than the two reference periods set out in paragraph 8(a). Table XX below summarizes this:

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[1] [Figures based on EWG data, cited in "Why the Disaster Trust Fund is Bad News," by Britt Lundgren and Jason Funk, published March 4, 2008. Accessed on Environmental Working Group website on March 5, 2008 (www.ewg.org/node/261001).]

[2] $5.1b Disaster Trust Fund proposed as part of the Senate Farm Bill and included in final 2008 Farm Bill. Senate Finance Committee Press Release. September 11, 2007. "Senate Finance Chairman Outlines Agriculture Tax Package." Accessed on April 9, 2008, at http://www.senate.gov/~finance/press/Bpress/2007press/prb091107a.pdf.

[3] Senate Finance Committee Press Release. "Finance Panel Approves Agriculture Tax Measures." October 4, 2007. Accessed on April 8, 2008, at http://finance.senate.gov/press/Bpress/2007press/prb100407a.pdf.

[4] The "4-H Bill" (the Heartland, Habitat, Harvest and Horticulture Act of 2007) is the 2007 Farm Bill. Senate Finance Committee Press Release." Baucus: Farm Bill Proposal "Dead on Arrival": Finance Chairman Opposes Slashing of Disaster Assistance for America's Farmers." Accessed at http://www.senate.gov/~finance/press/Bpress/2008press/prb031808a.pdf on April 8, 2008. March 18, 2008.

[5] Page 8, G/AG/N/USA.43; Pages 8 and 47, G/AG/N/USA.51; Pages 7, 59, and 87, G/AG/N/USA.60.

Table XX. Reference periods of the Noninsured Crop Disaster Assistance Program

Type of Production Loss	Years Covered	Reference period
Low yield	1999 – 2005	Reference period: 4 – 10 years
Prevented planted	1999 – 2005	Reference period: disaster year
Value loss	2002 – 2005	Reference period: disaster year
Animal Unit Day	2002 – 2005	Reference period: four to ten years, or the disaster year.

6. The Noninsured Crop Disaster Assistance Program (NAP)[6] was introduced in 1994 to provide risk protection to producers of crops not eligible for participation in the Federal Crop Insurance Corporation (FCIC) insurance programs.[7] During the period from 1999 through 2005, NAP provided, in most respects, coverage comparable to the basic "Catastrophic Risk Protection" (CAT) offered to producers of insured crops.[8] Producers eligible to participate in NAP are those growing any commercial agricultural crop, commodity, or acreage of a commodity grown for food or fiber for which CAT is *not* available. In addition, livestock and their by-products are excluded. [9] Producers that sign up for coverage are eligible for

[6] NAP was authorized under the Federal Crop Insurance Reform Act of 1994 (Title I of Public Law 103-354). Program regulations for the NAP are at 7 CFR Part 404 (Federal Register February 27, 1996; Volume 61; Number 39). and 7 CFR Part 1437 (FR March 19, 2002, Volume 67, Number 53).

[7]Federal Crop Insurance Reform Act of 1994 (Title I of Public Law 103-354). The Federal Crop Insurance Corporation (FCIC) promotes the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance. Management is vested in a Board of Directors, subject to the general supervision of the Secretary of Agriculture. Description of FCIC from "FCIC Meeting Archive" at http://www.rma.usda.gov/fcic/, accessed on March 4, 2008. In May 1996, the Federal Crop Insurance Corporation became the "Risk Management Agency." "About FSA" accessed at http://www.fsa.usda.gov/FSA/ on February 20, 2008.

[8]7 CFR Part 404 (Federal Register February 27, 1996; Volume 61; Number 39; "Summary"). "Catastrophic Risk Protection" (CAT) pays 55 per cent of the established price of a commodity on losses in excess of 50 per cent. USDA "Crop Policies" web page, accessed on February 20, 2008, at www.rma.usda.gov/policies.

[9] Under the 1996 regulations, NAP coverage was as follows: "(1) Any commercial crop grown for food; (2) any commercial crop planted and grown for livestock consumption, including but not limited to grain and forage crops; (3) any commercial crop grown for fiber, excluding trees grown for wood, paper or pulp products; (4) any commerically produced aquaculture species; (5) floriculture crops; (6) ornamental nursery crops; (7) Christmas tree crops; (8) turfgrass sod; (9) industrial crops; and (10) any crop, for which crop insurance under the Act is available in the county, that is affected by a natural disaster that is not insurable under the producer's crop insurance policy." 7 CFR Part 404 Section 404.12 (Federal Register; February 27, 1996; Volume 61; Number 39). Under the 2002 (current) regulations, NAP covers: "Eligible crops under this part will be any commercial agricultural crop, commodity or acreage of a commodity grown for food or fiber for which CAT is not available … (a) NAP payments will be made available for: (1) Any commercial crop grown for food, excluding livestock and their by-products; (2) any commercial crop planted and grown for livestock consumption, including but not limited to grain and forage crops; … (3) any commercial crop grown for fiber, excluding trees grown for wood, paper, or pulp products; (4) any commercial production of (i) aquacultural species (including ornamental fish); (ii) Floricultural crops; (iii) Ornamental nursery plants; (iv) Christmas tree crops; (v) turfgrass sod; (vi) industrial crops; and (vii) seed crops." 7 CFR Part 1437 Section 1437.4 (Federal Register March 19, 2002;

payments if their crops are damaged or prevented from being planted by drought, flood or other natural disasters and conditions related thereto, provided a minimum loss threshold is suffered.[10]

7. Beginning with marketing year 2001, the regulations implementing the NAP changed significantly.[11] The new regulations expanded "loss" under the program to include also "value loss" and "AUD (Animal Unit Day) loss" in addition to low yield and prevented planted.[12] These regulations, currently in effect, define compensable loss as follows:

> (1) Loss, as the result of an eligible cause of loss, that entails as determined by the CCC[13]: (i) prevented planted of greater than 35 per cent of the intended crop acreage; a yield loss of greater than 50 per cent of the approved yield; or value loss of greater than 50 per cent of the pre-disaster value; or (ii) AUD loss of greater than 50 per cent of the expected AUD.[14]

Volume 67; Number 53). In 2002, NAP coverage was extended to include sea oats and sea grass under the Farm Security and Rural Investment (FSRI) Act. The regulations implementing this change were published in 2002 (Federal Register October 7, 2002; Volume 67; Number 194).

[10]Eligible causes of loss are enumerated in the regulations: "(1) Damaging weather occurring prior to or during harvest, including but not limited to drought, hail, excessive moisture, freeze, tornado, hurricane, excessive wind or any combination thereof; (2) Adverse natural occurrence occurring prior to or during harvest, such as earthquake, flood or volcanic eruption; (3) A related condition, including but not limited to heat, insect infestation, or disease, which occurs as a result of an adverse natural occurring or damaging weather …" 7 CFR Part 1437 Section 1437.9 (Federal Register March 19, 2002; Volume 67; Number 53).

[11]The NAP was revised to conform with statutory amendments to the Federal Agriculture Improvement and Reform Act, made in the Agricultural Risk Protection Act of 2000 (Public Law 106-224). The new regulations set forth revised terms and conditions of the program. Revised regulations at 7 CFR Part 1437 (Federal Register March 19, 2002; Volume 67; Number 53; "Background") The new regulations stated: "This rule re-writes, in their entirely, the NAP regulations." Prior to this revision of terms and conditions, there was a dual eligibility requirement: production in the producer's "area" had to fall below 65 per cent of the expected area yield, *and* the individual producer had to suffer a loss in excess of the low yield or prevented planted loss threshold. The 2002 regulations eliminated this dual requirement, removing the area loss requirement so that eligibility was conditioned only on the producer's individual loss. 7 CFR Part 404 Section 404.19 and Section 404.23 (Federal Register; February 27, 1996; Volume 61; Number 3).

[12] "Animal Unit Days means an expression of expected or actual stocking rate for pasture or forage." 7 CFR Part 1437 Section 1437.3 (Federal Register March 19, 2002; Volume 67; Number 53).

[13] The Commodity Credit Corporation (CCC) is a division of the United States Department of Agriculture. It was established in 1933 to stabilize, support and protect farm incomes and prices. The CCC Charter Act, as amended, aids producers through loans, purchases, payments, and other operations, and makes available materials and facilities required in the production and marketing of agricultural commodities. "About The Commodity Credit Corporation" accessed at http://www.fsa.usda.gov/FSA/ on February 20, 2008. The Farm Service Agency (FSA) administers and manages farm commodity, credit, conservation, disaster and loan programs as laid out by Congress through a network of federal, state and county offices. FSA's responsibilities are organized into five areas: Farm Programs, Farm Loans, Commodity Operations, Management and State Operations. The agency administers farm commodity programs and implements ad hoc disaster programs. "About FSA" accessed at http://www.fsa.usda.gov/FSA/ on February 20, 2008.

[14]7 CFR Part 1437 Section 1437.1 (Federal Register March 19, 2002; Volume 67; Number 53).

8. Producers who suffer and demonstrate loss in excess of these thresholds, due to one of the eligible causes of loss,[15] are eligible for payments under the NAP.

9. The reference periods for measuring losses under NAP vary according to the type of production loss (low yield, prevented planted, value loss, AUD loss). As described below, none of the four types of compensable loss under the NAP is calculated using an average of the individual producer's production during the previous three years, or an average of his production during the previous five years excluding the highest and lowest value (an Olympic average).

- *Prevented planted loss* is measured based on intended planting ("intended crop acreage") in the disaster year.[16] The reference period is therefore one year, the disaster year.
- *Low yield* is measured based on "approved yield" which is calculated based on "Actual Production History," the simple average of four to ten years of production history.[17]

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[15] 7 CFR Part 1437 Section 1437.8 (Federal Register March 19, 2002; Volume 67; Number 53).

[16] According to the program regulations, prevented planted loss is determined based on the producer's intent to plant the crop acreage, along with his possession of, or access to, resources to plant, grow, and harvest the crop, as applicable. The determination of prevented planted losses only takes into account intention to plant during the year of the disaster; the reference period is one year, the disaster year. 7 CFR Part 1437 Section 1437.201 (Federal Register March 19, 2002; Volume 67; Number 53). The FSA Handbook regarding implementation of the NAP confirms that prevented planted loss is measured by considering the "eligible acreage intended for planting" rather than in consideration of historic production. Subparagraphs 25A-D FSA Handbook 1-NAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk. FSA Handbooks are published to provide procedures and interpretations of program regulations to local officials implementing programs. In the event there appears to be an "unintended conflict" between the Handbooks and the program regulations, FSA Handbook 1-NAP (Revision 1) states that the program regulations apply. FSA Handbook 5-DAP (Revision 2) Paragraph 1, accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[17] "Low yield" loss is calculated based on the "approved yield." Approved yield is determined based on the Actual Production History (APH), a measurement of historic production which is used under the "Actual Production History Coverage Program" to determine loss and payments under the Federal Crop Insurance Program. A variation of the APH is also used to determine loss and payments for the purposes of the NAP. The Actual Production History (APH) Coverage Program is implemented in accordance with the provisions in 7 CFR Section 1437 for purposes of the NAP, and 7 CFR Section 457 for purposes of the Federal Crop Insurance Program. Section 196 of Public Law 104-127 (1996 FAIR Act) requires that this basis be used for the NAP when determining "expected production:" "The Secretary shall determine yield coverage using the actual production history of the producer over a period of not less than the 4 previous consecutive crop years and not more than 10 consecutive crop years. Subject to paragraph (3), the yield for the year in which noninsured crop disaster assistance is sought shall be equal to the average of the actual production history of the producer during the period considered." The NAP regulations provide that "approved yield: (1) is used in the requisite calculation of loss and payment. (2) Is a simple average of a minimum of four base period marketing year yields … the base period is 10 marketing years, except 5 marketing years for apples and peaches, immediately preceding the marketing year for which an approved yield is calculated." The reference period for calculating

- *Value loss* is measured based on the "pre-disaster value," specifically the difference between the value of the production at the time of the disaster and the value of the affected production following the disaster.[18] The reference period is thus one year, the disaster year.
- *AUD loss* is measured as either low yield or prevented planted loss; this is done separately for mechanically harvested forage and forage intended for grazing. Prevented planted loss is determined for both types of forage using the same reference period, the disaster year[19], while low yield is determined using different reference periods. Low yield is determined for mechnically harvested forage[20] using a reference period of four to ten years; low yield is determined for grazed forage[21] using a reference period of either four to ten years or the disaster year.[22]

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low yield is thus four to ten years. 7 CFR Part 1437 Section 1437.102 (Federal Register March 19, 2002; Volume 67; Number 53).

