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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Parts 759 and 762

Rural Utilities Service

Rural Housing Service

Rural Business-Cooperative Service

Farm Service Agency

7 CFR Part 1945

RIN 0560-AH17

Disaster Designation Process

AGENCY: Farm Service Agency, Rural Business-Cooperative Service, Rural Housing Service, and Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Farm Service Agency (FSA) is revising its disaster designation regulations, with minor changes from the proposed rule. The rule simplifies procedures for Secretarial designations of disaster areas. This rule includes provisions for nearly automatic disaster designation in the case of severe drought. The rule also provides procedures FSA may use to delegate disaster designation authority to FSA State level officials. The rule removes the requirement that a State Governor or Indian Tribal Council must request a Secretarial disaster designation before a designation can be made. Also, this rule moves the disaster designation regulations to the same chapter of the Code of Federal Regulations (CFR) as the FSA Emergency Loan (EM) Program regulations.

FSA expects that the simplified process will result in faster designations of disaster areas, and result in more timely disaster assistance.

DATES: This rule is effective on July 12, 2012.

FOR FURTHER INFORMATION CONTACT: Steve Peterson; telephone: (202) 720-7641. Persons with disabilities who require alternative means for communications (Braille, large print, audio tape, etc.) should contact the USDA Target Center at (202) 720-2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

#### Background

This final rule amends procedures for designating counties as disaster areas. Some USDA programs past and present, administered by FSA have eligibility criteria that include whether losses occurred within a disaster area. For example, the Secretary of Agriculture is authorized to make emergency loans available (7 U.S.C. 1961) to farmers whose operations have been substantially affected by a natural disaster in a designated disaster county. Disaster designations have been used to qualify producers in those counties for other programs, such as certain crop disaster payment programs under past legislation and it is possible that future legislation will also tie program eligibility to Secretarial designations. The authority to make those designations and administer the designation system has been delegated to FSA. Until now, FSA regulations regarding the disaster designation process were in 7 CFR part 1945.

On November 14, 2011, FSA published a proposed rule to amend the disaster designation regulations to provide for changes in the designation process (76 FR 70368-70374). In general, that rule proposed to simplify the disaster designation process and to

delegate the authority for designation to the State level of FSA. It also proposed to move the disaster designation regulations from 7 CFR part 1945 to 7 CFR part 759. The latter (part 759) is in a part of the CFR where there are general regulations that apply to multiple programs administered by FSA. We received 18 comments during the 60-day comment period. Commenters included individuals, State agencies, universities, FSA employees, and producer associations. Almost all of the comments supported the rule. Some supporting comments asked for minor clarifications or changes. The comments opposing the rule included suggestions that are beyond FSA's authority, such as a suggestion requiring State agencies to participate in our disaster designation process. In response to comments, we are removing a proposed definition because it is not actually used in the other parts of the regulations, and we are clarifying the Secretary's delegation authority in several respects with minor changes to those in the proposed rule. For example, some references to the eligibility of contiguous counties are amended to refer to the separate regulations that apply to the disaster assistance programs. The delegation authority change clarifies that the delegation authority for disaster declarations may be delegated to the State level of FSA but that such a delegation is not automatic, or assumed, but is discretionary and will require specific delegation action. That is a change from the proposed rule, which proposed a delegation to the FSA State level as the default procedure. There were also a few comments asking for clarification of internal FSA procedures. We will provide clarification on internal FSA procedures in the handbooks, because we believe that in this instance that is the appropriate location for the level of detail about internal procedures reflected in the comments. FSA handbooks are available to the public.

This document first discusses the disaster designation process as specified in this rule, and then discusses our responses to the comments received. Except for the changes in response to comments noted above (removing a definition not used, changing delegation of authority from a default process to an optional process, and clarifying contiguous county applicability), the disaster designation process specified in this rule is the same as in the proposed rule.

#### Disaster Designation Process Background

There are four types of disaster determinations that can affect the administration of benefits by FSA:

- 1) USDA Secretarial disaster designations,
- 2) Presidential major disaster and Presidential emergency declarations,
- 3) FSA Administrator's Physical Loss Notifications, and
- 4) Quarantine designations by the Secretary under the Plant Protection Act or animal quarantine laws as defined in section 2509 of the Food, Agriculture, Conservation and Trade Act of 1990 (referenced in 7 CFR part 761, which includes a definition of "quarantine" in accordance with 7 U.S.C. 1961).

FSA administers the making of USDA Secretarial disaster designations. Those declarations specify:

- 1) The specific disaster that resulted in the designation,
- 2) The incidence period (dates) of that disaster, and
- 3) The specific counties that are included in the designation.

Of the four types of disaster determinations listed above, the USDA Secretarial disaster designation is the one that most often impacts FSA programs. Previously, its process was the most complicated of the four. This rule simplifies the process of making those determinations.

This rule reduces the number of steps in the process. Before, the process required actions by the Secretary of Agriculture, a State Governor or Indian Tribal Council, FSA National office, the FSA State Executive Director (SED), FSA county offices, the County Emergency Board (CEB), and the State Emergency Board (SEB). This process specified in this rule will in the most complex case only require action by the Secretary (or the Secretary's designee), the CEB, the SEB, and the SED. In the case of a severe drought, it will only require action by the Secretary (or the Secretary's designee). While the Secretary retains the authority to make any and all determinations, this rule provides procedures for that responsibility to be delegated to FSA at the State level. If the Secretary chooses, the SED will be delegated authority to make the designation on behalf of the Secretary, based on a recommendation from the SEB. (The SED is the chairperson of the SEB.) The Secretary retains the authority and flexibility to determine which SEDs will be delegated authority and when.

