Farmers’ Guide to ERP Phase 2: Extended Deadline Edition

May 31, 2023

ERP Phase 2 Extended Deadline is July 14, 2023

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Farmers' Guide to the Emergency Relief Program (ERP) Phase 2: Extended Deadline Edition

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This Farmers' Guide to the Emergency Relief Program (ERP) Phase 2 is current through May 15, 2023.

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Chapter One: Introduction

Through the Emergency Relief Program (ERP), the Farm Service Agency (FSA) provides payments to farmers who suffered crop losses in calendar years 2020 and 2021. ERP provides relief in two phases. The eligibility requirements and scope of assistance are different for each phase. This Guide is focused on ERP Phase 2.

I. ERP Phase 1 vs. ERP Phase 2

The first phase of ERP provided assistance for crop, tree, bush, and vine losses using information that was already on file with FSA or the USDA's Risk Management Agency (RMA).[1] This meant that ERP Phase 1 only applied to those farmers and ranchers who had previously received a federal crop insurance indemnity payment or a payment through the Noninsured Crop Disaster Assistance Program (NAP). Phase 1 of ERP was announced in the Federal Register on May 18, 2022.[2] The Phase 1 application period closed on December 16, 2022.[3]

By contrast, the second phase of ERP is intended to expand assistance to those farmers who may not have had crop insurance or NAP coverage, who did not suffer a large enough loss to trigger a coverage indemnity in those programs, or those who chose—for whatever reason—not to apply for ERP Phase 1.[4]

Assistance under ERP Phase 2 is based on a farmer's loss in revenue. In other words, ERP Phase 2 is intended to help farmers who experienced a decrease in revenue due to eligible crop losses that were caused by a disaster event.[5]

Enrollment in Phase 2 of ERP opened on January 23, 2023. The initial application deadline was June 2, 2023.[6] However, on May 26, 2023, FSA extended the application deadline for ERP Phase 2 until July 14, 2023.[7] This Guide focuses primarily on ERP Phase 2.

ERP Phase 2 does not provide assistance for crops intended for grazing. Farmers who experienced losses to grazing crops might consider applying for other FSA disaster relief programs, such as Emergency Assistance for Livestock, Honey Bees, and Farm-raised Fish (ELAP) and the Livestock Forage Disaster Program (LFP).[8]

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1 Farm Service Agency, Notice of Funds Availability; Emergency Relief Program (ERP), 87 Fed. Reg 30164 (May 18, 2022) (the "ERP Phase 1 Rule"). For additional information on ERP Phase 1, see the ERP Phase 1 Fact Sheet: FSA, Emergency Relief Program (ERP): Disaster Recovery Assistance for Commodity and Specialty Crop Producers (Aug. 2022), at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2022/fsa_erp_factsheet_2022_051222_final_v2.pdf.

2 ERP Phase 1 Rule, 87 Fed. Reg 30164 (May 18, 2022).

3 See USDA, Emergency Relief (April 7, 2023), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

4 See, for example, Emergency Relief FAQs, Additional ERP FAQs, "Why are there two phases for ERP?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

5 See, for example, ERP Phase 2 Handbook, 3-ECP, page 3-1, para. 45.A (March 23, 2023); USDA, ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

6 See USDA, Emergency Relief (April 7, 2023), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

7 FSA Notice ERP-10, "Emergency Relief Program (ERP) Phase 2 Program Signup Deadline Extended and Filing Deadline for Eligibility Forms for Phases 1 and 2" (May 26, 2023); USDA, Emergency Relief (May 30, 2023), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

8 For a short summary, see USDA, FSA, Emergency Assistance for Livestock, Honey Bees, and Farm-

II. Authority and Rules for ERP Phase 2

The authority and rules for ERP Phase 2 are found in several places, described below.

A. Congressional Act

The funding for ERP was authorized by the Extending Government Funding and Delivering Emergency Assistance Act, which President Biden signed into law on September 30, 2021.[9] This Act provides $10 billion in funding for disaster assistance, including ERP.[10]

B. USDA Regulations

The regulations for ERP Phase 2 can be found in the Code of Federal Regulations (C.F.R.).[11] Regulations for ERP Phase 1 are also in the C.F.R.[12]

C. Handbooks

Rules for ERP can also be found in what FSA calls Handbooks. These are thick documents that contain detailed internal policies and procedures for the administration of FSA programs, and they are available online.[13] FSA has released and amended the Handbook that governs the Phase 1 of ERP.[14] On February 16, 2023, FSA released the Handbook for ERP Phase 2.[15] The ERP Phase 2 Handbook was amended on March 23, 2023.[16]

FSA also relies on other Handbooks to provide rules for ERP Phase 2.[17]

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raised Fish (ELAP)(May 1, 2023), at https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/emergency-assist-for-livestock-honey-bees-fish/index, and USDA, FSA, Livestock Forage Disaster Program (LFP) (May 1, 2023), at https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/livestock-forage/index. FLAG Guides to these and other USDA disaster programs can be found on the FLAG website (May 1, 2023), at http://www.flaginc.org/farmers-guides-to-disaster-assistance/.

9 Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (2021).

10 Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43, 135 Stat, 344; FSA Handbook, 3-ERP, Emergency Relief Program Phase 2 (ERP Phase 2 Handbook), page 1-3, para. 3.B (March 23, 2023).

11 ERP Phase 2 regulations are found at 7 C.F.R. pt. 760, Subp. S (2023). See also, CCC, FSA, and USDA, "Pandemic Assistance Programs and Agricultural Disaster Assistance Programs," Final Rule, 88 Fed. Reg. 1862 (Jan. 11, 2023) (the "ERP Phase 2 Rule").

12 ERP Phase 1 Rule, 87 Fed. Reg 30164 (May 18, 2022).

13 Downloadable copies of FSA's Handbooks can be found here: https://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk.

14 See FSA Handbook 1-ERP, Emergency Relief Program (March 29, 2023). This Handbook was originally released on December 20, 2022.

15 FSA Handbook, 3-ERP, Emergency Relief Program Phase 2 (ERP Phase 2 Handbook) (February 16, 2023), available at: https://www.fsa.usda.gov/Internet/FSA_File/3-erp_r00_a01.pdf. For purposes of ERP Phase 2, "Whenever an unintended conflict appears to exist between any handbook provision and the pertinent applicable provisions published in the regulations, the provisions published in the regulations will apply." ERP Phase 2 Handbook, page 1-2, para. 2.C (March 23, 2023)

16 FSA Handbook, 3-ERP, Emergency Relief Program Phase 2 (ERP Phase 2 Handbook) (March 23, 2023), available at: https://www.fsa.usda.gov/Internet/FSA_File/3-erp_r00_a02.pdf.

17 For example, appeals of ERP Phase 2 decisions are governed by the FSA Handbook, 1-APP, Program Appeals, Mediation, and Litigation (Sept. 13, 2016).

D. Notices

FSA sometimes issues what are called Notices, which provide guidance on various topics and changes to FSA programs.[18] Several Notices relate to ERP Phase 2.

E. FSA Fact Sheets

FSA sometimes publishes fact sheets on its programs. There is a fact sheet for ERP Phase 2.[19]

F. ERP Phase 2 Website

FSA sometimes sets policy for ERP Phase 2, and other programs, through its website. Among other things, the ERP Phase 2 website provides information on eligibility and applying, including the required documents that a farmer will need to submit.[20] The website also has a Frequently Asked Questions page that is occasionally updated.[21]

III. Organization of this Guide

This Guide is broken up into several chapters. After this first introductory chapter, Chapters Two and Three focus on eligibility—eligibility of farmers as well as the eligible types of crop losses for ERP Phase 2. Chapter Four explains the rules for what FSA calls "linkage"—a requirement that farmers obtain some type of crop insurance coverage if they accept an ERP Phase 2 payment. Chapter Five describes how ERP Phase 2 payments are calculated, while Chapter Six goes into detail on the application process, including what documents must be submitted. Chapter Seven outlines the appeals process and describes what form of equitable relief is available for ERP Phase 2. And finally, Chapter Eight includes details on USDA's discrimination complaint process.