[18] "Value loss" is measured based on the field market value of the crop at the time of the disaster. The NAP program regulations state that "assistance for these commodities is provided based on the loss of value at the time of the disaster." 7 CFR Part 1437 Section 1437.202 (Federal Register March 19, 2002; Volume 67; Number 53); 7 CFR Part 1437 Section 1437.302 (Federal Register March 19, 2002; Volume 67; Number 53). The FSA Handbook which sets forth guidelines for implementation of this program, from 2001 onward, provides an example of how to determine value loss: "A value loss crop suffers damage because of a hurricane. To determine whether the unit suffered an eligible loss at the time of disaster, determine the total value of the inventory present for the crop on the unit immediately before and after the disaster." This example confirms that the reference period is the disaster year only. Subparagraph 181B, FSA Handbook 1-NAP (Revision 1) accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[19] The reference period for determining "AUD" prevented planted loss, for both mechanically harvested and grazed forage, is the disaster year only. FSA Handbook 1-NAP (Revision 1) states that with regard to forage, acreage eligibility for prevented planted shall be determined according to the rules for determining prevented planted for other crops. It is therefore assessed, as described above, based on the intention of the producer to plant the acreage during the year of the disaster, along with possession of, or access to, the resources to plant and harvest the crop. The reference period is the disaster year. Subparagraph 192A, FSA Handbook 1-NAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[20] 7 CFR Part 1437 Section 1437.401 (Federal Register March 19, 2002; Volume 67; Number 53). Low yield AUD loss is determined based on the "expected AUD." For forage intended to be mechanically harvested, the expected AUD is determined on the basis of Actual Production History (APH), which is a four to ten year production average. Subparagraph 193B, FSA Handbook 1-NAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[21] For forage intended for grazing, expected AUD is determined using a reference period of either four to ten years, or the disaster year. Subparagraph 195E of FSA Handbook 1-NAP (Revision 1) states that, for acreage intended to be grazed, *AUD loss* will be determined (a) based on "loss of similar mechanically harvested forage acreage on the farm or on similar farms in the area when approved yields [based on four to ten years of production history] have been calculated to determine loss" *or* (b) based on the percentage of loss as determined by two independent experts. Determining loss in this way would indicate a reference period of either four to ten years, for (a), or the disaster year only, for (b). In addition, Subparagraph 195E states that, for forage intended to be grazed, *expected AUD* will be determined based on "carrying capacity," which is "a stocking rate and the number of days grazing can normally be sustained without detrimental effects on the land resource absent any supplemental feedstuff." The State Technical Committee (STC) must establish a carrying capacity for each crop. Multiplying carrying capacity by number of acres grown during the disaster year provides a value for expected

1.3. The Crop Disaster Program

10. The United States claimed that the Crop Disaster Program (CDP) is green box support, and thus exempted it from its reduction commitments for the marketing years 1999 – 2005.[23] The various authorized Crop Disaster Programs are summarized in Table XX.

Table XX. Factual Summary of Crop Disaster Programs

Type of Production Loss	Year Type of Loss Covered	Reference Period/loss threshold
Low yield	1999, 2000, 2001-2002, 2003-2005	Reference period: simple average of 4-10 years of individual production history; simple average of 5 years of county level production; or Olympic average of 5 years of county production.
Prevented planted	1999, 2000, 2001-2002, 2003-2005	Loss threshold: lesser of 20 per cent or 20 acres. Reference period: disaster year or 4-10 years.
Value loss	1999, 2000, 2001-2002, 2003-2005	Reference period: disaster year.
Tree damage	1999	Loss threshold: 20 per cent. Reference period: undefined.[24]
Quality loss	2000, 2003-2005	Loss threshold: 20 per cent or 25 per cent. Reference period: disaster year.

11. The Crop Disaster Program[25] was created by Congress for the marketing years 1999, 2000, 2001 - 2002, 2003 – 2005, and 2005 – 2007, in response to natural disasters.[26] Each time this program is authorized, its terms and conditions are slightly different.[27]

AUD production. Carrying capacity is set at the national level for each region, and each county committee (COC) is required to use the carrying capacity established for the physical location of the acreage. Multiplying carrying capacity times production during the disaster year provides a production reference in connection with just one year (the disaster year). Subparagraphs 107.5A-E, and Paragraph 194, FSA Handbook 1-NAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[22][Regs: AUD reference periods]

[23] Page 8, G/AG/N/USA.43; Pages 8 and 47, G/AG/N/USA.51; Pages 7, 59, and 87, G/AG/N/USA.60.

[24] Although the regulations for the 1999 CDP do not specify the reference period used to determine the extent of tree damage suffered, it appears that the reference period is shorter than the required reference periods under paragraph 8(a), [as discussed below in more detail.] 7 CFR Part 1478 Section 1478.11 (Federal Register February 16, 2000; Volume 65; Number 32).

[25]1999 CDP authorized under the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2000 [Public Law 106-78] and Omnibus Consolidated Appropriations Act

12. CDP payments are provided to producers of crops who suffer losses due to a natural disaster or related condition during the marketing year covered by that particular CDP. Production loss is measured as low yield, prevented planted, value loss, quality loss, and damage to stands of trees.[28] Producers of nearly all agricultural products – insured, non-insurable, and uninsured crops - are eligible to receive benefits under this program.[29] The types of loss covered, the loss threshold that must be experienced in order for a producer to be eligible for payments, and the approach to calculating loss are slightly different depending on the marketing year.

13. For marketing years 1999, 2000, 2001, 2002, 2004, 2005, the loss threshold for certain eligible losses are as follows:

- Marketing year 1999: Eligibility is granted when the producer has suffered a prevented planted loss of the lesser of 20 acres or 20 per cent of intended planted acreage, or 20 per cent damage to eligible tree stands.[30]

[Public Law 106-113]; 2000 CDP authorized under the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2001 (Public Law 106-387); 2001-2002 CDP authorized under the Agriculture Assistance Act of 2003 [Public Law 108-7]; 2003–2005 CDP authorized under the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005 (Public Law 108-324); 2005-2007 CDP authorized under the Emergency Agricultural Assistance Act/U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007 (Public Law 110-28). Program regulations for 1999 CDP at 7 CFR Part 1478 (Federal Register February 16, 2000; Volume 65; Number 32); for 2000 CDP at 7 CFR Part 1480 (Federal Register March 21, 2001; Volume 66; Number 55); for 2001-2002 CDP at 7 CFR Part 1480 (Federal Register June 26, 2003; Volume 68; Number 123); for 2003-2005 CDP at 7 CFR Part 1479 (Federal Register March 29, 2005; Volume 70, Number 59); for 2005-2007 CDP at 7 CFR Part 760 (Federal Register December 21, 2007; Volume 72; Number 245).

[26]Disaster assistance is not made available immediately following a disaster, as it takes time for Congress or USDA to authorize the assistance and for the regulations for implementation to be finalized. Sign-up for the 2005-2007 Crop Disaster Program (created under the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007") began in October 2007; this means that producers seeking compensation for crop losses in marketing year 2005 or 2006 had to wait over a year for assistance. Fact Sheet "Crop Disaster Program" accessed on March 3, 2008, at http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=pfs&newstype=prfactsheet&type=detail&item=pf_20080125_distr_en_cdpqty08.html.

[27] For disaster programs based on a time-limited authorizing provision in legislation, new regulations are needed each time that a new legislative authorization is enacted. However, where a permanent authorization is provided, the regulations may remain unchanged for long periods of time.

[28] "Disaster" is defined in: 7 CFR Part 1479 Section 1479.101 (Federal Register March 29, 2005; Volume 70; Number 59); 7 CFR Part 1480 Section 1480.3 (Federal Register June 26, 2003; Volume 68; Number 123); 7 CFR Part 1478 Section 1478.3 (Federal Register February 16, 2000; Volume 65; Number 32); 7 CFR 1480 Section 1480.3 (Federal Register June 26, 2003; Volume 68; Number 123).

[29]Product coverage for the CDP: (1999 CDP) 7 CFR Part 1469 Section 1469.3 excludes livestock and livestock-related losses from coverage; (2000 CDP) 7 CFR 1480 Section 1480.3 excludes livestock and livestock related losses from coverage; (2001–2002 CDP) 7 CFR Part 1480 Section 1480.3 excludes tobacco, sugar cane, sugar beets, livestock and livestock related losses from coverage; (2003-2005 CDP) 7 CFR 1479.102 excludes sugar cane and livestock and livestock-related losses; (2005-2007 CDP) 7 CFR Part 760 Section 760.802 limits coverage to those growing crops insured by the Federal Crop Insurance Program or participating in the NAP.

[30]7 CFR Part 1478 Section 1478.16 (Federal Register February 16, 2000; Volume 65; Number 32).

- Marketing year 2000: Quality loss of 20 per cent or prevented planted loss of the lesser of 20 acres or 20 per cent of intended planted acreage gives rise to eligibility.[31]

- Marketing years 2001-2002: Prevented planted loss of the lesser of 20 acres or 20 per cent of intended planted acreage is the loss threshold for eligibility.[32]

- Marketing years 2004 and 2005: Quality loss of 20 per cent (or 25 per cent[33]), or prevented planted loss of the lesser of 20 acres or 20 per cent of intended planted acreage, gives rise to eligibility.[34]

14. A different reference period is used to calculate each type of production loss covered under the Crop Disaster Programs (low yield, prevented planted loss, value loss, quality loss, damage to stands of trees). The evidence can be summarized as follows:

- Low yield[35]: For marketing years 1999[36], 2000, 2001, 2002, 2004, 2005, low yield is calculated based on either the producer's "approved yield" or the

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[31] 7 CFR Part 1480 Part 1480.16 (Federal Register March 21, 2001; Volume 66; Number 55).
[32] 7 CFR Part 1480 Section 1480.16 (Federal Register June 26, 2003; Volume 68; Number 123).
[33] For marketing year 2005, two sets of CDP regulations apply – those for the 2003-2005 CDP and those for the 2005-2007 CDP. The 2005/2006/2007 program sets the quality loss threshold at 25 per cent while the 2003/2004/2005 program sets it at 20 per cent. 7 CFR Part 1479 Section 1479.120 (Federal Register March 29, 2005; Volume 70; Number 59); 7 CFR Part 760 Section 760.817 (Federal Register December 21, 2007; Volume 72; Number 245).
[34] The 2005-2007 CDP differs from earlier CDPs in that it determines "prevented planted" loss using the approach under the Federal Crop Insurance Program, for insured crops, *and* the NAP approach, for non-insurable crops. CDPs other than the 2005-2007 CDP use the crop insurance approach for insured crops but, rather than using the NAP approach, use a CDP-specific method to determine prevented planted for non-insurable crops. No loss threshold for prevented planted is defined in the 2005-2007 CDP regulations, which condition receipt of prevented planted compensation on receipt by the producer of either a crop insurance indemnity or a NAP payment. For the 2005 – 2007 CDP, therefore, the loss threshold for prevented planted loss is the same loss threshold as required under the Federal Crop Insurance Program and the NAP: the lesser of 20 acres or 20 per cent of intended planted acreage (Crop Insurance Program) or 35 per cent of expected production (NAP). 7 CFR Part 1479 Section 1479.115 (Federal Register March 29, 2005; Volume 70; Number 59). 7 CFR Part 1479 Section 1479.115 (Federal Register March 29, 2005; Volume 70; Number 59). The "Common Crop Insurance Policy Basic Provisions" set forth the loss threshold required in order to receive an RMA indemnity for prevented planted: "at least 20 acres or 20 percent of the insurable crop acreage in the unit, whichever is less." "Summary of Changes For The Common Crop Insurance Policy Basic Provisions – Reinsured Version (04-BR)" accessed on March 4, 2008, at the RMA website http://www.rma.usda.gov/FTP/Policies/2004/ra/PDF/04BRBASI.pdf.
[35] Regulations governing determination of low yield under all the Crop Disaster Programs at issue in this dispute are found at 7 CFR Part 1478 Section 1478.3 (Federal Register February 16, 2000; Volume 65; Number 32); 7 CFR Part 1480 Section 1480.3 (Federal Register March 21, 2001; Volume 66; Number 55); 7 CFR Part 1480 Section 1480.3 (Federal Register June 26, 2003; Volume 68; Number 123); 7 CFR Part 1479 Section 1479.102 (Federal Register March 29, 2005; Volume 70; Number 59); and 7 CFR Part 760 Section 760.802 (Federal Register December 21, 2007; Volume 72; Number 245).
[36] Throughout this section, the 1999 CDP is used to illustrate how eligible loss is determined under the CDP; any differences between this CDP and CDPs for later marketing years are cited.

"county average yield."[37] The producer's approved yield is calculated using the simple average of four to ten years of historic production data.

- The "county average yield" is the simple average of five years of *county* level historic production data, in some marketing years.[38] There is no reference to a the individual producer's production loss measured based on *that producer's* historic production.

- Prevented planted[39]: For marketing years 1999, 2000, 2001, 2002, 2004, 2005[40], prevented planted loss is calculated based on a reference period of

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[37] Under the 1999 CDP, the "low yield" reference period is a simple average of the previous four to ten years of the producer's expected production, or of the previous five years of *county*-level production. Low yield is measured based on the producer's "expected production." This is calculated based on "historic yield," which is defined in the program regulations as the *higher* of the county average yield or the producer's approved yield. The "county average yield" under the 1999 CDP is defined as the simple average of the 1993 through 1997 official county yields established by the FSA (a simple average of five years of production). The "approved yield," also called Actual Production History or APH, is calculated for producers of both insured crops and non-insurable crops as the average of production during the previous four to ten crop years. Therefore, low yield under the 1999 Crop Disaster Program is calculated based on the simple average of the producer's production during the previous four to ten years, or the average of *county* production during the previous five years. This is the approach used to calculate low yield under all Crop Disaster Programs at issue in this dispute, although for the 2001-2002, 2003-2005 and 2005-2007 Crop Disaster Programs, the county average yield is defined as a five-year Olympic rather than simple average and the reference years are updated. 7 CFR Part 1478 Sections 1478.11, 1478.3, 1478.9 (Federal Register February 16, 2000; Volume 65; Number 32). Regulations governing calculation of APH for the Federal Crop Insurance Program are found at 7 CFR Part 400, Subpart G. The regulations for calculating APH for the NAP, which is called the "approved NAP yield," are at 7 CFR Part 1437 Section 1437.102. Section 1437.102 states "an approved yield … is a simple average of a minimum of four base period crop year yields." Subparagraphs 3C, 52A and 56A of FSA Handbook 5-DAP (Revision 1) explain the determination of low yield in connection with the 2003-2005 CDP. This FSA Handbook was accessed March 5, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[38] For the 1999 and 2000 marketing years, the county average is a *simple* average of production during a five-year period; for other marketing years, it is an *Olympic* average of production at the county level during a five-year period. The "county average" for 1999 and 2000 is the simple average for the five-year period 1993–1997. The five-year period is updated for later Crop Disaster Programs: (2001-2002) MY 1996 - 2000, (2003-2005) MY 1998-2002, (2005-2007) MY 2001-2005. (1999) 7 CFR Part 1478.9, Part 1478.3 (Federal Register February 16, 2000; Volume 65; Number 32); (2000) 7 CFR Part 1480 Section 1480.9 (Federal Register March 21, 2001; Volume 66; Number 55); (2001-2002) 7 CFR Part 1480 Sections 1480.3 (Federal Register June 26, 2003; Volume 68; Number 123); (2003-2005) 7 CFR Part 1479 Sections 1479.102, 1479.108, 1479.110 (Federal Register March 29, 2005; Volume 70; Number 59); (2005-2007) 7 CFR Part 760 Section 760.808 (Federal Register December 21, 2007; Volume 72; Number 245).