The rule eliminates the requirement that a request from a State Governor or Indian Tribal Council is needed before a disaster designation can be made. Under this rule, an Indian Tribal Council or Governor may still initiate a request for designation to the County Emergency Board (CEB), SEB, or Secretary, but that request would no longer be required to initiate the process. In response to a request by a Governor or Tribal Council for information about pending potential disaster designations with respect to a specific

disaster, the Secretary will advise the Governor or Indian Tribal Council(s) of any designation requests that are under review in their State or Tribal region. This rule also eliminates the requirement for FSA National office review of the information submitted by the SEB to justify a disaster designation for a county. However, the FSA National office will perform spot check reviews.

This rule provides for a nearly automatic designation of any county in which drought conditions as reported in the U.S. Drought Monitor (<http://www.droughtmonitor.unl.edu>) meet the drought intensity value of at least D2 (Drought-Severe) for 8 consecutive weeks in any portion of the county. Further, any county that has a portion of its area in a drought intensity value of D3 (Drought – Extreme) or higher at any time during the growing season of the affected crops would be considered a disaster area.

This rule also revises the definition of “natural disaster” to be consistent with other existing FSA regulations that use that term.

In addition to the substantive changes to the disaster designation process, this rule implements the provisions specified in the proposed rule that reorganize the disaster designation regulations. This rule moves the disaster designation regulations from 7 CFR part 1945 to 7 CFR part 759. This rule also makes the clarifying changes that were in the proposed rule, including changes to remove internal FSA processes that are not needed in the rule, but are instead made in the handbook, where they more properly belong. A conforming change is made to amend 7 CFR part 762, “Guaranteed Farm Loans,” to remove a reference to 7 CFR 1945 and replace it with a reference to new part 759.

## Discussion of Comments

The following provides a summary of public comments received on the proposed rule and FSA's response, including changes we are making in response to the comments.

### Definitions

**Comment:** Removing the list of examples of unusual and adverse weather conditions from the definition of "natural disaster" could lead to potential program abuse and fraud. It would allow nearly any simple event like a spring rain during hay cutting to be considered a natural disaster. Therefore, that change should not be made. The definition and list of examples should not be modified or removed.

**Response:** The definition of "natural disaster" in this rule adequately describes a disaster as an unusual or severe weather condition or other natural phenomena that causes severe losses. The definition in this rule is consistent with other FSA regulations that use that term. A list of examples could be problematic if it was interpreted to mean that only those disaster conditions listed were possible eligible disaster situations. In those cases where the designation is not automatic (that is, not based on officially-published drought data), the rule provides an ample opportunity for review. No change is made in response to this comment.

**Comment:** The definition of CEB should be amended to specify that local Cooperative Extension agents or educators who have responsibilities for reporting the occurrence of a disaster, assessing the extent of a disaster, and for requesting approval in declaring a county a disaster are included as members of the CEB. Similarly, the term

SEB should likewise be amended to include Cooperative Extension agents having program responsibilities at the State level.

Response: The CEB and SEB do consider input from State and local experts on local disaster conditions. Extension agents can and do attend meetings and provide input. However, USDA does not have the authority to require Extension agents or other local non-federal partners to participate or attend as members of the CEB or SEB. Even if they were willing to participate, the determination must remain within USDA and it has been deemed best to limit the CEB and SEB membership accordingly. This will also assure consistency in the makeup of the CEBs and the SEBs. No change is made in response to this comment.

Comment: FSA should include State government agriculture and emergency management agency representatives on the SEB. They must receive communications about disaster designations, and must be allowed to provide input on the approval process.

Response: FSA agrees that State level persons who are engaged in work related to identifying and reporting disasters and other State or local government work can provide valuable information and input that a CEB or SEB may consider in making a CEB or SEB recommendation. Such representatives are invited to attend and provide input. However, as with the previous comments, FSA believe that the actual boards should be comprised of USDA staff only. This is particularly with respect to nonfederal persons as the designation is a federal function. Also, it is relevant to note that the boards are not outside advisory boards and therefore not subject to the special procedures that can apply to such organizations.

Comment: The definition of contiguous county should be amended to specify how rivers, lakes, and other bodies of water are viewed. For example, if counties are separated by a large body of water (Lake Michigan), are the counties on each side of the lake contiguous?

Response: The definition of “contiguous county” already provides for the inclusion of a county whose boundary touches a “primary county.” The rule makes no distinction for boundaries that touch in water, and is not defining county boundaries in a different way than those boundaries are legally defined by States and local jurisdictions. In the past, counties on each side and separated by a wide body of water, such as Lake Michigan or the Pacific Ocean, have not been viewed as contiguous by USDA because the legal boundaries of those counties are not contiguous. No change in the definition is necessary.

Comment: The definition of “production losses (severe)” needs to be clarified because it is unclear whether production losses include physical losses. If the intention is to limit production losses to only losses of production, the definition should state that physical losses are not included. There is a difference between physical and production losses resulting from natural disaster.