IV. Current As of May 15, 2023

This edition of a Farmers' Guide to Emergency Relief Program, Phase 2, is current as of May 15, 2023. This Extended Deadline Edition was published on May 31, 2023, reflecting the extended ERP Phase 2 application deadline of July 14, 2023. No other changes were made at that time.

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18 FSA Notices have a published date, as well as a disposal, or expiration, date. See, for example, FSA Notice ERP-1, "Emergency Relief Program (ERP) Resources" (June 27, 2022). The Notices may be downloaded from the FSA website. To search for downloadable FSA Notices, visit https://www.fsa.usda.gov/FSA/notices.

19 USDA, FSA, Revenue Loss Assistance: Emergency Relief Program (ERP) Phase 2 Fact Sheet (Jan. 2023) ("ERP Phase 2 Fact Sheet"), available at: https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/emergency-relief-program/pdfs/fsa_erp_factsheet_23.pdf.

20 The main ERP website is at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

21 FSA, Emergency Relief FAQs (May 3, 2023), at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

Chapter Two: Farmer Eligibility for ERP Phase 2

To be eligible for ERP Phase 2, the farmer must be what USDA calls an "eligible producer" and meet certain additional requirements.[22] The following sections explain those requirements.

I. Person or Legal Entity

An eligible producer can be a natural person.[23] An eligible producer can also be a legal entity.

A. Eligible Persons

An individual farmer must have a certain immigration or citizenship status to qualify as an eligible producer for ERP. An eligible person can be a United States citizen or a resident alien.

1. U.S. Citizen

An individual farmer can be an eligible producer if the farmer is a United States citizen.[24]

2. Resident Alien

If the farmer is a person, the farmer can be an eligible producer if the farmer is a resident alien.[25] For purposes of ERP, a resident alien means a "lawful alien," which is defined as "any person who is not a citizen or national of the United States but who is admitted into the United States for permanent residence under the Immigration and Nationality Act and possesses appropriate valid credentials issued by the United States Citizenship and Immigration Services, Department of Homeland Security."[26]

B. Eligible Legal Entities

A number of legal entities can be eligible producers for ERP Phase 2. However, an entity is not eligible if any members are "foreign persons."[27]

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22 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(1)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F, Exhibit 2, page 3, "Eligible Producer" (March 23, 2023).

23 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Person"); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F, Exhibit 2, page 3, "Eligible Producer" (March 23, 2023). For the purposes of ERP Phase 2, USDA seems to consider a "person" to be a natural person, and not an entity such as a corporation or partnership.

24 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(1)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); USDA, Revenue Loss Assistance: Emergency Relief Program (ERP) Phase 2 Fact Sheet ("ERP Phase 2 Fact Sheet"), at 1 (Jan. 2023).

25 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(2)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

26 7 C.F.R. § 1400.3, "Lawful alien" (2023). See, as well, ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(2)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); USDA, ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

27 ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F, Exhibit 2, page 3, "Eligible Producer" (March 23, 2023).

1. Partnership

A partnership can be an eligible producer if it is organized under state law.[28] All of the partners in the partnership must be citizens of the United States or resident aliens. A joint venture may also be eligible for ERP Phase 2.[29]

2. Sole Proprietorship

Under ERP Phase 2, a sole proprietorship is considered a legal entity that can be eligible for payment.[30]

3. Tribe or Tribal Organization

An eligible producer can be an Indian Tribe or a Tribal organization.[31]

4. Corporation and Limited Liability Company (LLC)

An eligible producer can be a corporation as well as a limited liability company (LLC).[32]

5. Cooperative—Potentially?

An eligible producer, according to FSA, can include some other organizational structures that are organized under state law.[33] This raises the question of whether a cooperative can be an eligible producer.

It seems possible that a cooperative could qualify as an eligible producer under ERP Phase 2. The rules, however, do not say directly that a cooperative could be eligible. In general, it will be the farmer member of an agricultural cooperative that will be eligible for ERP.

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28 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(3)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

29 ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F, Exhibit 2, page 4, "Legal Entity" (March 23, 2023).

30 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Legal entity"); ERP Phase 2 Handbook, Exhibit 2, page 4, "Legal Entity" (March 23, 2023).

31 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(5)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023). Indian tribe and a tribal organization, for this purpose, are defined in the Indian Self-Determination and Education Assistance Act. See 25 U.S.C. § 5304(e), (l). In general, an Indian tribe is any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. A tribal organization is generally defined as: (1) the recognized governing body of an Indian tribe; and (2) any legally established organization of which is controlled, sanctioned, or chartered by a tribe or which is democratically elected by the adult members of the Indian community to be served by the organization.

32 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(4)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); USDA ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

33 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(4)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

In some cases, however, cooperatives might be eligible. The rules do say that an "other organizational structure" can be eligible as long as itis organized under state law.[34] The vast majority of farm cooperatives are organized under state law.[35]

The challenge for a cooperative that wants to apply for Phase 2 of ERP as an organization is meeting other parts of the definition of eligible producer. Most farm cooperatives are either what are often called marketing cooperatives or supply cooperatives.[36] In general, marketing cooperatives assist member farmers in the marketing of the farmer member commodities. Some cooperatives buy the farm product, others negotiate a price for the sale for the farmer's product. Supply cooperatives, on the other hand, buy inputs—such as seed, fertilizer, and so forth—at a discount, and then sell it to the farmer members. Some cooperatives do both.

Three requirements will make many cooperatives not eligible for ERP Phase 2. First, many cooperatives do not meet the requirement, discussed below, that an eligible producer must share in the risk of producing a commodity and must be entitled to a share in the commodity available for marketing. Second, the cooperative must have an ownership interest in the commodity. Third, many cooperatives may not meet the Adjusted Gross Income (AGI) requirement.

In sum, as far as the entity eligibility requirements for ERP Phase 2 are concerned, nothing outright stops a cooperative from being eligible for ERP. Other eligibility rules, however, will limit cooperative eligibility. Cooperatives, in the end, come in many shapes and sizes, and operate under a wide variety of structures for their members. Some of these cooperatives, especially relatively small cooperatives that farm collectively, could well be eligible for ERP.[37] Others will not be eligible.

Farmer members of cooperatives can be eligible if they meet the requirements set by ERP Phase 2 rules.

II. Entitled to an Ownership Share in the Crop

To be an eligible producer for ERP Phase 2, the farmer must be entitled to an ownership share in the eligible crop that was marketed.[38] A farmer is eligible even if the eligible crop was not produced and marketed, so long as the farmer would have had an ownership share in the crop had it actually been marketed.[39]

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34 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(4)); ERP Phase 2 Handbook, 3-ECP, page 3-3, para. 45.F (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

35 See, for example, Roger A. McEowen, *Agricultural Law in a Nutshell*, 343-344 (2017).

36 For a brief legal summary, see McEowen, at 343-346.

37 Smaller cooperatives that are experimenting in various and interesting ways are discussed in Annalise Jolley, The Co-op Farming Model Might Help Save America's Small Farmers, Civil Eats (October 3, 2018), at https://civileats.com/2018/10/03/co-op-farming-models-might-help-save-americas-small-farms/.

38 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Ownership Interest," "Producer"); ERP Phase 2 Handbook, pages 3-3 and 3-4, para. 45.F-G (March 23, 2023).

39 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Producer").