[39] Regulations for determining prevented planted loss under all Crop Disaster Programs at issue are at (1999) 7 CFR Part 1478 Section 1478.16 (Federal Register February 16, 2000; Volume 65; Number 32); (2000) 7 CFR Part 1480 Section 1480.16 (Federal Register March 21, 2001; Volume 66; Number 55); (2001-2002) 7 CFR Part 1480 Section 1480.16 (Federal Register June 26, 2003; Volume 68; Number 123); (2003-2005) 7 CFR Part 1479 Section 1479.115 (Federal Register March 29, 2005; Volume 70; Number 59); (2005-2007) 7 CFR Part 760 (Federal Register December 21, 2007; Volume 72; Number 245).

[40] Under the 1999 CDP, the "prevented planted" reference period is the producer's production during either one year (the disaster year, or one of the previous four years), or the previous four to ten years. This type of production loss is calculated using one of three different reference periods, depending on whether the producer grows insured, uninsured, or non-insurable crops. With the exception of the 2005-2007 program, all the Crop Disaster Programs at issue in this dispute use the same approach to calculating prevented planted loss, although the reference years are updated for each marketing year (see footnote 34, above). 7 CFR Part 1479 Section 1479.16 (Federal Register February 16, 2000; Volume 65; Number 32).

either the disaster year or one year (of the previous four marketing years), for non-insurable or uninsured crops[41], or four to ten years, for insured crops[42].

- Value loss[43]: For marketing years 1999, 2000, 2001, 2002, 2004, 2005, value loss is calculated as the difference in the value of inventory during the disaster

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[41] Under the 1999 CDP, different reference periods are used to determine "prevented planted" loss for *insured* crops, on the one hand, and *non-insurable* and *uninsured* crops on the other hand. All producers, to be eligible for benefits, must have been prevented from planting 20 per cent or 20 acres of intended planted acreage. *Non-insurable* and *uninsured* crop producers, in order to be eligible, must prove an intent to plant the crop during the disaster year and must demonstrate that the crop could not be planted because of an eligible disaster. "Intended planted acreage" that a producer may claim is limited under the program regulations. The acreage claimed cannot exceed the number of acres planted by the producer, or that was prevented from being planted, to the crop in any one of the 1995 through 1998 crop years (the previous four crop years). These producers must also demonstrate they successfully planted the claimed acreage to the crop in one of those four crop years. These conditions reflect a reference period of one year (out of the previous four crop years). The FSA Handbook for the 2003-2005 CDP, Handbook 1-DAP (Revision 1), states that, for producers of non-insurable or uninsured crops, the number of acres approved for prevented planting shall be the *lesser* of these amounts of acreage and the acreage claimed by the producer. Prevented planted acreage can also be claimed based on intended production levels during the disaster year, as evidenced in a contract for the production of crops. Acreage may be claimed in connection with crops grown under a contract up to the number of acres specified in the contract, minus planted acreage. This reflects a reference period of one year, the disaster year. The above evidence demonstrates that prevented planted is determined under the CDP for *non-insurable* and *uninsured* crops using a reference period of just one year: either one of the previous four years or the disaster year. 7 CFR Part 1478 Section 1478.16 (Federal Register February 16, 2000; Volume 65; Number 32). 7 CFR Part 1479 Sections 1479.108, 1479.110, and 1479.115 (Federal Register March 29, 2005; Volume 70, Number 59). Subparagraph 71B, FSA Handbook 1-DAP (Revision 1) accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk. The same approach is used to determine prevented planted loss for non-insurable and uninsured crops under Crop Disaster Programs for other marketing years - except for the 2005-2007 CDP, which is slightly different. Under the 2005-2007 CDP, receipt of a prevented planted payment by *non-insurable* crop producers is conditioned upon receipt of *NAP* prevented planted payment. Therefore the reference period for determining prevented planted loss for these producers is the disaster year only, as under NAP. (*Uninsured* producers are not eligible for benefits under the 2005-2007 CDP, although, according to the FSA Handbook, this restriction may be waived if they commit to obtain risk coverage in the future.) 7 CFR Part 760 Section 760.816 (Federal Register December 21, 2007; Volume 72; Number 245).

[42] For *insured* producers, the 1999 CDP conditions receipt of CDP "prevented planted" compensation on the receipt of an RMA indemnity for prevented planted loss. This means that, with the limited exceptions cited in the regulations (peppers, fresh market sweet corn, fresh market tomatoes, processing tomatoes), producers of insured crops are eligible for CDP payments *only if* they also receive a prevented planted payment under the RMA-administered program. The reference period for calculating prevented planted loss under the 1999 Crop Disaster Program, for insured producers, is therefore the period used under the Federal Crop Insurance Program: the "approved yield (APH)." For the Crop Insurance Program, approved yield is calculated as the simple average of a minimum of four, not to exceed a maximum of ten, consecutive crop year yields for the crops. The CDP prevented planted reference period is therefore also four to ten years, for *insured* producers. 7 CFR 400 Subpart G. 7 CFR Part 1458 Section 1478.16 (Federal Register February 16, 2000; Volume 65; Number 32). This approach is used under CDP for all marketing years at issue in this dispute. Regulations for determining prevented planted loss for all the Crop Disaster Programs at issue in this dispute are at: (1999) 7 CFR Part 1478 Section 1478.16 (Federal Register February 16, 2000; Volume 65; Number 32); (2000) 7 CFR Part 1480 Section 1480.16 (Federal Register March 21, 2001; Volume 66; Number 55); (2001-2002) 7 CFR Part 1480 Section 1480.16 (Federal Register June 26, 2003; Volume 68; Number 123); (2003-2005) 7 CFR Part 1479 Section 1479.115 (Federal Register March 29, 2005; Volume 70; Number 59); (2005-2007) 7 CFR Part 760 (Federal Register December 21, 2007; Volume 72; Number 245).

[43] Regulations related to determination of "value loss" for all Crop Disaster Programs at issue in this dispute are at: 7 CFR Part 1478 Section 1478.18 (Federal Register February 16, 2000; Volume 65; Number 32); 7 CFR Part 1480 Section 1480.18 (Federal Register March 21, 2001; Volume 66; Number 55); 7 CFR Part 1480 Section 1480.18 (Federal Register June 26, 2003; Volume 68; Number 123); 7 CFR Part 1479 Section 1479.117

year, as a result of the natural disaster.[44] The reference period is therefore one year, the disaster year.

- Quality loss[45]: For marketing years 2000, 2004, 2005, quality loss is calculated based on quality loss suffered during the disaster year, due to the natural disaster.[46] The reference period is one year, the disaster year.

- Tree damage: For marketing year 1999, "damage to stands of eligible trees" gives rise to eligibility under the CDP. The regulations implementing the program do not specify the reference period for calculating loss.[47]

15. The approaches used to determine production loss under the Crop Disaster Programs for marketing years 1999 – 2005 are summarized in Table XX below.

(Federal Register March 29, 2005; Volume 70; Number 59); 7 CFR Part 760 Section 760.816 (Federal Register December 21, 2007; Volume 72; Number 245).

[44] "Value loss" is calculated using the same approach under all the CDPs at issue in this dispute. Under the 1999 CDP, value loss is determined based on "the loss of value at the time of the disaster," as determined by the CCC. The reference period is therefore one year, the disaster year. An FSA Handbook instructing employees as to how to implement the 2003-2005 CDP specifies that lost value must be calculated based on the value of the inventory prior to the disaster and after the disaster. This indicates that production during the disaster year only is taken into account when calculating value loss under this program. 7 CFR Part 1478 Section 1478.18 (Federal Register February 16, 2000; Volume 65; Number 32). Subparagraph 180B, FSA Handbook 5-DAP (Revision 1) states: "A value loss crop suffers damage because of a hurricane. To determine whether the unit suffered eligible loss at the time of disaster, determine the total value of inventory present on the unit immediately before and after the disaster." This FSA Handbook applies to the 2003-2005 CDP; the Handbook relevant to the 1999 CDP is no longer available publicly. Because the provisions related to value loss are the same in the regulations for the 1999, 2000, 2001-2002, 2003-2005 CDPs, it is not unreasonable to assume that the approach described in this Handbook was used under these earlier Crop Disaster Programs as well. FSA Handbook 5-DAP (Revision 1) accessed on March 6, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[45] Regulations related to determination of quality loss, for the three Crop Disaster Programs which provide for eligibility on this basis, are at: 7 CFR Part 1480 Section 1480.23 (Federal Register March 21, 2001; Volume 66; Number 55); 7 CFR Part 1479 Section 1479.120 (Federal Register March 29, 2005; Volume 70; Number 59); and 7 CFR Part 760 Section 760.817 (Federal Register December 21, 2007; Volume 72; Number 245).

[46] "Quality loss" was not a basis for eligibility under the 1999 CDP, so it is appropriate to use the 2000 CDP to explain the reference period. Quality loss, under the 2000 Crop Disaster Program, is calculated based on "the value the affected production of the crop would have had if the crop had not suffered a quality loss." The value of the crop during the disaster year only is taken into account for purposes of calculating loss, evidenced by the fact that payments are calculated based on the difference between the unit market value of the units of the crop affected by the quality loss had the crop not suffered a quality loss, and the per unit market value of the units of the crop affected by the quality loss, following the natural disaster. 7 CFR Part 1480 Section 1480.23 (Federal Register March 21, 2001; Volume 66; Number 55).

[47] The grounds for eligibility to receive CDP payments in connection with tree damage are inconsistent with paragraph 8(a) of Annex 2 because the loss threshold is 20%, which is below the required 30% loss threshold. In addition, although the regulations for the 1999 CDP do not specify the reference period used to determine the extent of tree damage suffered, the reference period is shorter than both the allowed reference periods under paragraph 8(a). Under other programs compensating tree damage, a one-year reference period is used to calculate loss; for instance, the Tree Assistance Program (1997) and the Tree Indemnity Program (2005) both use a reference period of the disaster year only to determine loss and eligibility. In light of this, it would not be unreasonable to assume that a one year reference period was also used to determine tree damage, as part of granting eligibility, under the 1999 Crop Disaster Program. 7 CFR Part 1478 Section 1478.11 (Federal Register February 16, 2000; Volume 65; Number 32).

Table XX. Determination of Production Loss Under the Crop Disaster Programs

	Low Yield	Prevented Planting	Value Loss	Quality Loss	Tree Damage
1999 Crop Disaster Program					
Loss Threshold	35%	Lesser of 20 acres or 20% intended planted acreage.	35%		20%
Reference Period	Higher of five-year average of county historic production, or producer's "APH", a simple average of four to ten years.	One year (non-insurable, uninsured crops) or four to ten years (insured crops).	Disaster Year		[Undefined]
2000	35%	Lesser of 20 acres or 20% intended planted acreage.	35%	20%	
	Higher of five-year average of county historic production, or producer's APH.	One year (non-insurable, uninsured) or four to ten years (insured).	Disaster Year	Disaster Year	
2001-2002	35 %	Lesser of 20 acres or 20% intended planted acreage.	35 %		
	Higher of five-year Olympic average of county historic production, or producer's APH.	One year (non-insurable, uninsured) or four to ten years (insured).	Disaster Year		
2003-2005	35 %	Lesser of 20 acres or 20% intended acreage.	35 %	20 %	
	Higher of five-year Olympic average of county historic production, or producer's APH.	One year (non-insurable, uninsured) or four to ten years (insured).	Disaster Year	Disaster Year	
2005-2007	35 %	Lesser of 20 acres or 20% intended acreage (insured) or 35 % (non-insurable).	35 %	25 %	
	Higher of five-year Olympic average of county historic production, or producer's APH.	One year (non-insurable), four to ten years (insured). Uninsured crops not eligible.	Disaster Year	Disaster Year	

1.4. The U.S. Livestock Programs

16. The United States notification claimed exemption for domestic support provided under the Livestock Assistance Program (Emergency Feed Program)[48], American Indian Livestock Feed Program, Pasture Recovery Program, Feed Indemnity Program, Livestock Indemnity Program, and "Livestock Hurricane Programs" (Livestock Indemnity Program II, Livestock Compensation Program)[49] for the years 1999, 2000, 2001, 2002, 2004, 2005, citing paragraph 8 of Annex 2.[50]

17. The livestock programs are summarized in the table below:

[48]Domestic support provided under the Livestock Assistance Program was notified under the heading "Emergency Feed Program" in the 1999, 2000, 2001 notifications. The Emergency Feed Program no longer existed during this period, according to the Catalogue of Federal Domestic Assistance (CFDA). The CFDA "Historical Index" records which years each domestic support program existed, assigning each program a number. LAP and EFP are both categorized as program number 10.066 in the CFDA Historical Index, which indicates that EFP was suspended in 1983 and was later replaced by the similar LAP. The current CFDA index reports only the Livestock Assistance Program as being currently in effect; it is listed as program no. 10.066. CFDA Index accessed on February 22, 2008 at http://12.46.245.173/cfda/pdf/historical.html and http://12.46.245.173/pls/portal30/CATALOG.BROWSE_ALPHA_PROGRAM_RPT.SHOW?p_arg_names=alpha&p_arg_values=L.

[49] The "Livestock Hurricane Programs" is actually two programs which were notified together by the United States in its 2005 notification: the Livestock Indemnity Program II and the Livestock Compensation Program.

[50] The following livestock programs were exempted from reduction commitments by the U.S.: (1999 notification) Emergency Feed Program (EFP), Pasture Recovery Program (PRP), American Indian Livestock Feed Program (AILFP), Livestock Indemnity Program (LIP); (2000) EFP, PRP, AILFP, LIP; (2001) EFP, PRP, AILFP, LIP; (2002) Livestock Assistance Program (LAP); (2004) LAP, AILFP; (2005) LIP, Feed Indemnity Program, Livestock Hurricane Programs (Livestock Indemnity Program II and Livestock Compensation Program).