Response: In the context of the rule “physical losses” means losses to a building or to stored goods and the like. Production losses -- losses of growing crops --- as defined in this rule do not include physical losses. The definition of “production losses (severe)” is clear that a loss of at least 30 percent or more of at least one crop (not property or things included in the rule’s definition of physical losses) is a severe production loss for purposes of the rule. FSA does not believe that either the definition

of production losses (severe) or the definition of severe physical losses require further amendment or clarification.

Comment: The definition for “normal year’s dollar value” is unnecessary as the term is not used in the rule. Additionally, the definition is in conflict with other FSA regulations.

Response: In response to this comment, the proposed definition has been removed and is not in this final rule.

#### Disaster Area Determination and Notification Process

Comment: Of the methods in § 759.5 for declaring a disaster (automatic process for drought, SEB recommendation, production losses of at least 30 percent, and Secretarial discretion for exceptions), only that in paragraph (b) (regarding recommendations by CEBs and SEBs), seems to require review by the FSA Deputy Administrator for Farm Programs. If the intent is not to use the method in paragraph (b) most of the time, but always use the other more lenient methods whenever possible, then there is no point in having that method, so paragraph (b) should be removed.

Response: The CEB and SEB criteria requires the finding of a 30 percent production loss and will likely be the most used option. By nature, those recommendations require review of some kind and therefore the rule provides for review by the Deputy Administrator. However, the rule allows for delegation of that review to the SED. Any SED disaster designation action may be reviewed by the Deputy Administrator for Farm Programs (DAFP) as appropriate. The special discretion for special cases where production losses are not at least 30 percent or where the automatic

drought criteria are not met is intended for special cases only. We think that the review provisions are necessary and appropriate to assure as much consistency as possible. No change is made in response to this comment.

Comment: USDA should notify Governors and State personnel when it receives a request for a designation from a CEB. It is important for Governors and States to have real time knowledge of agricultural disaster information and to ensure effective coordination and sharing of information. FSA should also notify Governors and State personnel when a disaster declaration is about to be made, before the general publication notification is made by USDA.

Response: FSA will provide that notice when requested once the disaster has occurred with respect to designations for that particular disaster. Because of the streamlined procedures and the desire for a quick determination where such a determination is warranted and possible, FSA does not anticipate that every Governor and State personnel will ask for pre-notification. FSA will amend internal operating guidelines and handbooks to provide procedures for responding to requests for information about pending disaster designations from interested parties, including Governors and Tribal Councils. The procedure will be in the handbooks and internal guidelines rather than in the rule.

Comment: The CEB does not meet regularly and in most cases the FSA County Executive Director (CED) compiles the information necessary for supporting designation requests. Recommend making CEB interchangeable with the CED.

Response: FSA recognizes the valuable contribution by the CED in obtaining the information that will be used by a CEB or SEB to recommend the disaster designation.

However, the CEB is comprised of representatives of several USDA agencies, including but not limited to FSA, that have responsibilities for reporting disasters and assessing the resulting damage caused. It provides a valuable coordination function between USDA agencies. CEB will meet as needed to promptly implement the procedures in this rule. No change is made to the rule in response to this comment.

Comment: The regulation does not specify how information required by the CEB and SEB is collected and documented. There should be more specifics about what is required. For example, GIS maps should be required for all disaster designation requests, not just for drought.

Response: The proposed rule provides procedure for the nearly automatic designations based on the Drought Monitor as well as the reliance upon the Loss Assessment Report (LAR) for those designation requests not meeting the automatic designation criteria. Information from which a LAR can be developed or produced can come from various sources. FSA does not intend to restrict or mandate the sources of information that may be considered by a CEB or SEB in assessing losses. However, FSA will issue internal operating guidelines that will provide instructions regarding necessary information and documentation that will be necessary to support recommendations. In the case of drought, the process will be nearly automatic, based on documentation provided by the Drought Monitor itself. We say “nearly” automatic because of the function that will be performed by FSA to identify eligible counties from the official reports and to prepare the notice. No change is made to the rule in response to this comment, but the subject matter will be addressed in FSA handbooks.

Comment: The streamlined automatic designation process for drought could create designations for multiple counties in times of regional disasters. That could be confusing and cause disaster designations when one is not appropriate because the entire county was not impacted.

Response: A disaster declaration is not the only eligibility requirement for FSA disaster assistance programs that depend on a declaration. Most also require some threshold of documented losses. While it is possible that a drought will not impact an entire county that has been declared a disaster, in that case the producers in the county who were not impacted will be unlikely to meet the other criteria for benefit eligibility. The rules for designating a county as a disaster area when requirements are met based on information that may only be applicable to part of the county are not being modified by this rule. Generally, there is no requirement that the peril or perils that cause a county to be designated a disaster area have impacted all or most of a county. The authorizing legislation for FSA programs that rely on disaster designations consistently refer to county level disaster declarations, with no provisions to make designations for smaller areas. Furthermore, even if a more discrete declaration were permitted, attempting to identify specific affected locations within a county would be time-consuming, uncertain, and would slow the process of making aid available without a justifiable and substantial countervailing benefit. Individual producers must still establish their loss and must establish that it is related to the disaster. No change is made in response to this comment.

Comment: In the case of drought, the regulation should specify that when large areas of a State are impacted, counties affected should be combined as much as possible. The regulations should permit the SED to combine declarations, even if that means a 30-

to 60-day delay until the data from the additional counties are known. That would make the disaster response process easier for States.