Under ERP rules, FSA has the authority to request documentation from a farmer in order to verify that the farmer has a valid ownership share interest in the eligible crop, as well as control of the crop acreage on which the crop was grown.[40]

III. At Risk in the Crop, Production, and Marketing

To be an eligible producer for ERP Phase 2, the farmer must be at risk in the crop, production, and marketing associated with the agricultural production of the crops on the farm.[41]

IV. Conservation Compliance

The farmer must be in compliance with general FSA restrictions against conversion of highly erodible land and wetlands and must not otherwise be precluded from receiving USDA benefits.[42]

V. Compliance with Controlled Substance Rules

To be eligible for a payment under ERP Phase 2, a farmer must comply with certain controlled substance rules.[43] This means that a person who is convicted of a controlled substance violation will be ineligible, at least for a time, for ERP Phase 2.[44] In particular, the conviction cannot be for planting, cultivating, growing, producing, harvesting, or storing a controlled substance.[45] As of 2018, with the passing of the Agriculture Improvement Act of 2018 (commonly known as the 2018 Farm Bill), some hemp production will not trigger this restriction because hemp is no longer classified as a Schedule I controlled substance.[46]

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40 ERP Phase 2 Handbook, page 3-4, para. 45.H (March 23, 2023). FSA can require the farm produce one of the following: (1) copies of signed written leases or rental agreements; (2) copies of legal documents showing land ownership or control of rented crop acreage; (3) statement or FSA or CCC form signed by the landowner, farm operator, or landlord that the farmer had control of the acreage.

41 ERP Phase 2 Handbook, page 3-3, para. 45.F (March 23, 2023).

42 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(6)); ERP Phase 2 Handbook, page 1-20, para. 11.A (March 23, 2023); The regulations governing highly erodible land and wetland conservation can be found at 7 C.F.R. pt. 12 (2019). The FSA Handbook that governs conservation compliance is 6-CP, Highly Erodible Land Conservation and Wetland Conservation Provisions (Sept. 24, 2021).

43 ERP Phase 2 Handbook, page 1-20, para. 12.A (March 23, 2023).

44 The rules found in FSA Handbook, Common Management and Operating Provisions, 1-CM (Revision 3), pages 30-1 and 30-2, para. 871 (June 7, 2022), and in 7 C.F.R. part 718 (2023), apply. See ERP Phase 2 Handbook, page 1-20, para. 12.A (March 23, 2023). Controlled substance is defined in 21 C.F.R. part 1308 (2023). A person convicted of a controlled substance violation could be ineligible for Phase 2 ERP payments for the year in which the conviction took place as well as the next four years. See FSA Handbook, 1-CM, page 30-1, para. 871.C (June 7, 2022).

45 7 C.F.R. § 718.6(b)(1)(ii) (2023).

46 See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619 (Dec. 20, 2018) (to be codified at 21 U.S.C. § 802(16)). The applicable definition of "hemp" is found at 7 U.S.C. § 1639o(1); see also FSA Handbook, 1-CM, page 30-1, para. 871.B (June 7, 2022). For more discussion of hemp, see USDA, Office of General Counsel, Memorandum: Executive Summary of New Hemp Authorities (May 28, 2019), at https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf.

Chapter Three: Crop Loss Eligibility for ERP Phase 2

ERP Phase 2 provides payments only for losses of certain crops. The following sections explain the eligibility rules for crops, including the types of qualifying disaster events that must have caused the crop losses.

I. Produced in the United States

To be eligible for ERP Phase 2, the crop must have been produced in the United States.[47]

II. Produced as Part of a Farming Operation

To be eligible for ERP Phase 2, the crop must have been produced as part of a farming operation.[48] For purposes of ERP Phase 2, a farming operation is a business engaged in the production of agricultural products, commodities, or livestock.[49] To qualify, it must be operated by a person, legal entity, or joint operation that would qualify for an ERP Phase 2 payment—either directly or indirectly.[50]

III. Intended to be Commercially Marketed

To be eligible for ERP Phase 2, the crop must have been intended to be commercially marketed.[51]

IV. Eligible Types of Crops

In general, the eligible crops for ERP Phase 2 are categorized into three groups: specialty crops, high value crops, and "other" crops. Farmers should note that Phase I of ERP did not have a category of high value crops, so these are newly-eligible crops for ERP Phase 2.

A. Specialty Crops

The regulations for ERP define specialty crops as "fruits, tree nuts, vegetables, culinary herbs and spices, medicinal plants, as well as nursery, floriculture, and horticulture crops."[52] Eligible specialty crops also include those identified by USDA's Agricultural

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47 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-5, para. 45.K (March 23, 2023).

48 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-5, para. 45.K (March 23, 2023).

49 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Farming operation"); ERP Phase 2 Handbook, Exhibit 2, page 4, "Farming Operation" (March 23, 2023).

50 A person or legal entity may have more than one farming operation so long as they are a member of one or more legal entities or joint operations. See ERP Phase 2 Handbook, Exhibit 2, page 4, "Farming Operation" (March 23, 2023).

51 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-5, para. 45.K (March 23, 2023).

52 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Specialty crops"); ERP Phase 2 Handbook, Exhibit 2, page 7, "Specialty Crops" (March 23, 2023).

Marketing Service (AMS).[53] USDA also has the discretion to designate additional crops as specialty crops.

For Phase 2 of ERP, specialty crops have the same meaning as in ERP Phase 1.[54]

B. High Value Crops

High value crops are defined as any eligible crop not identified as a specialty crop or "other crop."[55] High value crops also include any eligible crop—regardless of type—if the crop is a direct market crop, organic crop, or a crop grown for a specific market where it sells for a greater value than it would in the crop's typical market. For example, soybeans intended for tofu production would be considered a high value crop.[56]

C. "Other Crops"

Under the regulations for Phase 2 of ERP, there is a third category of eligible crops that FSA calls "other crops."[57] FSA defines "other crop" to mean cotton, peanuts, rice, feedstock, and any crop grown with an intended use of grain, silage, or forage."[58]

Other crops also include eligible crops that have an intended use other than grain, silage, or forage, but which do not meet the definition of high value or specialty crops. For example, canola that is intended to be processed would be considered an eligible other crop.[59]

If a crop fits both the definition of an "other crop" and a high value crop, FSA will classify it as a high value crop.[60]

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53 For a list of AMS specialty crops, visit https://www.ams.usda.gov/services/grants/scbgp/specialty-crop. See ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Specialty crops").

54 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1864, prefatory remarks (Jan. 11, 2023).

55 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "High value crop"); ERP Phase 2 Handbook, Exhibit 2, page 4, "High value crops" (March 23, 2023).

56 ERP Phase 2 Handbook, Exhibit 2, page 4, "High value crops" (March 23, 2023).

57 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Other crop"); ERP Phase 2 Handbook, Exhibit 2, page 6, "Other Crops" (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

58 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Other crop"); ERP Phase 2 Handbook, Exhibit 2, page 6, "Other Crops" (March 23, 2023).

59 ERP Phase 2 Handbook, Exhibit 2, page 6, "Other Crops" (March 23, 2023). Canola is limited to what USDA calls a "PR" purpose. PR, for the USDA, means processed. Processed, for USDA purposes means:

> Intended to have an end use after being treated or prepared by some particular process that changes the original properties, such as freezing, canning, pickling, salting, drying, processing, etc.

FSA Handbook Acreage and Compliance Determinations, 2-CP, Exhibit 11, page 8 (March 30, 2023).

60 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Other crop"); ERP Phase 2 Handbook, Exhibit 2, page 6, "Other Crops" (March 23, 2023).