Table X. Livestock Programs

Program	Years Notified	Reference Period/Loss threshold
Livestock Assistance Program[51]	1999-2001, 2002, 2004	Reference period: disaster year.
American Indian Livestock Feed Program	1999-2001, 2004	Loss threshold: 35 per cent regional loss. Reference period: disaster year.
Pasture Recovery Program	1999, 2000	Reference period: disaster year.
Livestock Compensation Program[52]	2005	Loss threshold: value equal to 30 days' feed. Reference period: disaster year.
Feed Indemnity Program	2005	Loss threshold: none. Reference period: disaster year.
Livestock Indemnity Program	1999, 2000, 2005	Loss threshold: none. Reference period: disaster year.
LIP II[53]	2005	Loss threshold: none. Reference period: disaster year.

18. Under the Livestock Assistance Program, American Indian Livestock Feed Program, Pasture Recovery Program, Livestock Compensation Program[54], and Feed Indemnity Program, compensation is provided to livestock producers suffering feed or forage losses in a specific calendar or marketing year. Producers are compensated for loss of feed or forage, or for the increased cost of acquiring feed for their livestock. Under the Livestock Indemnity Program and Livestock Indemnity Program II,[55] producers are compensated for losses related to animal mortality resulting from an eligible natural disaster.[56]

19. The loss threshold and the reference period used to determined production loss, under each program, is defined in the regulations for that program and described below.

[51]Notified also as "Emergency Feed Program." Page 9, G/AG/N/USA.43; Pages 9 and 47, G/AG/N/USA.51.
[52]Notified as "Livestock hurricane programs" in 2005. Page 88, G/AG/N/USA.60.
[53]Notified as "Livestock hurricane programs" in 2005. Page 88, G/AG/N/USA.60.
[54] In 2005, the United States notified the Livestock Indemnity Program II and the Livestock Compensation Program together as "Livestock hurricane programs." Page 88, G/AG/N/USA.60.
[55] In 2005, the United States notified the Livestock Indemnity Program II and the Livestock Compensation Program together as "Livestock hurricane programs." Page 88, G/AG/N/USA.60.
[56] The feed and livestock mortality disaster programs were authorized periodically, in connection with losses during a specific marketing year due to natural disasters. As a result, the program regulations – and therefore the terms and conditions of the programs – differ slightly, depending on marketing year.

1.4.2. Livestock Assistance Program (LAP)[57]

20. The Livestock Assistance Program compensates producers for loss of grazing production resulting from a natural disaster. To be eligible under this program, a producer must be located in a *county* which has suffered a loss of grazing production of at least 40 per cent for three consecutive months and must have also *individually* suffered a loss above this threshold.[58] For a county to be eligible for the LAP, the local county office must confirm that the county has suffered a natural disaster,[59] along with a qualifying loss of grazing production.[60] Once a county or part of a county has been approved for participation in the LAP, individual producers who owned or leased grazing land in the approved area may apply for benefits by certifying they have suffered a loss exceeding the required threshold.

21. CCC county offices (COC) are responsible for determining whether a county has suffered an eligible loss of grazing production due to a natural disaster.[61] The COC, using available data sources plus "general knowledge of local rainfall data, pasture losses, grazing livestock movement out of county, abnormal supplemental feeding practices," must establish the percentage of grazing loss for each general type of pasture.[62] This is established based on

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[57] [Regs: LAP reference period]

[58] 7 CFR Part 1439 Section 1439.105 (Federal Register June 26, 2003; Volume 68; Number 123).

[59] A "natural disaster" is defined as a drought (40 per cent or greater loss of normal precipitation during 4 consecutive months), excessive moisture (an average of 140 per cent or greater increase in normal precipitation during 4 consecutive months), or another documented natural disaster. Subparagraph 14B, FSA Handbook 4-DAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[60] 7 CFR Part 1439 (Federal Register June 26, 2003; Volume 68; Number 123). Notice DAP-165,"Preparing for the Livestock Assistance Program (LAP) Signup," published October 1, 2003, by USDA. Subparagraph 12A of FSA Handbook 4-DAP, (Revision 1) states that eligible counties must be officially declared as disaster counties by the President or Secretary of Agriculture; must have suffered a 40 per cent or greater loss of grazing production; and must have received approval by the State Technical Committee of the applicable year CCC-654 Form. Form CCC-654 is used by local officials to describe abnormal precipitation or moisture levels, or other natural disasters, which resulted in a loss of grazing production or a "livestock feed emergency." Form CCC-654 is used for purposes of determining *county* eligibility. See also Subparagraphs 14B-D of FSA Handbook 4-DAP (Revision 1).

[61] With regard to an individual producer's certified percentage grazing losses, FSA Handbook 4-DAP (Revision 1) states: "It is the producer's responsibility to provide and certify their individual grazing loss, by grazing type … A producer's grazing losses are based on several factors that may be unique to each producer, such as: local weather conditions; pasture type; type of livestock; number of livestock; management decisions." No reference is made to historic production as part of this determination by the producer of his production loss. Subparagraph 17A, FSA Handbook 4-DAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk. 7 CFR Part 1439 Section 1439.104. 7 CFR Part 1439 (Federal Register March 31, 2005; Volume 70; Number 61). Notice DAP-165,"Preparing for the Livestock Assistance Program (LAP) Signup," published October 1, 2003, by the USDA.

[62] 7 CFR Part 1439 Section 1439.104 (Federal Register March 31, 2005; Volume 70; Number 61). The three general types of pasture are: non-irrigationed improved grasses, non-irrigated native grasses, and non-irrigated forage sorghum. Notice DAP-165,"Preparing for the Livestock Assistance Program (LAP) Signup," published October 1, 2003, by the USDA.

the "carrying capacity"[63] the county committee determines could be expected from pasture and normal grazing crops for livestock for the LAP crop year if a natural disaster had not diminished the production of these grazing crops."[64] The average of the percentage loss for the three types of pasture, as determined by the county committee, equals the "county grazing loss percentage" on which county eligibility is based.[65] There is no reference to individual losses.

22. The established "actual per cent of loss" caused by the natural disaster, along with information regarding moisture and precipitation levels, as evidence of the natural disaster, is submitted to the State Office of the CCC for approval of the county for participation in LAP.[66]

23. Once a county has been approved for participation in the LAP, producers who owned or leased grazing land in that county may apply for benefits. To be eligible for payments, the producer must have "suffered a 40 per cent or greater grazing loss for 3 consecutive months."[67] He must certify the number of acres of each type of pasture grown during the disaster year and his livestock numbers, confirming also that grazing losses were related to the natural disaster.[68] According to the FSA Handbook for the 2003/2004 LAP, producers are *not* required to compare their disaster year production with past production in order to

[63] "Carrying capacity" may be defined as the stocking rate that is economically and environmentally sustainable for a particular grazing unit throughout the grazing season. "Stocking rate" is the number of animals grazing on an acre of grazing land for a defined period of time. Explanation of stocking rate and carrying capacity contained in "Understanding Pasture Stocking Rate and Carrying Capacity," Maryland Cooperative Extension Fact Sheet 788, accessed on April 8, 2008, at http://extension.umd.edu/publications/PDFs/FS788.pdf.

[64] 7 CFR Part 1439 Section 1439.104 (Federal Register March 31, 2005; Volume 70; Number 61).

[65] Notice DAP-165,"Preparing for the Livestock Assistance Program (LAP) Signup," published October 1, 2003, by the USDA. See also Subparagraph 17A, FSA Handbook 4-DAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[66] As part of obtaining *county* approval to participate in the LAP, the county officials must fill in Form CCC-654, "County Feed Loss Assessment Report." The FSA Handbook and Notice DAP-165 explain how to determine whether (a) a "natural disaster" has occurred in a given county, and (b) whether there has been a 40 per cent loss of normal grazing production for 4 consecutive months in that county. Both are requirements for county eligibility. For a county to participate, the State Technical Committee must approve the Form CCC-654. Notice DAP-165,"Preparing for the Livestock Assistance Program (LAP) Signup," published October 1, 2003, by the USDA. 7 CFR Part 1439 Section 1439.104 and 105. 7 CFR Part 1439 (Federal Register March 31, 2005; Volume 70; Number 61). Subparagraph 12A FSA Handbook 4-DAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[67] Subparagraphs 12B and 12C, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[68] Subparagraphs 12B and 12C of FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk. Form CCC-740 is used for *individual* producers' applications; information submitted using this form does not include historic production data. It is attached as Exhibit-BRA XX.

establish they have suffered a loss in excess of the required loss threshold.[69] They must certify their percentage grazing loss in the application; the figure provided serves as the basis for the granting of eligibility.[70] This evidence suggests that the reference period is the disaster year only.

1.4.3. American Indian Livestock Feed Program[71]

24. Livestock producers in tribal-governed regions are eligible to receive payments if their region has suffered at least a 35 per cent loss of feed produced for a defined period, as determined by the CCC, due to a natural disaster.[72] As with the LAP, under this program, once a *region* has been approved for participation, *individual producers* in that region are eligible for benefits, provided they owned, leased or had legal permission to use tribal-governed land in the approved region at the time of the qualifying natural disaster.[73] Eligibility requirements for the American Indian Livestock Feed Program do not include an *individual* loss threshold in addition to the 35 per cent *regional* loss threshold.[74] This means that individual producers may qualify for assistance under this program without having suffered at least a 30 per cent production loss.

25. The reference period is set out in the FSA Handbook for the 2003/2004 AILFP and does not require that FSA officials consider historic production when determining that there has been an eligible loss of feed in a region. The program regulations and FSA Handbook state that when a tribal government suspects that a feed emergency exists due to a natural

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[69] Producers must fill out Form CCC-740 to apply for LAP. This Form does not request any historic production information, and the FSA Handbook for the 2003/2004 LAP does not require that historic production be taken into account when determining eligibility. Instead, eligibility is based on the producer having certified a percentage grazing loss higher than 40 per cent. Subparagraphs 17B, 17C and 20E of FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[70] Subparagraph 17B, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[71]Authorized under: Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2000 (Public Law 106-78); Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2001 (Public Law 106-387); Military Construction Appropriations and Emergency Supplemental Appropriations for Hurricane Disaster Assistance Act of 2005. Regulations at 7 CFR Part 1439, 900-914 (Federal Register March 19, 2001; Volume 66; Number 53).

[72] This *regional* loss threshold is set forth in the program regulations at 7 CFR Part 1439 Section 1439.903 (Federal Register March 19, 2001; Volume 66; Number 53) and in Subparagraphs 45A and B of the FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[73] Subparagraph 43A, FSA Handbook 4-DAP states that a "region" is a geographic area, as determined by a tribal government, suffering a qualifying loss of livestock feed because of a natural disaster. Subparagraph 42L, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[74]7 CFR Part 1439 Section 1439.907 (Federal Register March 19, 2001; Volume 66; Number 53).

disaster, it may request approval of the region for participation in AILFP.[75] Program regulations indicate that tribal governments should submit "historical production data and estimated or actual production data for the disaster year" when requesting approval.[76] The FSA then sends a three-person "survey team" to confirm that a natural disaster has resulted in a loss of feed in the region. The team must compile a "survey report" detailing the type of disaster, the dates of the disaster, and the extent of the livestock feed emergency resulting from such disaster, specifying also which areas were most affected.[77] Based on the FSA Handbook, this report *does not* include a comparison of disaster-year production to historic production during the previous three or five years. The CCC uses the survey report, together with supporting documentation submitted by the tribal authorities – which does not include information related to historic production - to grant or deny approval to a region.[78]

26. Once a region has been approved for participation in the American Indian Livestock Feed Program, individual producers may apply for benefits by providing information "that accurately reflects livestock feed purchases for eligible livestock during the feeding period" affected by the livestock emergency.[79] They must fill out a form detailing their additional feed costs during the emergency and must submit supporting evidence such as receipts for the purchase of feed.[80] Producers are *not* required to submit information regarding the *extent* of loss as a percentage of their normal production, and they are *not* required to submit information regarding their historic production of livestock or feed.[81] Eligibility is not

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[75] According to Subparagraph 47A of the FSA Handbook the tribal government must provide documentation that a natural disaster resulted in a loss of livestock feed production in excess of 35%. The program regulations state that tribal governments should provide USDA with "historical production data and estimated or actual production data for the disaster year" as evidence that a feed disaster actually exists. [Regulations] FSA Handbook 4-DAP (Revision 1), accessed at March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[76] [Regulations]
[77] 7 CFR Part 1439 Section 1439.906 (Federal Register March 19, 2001; Volume 66; Number 53). Survey team procedures and survey report contents are detailed at Subparagraphs 46A-C of FSA Handbook 4-DAP (Revision 1), accessed at March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[78] As part of a request for approval for participation in the AILFP, the following documentation must be submitted: the regional survey report; Form CCC-648; Form CCC-453; maps marked with the overall region and the affected region; weather data provided by the FSA State Office. Subparagraph 47B, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[79] 7 CFR Part 1439 Section 1439.907 (Federal Register March 19, 2001; Volume 66; Number 53).
[80] The producers must also submit copies or originals of receipts for feed purchased as a result of the feed emergency. Subparagraphs 48A-E and 50F, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[81] Form CCC-644 is used by individual producers to apply for benefits under the AILFP. A completed CCC-644 Form does not contain information related to historic production; rather, it simply documents, supported by the receipts attached as evidence, the additional feed costs incurred by the producer due to a natural disaster. FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

determined by the tribal authorities and FSA in consideration of past production. The the reference period for determining eligible loss appears to be the disaster year only.