Response: The current regulations permit a disaster declaration that includes multiple counties. That is not changing with this rule. However, in the case of a drought, the Secretary will designate that area a disaster area when the drought intensity threshold is met, without waiting to see if nearby counties reach the severe or extreme drought threshold. We see no persuasive point in delaying the process to see if other counties qualify. No change is made in response to this comment.

Comment: The Drought Monitor is a valid tool; however, the problem is defining the line location for the drought area as it relates to a whole county. There may be instances where the Drought Monitor may accurately show that a small percent of a county has suffered due to drought; however, based on that data, an entire county may get the designation (based on drought). Recommend the CEB or CED determine if drought monitor conditions are reflective of conditions for the county and not just for the location of the monitor.

Response: As specified in § 759.5(a) of this rule, a loss assessment report (LAR) developed by the CEB is not required for disaster designation in the case of severe drought. Also, as noted above, a disaster declaration is not the only eligibility requirement for most FSA disaster assistance programs, and the authorizing legislation for FSA programs that rely on disaster designations consistently refer to county level disaster declarations, with no provisions to make designations for smaller areas. No change is made in response to this comment.

Comment: The rule is unclear how an individual farmer, State Governor, Indian tribal council, or local governing body will initiate a request for designation.

Response: Anyone can contact the Secretary or FSA and request a designation using any means, including a phone call, letter, or email, to report production losses or drought conditions to the CEB, as specified in this rule in § 759.5. Time and prudent considerations may govern how that contact is made. In any case, we do not believe that it is necessary to specify the method of contact in the rule itself to allow flexibility.

Comment: If anyone can request a disaster designation, this could greatly increase the workload for local staff. Recommend keeping the requirement for a request by the Governor or Indian Tribal Council.

Response: The benefits to producers of allowing anyone to report losses, facilitating a more expedited disaster designation process, outweigh any perceived or alleged increases in workload.

Comment: The new process will be more objective for drought. In the past, it was possible that some people could try to use undue influence to force the CEB to request a disaster even though conditions may not warrant a county-wide declaration process. What is being done to ensure that will not happen with the new process?

Response: The general drought authority will rely on published reports. Where the CEB is involved in the process, there will be review of the disaster recommendation by the SEB and by the Secretary's designee. We believe that the provisions for review are sufficient and persons concerned about any disaster declaration are always free to make that feeling known to generate greater review in particular cases. No change is made in response to this comment.

Comment: Governors or Indian tribal councils should have to seek designations. State governments and Indian tribal councils should not be removed from the process. A State may not want a designation approved. The drought might not be as severe as the Drought Monitor makes it seem, and a disaster declaration could scare away tourists.

Response: USDA has the responsibility to designate disasters using consistent criteria for the entire nation, so that producers in all States and counties have an opportunity to be eligible for disaster assistance if they suffered losses in a disaster area. No change is made in response to this comment.

Comment: The proposed designation process could compromise the integrity of the designation process by removing safeguards realized with a National review of designation requests. By removing the FSA National office review by impartial reviewers, politically appointed SEDs will be under increasing pressure to approve disaster designations, perhaps wrongly.

Response: The FSA National office will still be responsible for oversight and spot check of the process as needed and we believe that the opportunity for review in the regulations is sufficient. Also, as indicated, problems with individual determination can always be raised to generate additional review. In this rule, § 759.5 specifies that if the Secretary so chooses, authority may be delegated to make the designation at the State level, but that delegation is not automatic. At the State level, the SED may act based on a recommendation from the SEB. Such delegations may be limited to particular disasters. Section 759.6 has also been changed from the proposed rule to remove proposed language referring to a disaster designation made by the SED to reflect that there must be

a specific delegation as no SED is empowered by the regulations themselves to make the designation.

Comment: Keep the old more complex process. Simplifying the process will result in more fraud, increasing the total government deficit.

Response: As noted above, the FSA National office will conduct spot checks of disaster designations to ensure program integrity. The revised process is expected to result in faster disaster designations, but not more eligible disaster designations, as the rule does not materially change the conditions under which a designation could be made.

Comment: Need clarification on the discretionary exceptions from the definition of production losses 7 CFR 1945.6(c)(3)(iii)(C). Are they being removed? The previous definition allowed a disaster declaration if production losses have not met the 30 percent loss threshold, but other conditions exist, including producers unable to get financing. According to the table in the preamble to the proposed rule, and the proposed new definition of production losses, it looks like the discretionary exceptions for production losses are removed from the definition section. Does that mean that the lack of getting a lender to finance is no longer included in the definition of production losses, and that we will be unable to obtain a disaster declaration based on financial hardship?

Response: This rule does not remove the provisions allowing the Secretary discretionary authority to declare a disaster even if the 30 percent production loss threshold has not been met. The discretionary exception provisions have been moved, not removed. The discretionary authority disaster designation process is specified in § 759.5, rather than in the definitions section. It includes the number of farmers unable to obtain emergency financing as one of the factors the Secretary may consider in

determining whether to use this discretionary authority. This rule does not modify EM procedures or policies. No change is made in response to this comment.

Comment: The current designation process enables a Governor to best manage an agricultural disaster, including taking the necessary steps within the State in determining how and where the State is best served by seeking Federal relief through a disaster designation. Do not take the Governors out of the process. If each county has to independently advocate relief, the larger counties with more resources will be able to more vigorously and expeditiously make disaster designation requests, at the expense of more rural counties. This would not be fair, and would disable the Governor's ability to prioritize statewide needs.