V. Ineligible Crops

Several types of crops are mentioned by FSA as NOT eligible for ERP Phase 2.[61]

First, crops intended for grazing are not eligible for ERP Phase 2.[62]

Second, many aquatic species are not eligible.[63] Only aquatic species that meet FSA's definition of eligible aquaculture are eligible. FSA has an official definition of aquaculture for this purpose.[64]

Third, cannabis sativa L., and any part of the plant that does not meet the definition of hemp, is not eligible.[65]

Fourth, timber is not eligible for ERP Phase 2.[66]

Fifth, livestock and animal by-products are not eligible for ERP Phase 2.[67]

VI. Crop Loss Must Result in Decreased Revenue

To be an eligible crop loss for Phase 2 of ERP, a farmer must experience decreased revenue as a result of the loss. This decrease in revenue can come either from a crop production loss or a crop quality loss.[68]

A decrease in revenue is based on the difference in a farmer's allowable gross revenue for the disaster year compared to the allowable gross revenue for the farmer's benchmark year.[69] If one crop had a qualifying loss, revenue from all eligible crops can be included in allowable gross revenue.

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61 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023).

62 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023).

63 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023).

64 Aquaculture is defined as the following:

> Aquaculture means any species of aquatic organisms grown as food for human or livestock consumption or for industrial or biomass uses, fish raised as feed for fish that are consumed by humans, and ornamental fish propagated and reared in an aquatic medium. Eligible aquacultural species must be raised by a commercial operator and in water in a controlled environment.

ERP Phase 2 Handbook, Exhibit 2, "Aquaculture" (March 23, 2023).

65 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023). Hemp has a definition for the purpose of ERP Phase 2. See ERP Phase 2 Handbook, Exhibit 2, "Hemp" (March 23, 2023).

66 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023).

67 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Eligible crop"); ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023).

68 ERP Phase 2 Rule, 88 Fed. Reg. 1862, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 1-3, para. 3.D (March 23, 2023).

69 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-1, para. 45.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

A. Benchmark Year: 2018 or 2019

Benchmark year means either tax year 2018 or 2019.[70] The farmer may select which year to use as the benchmark year. The benchmark year is intended to represent a typical year of revenue for the farming operation.[71]

If a farmer does not have allowable gross revenue for tax year 2018 or 2019—for example, if the farmer began farming in year 2020—the farmer may certify to an adjusted benchmark year revenue.[72] Adjusted benchmark year revenue is described in detail in Chapter Five of this Guide.

B. Disaster Year: 2020 or 2021

The disaster year is the calendar year in which the qualifying disaster event occurred.[73] For purposes of ERP Phase 2, this could be either calendar year 2020 or 2021. FSA rules sometimes refer to disaster years as "program years."[74] This means that for Phase 2 of ERP, both the applicable program years and disaster years are calendar years 2020 or 2021.

C. Disaster Year Revenue Defined

FSA provides some confusing rules for defining disaster year revenue for ERP Phase 2. In general, disaster year revenue is what FSA calls the allowable gross revenue for the disaster year.[75] The tax year can be, but does not need to be, the year after the disaster year. FSA also requires the farmer to pick a representative tax year.

1. Representative Tax Year

FSA requires the farmer to pick what it calls a "representative tax year" for each disaster year.[76] It is the year in which disaster year revenue is reported on a tax form. Farmers will pick the representative tax year that best represents their disaster year revenue.[77]

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70 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Benchmark year"); ERP Phase 2 Handbook, page 3-1, para. 45.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

71 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-1, para. 45.A (March 23, 2023).

72 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Benchmark revenue"); ERP Phase 2 Handbook, page 3-28, para. 50.A (March 23, 2023).

73 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Disaster year"); ERP Phase 2 Handbook, page 3-1, para. 45.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

74 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Program year"); FSA, Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, at Part A—Producer Agreement (Jan. 23, 2023). The ERP Phase 2 Application, as well as instructions for filling out the application, are available at FSA, Emergency Relief, ERP Phase 2 Forms: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

75 ERP Phase 2 Handbook, page 3-24, para. 48.A (March 23, 2023).

76 See Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, at Parts C and D (Jan. 23, 2023). See also ERP Phase 2 Handbook, pages 3-110 and 3-111, para. 68.A (March 23, 2023).

77 ERP Phase 2 Handbook, page 3-24, para. 48.A (March 23, 2023).

In general, there are two possible choices for representative tax year for each disaster year. According to FSA, if the disaster year was 2020, the representative tax year can be either 2020 or 2021.[78] If the disaster year was 2021, the representative tax year can either be 2021 or 2022.

2. Single Year Disasters

For many farmers a qualifying disaster will only have occurred during one year—either 2020 or 2021. For these farmers, disaster year revenue is defined as the allowable gross revenue for the tax year in which the farmer would report revenue for the disaster-affected crop.[79] The farmer can choose which tax year to use.

So, the farmer's disaster year is the calendar year in which the qualifying disaster event occurred, but the farmer's disaster year revenue could come from the following tax year. FSA calls the tax year the farmer elects the "representative revenue year" for disaster year revenue.[80]

FSA gives the following example. A farmer plants fall wheat in October 2020, with an expected harvest in 2021. If the wheat was affected by a disaster—a freeze—in December 2020, the farmer's representative revenue year would be tax year 2021, even though the disaster year was 2020. This is because 2021 is when the farmer would report the disaster year revenue for the wheat crop.[81]

This means that although ERP Phase 2 provides assistance for only disaster years 2020 and 2021, it is possible that a farmer's disaster year revenue for disaster year 2020 could be from tax years 2020 or 2021, and for disaster year 2021 the disaster year revenue could come from tax years 2021 or 2021.[82]

3. Multiple Disaster Years

Some farmers will have had qualifying disasters in both 2020 and 2021. If so, the farmer must choose a different representative tax year for each of the disaster years—the tax years cannot be the same for both disaster years.[83] In addition, if there are two disaster years, the representative tax years must be consecutive. That is to say there cannot be a tax year between the two representative tax years the farmer selects.

FSA gives the following example. A farmer had a qualifying drought loss for pinto beans in calendar year 2020, and had a qualifying loss for processed canola in calendar year 2021. The farmer applies for ERP Phase 2 for both years. The farmer picks 2021 as the representative tax year for the 2020 losses. The farmer must then use 2022 as the representative tax year for 2021 losses.[84]

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78 ERP Phase 2 Handbook, page 3-24, para. 48.A (March 23, 2023).

79 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Disaster year revenue"); ERP Phase 2 Handbook, page 3-24, para. 48.A, Exhibit 2, page 3, "Disaster Year Revenue" (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

80 See Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, at Parts C and D (Jan. 23, 2023). See also ERP Phase 2 Handbook, pages 3-109 through 3-111, para. 68.A (March 23, 2023).

81 ERP Phase 2 Handbook, page 3-2, para. 45.D (March 23, 2023).

82 ERP Phase 2 Handbook, Exhibit 2, page 3, "Disaster Year Revenue" (March 23, 2023).

83 ERP Phase 2 Handbook, pages 3-24 and 3-25, para. 48.A-B (March 23, 2023).

84 ERP Phase 2 Handbook, page 3-26, para. 48.B (March 23, 2023).

VII. Crop Loss Must be Caused by a Qualifying Disaster Event

ERP Phase 2 provides assistance for crop losses that are due—in whole or in part—to what FSA calls "qualifying disaster events."[85] For some qualifying disaster events, crop losses caused by a related weather condition—meaning a condition that is related to a disaster event—are also eligible.[86]

When applying for ERP Phase 2, farmers do not need to indicate the specific qualifying disaster event they experienced. Instead, farmers need to certify that they experienced at least one of the qualifying disaster events or related conditions.[87] The farmer may later be asked to document that event.[88] Later sections of this Guide discuss the documentation requirements in more detail.

The next sections describe disaster events and related conditions.

A. Qualifying Disaster Events

There are several types of qualifying disaster events. The next sections describe disaster events—and related weather conditions—that qualify for ERP Phase 2 assistance. Some of these qualifying disaster events are defined by FSA. For others, the regulations and FSA guidance do not provide a definition.