1.4.4. Pasture Recovery Program[82]

27. Compensation under this program is provided to owners or operators of "eligible pasture land that was damaged or destroyed by drought or related conditions during calendar year 1999," on which livestock is normally grazed.[83] A Pasture Recovery Program was also authorized in connection with calendar year 2000.[84]

28. To be eligible, pastureland must be "damaged or destroyed", and it must be located in a county which was approved for participation in the Livestock Assistance Program. This means that the loss threshold and reference period used to determine eligibility under the LAP are determinative of eligiblity under this program as well. The reference period used to calculate eligible loss under the Livestock Assistance Program is discussed above.[85]

1.4.5. Livestock Compensation Program[86]

29. The Livestock Compensation Program provides compensation to producers suffering a loss of feed due to an eligible 2005 hurricane.

30. The loss threshold for eligibility under this program is based on the *value* of lost feed. To be eligible for payments, a livestock producer must have suffered a loss of produced or purchased feedstuffs, intended for eligible livestock, with a value in excess of "the cost of the

[82]Authorized under: (1999 PRP) Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2000 (Public Law 106-78); (2000 PRP) Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act 2001 (Public Law 106-387). Regulations at 7 CFR Part 1439, Subpart D (Federal Register June 8, 2000; Volume 65; Number 111); 7 CFR Part 1439, Subpart D (Federal Register March 19, 2001; Volume 66; Number 53).

[83]7 CFR Part 1439 Section 1439.304 (Federal Register June 8, 2000; Volume 65; Number 111). The loss threshold under the Pasture Recovery Program relates to the condition of the pastureland, which must be "damaged or destroyed" to the extent that the forage crop cannot return in the subsequent year and seeding is required to reestablish the forage crop, as determined by the CCC. 7 CFR Part 1439 Sections 1439.304 through 1439.306 (Federal Register June 8, 2000; Volume 65; Number 111).

[84] 7 CFR Part 1439 (Federal Register March 19, 2001; Volume 66; Number 53).

[85] The Livestock Assistance Program is inconsistent with paragraph 8(a), as the reference period used to determine eligible loss is not the three-year average or five-year Olympic average required under paragraph 8(a), Annex 2. [Cross reference section].

[86]Authorized under the Emergency Agricultural Disaster Assistance Act of 2006 (Public Law 109-234). Regulations at 7 CFR Part 1416 (Federal Register February 12, 2007; Volume 72; Number 28).

amount of corn needed to maintain the specific animals for 30 days, as determined by CCC."[87]

31. The value of 30 day's worth of corn (feed) is established in the FSA Handbook for this program, for each type of animal covered; this is called the "per head payment rate."[88] Each producer's loss is calculated based on the type and number of animals he owned or cash-leased, using the rates established by the CCC.[89] The result of this calculation represents a different production loss in *percentage terms* for every producer, depending on whether the producer feeds his livestock with *feedstuffs* or *grazing*, the latter being much cheaper.[90] Regardless of whether the producer uses feedstuffs, grazing or a combination of the two, the percentage production loss is always lower than the required 30 per cent loss threshold in paragraph 8(a).[91]

32. Based on the regulations and the FSA Handbook for this program, eligible loss is assessed by looking at the cost of lost feed during the disaster year only. Applicants are required to demonstrate to the CCC that the feed lost was intended for the claimed eligible livestock, that the loss occurred as a direct result of the eligible hurricane during the disaster

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[87] 7 CFR Part 1416 Section 1416.102 and 104 (Federal Register February 12, 2007; Volume 72; Number 28). "Eligible livestock" is livestock of the types listed in the regulations and FSA Handbook that was maintained for commercial use as part of a farming operation; owned or cash-leased; and physically located in a disaster county. Subparagraph 1203A FSA Handbook 4-DAP (Revision1). An "eligible producer" is someone who had legal ownership of or cash-leased, but not both for the same livestock, eligible livestock during the disaster period; and suffered an eligible feed loss (for eligible livestock) due to hurricanes Katrina, Ophelia, Rita or Wilma. Subparagraph 1222C, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[88] Subparagraph 1223D FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[89] See Paragraphs 1223 – 1225 of the FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[90] Feeding livestock with forage (grazing) is estimated to cost one-half to one-third the cost of feeding livestock with feedstuffs. "Extending Grazing Season Reduces Costs", by Ed Rayburn, Forage Agronomy Specialist, WVU Extension Service, August 2000, available at http://www.wvu.edu/~agexten/forglvst/extendin.htm (last visited 3 March 2008) (Exhibit Bra-XX).

[91] When a producer feeds his livestock only with feedstuffs, a loss of 30 days' worth of feed equals a loss of only 8 per cent on an annual basis, well below the 30 per cent loss threshold required under paragraph 8(a). A loss threshold of 30 days worth of feed out of the entire year translates into an effective loss threshold of 365/30 days, or 8 per cent, of total annual requirements. The loss threshold for a producer relying exclusively on forage and grazing to feed his livestock, while higher, also fails to comply with the required 30 per cent threshold in paragraph 8(a). Grazing costs 30 to 50 per cent less than feedstuffs, so a producer relying exclusively on grazing to feed his livestock would need to lose 30 to 50 per cent more forage for the value of the lost forage to reach "the cost of the amount of corn needed to maintain the specific animals for 30 days." But even if a producer lost 3 months worth of forage (*i.e.*, 90 days), he would have a production loss of only 25 per cent (365/90). Therefore, even taking into account the lower cost of forage, the production loss would still not exceed the required loss threshold for eligibility in paragraph 8(a). This program is therefore inconsistent with Annex 2.Extending Grazing Season Reduces Costs, Ed Rayburn, Forage Agronomy Specialist, WVU Extension Service, August 2000, available at http://www.wvu.edu/~agexten/forglvst/extendin.htm (last visited 3 March 2008) (Exhibit Bra-XX).

period, and that the cost of the lost feed was equal to the required value set forth in the regulations (30 days' worth of corn).[92] They are also required to submit detailed information quantifying the amount and type of feed lost. However, the program regulations and FSA guidelines *do not* require producers to submit data regarding historic production.[93] These facts suggest that the disaster year is the reference period used to determine eligible loss under this program.

1.4.6. Feed Indemnity Program[94]

33. This program provides benefits to eligible owners and cash lessees of livestock, for feed losses or increased feed costs that occurred in eligible counties as a result of an eligible natural disaster, based on the number and type of livestock they owned or cash-leased.[95] According to the regulations, to be considered an eligible livestock producer, a producer must have suffered "*a feed loss* or an *increased feed cost* during the applicable disaster period as set forth in Section 760.101 with respect to feed used for the eligible livestock."[96] To be eligible, a producer's loss did not have to exceed *30 per cent* of production.

34. The reference period used to determine eligibility is the disaster year. According to the program regulations and FSA Handbook, producers are required to certify to the CCC the number and type of livestock physically located in an eligible county during the disaster period, for purposes of determining eligibility and calculating compensation.[97] The FSA Handbook for this program specifies that "eligibility is based on the physical location of the

[92] 7 CFR Part 1416 Section 1416.103 (Federal Register February 12, 2007; Volume 72; Number 28).
[93] The list of supporting documentation that producers may submit makes scant reference to past production: "Any other support documentation as determined by CCC to be necessary to make a determination of eligibility of the applicant. Supporting documents include, but are not limited to: verifiable purchase records; veterinarian records; bank or other loan papers; rendering truck receipts; Federal Emergency Management Agency records; National Guard records; written contracts; production records; Internal Revenue Service records; property tax records; private insurance documents; sales records; and similar documents." 7 CFR Part 1416 Section 1416.103 (Federal Register February 12, 2007; Volume 72; Number 28).
[94] Authorized under Section 32 of the Agricultural Adjustment Act of 1935, as part of 2005 Section 32 Hurricane Disaster Programs. Regulations at 7 CFR Part 760 (Federal Register January 9, 2007; Volume 72; Number 5).
[95] 7 CFR Part 760 Section 760.301. (Federal Register January 9, 2007; Volume 72; Number 5).
[96] 7 CFR Part 769 Section 760.303 (Federal Register January 9, 2007; Volume 72; Number 5). (Italics added). This loss threshold is repeated in Subparagraph 722C of FSA Handbook 4-DAP (Revision 1), accessed at March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[97] 7 CFR Part 760 Sections 760.303 through 760.305 (Federal Register January 9, 2007; Volume 72; Number 5). FSA Handbook 4-DAP Revision 1 states that producers must fill in Form CCC-898, certifying the number of eligible livestock, the eligible feed loss, the physical location of the claimed livestock during the disaster period, the physical location of the current inventory, and providing all supporting documentation in support of the application. Subparagraph 1251B, FSA Handbook 4-DAP (Revision 1) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

livestock on the beginning date of the applicable disaster period."[98] The regulations and handbook *do not* require producers to submit information regarding their historic production, as livestock inventory and location during the disaster year alone form the basis of eligibility.

1.4.7. Livestock Indemnity Program (LIP) and LIP II[99]

35. The Livestock Indemnity Program compensates producers for livestock deaths resulting from a natural disaster. The loss threshold under the Livestock Indemnity Program regulations for the 1999 and 2000 state that, to receive benefits under the program, a livestock owner or contract grower must have suffered a loss of livestock "in excess of the normal mortality rate established by the CCC, based on the number of animals in the livestock category that were in the owner's inventory at the time of the disaster."[100] The regulations for the 2005 LIP and LIP II programs[101] also fail to specify a required loss threshold for eligibility.[102] To apply for 2005 LIP and LIP II, livestock owners and contract growers must submit information to the CCC quantifying the loss of animals and proving their physical location at the time of death.[103] Producers are eligible for benefits under this program, for all years, provided they lost animals, regardless of the *percentage* of livestock inventory that was lost. [104]

[98] Exhibit 28 (Paragraph 1251) of FSA Handbook 4-DAP (Revision 1) is Form CCC-898, which must be filled out by applicants for the Livestock Compensation Program. This form does not request information about historic production. FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[99] Authorized under: (1999 LIP) Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2000 (Public Law 106-78) and the Omnibus Consolidated Appropriations Act of 2000 [Public Law 106-113]; (2000 LIP) Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2001 (Public Law 106-387); (2005 LIP) Section 32 of the Agricultural Adjustment Act of 1935; (LIP II) Emergency Agricultural Assistance Act of 2006 (Public Law 109-234). Regulations at: (1999 LIP) 7 CFR Part 1400 (Federal Register June 8, 2000; Volume 65; Number 111); (2000 LIP) 7 CFR Part 1439 (Federal Register March 7, 2001; Volume 66; Number 45); (2005 LIP) 7 CFR Part 760 (Federal Register January 9, 2007; Volume 72; Number 5); (LIP II) 7 CFR Part 1416 (Federal Register February 12, 2007; Volume 72; Number 28).

[100] (1999 LIP) 7 CFR Part 1439 Section 1439.204 (Federal Register June 8, 2000; Volume 65; Number 111). (2000 LIP) 7 CFR Part 1439 Section 1439.206 (Federal Register March 7, 2001; Volume 66; Number 45).

[101] The Livestock Indemnity Program II is a version of the Livestock Indemnity Program; it is called "II" to distinguish it from the LIP which was authorized separately in connection with the same marketing year, 2005. The LIP and LIP II were authorized as part of the 2005 Section 32 Hurricane Disaster Programs (LIP) and the 2006 Emergency Agricultural Disaster Assistance Programs (LIP II).

[102] The FSA Handbook does not specify, for 2005 LIP and LIP II, any required loss threshold. FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[103] 7 CFR Part 760 Section 760.404 (Federal Register January 9, 2007; Volume 72; Number 5).

[104] 7 CFR Part 1416 Section 1416.200 (Federal Register February 12, 2007; Volume 72; Number 28); 7 CFR Part 760 (Federal Register January 9, 2007; Volume 72; Number 5). LIP II was notified together with the Livestock Compensation Program as "Livestock hurricanes assistance" in the 2005 notification. G/AG/N/USA.60.

36. The reference period used to determine eligible loss under the Livestock Indemnity does not examine historic production when determining eligible loss. The 1999 LIP regulations require livestock producers to submit available supporting documentation to help the county committee verify the "loss and quantity of eligible livestock that perished in the natural disaster."[105] The illustrative list of supporting documents provided in the regulations does not include anything related to past production. These facts suggest that the reference period for the 1999 Livestock Indemnity Program was the disaster year only.[106]

37. Similarly, the FSA handbook for the 2005 LIP[107] states that applicants must submit documentation of livestock deaths, including the location and time of their deaths, in order to receive benefits.[108] Applicants are not required to produce any information regarding historic production. The same FSA Handbook requires eligible livestock owners and contract growers seeking assistance under the LIP II to provide the same types of information and evidence regarding their livestock deaths, but nothing related to historic production.[109] Based on the program regulations and FSA Handbook, historic production is not taken into account by the CCC when determining eligibility.[110]

38. To sum, eligible loss and compensation are determined under the Livestock Indemnity Program and LIP II based on the number of animals lost due to the disaster, without requiring

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[105] 7 CFR Part 1439 Section 1439.204 (Federal Register June 8, 2000; Volume 65; Number 111).
[106] 7 CFR Part 1439 Section 1439.204 (Federal Register June 8, 2000; Volume 65; Number 111).
[107] The FSA Handbook 4-DAP (Revision 1) refers to this program as 2005 Hurricanes LIP.
[108] Applicants for 2005 Hurricanes LIP must submit a completed Form FSA-573, certifying the eligible livestock, the physical location of the livestock claimed during the disaster period, the physical location of the current inventory, and providing supporting documentation. The FSA Handbook for LIP implementation does not instruct local officials to take historic production into account when determining production loss for purposes of eligibility. Subparagraphs 451B and 452A, FSA Handbook 4-DAP (Revision 1), accessed on March 8,2 008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[109] Form CCC-897 is used to apply for LIP II, as described in Subparagraph 1051A of FSA Handbook 4-DAP. Subparagraph 1051A states that livestock producers must certify the number and type of eligible livestock using CCC-897, along with the physical location of the livestock claimed during the disaster periods, the physical location of the current livestock inventory. Producers must provide all supporting documentation. FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[110] The FSA Handbook states that local CCC offices, when processing LIP II applications, must confirm the following in order to grant eligibility to a producer: the claimed livestock deaths occurred in a disaster county, during the applicable disaster period, as a direct result of Hurricane Katrina, Ophelia, Wilma or Rita; the reasonableness of the livestock deaths claimed; the proof of death provided is verifiable; documentation of livestock inventory when the deaths occurred. These offices are not instructed to compare disaster-year losses to historic production when determining eligible production loss has been suffered. Form CCC-897 (Exhibit 23/Paragraph 1051 in the FSA Handbook), which must be submitted by applicants, does not include questions regarding historic production. Subparagraph 1052A, FSA Handbook 4-DAP (Revision 1), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

any specific *percentage* production loss and without comparing loss suffered during the disaster year to historic production.[111]

1.5. The Florida Hurricane Disaster Programs[112]

39. The United States claimed exemption for the Florida Hurricane Disaster Programs from reduction commitments in its 2004 notification, on the basis of paragraph 8 of Annex 2, and thus did not exempt such support from reduction commitments.[113] These three programs – the Florida Citrus Disaster Program, the Florida Fruit, Vegetable and Tropical Fruit Disaster Program, and the Florida Nursery Disaster Program – are discussed below.