Response: The simplified and streamlined process does not remove authority of Governors to seek designations for any of counties located in their respective State. The proposed rule also does not prohibit a Governor from taking any State level action in response to whatever concerns or needs that might arise following an emergency. In fact, the expedited designation process should be able to assist all localities with a faster disaster designation process. Local emergency response resources and their distribution are outside the scope of this rule. FSA will designate counties based on factual information about disaster conditions in counties large and small. No change is made in response to this comment.

Comment: What if the same disaster causes both production and physical losses? Does the rule mean that both a Secretarial declaration and an Administrator's declaration of physical loss would be required in that case? If so, that seems more complicated, not less complicated, than the current procedure.

Response: As specified in this rule in § 759.6, the Administrator's declaration of physical loss process is used when only physical losses occur. When both production and physical losses occur, the Secretarial disaster designation process is used. No change is made in response to this comment.

Comment: Eliminate the Presidential, Secretarial, and Administrator designations processes for the FSA EM and the FSA Supplemental Revenue Assistance Payments (SURE) Program. The current process is complicated and time consuming. Proposed rule is unclear if there will be any reduction of paperwork or other time requirements on county FSA offices. The rule does not appear to have very many benefits for individual producers.

Response: USDA does not have authority to modify the disaster designation eligibility requirements for the SURE (should it be reauthorized) or EM program because these requirements are specified in authorizing laws. The streamlined process of processing requests for designations should benefit producers by providing disaster benefits more quickly. No change is made in response to this comment.

#### General Comments

Comment: USDA should consider increasing the maximum income levels for benefit eligibility to allow farmers and ranchers in high cost areas to take advantage of more FSA program benefits.

Response: USDA does not have authority to change the adjusted gross income provisions that apply to FSA program benefit eligibility to the extent that they are mandated by law and in other instances use of those provisions may help target benefits

to those whose need is the greatest. In any event, this comment and issue are outside the scope of this rule. No change is made in response to this comment.

Comment: Benefits for adjoining counties should be discontinued to help reduce potential fraud or less than credible claims. Disaster designations should only apply to the county and not other adjoining areas.

Response: The proposed rule was meant to address only the process by which designations are made and hence this comment goes beyond the scope of this rule. The program specific rules include contiguous counties when specifically authorized for that program by law. However, some additional language has been added to clarify that the rules about contiguous counties should be resolved by the regulations particular to each program. That said, the designation regulations have traditionally carried provisions dealing with that issue specifically for the EM program and this rule continues that practice. As some point we will consider moving the substantive EM provisions to the EM regulations themselves. The EM regulations are found in 7 CFR part 764. The EM regulations require a disaster as a predicate for an EM loan and under the general definitions in 7 CFR part 761 a “disaster” requires an FSA designation. This rule specifies that the FSA designation will include not only those that involve a Secretarial designation under these rules but the EM Program will also consider as designated counties eligible to trigger EM loans those counties that are the subject of the other kinds of disaster determinations noted above. The provisions addressing EM qualifications appear in 7 CFR 759.6 of the regulations adopted in this rule. To avoid confusion, 7 CFR part 759 as clarified in this rule will specify that unless otherwise indicated in the regulations for the actual benefit program, or in 7 CFR 759.6, for purpose of

administering disaster assistance only the primary county will be considered the disaster county. That is, producers in the contiguous county will only be able to qualify for disaster assistance if the disaster assistance regulations or, in the case of EM, 7 CFR 759.6, provide for such eligibility. This is consistent with long-standing practice, and provisions in authorizing laws, and involves no change in policy.

Comment: The more timely designations may place an even greater burden on local governments who have limited staff to help with disaster response and the recovery process.

Response: This rule does not require any specific action by a local government to assist with USDA's disaster designation process. In fact, it removes the requirement for a request for disaster designation by the Governor or Tribal Council. The more rapid designation of disasters should help identify where response is most urgently needed, allowing local governments to focus resources on where it is needed the most. No change is made in response to this comment.

#### Miscellaneous Change

This rule also removes the abbreviation for NASS, the USDA National Agricultural Statistics Service, which only appeared in a definition in the proposed rule that is not included in this final rule.

#### Effective Date

The administrative procedure provisions in 5 U.S.C. 553(d) require that a substantive rule be published "not less than 30 days before its effective date." As

specified in 5 U.S.C. 553(d), exceptions to the 30-day post publication effective period include: 1) a substantive rule which grants or recognizes an exemption or relieves a restriction; 2) interpretative rules and statements of policy; and 3) as otherwise provided by the agency for good cause found and published with the rule. Here, however, the substance of this final rule was published in the proposed rule that was published more than 30 days prior to the publication of this final rule. Moreover, even if that should not be deemed to suffice, FSA finds that all of the exceptions apply. In fact, the rule relieves restrictions that the Secretary had placed on USDA's own internal processes, policy, and rules in order to expedite and make more efficient timely designations. Also, this rule makes substantive changes only with respect to USDA's own operations and thus involves matters of agency policy not of regulations in the normal sense. This rule accordingly involves, in terms of its changes, an agency statement of policy. Further, this rule will, with no negative countervailing considerations, provide a benefit to the public by providing more timely disaster relief. For that reason, any delay in implementing this rule is in the opinion of the agency, contrary to the public interest. Accordingly, this rule is made effective immediately upon filing for public inspection.