The following are qualifying disaster events for ERP Phase 2.

1. Drought

To qualify as an eligible drought for ERP Phase 2, one of two things must be true.[89]

First, a drought can qualify if it occurred in an area within a county that was rated by the U.S. Drought Monitor as having a severe drought (D2) for eight consecutive weeks.[90]

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85 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

85 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, pages 3-1 and 3-2, para. 45.B-C (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

86 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

87 See FSA, Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, at Part A—Producer Agreement (Jan. 23, 2023).

88 See, for example, Emergency Relief FAQs, Additional ERP FAQs, "If [] my county did not qualify for drought based on the U.S. Drought Monitor am I automatically ineligible for ERP?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

89 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying drought"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

90 Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (Sept. 30, 2021); ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying drought"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

Second, it is a qualifying drought if the Drought Monitor recorded an extreme drought (D3), or something higher, at any time during the applicable calendar (disaster) year.[91]

FSA has published a list of counties that experienced ERP-qualifying droughts in calendar years 2020 and 2021.[92]

2. Derecho

A derecho is a qualify disaster event for ERP Phase 2.[93] In addition, the related condition of excessive wind also qualifies.[94]

3. Excessive Heat

Excessive heat is a qualify disaster event for ERP Phase 2.[95] Neither the regulations nor FSA rules define excessive heat.

4. Excessive Moisture

Excessive moisture is a qualify disaster event for ERP Phase 2.[96] Neither the regulations nor FSA rules define excessive moisture.

5. Flooding

Flooding is a qualify disaster event for ERP Phase 2.[97] In addition, silt or debris that occurred as a direct or proximate result of flooding are qualifying related conditions.[98]

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91 The Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (Sept. 30, 2021); ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying drought"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

92 For the list of counties that experienced qualifying droughts in calendar year 2020, visit https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2022/fsa_erp_2020_factsheet_v2.pdf. For the list of counties that experienced qualifying droughts in calendar year 2021, visit https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2022/fsa_erp_2021_factsheet_v3.pdf.

93 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

94 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

95 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

96 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

97 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

98 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

6. Freeze

Freeze is a qualify disaster event for ERP Phase 2.[99] For purposes of ERP Phase 2, a qualifying freeze includes a polar vortex.

7. Hurricanes

Hurricanes are qualifying disaster events for ERP Phase 2.[100] To qualify, the hurricane must be named. In addition, the related conditions of excessive wind, storm surges, tornados, tropical storms, and tropical depressions also qualify if they are a direct result of a qualifying hurricane.[101]

8. Smoke Exposure

Smoke exposure is a qualifying disaster event for ERP Phase 2.[102] Neither the regulations nor FSA rules define what it means to have a loss caused by smoke exposure.

9. Wildfires

A wildfire is a qualifying disaster event for ERP Phase 2.[103] Neither the regulations nor FSA rules provide a definition or description of a qualifying wildfire.

10. Winter Storms

Winter storms are a qualifying disaster event for ERP Phase 2.[104] In addition, excessive wind and blizzards are qualifying related conditions if they occurred as a direct result of a winter storm.[105]

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99 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

100 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

101 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

102 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

103 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

104 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Qualifying disaster event"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

105 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-1, para. 45.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

B. Related Conditions

As noted in the list of qualifying disaster events above, for some qualifying disasters, FSA will allow eligibility for ERP Phase 2 for what the regulations call "related conditions."[106] FSA defines related conditions. The definition has two parts.

First, related conditions are damaging weather and other adverse natural events.[107]

Second, the damaging weather and other adverse natural events must occur as a direct result of a specific qualifying disaster event.[108]

In other words, damage from a storm that would not usually qualify as a qualifying disaster event could create ERP Phase 2 eligibility so long as the storm was a direct result of a qualifying disaster event. That means that events like excessive winds, tropical storms, blizzards, and silt or debris—all things that would not create eligibility on their own—can create eligibility as related conditions so long as they occurred because of a qualifying disaster event.

FSA gives two examples to help define related conditions. One describes a related condition, and one describes something that would not be a related condition.[109]

First, suppose a named hurricane makes landfall, becomes a tropical storm, and then later a tropical depression. Losses due to the tropical storm and tropical depression would be eligible for ERP Phase 2 assistance as conditions related to the hurricane.[110]

Second, suppose a wildfire occurred in September. Later there is heavy rainfall that causes a mudslide in November. FSA says the mudslide would not count as a related condition because it did not occur concurrently—at the same time—as the wildfire.[111]

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106 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

106 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Producer"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023).

107 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

107 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Producer"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023).

108 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

108 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Producer"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023).

109 ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023).

109 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Related condition"); ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023); ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

110 ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023).

111 ERP Phase 2 Handbook, page 3-2, para. 45.C (March 23, 2023).

Chapter Four: Linkage Requirements for ERP Phase 2

In order to receive a payment under ERP Phase 2, farmers must meet what FSA calls a "linkage" requirement.[112] In general, this means farmers must obtain some form of crop insurance or similar coverage for the next two crop years for each of their eligible crops that suffered a loss due to a qualifying disaster event.[113]

To meet this requirement, farmers must fill out and sign a "Crop Insurance and/or NAP Coverage Agreement," Form FSA-522, when applying for ERP Phase 2.[114] Unlike the ERP Phase 2 Application (Form FSA-521), the coverage agreement (Form FSA-522) requires that farmers list each of their eligible crops that suffered a loss from a disaster event.

The following sections explain the linkage rule in more detail.

I. Coverage Required

To satisfy the ERP Phase 2 linkage requirement, a farmer must obtain: (1) crop insurance; (2) Noninsured Crop Disaster Assistance Program (NAP) coverage; or (3) Whole-Farm Revenue Protection (WFRP) coverage. The following rules apply.

A. Crop Insurance—If Available

To meet the linkage requirement, farmers must purchase federal crop insurance—if available—for each of the eligible crops that suffered a loss from a qualifying disaster event.[115]

1. Which Crops—Only Those on ERP Phase 2 Application

The rules make clear that the crop insurance requirement does not apply for every crop the farmer raised and sold. It only needs to be bought for the farmer's eligible crops that suffered a revenue loss due to a qualifying disaster event.[116] So, if the farmer raised five different crops in 2020, but only two crops were affected by the disaster, the crop insurance requirement only applies to those two crops. These might not be the two most important crops raised by the farmer.

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112 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023).

113 Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (Sept. 30, 2021); ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023).

114 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

115 Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (Sept. 30, 2021).

116 Form FSA-522, Part B, Crop Insurance And/Or NAP Coverage Agreement, Instructions for FSA-522 (Jan. 23, 2023), at https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/emergency-relief-program/pdfs/fsa_522_crop_insurance_andor_nap_coverage_agreement.pdf; FSA, Instructions for FSA-522 (May 8, 2023).

2. Coverage Level

The coverage purchased must be at the level of 60/100 or greater. [117] It must be purchased for all counties in which the crop is planted. While there is a significant federal government subsidy for all federal crop insurance, some farmers may find the insurance costly.

3. If Crop Insurance not Available

Federal crop insurance is not available for all crops in all counties. If crop insurance is not available for a crop the farmer must try to buy NAP coverage. NAP is discussed below.