40. The loss thresholds and reference period used to calculate loss, set in the programs' eligibility criteria, are different for each of the three programs which make up the Florida Hurricane Disaster Programs. They are defined in the regulations and described below. The Florida Hurricane Disaster Programs loss thresholds and reference periods are summarized in Table XX below.

[111] Regulations at (LIP 1999) 7 CFR Part 1439 Section 1435.205 (Federal Register June 8, 2000; Volume 65; Number 111);(LIP 2000) 7 CFR Part 1439 Section 1439.205 and 1439.206 (Federal Register March 7, 2001; Volume 66; Number 45) (LIP 2005) 7 CFR Part 760 Sections 760.404 and 760.405 (Federal Register January 9, 2007; Volume 72; Number 5); (LIP II 2005) 7 CFR Part 1416 Sections 1416.204 and 1416.205 (Federal Register February 12, 2007; Volume 72; Number 28).

[112] The United States notified, in 2004, three programs together as "Florida Hurricane Disaster Programs." G/AG/N/USA.60. These three programs were authorized under Section 32 of the Agricultural Adjustment Act of 1932. Regulations entitled "Notice of Program Implementation" were published in Federal Register October 29, 2004 (Volume 69; Number 204).

[113] Page 60, G/AG/N/USA.60.

Table XX. Inconsistencies of The Florida Hurricane Disaster Programs with Paragraph 8(a)

Program	Year Notified	Loss Threshold/Reference Period
Florida Citrus Disaster Program	2004	Loss threshold: 15 per cent. Reference period: 4 – 10 years of individual production or Olympic average of 5 years of county production.
Florida Fruit and Vegetable and Tropical Fruit Disaster Program	2004	Reference period: either the disaster year (fruit and vegetable producers); or 4 – 10 years of individual production or an Olympic average of 5 years of county production (tropical fruit producers).
Florida Nursery Disaster Program	2004	Loss threshold: none. Reference period: disaster year.

41. The Florida Hurricane Disaster Programs were created to compensate agricultural producers for damage resulting from the 2004 Hurricanes Charley, Francis and Jeanne. Compensation under these programs was provided to producers in certain affected counties only.[114]

1.5.8. Florida Citrus Disaster Program

42. Citrus producers maintaining groves of fruit "being trees of citrus type" who suffered "15 per cent and greater associated tree damage" are eligible for assistance under this program.[115] This loss threshold is lower than 30 per cent.

43. The regulations do not indicate the reference period used to determine eligible loss under this program, although Notice DAP-205, published by the FSA to guide implementation of the program, states "crop losses are based on a normal yield (higher of a producer's APH or county average established under 2002/2002 CDP). The county average under the 2001/2002 CDP was the Olympic average of production at the county level for the

[114]Eligible counties are the Presidentially-declared disaster counties listed in the Notice of Program Implementation, and any other such counties subsequently declared by the President. "Summary," Notice of Program Implementation.

[115]A grove is a "contiguous acre of the same citrus crop." Part IV, Notice of Program Implementation. The Florida Citrus Fruit Crop Provisions, published by the Federal Crop Insurance Corporation (FCIC), list the following products: Citrus I (early and mid-season oranges), Citrus II (late oranges juice), Citrus III (grapefruit for which freeze damage will be adjusted on a juice basis), Citrus IV (tangelos and tangerines), Citrus V (murcott honey oranges and temple oranges), Citrus VI (lemons and limes), Citrus VII (grapefruit for which freeze damage will be adjusted on a fresh fruit basis, and late oranges fresh), Citrus VIII (navel oranges). Document 09-026, accessed February 20, 2008, from http://www.rma.usda.gov/policies/2009/09026FLC.pdf.

five-year period covering 1996 through 2000.[116] The APH is determined using the simple average of production during a reference period of four to ten years or using country data.

1.5.9. Florida Vegetable, Fruit and Tropical Fruit Disaster Program

44. Under this program, producers of vegetables, fruits, and selected tropical fruits are eligible to receive payments, provided they suffered production losses in excess of 50 per cent.[117] The reference period for determining eligible loss of fruits and vegetables is different from the period used to determine loss of tropical fruits.

45. The loss threshold for fruits and vegetable producers is "50 per cent or more of the *plant population* at the time of the disaster."[118] Although they are required to document the extent of their loss and demonstrate that they used necessary materials and procedures to grow their fruits and vegetables, producers are not required to submit any information regarding their historic production.[119] Based on Notice DAP-25, an FSA document which provides guidelines as to how to implement the Florida Disaster Programs, fruit and vegetable losses are determined based on production during the disaster year only. It states

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[116] Page 8, Notice DAP-205, a document issued by the FSA regarding implementation of the Florida Disaster Programs. Notice DAP-205 was downloaded on April 18, 2008, from USDA website: http://www.fsa.usda.gov/Internet/FSA_Notice/dap_205.pdf. Regulations governing county average calculation for 2001/2002 CDP are at 7 CFR Part 1480 Sections 1480.3 (Federal Register June 26, 2003; Volume 68; Number 123).

[117] Part VI, Notice of Program Implementation.

[118] For fruits and vegetables, eligible loss is defined based on the "type of planting application or method installed and completed on the date and time the hurricanes occurred in that area." Producers who plant "conventional row crop fruits and vegetables" must have suffered a loss of 50 per cent or more of the "plant population" at the time of the disaster. Producers using "plasticulture" must have a loss that is 50 per cent or greater of "plastic or plant population, as applicable." The FSA Handbook for a later Fruit and Vegetable Disaster Program [Subparagraph 1026B] states that ""plasticulture" refers to production practices where the soil has been bedded, fumigated, fertilized, and covered with plastic mulch." [Additional definition of plasticulture: "The term plasticulture is defined as the use of plastics in agriculture. This broad term would include plastic film mulches, drip irrigation tape, row covers, low tunnels, high tunnels, silage bags, hay bale wraps, and plastic trays and pots used in transplant and bedding plant production." "The use of plasticulture in the production of horticultural crops (vegetables, small fruits, flowers, tree fruits, and ornamentals) helps to mitigate the sometime extreme fluctuations in weather, especially temperature, rainfall and wind, which occurs in may parts of North America." "An Introduction to Plasticulture," by Dr. Michael D. Orzolek, American Society of Plasticulture website (http://www.plasticulture.org), accessed on February 20, 2008.] Four types of plasticulture are cited in the regulations; for each type of plasticulture, a slightly different approach is used to measure the required 50 per cent production loss. Part VI, Notice of Program Implementation.

[119] In contrast to fruit and vegetable producers, tropical fruit producers are required to submit information regarding historic production. Part VI, Notice of Program Implementation. Under the 2006 Fruit and Vegetable Disaster Program, created as part of the 2006 Emergency Agricultural Disaster Assistance Programs, the loss threshold for fruit and vegetable producers is measured based on producers' "crop production losses" or "crop damage", rather than based on the loss of "plant population." The different choice of words in the regulations for the Florida program - loss of "plant population" – suggests a reference period of the disaster year. 7 CFR Part 1416 Section 1416.402; Part VI, Notice of Program Implementation.

that loss is determined based on the loss of “plant population.”[120] In addition, the FSA form used to apply for benefits under this program requires only that producers certify their level of loss and specify the number of acres for which there was a 50% or greater loss of plant population due to the disaster.[121]

46. The approach used to determined eligible loss is different for tropical fruit producers. The regulations state that, in order to be eligible for benefits, these producers must have suffered a loss in excess of 50 per cent of their “expected production.”[122] The program regulations define “expected production” differently, depending on whether the producer is participating in the Federal Crop Insurance Program or the NAP.[123] For producers of insured or non-insurable tropical fruits, it is defined as the higher of the county average or the producer’s Actual Production History (APH); for uninsured producers it is the county average.[124] The “county average” is defined in the regulations as the simple average of county production during the five-year period from 1996 through 2000.[125] Therefore, the reference period for tropical fruits is either a simple average of the producer’s production during the previous four to ten years, or the simple average of five years of production history at the *county* level.

1.5.10. Florida Nursery Disaster Program

47. Under this program, commercial ornamental nursery and fernery producers are eligible for assistance for inventory losses for each nursery or fernery operation and clean-up costs for nursery operations.[126] According to the regulations, producers are compensated for

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[120] Page 14, Notice DAP-25, downloaded from the USDA website on April 18, 2008: http://www.fsa.usda.gov/Internet/FSA_Notice/dap_205.pdf.
[121] Page 14, Notice DAP-25, downloaded from the USDA website on April 18, 2008: http://www.fsa.usda.gov/Internet/FSA_Notice/dap_205.pdf.
[122] The Notice of Program Implementation refers to 7 CFR Part 1480 Section 1480.3, which sets forth the regulations implementing the 2000 Crop Disaster Program.
[123] The program regulations refer to the definition of “expected production” at 7 CFR Part 1480 Section 1480.3.
[124] 7 CFR Part 1480 Section 1480.3 contains the program regulations for the 2001 - 2002 Crop Disaster Program. These regulations define “expected production” as the higher of the county average or the producer’s Actual Production History (for NAP participants and producers of insured crops) or the county average (for producers of uninsured crops). The county average for the 2001-2002 CDP is the simple average of county-level production, determined by the CCC, for the five-year period 1996-2000. 7 CFR Part 1480 Section 1480.3 (Federal Register June 26, 2003; Volume 68; Number 123). This reference period is confirmed by Notice DAP - 25, which states “crop losses are based upon a normal yield (higher of a producer’s APH or county average established under the 2001/2002 CDP). Page 15, Notice DAP-25, downloaded from the USDA website on April 18, 2008: http://www.fsa.usda.gov/Internet/FSA_Notice/dap_205.pdf.
[125] 7 CFR Part 1480 (Federal Register June 26, 2003; Volume 68; Number 123).
[126] Part V, Notice of Program Implementation.

the value of the inventory lost, along with clean-up costs for debris removal, regardless of whether their production loss exceeded *30 per cent* of production.[127]

48. The reference period used to determine eligible loss under the Florida Nursery Disaster Program is calculated based on the "beginning and ending inventory value" of each nursery, rather than by comparing production during the disaster year to historic production. The regulations state that "producers must provide the inventory value before the hurricane and the inventory value after the hurricane;" eligibility is therefore determined based on the disaster year only.[128] Notice DAP-205, a document containing guidelines for implementation of the program, states that the "value of the beginning and ending inventory shall be calculated using the value loss provisions in 1-NAP (Rev 1)."[129] As discussed above under Section XX, value loss under the Non-insured Crop Assistance Program is calculated using a reference period of one year.

1.6. The 2005 Hurricane Disaster Programs[130]: Hurricane Indemnity Program, Tree Indemnity Program

49. The United States claimed that the Hurricane Indemnity Program and the Tree Indemnity Program are green box disaster assistance programs exempt from reduction commitments, under paragraph 8 of Annex 2. The Tree Indemnity Program and the Hurricane Indemnity Program are summarized in the Table XX.

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[127] Part V, Notice of Program Implementation.

[128] Part V, Notice of Program Implementation.

[129] Page 11, Notice DAP-205. Notice DAP-205 downloaded from the USDA website on April 18, 2008: http://www.fsa.usda.gov/Internet/FSA_Notice/dap_205.pdf. FSA Handbook 1-NAP (Revision 1) accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk. As discussed above under [Section XX], under the NAP "value loss" is measured based on the field market value of the crop at the time of the disaster. This is confirmed by the FSA Handbook 1-NAP and by the NAP program regulations, which state that "assistance for these commodities is provided based on the loss of value at the time of the disaster." 7 CFR Part 1437 Section 1437.202 (Federal Register March 19, 2002; Volume 67; Number 53); 7 CFR Part 1437 Section 1437.302 (Federal Register March 19, 2002; Volume 67; Number 53).

[130]The United States notified four programs under the heading "2005 Hurricanes Disaster Programs": the Hurricane Indemnity Program and Tree Indemnity Program, along with the Livestock Indemnity Program and Feed Indemnity Program. These four programs were authorized under Section 32 of the Agricultural Adjustment Act of 1935. Regulations are at 7 CFR Part 760 (Federal Register January 9, 2007; Volume 72; Number 5).

Table X. Inconsistencies of The 2005 Section 32 Hurricane Disaster Programs With Paragraph 8(a)

Program	Year Notified	Loss Threshold/Reference Period
Tree Indemnity Program	2005	Loss threshold: $90 costs incurred per acre. Reference period: disaster year.
Hurricane Indemnity Program	2005	Loss threshold: 15 per cent. Reference period: either 4-10 years or the disaster year.

50. The 2005 Section 32 Hurricane Disaster Programs were created to compensate producers for losses suffered in the counties most affected by the 2005 hurricanes Dennis, Rita, Katrina, Ophelia and Wilma.[131] The Section 32 Hurricane Disaster Programs include four programs, two of which, the Tree Indemnity Program (TIP) and Hurricane Indemnity Program (HIP), are discussed below.[132]

51. The loss threshold and reference period used to determine eligible loss are different under the Hurricane Indemnity Program and Tree Indemnity Program.