#### Executive Order 12866 and 13563

Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review," direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity).

Executive Order 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866 and, therefore, OMB has not reviewed this final rule.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. FSA has determined that this rule will not have a significant impact on a substantial number of small entities. New provisions of this rule will not impact a substantial number of small entities to a greater extent than large entities. FSA anticipates that the rule will not require submission of any additional information by the public. It is expected to be revenue neutral, neither increasing nor decreasing benefits for producers as a whole. Therefore, FSA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

## Environmental Review

FSA has determined that these changes would not constitute a major Federal action that would significantly affect the quality of the human environment. Therefore, in accordance with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4347, the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and FSA regulations for compliance with NEPA (7 CFR part 799), no environmental assessment or environmental impact statement will be prepared.

## Executive Order 12372

Executive Order 12372, “Intergovernmental Review of Federal Programs,” requires consultation with State and local officials. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened Federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal Financial assistance and direct Federal development. This rule neither provides Federal financial assistance or direct Federal development; it does not provide either grants or cooperative agreements. Therefore, this rule is not subject to Executive Order 12372.

## Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988, “Civil Justice Reform.” This rule preempts State and local laws, regulations, or policies that are in conflict with the provisions of this rule. The rule will not have retroactive effect.

#### Executive Order 13132

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

#### Executive Order 13175

This rule has been reviewed for compliance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” This Executive Order imposes requirements on the development of regulatory policies that have Tribal implications or preempt Tribal laws. The USDA Office of Tribal Relations has concluded that the policies contained in this rule do not, to our knowledge conflict with any Tribal law and therefore does not preempt Tribal law. Were there a conflict, the provisions of the regulations would prevail as far as administering the federal programs that are affected by the rule.

Before publishing the proposed rule, FSA consulted with the USDA Office of Tribal Relations and has concluded that this rule will not, to our knowledge, have a substantial direct effect on Indian tribes and no formal Tribal consultation under EO 13175 is required. FSA will conduct an informational forum (telephone call or

webinar) to answer questions about this rule from all interested Indian Tribes soon after this rule has been published.

#### The Unfunded Mandates Reform Act of 1995

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

#### Paperwork Reduction Act of 1995

The amendments in this final rule require no revision to the information collection that was previously approved by OMB under control number 0560-0170. Although this rule streamlines the disaster designation process, including removing the requirement for a State Governor or Indian Tribal Council to initiate a request for a Secretarial disaster designation, it does not prohibit that action and may therefore not result in a reduction in

burden hours. Any change in burden hours will be documented in the next information collection request.

#### E-Government Act Compliance

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

#### Federal Assistance Program

These changes affect the following FSA program listed in the Catalog of Federal Domestic Assistance:

10.404 -- Emergency Loans

#### List of Subjects

##### 7 CFR Part 759

Administrative practice and procedure, Agriculture, Authority delegations, Disaster assistance, Loan programs - Agriculture, Reporting and recordkeeping requirements.

##### 7 CFR Part 762

Agriculture, Credit, Loan programs-Agriculture.

##### 7 CFR Part 1945

Agriculture, Disaster assistance, Drug traffic control, Loan programs – Agriculture, Reporting and recordkeeping requirements.

For the reasons discussed above, FSA adds 7 CFR part 759, amends 7 CFR part 762, and under the authority of 7 U.S.C. 1989, removes 7 CFR part 1945 as follows:

CHAPTER VII--FARM SERVICE AGENCY, DEPARTMENT OF AGRICULTURE

1. Add a new part 759 to read as follows:

PART 759— DISASTER DESIGNATIONS AND NOTIFICATIONS

Sec.

759.1 Administration.

759.2 Purpose.

759.3 Abbreviations and definitions.

759.5 Secretarial disaster area determination and notification process.

759.6 EM to be made available.

Authority: 5 U.S.C. 301, 7 U.S.C. 1961 and 1989.

§ 759.1 Administration.

(a) This part will be administered under the general supervision and direction of the Administrator, Farm Service Agency (FSA).

(b) FSA representatives do not have authority to modify or waive any of the provisions of the regulations of this part as amended or supplemented.

(c) The Administrator will take any action required by the regulations of this part that the Administrator determines has not already been taken. The Administrator will also:

(1) Correct or require correction of any action taken that is not in accordance with the regulations of this part; or

(2) Require withholding taking any action that is not in accordance with this part.

(d) No provision or delegation in these regulations will preclude the Administrator or a designee or other such person, from determining any question arising under this part, or from reversing or modifying any determination made under this part.

(e) Absent a delegation to the contrary, this part will be administered by the Deputy Administrator for Farm Programs of FSA on behalf of the Administrator of FSA or the Secretary, but nothing in this part will inhibit the ability of the Administrator of FSA or the person holding the equivalent position in the event of a reorganization to delegate the functions of DAFP under these regulations to another person. Likewise, nothing shall inhibit the ability of the Secretary to reassign any duties with respect to the designations of disasters under this part.

§ 759.2 Purpose.

(a) This part specifies the types of incidents that can result in an area being determined a disaster area, which under other regulations makes qualified farmers in such areas eligible for Emergency loans (EM) or eligible for such other assistance that may be available, based on Secretarial disaster designations. Nothing in this part overrides provision of those regulations that govern the actual administration and availability of the disaster assistance regulations.