B. NAP Coverage—If Crop Insurance is Not Available

If crop insurance is not available for any of the crops listed on Form FSA-522, the insurance coverage agreement, the farmer must purchase Noninsured Crop Disaster Assistance Program (NAP) coverage for those crops.[118] The coverage level required for NAP is the catastrophic level (50/55) or higher. [119] Coverage must be purchases for all administrative counties in which the crop is planted.[120]

C. Whole Farm Revenue Protection

If both crop insurance and NAP are unavailable for a crop, the farmer must purchase Whole-Farm Revenue Protection (WFRP) coverage for the crop, if they are eligible to do so.[121]

II. Required for the Next Two Available Crop Years

In general, to meet the linkage requirement farmers must purchase coverage for the next two available crop years for each crop listed on the coverage agreement, Form FSA-522.[122] The next available crop years will be determined from the date a farmer receives an ERP Phase 2 payment.[123] This means that the next two available crop years could vary from crop to crop and based upon what type of coverage the farmer purchases. The next two available crop years could therefore be: 2023 and 2024; 2024 and 2025; or 2025 and 2026.[124]

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117 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)(1)); ERP Phase 2 Handbook, page 3-7, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

118 Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (Sept. 30, 2021); ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b), (d)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

119 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)(2)); ERP Phase 2 Handbook, page 3-7, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

120 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)(2)); ERP Phase 2 Handbook, page 3-7, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

121 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(e)); ERP Phase 2 Handbook, page 3-7, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

122 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023).

123 ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023).

124 ERP Phase 2 Handbook, page 3-10, para. 46.C (March 23, 2023).

The ERP Phase 2 Handbook provides an example. Suppose a farmer received an ERP payment in July of 2022 for losses to an avocado crop in 2020. The application closing date for NAP coverage for avocados was January 1, 2023, for the 2024 crop year. This would mean that for purposes of the linkage requirement, the next two available crop years for which the farmer must obtain NAP coverage for avocados are 2024 and 2025.[125]

III. Must File an Acreage Report During Linkage Years

The two crop years for which a farmer must obtain coverage for their eligible crops are called linkage years. For each of these years, the farmer is required to file an accurate acreage report with FSA.[126] Farmers are only required to file acreage reports for their linkage years, meaning an acreage report is not required to be on file with FSA when a farmer applies for ERP Phase 2.[127]

IV. When Linkage Coverage is Not Required

Under certain circumstances, the linkage requirement to obtain coverage for crops listed on the Form FSA-522 will not apply. The sections below describe those circumstances.

A. If the Farmer Received an ERP Phase 1 Payment for the Same Loss

If a farmer received an ERP Phase 1 payment for a crop, and the farmer applies for an ERP Phase 2 payment for a loss to that same crop, the farmer is not obligated to obtain additional years of coverage.[128]

B. If the Farmer Does Not Plant the Crop During a Linkage Year

If a farmer does not plant a crop listed on Form FSA-522 during one or both of the linkage years, the farmer is not required to obtain coverage for the year or years the crop was not planted.[129]

C. If the Farmer No Longer Farms or the Entity Dissolves

If a farmer stops farming the farmer is not required to obtain coverage for the crops listed on Form FSA-522.[130] In the case of an entity that applies for ERP Phase 2, if the entity completely dissolves and the majority share of members are not farming under a new tax identification number (TIN), then the linkage requirement to obtain coverage will not apply.

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125 ERP Phase 2 Handbook, page 3-10, para. 46.C, Example 2 (March 23, 2023).
126 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023).
127 Emergency Relief FAQs, Additional ERP FAQs, "I didn't file an acreage report for the disaster years 2020 or 2021, am I ineligible or will I have to pay a late-filed fee to be able to apply for ERP Phase 2?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.
128 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(g)); ERP Phase 2 Handbook, page 3-10, para. 46.D (March 23, 2023).
129 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(f)); ERP Phase 2 Handbook, page 3-9, para. 46.B (March 23, 2023).
130 ERP Phase 2 Handbook, page 3-9, para. 46.B (March 23, 2023).

Chapter Five: Payments for ERP Phase 2

In general, ERP Phase 2 payments are revenue-based payments based on the difference between a farmer's allowable gross revenue from their selected benchmark year and the allowable gross revenue from the applicable disaster year.[131]

Farmers can be eligible to receive ERP Phase 2 payments for both disaster year 2020 and 2021.[132] If a farmer is eligible for payments for both years, FSA will calculate each year's payment separately.

I. Overview of ERP Phase 2 Payments—Made in Two Installments

Payments for ERP Phase 2 are subject to available funding. The money Congress set aside for ERP Phase 2 is limited. For this reason, under Phase 2 FSA will issue an initial payment to eligible farmers. Later, after enrollment ends, a final payment will be made. That final payment may be prorated if it turns out there is not enough money available to cover all farmers at the full amount for which they are eligible.

A. Initial Payment

To avoid running out of funds, FSA will issue an initial Phase 2 payment to eligible farmers.[133] This payment will be the lesser of either $2,000 or the farmer's total ERP Phase 2 payment. The calculation for an ERP Phase 2 payment is discussed later in this chapter.

If a farmer previously received an ERP Phase 1 payment, that payment will be subtracted from the farmer's initial ERP Phase 2 payment.[134] If the farmer's ERP Phase 1 payment was equal to, or greater than, the farmer's ERP Phase 2 initial payment, the farmer will not receive an initial payment for Phase 2.[135]

B. Final Payment

After the close of the ERP Phase 2 application period, FSA will issue a final payment to eligible farmers.[136] This payment will be equal to the farmer's total ERP Phase 2 payment, minus the farmer's initial Phase 2 payment.

However, if the funding for ERP Phase 2 is not sufficient to pay all eligible farmers in full, the final payment will be reduced so that the program stays within its budget. This reduction in payment would occur when FSA applies what it calls an "ERP factor."[137] As described in more detail below, all Phase 2 payments are calculated by applying an ERP factor. If, after the close of the enrollment period, there are not enough funds to cover the

[131] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-21, para. 47.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

[132] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1864, prefatory remarks (Jan. 11, 2023).

[133] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(c)); ERP Phase 2 Handbook, page 3-202, para. 85.D (March 23, 2023).

[134] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(c)); ERP Phase 2 Handbook, page 3-202, para. 85.D (March 23, 2023).

[135] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks, FN10 (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-202, para. 85.D (March 23, 2023).

[136] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d).

[137] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d)); ERP Phase 2 Handbook, page 3-201, para. 85.A-B (March 23, 2023).

payments FSA will adjust the ERP factor so that eligible applicants receive a reduced amount.[138]

II. Payment Calculation Equation

A farmer's ERP Phase 2 payment is calculated using the equation below.[139] Although the equation itself is not very complicated, fully understanding how Phase 2 payments are calculated requires understanding several specific terms—those terms are defined in the section that follows.

To determine a farmer's total ERP Phase 2 payment, FSA will use the following calculation. If a farmer's eligible crops for Phase 2 fall into both (1) the specialty or high value crop category, as well as (2) the other crop category, FSA will do this calculation twice and add the resulting amounts together to get the farmer's total Phase 2 payment.[140]

Allowable gross revenue from the farmer's benchmark year
x (*multiplied by*) the ERP Factor
\- (*minus*) the farmer's disaster year revenue (from tax year 2020, 2021, or 2022),
\- (*minus*) the farmer's ERP Phase 1 gross payment, if applicable,
\- (*minus*) the farmer's net disaster payments for similar losses (CFAP 1, CFAP 2, 2020 WHIP+, 2020 QLA)
\- (*multiplied by)* percentage of expected revenue for specialty/high value or other crops

= (equals) Total ERP Phase 2 payment

III. Understanding Key Terms in the ERP Phase 2 Payment Calculation

The equation for ERP Phase 2 payments involves several concepts that are specific to Phase 2. For example, allowable gross revenue, benchmark year revenue, disaster year revenue, and the ERP factor each have a specific meaning for purposes of Phase 2. The sections below describe these terms in detail.

A. Allowable Gross Revenue for both Benchmark and Disaster Years

For Phase 2 of ERP, farmers self-certify their allowable gross revenue for both their selected benchmark year and disaster year(s).[141] So long as at least one of the farmer's ERP-eligible crops suffered a loss from a qualifying disaster event, the famer should include revenue from *all* ERP-eligible crops when calculating their allowable gross revenue.