1.6.11. Tree Indemnity Program

52. Under the Tree Indemnity Program (TIP), eligible producers are compensated for eligible fruit trees, bushes and vines that were lost or damaged during the disaster period.[133] According to the program regulations, to be eligible for payments, a producer's trees, bushes and vines must have been "impacted during a 2005 hurricane," and the producer must have incurred at least $90 per acre in replanting, rehabilitation, and cleanup costs as a result.[134] $90 per acre represents a different percentage of production loss depending on the producer and is undoubtedly, in some cases, less than 30 per cent.

[131] Only producers in certain counties in Alabama, Florida, Louisiana, Mississippi, North Carolina and Texas were eligible. "Summary," 7 CFR Part 760 (Federal Register January 9, 2007; Volume 72; Number 5).
[132] The other two programs which make up the Section 32 Hurricane Disaster Programs, the Feed Indemnity Program (FIP) and the Livestock Indemnity Program (LIP), are addressed above in [Section XX], together with other livestock programs.
[133] "Supplementary Information," 7 CFR Part 760 (Federal Register January 9, 2007; Volume 72; Number 5).
[134] 7 CFR Part 760 Section 760.502 (Federal Register January 9, 2007; Volume 72; Number 5). "To qualify for TIP, an eligible fruit tree, bush and/or vine producer is one who bears financial responsibility and shows stand has incurred damage of at least $90 per acre for replanting, rehabilitation, cleanup or debris removal, excluding crop production." FSA Handbook 5-DAP (Revision 1) Subparagraph 731B. Producers are categorized in "Tiers" depending on the geographic location of their stands of trees, vines or bushes. Each Tier consists of counties having suffered a similar level of destruction due to the natural disaster. Each Tier is assigned a level of costs incurred for replanting, rehabilitation, cleanup and debris removal; this serves as one of the bases for assessing eligibility and payment rates, along with supporting evidence provided by the producer. For instance, Tier I represents the highest level of damage: at least $750 per acre in costs incurred. Subparagraph 732A, FSA Handbook 5-DAP (Revision 1), accessed at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk on March 8, 2008.

53. In addition, the reference period for determining eligible loss is one year. The FSA Handbook regarding implementation of this program does not instruct officials implementing TIP to compare production during the disaster year to historic production levels as part of determining loss for purposes of eligibility. Applicants are required to certify and provide proof that the damage to eligible fruit trees, bushes or vines and related expenses was incurred during the applicable disaster period, and that the loss or damage was a direct result of a 2005 hurricane.[135] They are required to submit supporting documentation regarding the quantity and kind of fruit trees, bushes and vines affected, and the geographic location and number of acres in the disaster-affected stands, but they are not required to submit information regarding historic production.[136] Based on this evidence, a reasonable inference is that the reference period is the disaster year only.

1.6.12. Hurricane Indemnity Program

54. Under the Hurricane Indemnity Program (HIP), benefits are provided to producers of insured crops who received a crop insurance indemnity from the Risk Management Agency (RMA) and to producers of non-insurable crops who received a NAP payment.[137] The regulations state that, to receive benefits, producers must have received an RMA or NAP payment for crop losses in an eligible county, which occurred during a disaster period, due to the causes of loss listed in the HIP regulations.[138] This means that the loss threshold and reference period used to determine eligible production loss under the HIP are the same as those used for the NAP and the Federal Crop Insurance Program.

55. The loss threshold under the Federal Crop Insurance Program ranges from 50 per cent, under the most basic crop insurance policy (CAT), to as low as 15 per cent for producers who purchase a higher level of insurance coverage. 15 per cent is the loss threshold for producers who purchase a policy with “85 per cent coverage;” with this level of coverage, a producer who has suffered a *15 per cent* production loss would be eligible to

[135] 7 CFR Part 760 Section 760.503 (Federal Register January 9, 2007; Volume 72; Number 5).
[136] The list of supporting evidence which may be submitted to CCC, provided in Section 760.503, does not include any historic production records: “purchase records; bank or other loan documents; Federal Emergency Management Agency and National Guard records; IRS records; property tax records; private insurance documents; and simlar documents.” 7 CFR Part 760 Section 760.503 (Federal Register January 9, 2007; Volume 72; Number 5).
[137] 7 CFR Part 760 Section 760.201 (Federal Register January 9, 2007; Volume 72; Number 5).
[138] 7 CFR Part 760 Section 760.202 (Federal Register January 9, 2007; Volume 72; Number 5).

receive an indemnity from the RMA.[139] In addition, RMA indemnities for prevented planted may be paid to producers claiming acreage of at least 20 acres or *20 per cent* of the insured acreage.[140] This means that the loss thresholds used to determine eligibility under the Crop Insurance Program are provided on the same basis as HIP payments.

56. The reference periods for calculating loss under the Hurricane Indemnity Program are based on the periods used under the NAP and Federal Crop Insurance Program. Production loss is calculated differently under the NAP based on the type of production loss; it is determined based on either the "approved yield," which is the simple average of the producer's previous four to ten years of production, or the disaster year.[141] Under the Crop Insurance Program, the "approved yield" is also the basis for calculating eligible loss; this means the reference period for producers of insured crops is four to ten years, for purposes of the HIP.[142] The reference period under the Hurricane Indemnity Program is therefore either four to ten years or one year (the disaster year).

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[139] 85 per cent is the highest available coverage under the Federal Crop Insurance Program, available if a farmer participating in the CAT chooses to "buy up", or purchase additional coverage. "Overview" page of the USDA website, accessed on April 9, 2008, at http://www.rma.usda.gov/policies/.

[140] "Summary of Changes For The Common Crop Insurance Policy Basic Provisions – Reinsured Version (04-BR)." Accessed on March 4, 2008, at RMA website http://www.rma.usda.gov/FTP/Policies/2004/ra/PDF/04BRBASI.pdf.

[141] As described above in [Section XX], under the NAP, the reference periods for calculating loss are as follows. For prevented planted loss, the reference period is one year, the disaster year; for low yield, the reference period is the "approved yield," which is calculated as the simple average of four to ten years of production history; for value loss, the reference period is one year, the disaster year; for AUD loss, the reference period is either four to ten years or one year, the disaster year. The loss thresholds under the NAP are as follows: "(i) prevented planted of greater than 35 per cent of the intended crop acreage; a yield loss of greater than 50 per cent of the approved yield; or value loss of greater than 50 per cent of the pre-disaster value; or (ii) AUD loss of greater than 50 per cent of the expected AUD." 7 CFR Part 1437 (Federal Register March 19, 2002; Volume 67; Number 53).

[142] The Actual Production History (APH) Coverage Program is implemented in accordance with the provisions in 7 CFR Part 457 for purposes of the Federal Crop Insurance Program; the "approved yield" is the basis for calculating loss under the Actual Production History Coverage Program (7 CFR Part 457). The calculation of APH for purposes of the NAP is detailed in separate regulations, found at 7 CFR Part 1437.101, entitled "Determining Yield Coverage using Actual Production History."

1.7. The "Specialty/Nursery Hurricanes Disaster Programs"[143]

57. The Citrus Disaster Program, Tropical Fruit Disaster Program, Nursery Disaster Program, and Fruit and Vegetable Disaster Program were notified collectively by the United States as green box support under paragraph 8(a) of Annex 2, in 2005, as the "Specialty/nursery hurricanes disaster programs."[144] Table XX summarizes the loss thresholds and reference periods of the these programs. This section also describes the inconsistencies of a fifth program, created together with these programs, which was not notified by the United States: the Hurricane Tree Assistance Program.[145]

Table X. The 2006 Hurricane Assistance Program

Program	Year Notified	Loss Threshold/Reference Period
Citrus Disaster Program	2005	Loss threshold: 15 per cent. Reference period: 4 – 10 years of individual production or an Olympic average of 5 years of county production.
Tropical Fruit Disaster Program	2005	Reference period: 4 – 10 years of individual production or an Olympic average of 5 years of county production.
Nursery Disaster Program	2005	Loss threshold: none. Reference period: disaster year.
Fruit and Vegetable Disaster Program	2005	Loss threshold: 15 per cent. Reference period: 4 – 10 years of individual production or an Olympic average of 5 years of county production.
Hurricane Tree Assistance Program	2005	Loss threshold: 15 per cent. Reference period: disaster year.

[143] The United States notified, in 2005, four programs together as one entry entitled"Specialty/nursery hurricane disaster programs." Page 88, G/AG/N/USA.60. According to the US Notification G/AG/N/USA.59 (page 20), this single entry includes domestic support provided under the Citrus Disaster Program, Nursery Disaster Program, Fruit and Vegetable Disaster Program, and Tropical Fruit Disaster Program. The Hurricane Tree Assistance Program, authorized at the same time in connection with the same disasters, in support of the same disaster-stricken counties, was not notified. See 7 CFR Part 1416 (Federal Register February 12, 2007; Volume 72; Number 28). Two livestock programs were also authorized as part of "2006 Emergency Disaster Assistance." In its 2005 notification, the United States grouped the two livestock programs, the Livestock Indemnity Program II and Livestock Compensation Program, notifying them as one entry entitled "Livestock hurricane assistance." G/AG/N/USA.60. These livestock programs are discussed above under [Cross reference section] together with other livestock assistance.

[144] G/AG/N/USA.60 page 20; G/AG/N/USA.59 page 88.

[145] The Hurricane Tree Assistance Program was created in response to the same 2005 hurricanes Katrina, Ophelia, Rita and Wilma, to help producers in the same counties recover from disaster-related losses. Regulations at 7 CFR Part 1416 Section 1416.700 - 705 (Federal Register February 12, 2007; Volume 72; Number 28).

58. The 2006 Hurricane Assistance Programs compensate producers of crops and livestock for losses resulting from the 2005 Hurricanes Katrina, Ophelia, Rita and Wilma.[146] Benefits are available only to producers in counties that were designated a major disaster or emergency area by the President or a natural disaster area by the Secretary of Agriculture.[147]

59. The eligibility criteria relevant to the paragraph 8(a) analysis are different for each of the programs, as defined in the regulations and described below.[148]

1.7.13. Citrus Disaster Program

60. This program compensates citrus producers who suffered citrus crop production losses and associated fruit-bearing tree damage.[149] Producers must have suffered at least *15 per cent* "associated tree damage" to receive benefits.[150]

61. The reference periods used to calculate eligible loss under the Citrus Disaster Program are set out in the FSA Handbook: "Crop losses are based on a normal yield (higher of a producer's APH or county average yield established for 2003/2004/2005 CDP)."[151] A producer's Actual Production History (APH) is the simple average of his production during the previous four to ten year period, and the county average under the 2003/2004/2005 Crop Disaster Program is a five-year Olympic average of production at the county level.[152] This means the reference period used to determine loss under the Citrus Disaster Program is either four to ten years of individual production, or five years of *county* production.

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[146] Authorized under the 2006 Emergency Agricultural Disaster Assistance Act (Public Law 109-234). Program regulations are at 7 CFR Part 1416 (Federal Register February 12, 2007; Volume 72; Number 28).
[147] 7 CFR Part 1416 (Federal Register February 12, 2007; Volume 72; Number 28).
[148] 7 CFR Part 1416 (Federal Register February 12, 2007; Volume 72; Number 28).
[149] 7 CFR Part 1416 Section 1416.302 (Federal Register February 12, 2007; Volume 72; Number 28).
[150] 7 CFR Part 1416 Section 1416.302 (Federal Register February 12, 2007; Volume 72; Number 28). Production loss under this program is measured based on the producer's "Tier." Producers are grouped into Tiers under this program, based on their geographic location, with each Tier representing the extent of damage suffered in the county where the producer's grove of trees is located. Producers may be moved to another Tier if they suffered individual losses above or below the percentage loss relevant to the Tier where they would be categorized based on geographic location alone. Categorization of a county in Tier I reflects a crop loss of 75 per cent or greater, while categorization in Tier IV indicates "15 per cent or greater tree loss or associated damage." The producer's Tier is used, along with supporting evidence provided by the producer, to determine whether the production loss meets the criteria for eligibility, and to determine the amount of compensation due. Subparagraph 1016D, FSA Handbook 5-DAP (Revision 1), accessed March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[151] Subparagraph 1018A, FSA Handbook 5-DAP (Revision 1) accessed at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk on March 8, 2008. The county average for the 2003-2005 Crop Disaster Program is the Olympic average of production at the county level 1998-2002. 7 CFR Part 1479 Section 1479.102 (Federal Register March 29, 2005, Volume 70, Number 59).
[152] Regulations setting forth the reference period for the 2003-2005 CDP are at: 7 CFR Part 1479 Sections 1479.102, 1479.108, 1479.110 (Federal Register March 29, 2005; Volume 70; Number 59) [Cross-reference].

1.7.14. Tropical Fruit Disaster Program

62. Producers of carambola, longan, lychee and mangoes who suffer and demonstrate a production loss of at least 50 per cent of "commercial production," due to an eligible hurricane, are compensated under this program.[153]

63. The reference periods used to calculate eligible loss is measured by comparing disaster-year production to either the average of the individual producer's production during the previous four to ten year period, or an Olympic average of *county* level production during a five year period.[154]

1.7.15. Nursery Disaster Program

64. Commercial ornamental fernery and nursery producers are compensated under this program for inventory losses and clean-up costs.[155] According to the program regulations and the FSA Handbook regarding implementation of this program, eligibility does not depend on a producer having suffered a production loss above a certain threshold. The FSA Handbook lists the conditions for eligibility: "Eligible nursery operations must be physically located in an eligible county; have inventory losses because of an eligible cause of loss; meet all applicable state nursery licensing requirements; grow for commercial purposes."[156] The program regulations state that loss is determined based on the inventory value before and after the hurricane, and the actual level of crop loss and cleanup costs reported by the producer.[157] Producers are eligible if they lost inventory as a result of an eligible disaster, regardless of whether their loss represents a *30 per cent* production loss.