(b) This part specifies the responsibility of the County Emergency Board (CEB), State Emergency Board (SEB), and the State Executive Director (SED) in regard to Secretarial Designations with regards to disasters. It also addresses matters relating to the handling of a Presidential declaration of disaster or the imposition of a USDA quarantine by the Secretary with respect to triggering the availability of EM loans.

§ 759.3 Abbreviations and definitions.

(a) Abbreviations. The following abbreviations apply to this part.

CEB means the County Emergency Board.

CED means the County Executive Director.

DAFP means the Deputy Administrator for Farm Programs of the Farm Service Agency.

EM means Emergency loan administered under 7 CFR part 764.

FSA means the Farm Service Agency.

LAR means the Loss Assessment Report.

SEB means the State Emergency Board.

SED means the State Executive Director.

USDA means the United States Department of Agriculture.

(b) Definitions. The following definitions apply to this part.

Administrator means the Administrator of FSA.

Contiguous county is used in reference to a primary county as defined in this section. A contiguous county is any county whose boundary touches at any point with that of the primary county. For programs other than the EM Program, disaster assistance regulations will specify whether benefits will be available only in the primary counties or also in the contiguous counties. For the EM Program that issue is addressed in § 759.6, unless specified otherwise in the disaster assistance regulations for other programs or in § 759.6 for the EM Program, only the “primary” country will be considered the qualifying “disaster county.” Therefore, if the disaster assistance regulations specify that they cover the disaster area and contiguous counties, then the only eligible counties would be the primary county and those contiguous to that county. Coverage would not

include coverage of those counties that are in turn contiguous to those counties that are contiguous to the primary county.

County is used when referring to a geographical area, a local administrative subdivision of a State or a similar political subdivision of the United States generally considered to be in county usage, for example, it includes an area referred to as a “county” or “parish.” Except where otherwise specified, the use of the term county or similar political subdivision is for administrative purposes only.

CEB is comprised of the representatives of several USDA agencies that have responsibilities for reporting the occurrence of, and assessing the damage caused by, a natural disaster, and for requesting approval in declaring a county a disaster area.

CED is the person in charge of administering the local FSA county office for a particular county.

Disaster area is the county or counties declared or designated as a disaster area as a result of natural disaster related losses. The disaster area only includes the primary counties, but benefits may be available in the counties contiguous to the primary county if so provided by the disaster assistance regulations or, in the case, of the EM Program, in § 759.6.

LAR is a loss assessment report prepared by the CEB relating to the State and county where the potential disaster occurred and for which county or counties the CEB is responsible. The LAR includes as applicable, but is not limited to, starting and ending dates of the disaster, crop year affected, type of disaster incident, area of county affected by disaster; total number of farms affected, crop loss or pasture loss data associated with

the applicable disaster (or both types of losses), livestock destroyed, and other property losses.

Natural disaster is a disaster in which unusual and adverse weather conditions or other natural phenomena have substantially affected farmers by causing severe physical losses, severe production losses, or both.

Primary county is a county determined to be a disaster area.

Presidential declaration is a declaration of a disaster by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121-2) requiring Federal emergency assistance to supplement State and local efforts to save lives and protect property, public health and safety, or to avert or lessen the threat of a disaster.

Production losses (severe) within a county are those in which there has been a reduction county-wide of at least a 30 percent or more loss of production of at least one crop in the county.

SEB means the State Emergency Board which is comprised of the representatives of several USDA agencies having emergency program responsibilities at the State level. The board is required to respond to emergencies and carry out the Secretary's emergency preparedness responsibilities.

SED is the person who serves as the Chairperson of the USDA SEB in each State, is responsible for providing the leadership and coordination for all USDA emergency programs at the State level, and is subject to the supervision of DAFP.

Severe physical losses means, for the purpose of determining an Administrator's declaration of physical loss, losses that consist of severe damage to, or destruction of: Physical farm property including farmland (except sheet erosion); structures on the land

including, but not limited to, building, fences, dams; machinery, equipment, supplies, and tools; livestock, livestock products, poultry and poultry products; harvested crops and stored crops.

Substantially affected when used to refer to producers and to the relationship of a particular producer to a particular disaster means a producer who has sustained qualifying physical or production losses, as defined in this section, as a result of the natural disaster.

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

United States means each of the several States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Extension of disaster assistance, following a disaster designation, to insular areas of the United States not covered by this definition of “United States” will be only as authorized by law, and as determined by the Administrator on behalf of the Secretary to be appropriate.

§ 759.5 Secretarial disaster area determination and notification process.

(a) U.S. Drought Monitor. With respect to drought and without requiring an LAR:

(1) If any portion of a county is physically located in an area with a Drought Monitor Intensity Classification value of D3 (drought - extreme) or higher during any

part of the growing season of the crops affected by the disaster in the county, then the county will be designated a disaster area by the Secretary.

(2) If any portion of a county meets the threshold Drought Monitor Intensity Classification value of D2 (drought-severe) for at least 8 consecutive weeks during the growing season of affected crops, then the county will be designated a disaster area by the Secretary.