[138] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d)); ERP Phase 2 Handbook, page 3-201, para. 85.C (March 23, 2023).

[139] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)); ERP Phase 2 Handbook, page 3-201, para. 85.A (March 23, 2023).

[140] The reason FSA will calculate payments separately for these different categories of crops is because there are different payment limitations for each. Payment limitations are discussed later in this chapter.

141 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863-1864, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-21, para. 47.A (March 23, 2023).

Allowable gross revenue includes revenue from several sources.[142] In general, much of the allowable gross revenue for ERP Phase 2 can be found on a farmer's IRS Schedule F form, lines 1 through 8. However, farmers are not required to have filed a federal tax return in order to determine their allowable gross revenue for ERP Phase 2. Farmers can use similar federal tax forms or other supporting financial documentation to calculate their allowable gross revenue.[143]

The sections below describe what is considered allowable gross revenue for Phase 2. These are the only types of revenue that can be included when determining allowable gross revenue for Phase 2.[144] Pages three and four of the ERP Phase 2 application, Form FSA-521, also include a chart of the allowable and excluded gross revenue.[145]

1. Sales of eligible crops, including value-added commodities

Income from the sale of eligible crops that were produced by the farmer are included in the allowable gross revenue. This is true for both the farmer's applicable benchmark and the farmer's disaster years.[146] The crops must have been grown in the United States or its territories by the farmer.[147]

Sales for this purpose can sales that are the result from adding value to a crop the farmer grew through post-production activities. This includes sales that were, or could have been, reported on an IRS Schedule F. An example of such a post-production activity would be turning strawberries into jam.[148]

This also includes any sales of aquatic species that are grown as food for human or livestock consumption, industrial or biomass uses, or the sales of ornamental fish propagated and reared in an aquatic medium.[149] To be eligible for Phase 2, the aquatic species must meet the definition of eligible aquaculture.[150]

2. Sales of eligible crop purchased and resold with a change in characteristic

Allowable revenue includes revenue from a farmer's sale of eligible crops that the farmer purchased intending to resell, but which had a change in characteristic due to

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142 The ERP Phase 2 Fact Sheet provides a detailed list of allowable gross revenue, and where those figures are located on an IRS form Schedule F. See ERP Phase 2 Fact Sheet, at 4-5 (Jan. 2023).

143 ERP Phase 2 Handbook, page 3-24, para. 47.D (March 23, 2023).

144 ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023).

145 See FSA, Emergency Relief Program (ERP) Phase 2 Application, 3-4 (Jan. 23, 2023).

146 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(1)); ERP Phase 2 Handbook, page 3-21, para. 47.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

147 ERP Phase 2 Handbook, page 3-21, para. 47.B (March 23, 2023).

148 ERP Phase 2 Fact Sheet, at 4 (Jan. 2023). Allowable revenue under this category may be found on a farmer's IRS Schedule F, line 2. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

149 ERP Phase 2 Handbook, page 3-6, para. 45.L (March 23, 2023). Eligible aquaculture is defined as "any species of aquatic organisms grown as food for human or livestock consumption or for industrial or biomass uses, fish raised as feed for fish that are consumed by humans, and ornamental fish propagated and reared in an aquatic medium." ERP Phase 2 Handbook, Exhibit 2, page 1, "Aquaculture" (March 23, 2023). The species must be raised by a commercial operator in water that is in a controlled environment.

150 ERP Phase 2 Handbook, page 3-35, para. 51.B (March 23, 2023).

the time between the purchase and the resale.[151] For example, if the farmer purchased a two-inch plant, and four months later sold the same plant at eighteen inches, that would be allowable gross revenue.

When determining the allowable revenue for purchased and resold crops, a farmer should take the sales of the eligible crops minus the crop's cost or other basis.[152]

3. Taxable amount of cooperative distributions

Allowable revenue includes the taxable amount of cooperative distributions that are directly related to the sale of eligible crops the farmer produced.[153] As an example, the ERP Phase 2 Fact Sheet notes that per-unit allocations paid to patrons for gross grain sales would fall within this category of allowable gross revenue.[154]

4. Benefits under certain agricultural programs

If a farmer received benefits under any of the following agricultural programs, the value of those benefits counts as allowable gross revenue for purposes of ERP Phase 2: (1) 2017 WHIP; (2) Agricultural Risk (ARC) and Price Loss Coverage (PLC) programs; (3) Biomass Crop Assistance Program (BCAP); (4) Loan deficiency payments (LDP); (5) Marketing Loan Gains (MLG); (6) Market Facilitation Program (MFP); (7) On-Farm Storage Loss Program; and (8) Seafood Trade Relief Program (STRP). [155]

5. CCC loans reported as income to the IRS

Farmers should include as allowable gross revenue their CCC loans, so long as the loans were treated as income and reported to the IRS.[156]

6. Crop insurance proceeds

Crop insurance proceeds that a farmer receives for eligible crops under ERP Phase 2 can count as allowable gross revenue.[157] However, any crop insurance service fees and

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[151] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(2)); ERP Phase 2 Handbook, page 3-21, para. 47.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[152] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(2)); ERP Phase 2 Handbook, page 3-21, para. 47.B (March 23, 2023). Allowable revenue under this category may be found on a farmer's IRS Schedule F, line 1C. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[153] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(3)); ERP Phase 2 Handbook, page 3-21, para. 47.B (March 23, 2023). Allowable revenue under this category may be found on a farmer's IRS Schedule F, line 3A. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[154] ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[155] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(4)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be found on a farmer's IRS Schedule F, line 4A. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[156] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(5)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be found on an IRS form 1099-A, or as reported on a farmer's IRS Schedule F, lines 5A-5C. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[157] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(6)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable

premiums should be subtracted from the proceeds when calculating the value of the allowable gross revenue for purposes of ERP Phase 2.

7. NAP payments

Payments from the Noninsured Crop Disaster Assistance Program that a farmer receives for eligible crops under ERP Phase 2 can count as allowable gross revenue.[158] However, any NAP service fees and premiums should be subtracted from the NAP payments when calculating the value of the allowable gross revenue for purposes of ERP Phase 2.

8. ELAP payments for aquaculture crops

Payments a farmer receives under the ELAP program for an eligible aquaculture crop count as allowable gross revenue for ERP Phase 2.[159]

9. Grant agreement payments from FSA

Payments a farmer receives through a grant agreement with FSA for losses to eligible crops count as allowable gross revenue for ERP Phase 2.[160]

10. Grants from certain government departments

Payments a farmer receives through a grant from any of the following government departments count as allowable gross revenue for ERP Phase 2, so long as the payments are direct payments for the loss of agricultural commodities or the loss of revenue from agricultural commodities: (1) Department of Commerce; (2) National Oceanic and Atmospheric Administration; or (3) State program funds providing direct payments for the loss of agricultural commodities or the loss of revenue from agricultural commodities.[161]

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revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

158 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(7)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

159 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(8)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

160 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(9)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

161 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(10)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

11. Other revenue directly related to the production of eligible crops

Any other revenue that a farmer receives that is directly related to the production of an eligible crop, and which must be reported as income to the IRS, counts as allowable gross revenue for ERP Phase 2.[162]

12. ERP Phase 1 payments for the applicable disaster year

For the farmer's applicable disaster year only, any ERP Phase 1 payments issued to another person or entity for the producer's share of an eligible crop will count as allowable gross revenue for Phase 2, regardless of the tax year in which the payment would be reported to the IRS.[163]

B. Allowable Gross Revenue for Benchmark Years Only

Certain categories of revenue are only included as allowable gross revenue for a farmer's benchmark year. The following sections describe these categories.