[153] 7 CFR Part 1416 Section 1416.502 (Federal Register February 12, 2007; Volume 72; Number 28).
[154] The FSA Handbook for implementation of this program states: "Crop losses are based on a normal yield (higher of a producer's APH or county average yield established for 2003/2004/2005 CDP)." Subparagraph 1038A, FSA Handbook 5-DAP (Revision 1), accessed at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk on March 8, 2008. The county average for this CDP is the Olympic average of production at the county level 1998-2002. 7 CFR Part 1479 Section 1479.102 (Federal Register March 29, 2005, Volume 70, Number 59).
[155] 7 CFR Part 1416 Section 1416.601 (Federal Register February 12, 2007; Volume 72; Number 28).
[156] Subparagraph 1046B, FSA Handbook 5-DAP (Revision 1), accessed March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[157] 7 CFR Part 1416 Section 1416.601 (Federal Register February 12, 2007; Volume 72; Number 28). Subparagraph 1047B of the FSA Handbook for this program requires applicants to certify their beginning and ending inventory (pre-disaster and post-disaster inventories); number of acres eligible for cleanup assistance; the producer's share; actual level of crop loss and cleanup costs related to an eligible hurricane; applicable crop losses and incurred crop loss expenses were equal to or greater than the producer's claimed tier; and to certify that no other federal program payment was received for the same crop loss. FSA Handbook 5-DAP (Revision 1), accessed March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

65. With respect to the reference period calculating eligible loss, producers are required to report to the CCC their inventory value before and after the hurricane, along with the geographic location and number of acres in the disaster-affected area, but they are not required to submit information regarding their historic production.[158] Eligible loss is determined based on the "inventory losses" suffered as a result of the disaster, which are measured by looking at the beginning and ending inventory.[159] This evidence suggests that the reference period is one year, the disaster year.

1.7.16. Fruit and Vegetable Disaster Program

66. Producers of fruits and vegetables using "plasticulture" and production practices "other than plasticulture" are eligible for assistance under this program.[160] Producers are eligible for payments provided they suffered "15 per cent or more associated crop damage."[161]

67. The reference period used to calculate eligible loss under the Fruit and Vegetable Disaster Program is either the average of the individual producer's production during the previous four to ten year period, or an Olympic average of *county* level production during the five year period 1998-2002.[162]

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[158] 7 CFR Part 1416 Section 1416.601 (Federal Register February 12, 2007; Volume 72; Number 28). Subparagraphs 1047A and B, FSA Handbook 5-DAP (Revision 1), accessed March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[159] Subparagraph 1047B, FSA Handbook 5-DAP (Revision 1), accessed March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk. Subparagraph 1085C lists the steps that a county official must take when registering a nursery producer for benefits under this program: enter producer's share of disaster affected nursery; "enter pre-hurricane dollar inventory value; enter post-hurricane dollar inventory value; enter total number of acres in the nursery." This illustrates that production during the disaster year only is used to determine prodution loss for purposes of eligibility and compensation.

[160] 7 CFR Part 1416 Section 1416.402 (Federal Register February 12, 2007; Volume 72; Number 28).

[161] "15 per cent or more associated crop damage" is also referred to in the regulations as "15 per cent or more crop and/or field damage." 7 CFR Part 1416 Section 1416.402 (Federal Register February 12, 2007; Volume 72; Number 28). Production loss under this program is measured based on the producer's "Tier," which represents the extent of damage suffered in the county where the producer's farm is located. Producers may be moved to another Tier if they suffered individual losses above or below the percentage loss in the Tier where they would be categorized based on geographic location alone. Categorization of a county in Tier I under this program reflects a 60 per cent loss of production and associated crop loss. The producer's Tier is used, along with supporting evidence provided by the producer, to determine the amount of production loss, [for purposes of eligibility and compensation.] FSA Handbook 5-DAP (Revision 1) Subparagraph 1028A. Accessed March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[162] "Crop losses are based on a normal yield (higher of a producer's APH or county average yield established for 2003/2004/2005 CDP)." Subparagraph 1028A, FSA Handbook 5-DAP (Revision 1), accessed at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk on March 8, 2008. The county average for the 2003-2005 Crop Disaster Program is the Olympic average of production at the county level for the crop years 1998-2002. 7 CFR Part 1479 Section 1479.102 (Federal Register March 29, 2005, Volume 70, Number 59).

1.7.17. Hurricane Tree Assistance Program (TAP)

68. Under this program, producers are reimbursed for the cost of replanting eligible stands of trees, vines and bushes which were lost due to a natural disaster, provided they do so within 12 months of the date of approval of their application.[163] To qualify as an "eligible stand," a stand of trees, bushes and vines must have been "impacted during an eligible disaster", must have suffered "qualifying tree, bush or vine losses of *15 per cent* or greater for the individual stand," must have been grown for commercial use, and must have been physically located in an eligible county.[164]

69. The reference period for determining eligible loss under the Hurricane TAP is based on program regulations and the FSA Handbook for the Hurricane Tree Assistance Program. Eligible production loss is assessed based on the "actual loss" suffered. The FSA Handbook instructs local FSA officials to conduct field visits to ensure the 15 per cent tree loss threshold has been met by an applicant: "the FSA representative shall verify the *actual number* of trees in the stand, and *actual trees lost* because of an eligible hurricane to ensure that the correct eligible loss threshold calculation is made."[165] The example provided in the FSA Handbook of how to determine loss, for purposes of eligiblity, illustrates that production loss is determined using only the disaster year as a reference.[166]

1.8. The Sugar Beet Disaster Program[167]

70. In its 2002 notification, the United States improperly claimed exemption for domestic support provided under the Sugar Beet Disaster Program. The Sugar Beet Disaster Program was authorized in 2003 to compensate producers for weather-related losses in 2001 or

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[163] Subparagraph 167D, FSA Handbook 1-TAP (Revision 2), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[164] 7 CFR Part 1416 Section 1416.702 (Federal Register February 12, 2007; Volume 72; Number 28). "Eligible stands must: by physically located in an eligible disaster county; have been impacted by an eligible cause of loss according to Subparagraph 166B during the disaster period listed in Exhibit 10; be grown for commercial use; suffer qualifying tree, bush or vine losses of 15% or greater for the individual stand." Subparagraph 167B, FSA Handbook 1-TAP (Revision 2), accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[165] Subparagraph 192A, FSA Handbook 1-TAP, accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[166] The applicant in the example has a stand of 1,000 trees, with 400 "actual trees lost." The FSA Handbook states that because he suffered a loss above the 15 per cent threshold of 150 trees, this producer qualifies for assistance. Subparagraph 192A, FSA Handbook 1-TAP, accessed on March 8, 2008 at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

[167] Authorized under the Agricultural Assistance Act of 2003 (Public Law 108-7). Regulations are at 7 CFR Part 1481 (Federal Register August 18, 2003; Volume 68; Number 159).

2002.[168] Producers who suffered losses of more than 35 per cent of sugar beets in 2001 or 2002 as the result of a weather-related condition could apply for benefits in connection with one of the two marketing years.[169]

71. With respect to the reference period for determining whether a producer has suffered loss, all producers were required to submit "proof of loss" documentation, quantifying and explaining the losses suffered.[170] The regulations provide for a different approach to determining loss for *insured* and *uninsured* producers. For insured producers, RMA loss records were used as "proof of loss", which suggests that the reference period used to calculate loss under the Federal Crop Insurance Program, four to ten years, was also the reference period for *insured* producers under this program.[171]

72. *Uninsured* sugar beet producers applying for benefits under this program were required to submit documentation regarding the number of acres, yield, production, and sugar per cent by unit for 2001 and 2002.[172] According to the program regulations, they were not required to submit information regarding their historic production, and the regulations do not indicate that historic production was taken into account as part of determining production loss and eligibility. For them, the reference period appears to have been the disaster year only.

1.9. The Tree Assistance Program

73. The United States improperly claimed exemption, on the basis of paragraph 8 of Annex 2, for domestic support provided under the Tree Assistance Programs for the years 1999, 2000, and 2001. Support was provided under this program to compensate producers of trees, bushes, and vines for losses resulting from natural disasters; lacking permanent authority, it was authorized on an annual basis.[173] Evidence indicates that such assistance was provided for the years 1999, 2000, and 2001 on the basis of the regulations for the 1997

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[168] This program was notified by the United States in the 2002 notification, even though producers could request compensation under this program for losss suffered in *either* the 2001 or 2002 marketing year.
[169] 7 CFR Part 1481 Section 1481.4 (Federal Register August 18, 2003; Volume 68; Number 159).
[170] 7 CFR Part 1481 Sections 1481.6 and 1481.7 (Federal Register August 18, 2003; Volume 68; Number 159).
[171] [Regulations]. The Actual Production History, a simple average of four to ten years of historic production, is used as the reference period under the Federal crop insurance program.
[172] 7 CFR Part 1482 Section 1481.6 (Federal Register August 18, 2003; Volume 68; Number 159).
[173] For instance, tree assistance was authorized under the Dire Emergency Supplemental Appropriations Act, 1992 (Public Law 102-368), the Emergency Supplemental Appropriations Act of 1994 (Public Law 103-211); The Emergency Supplemental Appropriations for Recovery from Natural Disasters for the Fiscal Year Ending September 30, 1997 (Public Law 105-18); The Supplemental Appropriations Act for the Fiscal Year Ending September 30, 1998 (Public Law 105-174). CRS Report no. RL 31095, "Emergency Funding for Agriculture: A Brief History of Supplemental Appropriations, FY1989 – FY2006. July 3, 2006, by Ralph M. Chite.

Tree Assistance Program. No information is availbale to identify separate regulations implementing tree assistance for the 1999, 2000, and 2001 marketing years.

74. The Tree Assistance Program was first authorized by the Disaster Assistance Act of 1988.[174] This program provided compensation to producers for the replanting of forests and orchards that were lost due to natural disasters, provided they suffered a loss of at least 35 per cent tree mortality.[175] The 1997 Emergency Supplemental Appropriations Act[176] authorized and funded a Tree Assistance Program for FY1997 losses; at this time, the regulations governing the Tree Assistance Program were revised to lower the loss threshold to 20 per cent and to modify the cost-share payments provided to producers.[177] The regulations were revised again in 2004, to implement the Tree Assistance Program created in 2002 under the 2002 FSRI Act. At this time, the loss threshold for eligibility was lowered again, to 15 per cent.[178]

75. Under the 1997 Tree Assistance Program, producers whose eligible trees or vines sustained a loss in excess of 20 per cent, after adjustment for normal mortality, were compensated for a portion of the cost of replanting and rehabilitation.[179] "Qualifying loss" was defined in the regulations as the loss of the individual stand of eligible trees, or eligible vines, after deducting the normal mortality of such trees or vines, equal to or in excess of *20 per cent* mortality.[180]

76. The reference period for calculating eligible loss is not defined in the regulations, although "total mortality" is defined as the "actual percentage of eligible tree or eligible vine losses on a given individual stand."[181] The section of the regulations describing "qualifying loss" does not reference historic production. Rather, it appears that the number of trees

[174]Disaster Assistance Act of 1986 (Public Law 100-387). CRS Report 98682, "Farm Disaster Assistance: USDA Programs and Recent Legislative Action," by Ralph M. Chite, November 4, 1998.
[175] Page 4, CRS Report 98682.
[176] Page 4, 1997 Emergency Supplemental Appropriations Act (Public Law 105-18). CRS Report 98682.
[177]"Tree Assistance Program for 1997." Notice RIN 0560-AF17, published by the Department of Agriculture Regulatory Review Group. Program regulations for TAP 1997 are at 7 CFR 783 (Federal Register September 29, 1997; Volume 62; Number 188).
[178] 7 CFR 783 (Federal Register March 2, 2004; Volume 69; Number 41).
[179] 7 CFR Part 783 (Federal Register September 29, 1997; Volume 62; Number 188). "Adjusted for normal mortality" means that if the loss threshold is 20% and the normal mortality rate is 3%, a producer must have suffered a loss of 23% to be eligible for benefits. This is explained in FSA Handbook 1-TAP (Revision 2) published in connection with the TAP authorized under the 2002 Farm Bill, and subsequent Tree Assistance Programs authorized on this basis. FSA Handbook 1-TAP (Revision 2) accessed on March 8, 2008, at http://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.
[180] 7 CFR Part 783 Section 783.6 (Federal Register September 29, 1997; Volume 62; Number 188).
[181] 7 CFR Part 783 Section 783.3 (Federal Register September 29, 1997; Volume 62; Number 188).

which existed in the stand when the disaster struck and which were lost due to the natural disaster was the basis for determining production loss. The reference period appears to have been the disaster year only.

77. Evidence suggests that 1999, 2000, and 2001 Tree Assistance Programs were implemented based on the regulations governing the 1997 TAP. As discussed above, those loss thresholds and reference periods are not those set out in paragraph 8(a). To the extent that tree assistance in 1999, 2000, and 2001 was provided on the basis of these same regulations, then the same conditions would apply.

78. In its recent notifications, the United States has acknowledged that Tree Assistance Programs with a loss threshold lower than the required threshold under paragraph 8(a) constitute non-exempt domestic support. In 2002, a Tree Assistance Program (TAP) was created under the FSRI Act and, on the basis of this authority, several TAP programs were funded between 2002 and 2005.[182] This program was properly notified by the United States as amber box domestic support for the years 2002, 2004, and 2005,[183] since the loss threshold of *15 per cent* under this program is inconsistent with the requirements of paragraph 8(a).

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[182] The Tree Assistance Program was created under the Farm Security and Rural Investment (FSRI) Act of 2002 (Public Law 107-171). Programs funded on the basis of this authority include: Michigan Fireblight TAP (2003), TAP in connection with wildfires in California and ice storms in New York (2003), TAP for orchardists, forest land owners (2004), TAP for pecan tree producers (2004), and Hurricane TAP (2005). These programs were all notified by the United States as amber box domestic support. Pages 14, 70, 98, G/AG/N/USA.60.

[183] Pages 14, 70, 98, G/AG/N/USA.60.