(b) CEB and SEB recommendations. In instances where counties have been impacted by a disaster but the county has not been designated a disaster area under the provisions of paragraph (a) of this section, CEB will make a disaster designation recommendation request to SEB when a disaster has resulted in severe production losses. The determination of the sufficiency of the production losses will be governed by the provisions in paragraph (c) of this section. The CEB may make such efforts as are needed to identify counties that have been impacted and had such production losses. A farmer, Indian Tribal Council, or local governing body may initiate the process by reporting production losses or drought conditions to CEB and suggesting that there be a recommendation in favor of designating a county as a disaster area. Recommendations by a CEB in favor of a disaster designation by a CEB under this paragraph are subject to the following:

(1) A LAR is required as part of a CEB disaster designation request. CEB will submit a disaster designation request with a LAR to SEB for review and recommendation for approval by the Secretary. CEB's written request and SEB recommendation must be submitted within three months of the last day of the occurrence of a natural disaster.

(2) If SEB determines a qualifying natural disaster and loss have occurred, SEB will forward the recommendation to the Administrator. The natural disaster may include drought conditions that were not sufficiently severe to meet the criteria in paragraph (a) of this section. Since the U.S. Drought Monitor tracks only drought conditions, not specifically agricultural losses resulting from those conditions, it is possible for a drought that does not meet the criteria in paragraph (a) of this section to result in production losses that constitute a natural disaster.

(3) The Secretary or the Secretary's designee will make disaster area determinations. The Secretary may delegate the authority to the SED. In such case, the SED will act on behalf of the Secretary, subject to review by DAFP as may be appropriate and consistent with the delegation. The delegation of authority to the SED may be revoked by the authority making that delegation or by other authorized person. In all cases, DAFP may reverse any SED determination made in accordance with this section unless the delegation to the SED specifies that such review is not allowed.

(c) Eligible production losses. For purposes of making determinations under paragraph (b) of this section, in order for an area to be declared a disaster area under paragraph (b) of this section based on production losses, the county must have had production losses of 30 percent of at least one crop in the county as the result of a natural disaster.

(d) Discretionary exception to production losses for designating a county as a disaster county. For purposes of the EM program only, unless otherwise specified in the designation, a county may be designated by DAFP as a designated disaster county even though the conditions specified in paragraphs (a) through (c) of this section are not

present so long as the disaster has otherwise produced such significant production losses, or other such extenuating circumstances so as to justify, in the opinion of the Secretary, the designation of a county as a disaster area. In making this determination, the Secretary may consider all relevant factors including such factors as the nature and extent of production losses; the number of farmers who have sustained qualifying production losses; the number of farmers that other lenders in the county indicate they will not be in position to provide emergency financing; whether the losses will cause undue hardship to a certain segment of farmers in the county; whether damage to particular crops has resulted in undue hardship; whether other Federal or State benefit programs, which are being made available due to the same disaster, will consequently lessen undue hardship and the demand for EM; and any other factors considered relevant.

§ 759.6 EM to be made available.

(a) For purposes of the EM Program under part 764, subpart I, of this chapter, a county will be considered an eligible disaster area as designated by FSA for coverage of the EM Program as follows:

(1) Secretarial designations. When production losses meet the requirements in § 759.5 and the county has been designated as a disaster area for that reason, or when the discretionary exception to production losses for EM under § 759.5(d) has been exercised, the primary and contiguous counties will be areas in which otherwise eligible producers can receive EM loans.

(2) Physical loss notification. When only qualifying physical losses occur, the SED will submit a request to the FSA Administrator to make a determination that a natural disaster has occurred in a county, resulting in severe physical losses. If the FSA

Administrator determines that such a natural disaster has occurred, then EM can be made available to eligible farmers for physical losses only in the primary county (the county that was the subject of that determination) and the counties contiguous to that county.

(3) USDA quarantine. Any quarantine imposed by the Secretary of Agriculture under the Plant Protection Act or the animal quarantine laws, as defined in section 2509 of the Food, Agriculture, Conservation, and Trade Act of 1990, automatically authorizes EM for production and physical losses resulting from the quarantine in a primary county (the county in which the quarantine was in force) and (where the quarantine effects extend beyond that county) the counties contiguous to that primary county.

(4) Presidential declaration. Whenever the President declares a Major Disaster Declaration or an Emergency Declaration, FSA will make EM available to eligible applicants in declared and contiguous counties, provided:

(i) The Presidential declaration is not solely for Category A or Category B Public Assistance or Hazard Mitigation Grant Assistance, and

(ii) The Presidential Major Disaster declaration is for losses due to severe, general disaster conditions including but not limited to conditions such as flood, hurricane, or earthquake.

(b) [Reserved]

PART 762— GUARANTEED FARM LOANS

2. The authority citation for part 762 would continue to read as follows:

Authority: 5 U.S.C. 301 and 7 U.S.C. 1989.

§ 762.106 [Amended]

3. Amend § 762.106(b)(2) and (c)(4) by removing the reference “part 1945, subpart A of this title” and adding in its place each time it appears “§ 761.2(b) and part 759 of this chapter”.

CHAPTER XVIII--RURAL HOUSING SERVICE, RURAL BUSINESS-  
COOPERATIVE SERVICE, RURAL UTILITIES SERVICE, AND FARM SERVICE  
AGENCY, DEPARTMENT OF AGRICULTURE

PART 1945 [Removed]

4. Remove part 1945.

Signed on July 10, 2012.

Karis T. Gutter,  
Under Secretary,  
Farm and Foreign Agricultural Services, and

Signed on July 10, 2012.

Dallas Tonsager,  
Under Secretary,  
Rural Development.

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