1. 2017 WHIP payments—Benchmark year only

For the farmer's applicable benchmark year only, any 2017 Wildfire and Hurricanes Indemnity Program (WHIP) payments will count as allowable gross revenue.[164]

2. 2018 and 2019 WHIP+ Payments

For the farmer's applicable benchmark year only, any 2018 and 2019 Wildfire and Hurricanes Indemnity Program (WHIP+) payments will count as allowable gross revenue.[165]

3. 2018 and 2019 QLA payments

For the farmer's applicable benchmark year only, any 2018 and 2019 Quality Loss Adjustment Program (QLA) payments will count as allowable gross revenue.[166]

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[162] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(11)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 8. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[163] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(12)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[164] ERP Phase 2 Handbook, page 3-23, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[165] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(13)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

[166] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(a)(13)); ERP Phase 2 Handbook, page 3-22, para. 47.B (March 23, 2023). Allowable revenue under this category may be on a farmer's IRS Schedule F, line 6. See ERP Phase 2 Fact Sheet, at 4 (Jan. 2023).

C. Excluded Gross Revenue

Only the types of revenue listed above as allowable gross revenue can be included as revenue for purposes of ERP Phase 2.[167] This means that many other types of revenue should not be included in the farmer's certification on their ERP Phase 2 application.

1. Examples of Gross Revenue that Do NOT Count for ERP Phase 2

Below are examples of the types of revenue that are NOT included as allowable gross revenue for ERP Phase 2. This list is not a complete list. It gives examples of the types of revenue that farmers should not include.

- Resale items not held for characteristic change
- Sales of livestock, animal by-products, and any commodities that are not "eligible crops"
- Federal assistance programs not previously listed, including payments from programs such as the Livestock Forage Disaster Program (LFP), the Livestock Indemnity Program (LIP), the Tree Assistance Program (TAP), the Milk Loss Program, and payments for livestock or honeybees under the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP)
- Conservation program payments
- Any pandemic assistance payments that were not for the loss of eligible crops or the loss of revenue from eligible crops
- Income from a pass-through entity such as an S Corp or LLC
- Custom hire income
- Net gain from hedging or speculation
- Wages, salaries, tips, and cash rent
- Rental of equipment or supplies
- Acting as a contract producer of an agricultural commodity.

2. Some Disaster Payments are Excluded from Gross Revenue

When calculating the Phase 2 payment for ERP, FSA will automatically subtract some payments. These payments are from programs that are for crops eligible under ERP Phase 2, or the loss of revenue from those Phase 2 eligible crops The reduction of these program payments is done automatically by FSA when calculating a farmer's Phase 2 payment, and therefore farmers should not include payments from the following programs when determining their allowable gross revenue.[168]

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[167] ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023). The exclusive list of allowable gross revenue for ERP Phase 2 is found in the ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903).

[168] See Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, at Parts C and D (Jan. 23, 2023). In addition, the Handbook provides examples of how disaster payments are taken into account

a. *ERP Phase 1 Payments*

If a farmer received an ERP Phase 1 payment, that payment amount will be subtracted from the farmer's allowable gross revenue.[169] Any ERP Phase 1 payment made for program year 2020 will be subtracted from the farmer's allowable gross revenue for that year.[170] If the farmer received an ERP Phase 1 payment for program years 2021 or 2022, those amounts will be subtracted from the farmer's ERP Phase 2 allowable gross revenue for disaster year 2021.

b. *CFAP Payments—Excluding Contract Producer Revenue*

If a farmer received a CFAP payment for one of the ERP Phase 2 disaster years—2020 or 2021—the net CFAP payments will be subtracted from the farmer's allowable gross revenue for that disaster year. This includes payments from both CFAP 1 and CFAP 2.[171] However, CFAP payments made for contract producer revenue will not be subtracted from the farmer's gross revenue for ERP Phase 2.

Because the CFAP program did not exist in 2018 or 2019, there is no reduction in the farmer's benchmark year allowable gross income for CFAP payments.[172] The only CFAP payment reductions will be for the farmer's disaster year allowable gross income.

c. *WHIP+ Payments for Disaster Year 2020*

If a farmer received a payment from the Wildfires and Hurricanes Indemnity Program Plus (WHIP+) for program year 2020, that net payment will be subtracted from the farmer's allowable gross revenue for disaster year 2020.[173]

d. *Quality Loss Adjustment (QLA) Program Payments for Disaster Year 2020*

If a farmer received a payment from the Quality Loss Adjustment (QLA) Program for program year 2020, that net payment will be subtracted from the farmer's allowable gross revenue for disaster year 2020.[174]

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when determining a farmer's ERP Phase 2 payment. See ERP Phase 2 Handbook, pages 3-202 through 3-206, para. 85.D-G (March 23, 2023).

169 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(3)); ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023).

170 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(3)).

171 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(4)); ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023).

172 Emergency Relief FAQs, Additional ERP FAQs, "Are producers to exclude CFAP payments from the allowable gross revenue even though the software will reduce CFAP from the ERP Phase 2 payment?" (June 6, 2022); ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(4)); ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023).

173 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(4)); ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023). The regulations for WHIP+ can be found under 7 C.F.R. part 760, subpart O (2023).

174 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(4)); ERP Phase 2 Handbook, page 3-23, para. 47.C (March 23, 2023). The regulations for WHIP+ can be found under 7 C.F.R. part 760, subpart O (2023).

D. Disaster Year Revenue and Representative Revenue Year

As described earlier in this Guide, disaster year revenue is defined as the allowable gross revenue for the tax year—chosen by the farmer—that corresponds to the tax year in which the farmer would report revenue for the disaster-affected crop.[175] FSA calls the tax year the farmer selects the "Representative Revenue Year" for the farmer's disaster year revenue.[176] This means that although the disaster year is the calendar year in which the qualifying disaster event occurred—either 2020 or 2021—a farmer's disaster year revenue could come from the following tax year. For example, if a farmer is applying for disaster year 2021, the representative revenue year could be either 2021 or 2022.

It is important to note that if a farmer is applying for ERP Phase 2 payments for both disaster year 2020 and 2021, the farmer's representative revenue year for each disaster year must be different and must be consecutive.[177] So, for example, if a farmer selects year 2021 as the representative revenue year for their 2020 disaster year, then the farmer must select year 2022 as their representative revenue year for the 2021 disaster year.

E. Benchmark Year and Benchmark Year Revenue

For Phase 2 of ERP, farmers must select a benchmark year that is intended to represent a typical year of allowable gross revenue for the farmer's operation.[178]

However, for some farmers—including beginning farmers and those whose operations have changed in size or scale—there may not be a benchmark year that reflects their operation's "typical" revenue. In those situations, Phase 2 attempts to account for this by allowing a farmer to provide what's called an "adjusted benchmark year revenue."[179]

The rules for benchmark years, benchmark year revenue, and adjusted year revenue are described in the sections below.

1. Benchmark Year and Benchmark Year Revenue

For Phase 2, a farmer's benchmark year means either tax year 2018 or 2019.[180] The farmer may select which year to use as the benchmark year.

If a farmer is applying for ERP Phase 2 for both disaster years 2020 and 2021, the farmer should select one benchmark year for each disaster year.[181] The benchmark year can be the same or different for each disaster year.

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175 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Disaster year revenue"); ERP Phase 2 Handbook, page 3-24, para. 48.A Exhibit 2, page 3, "Disaster Year Revenue" (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

176 See Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, at Parts C and D (Jan. 23, 2023). See also ERP Phase 2 Handbook, pages 3-109 through 3-111, para. 68.A (March 23, 2023).

177 ERP Phase 2 Handbook, page 3-24, para. 48.A, page 3-110, para. 68.A, Exhibit 9, page 3 (March 23, 2023).

178 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-26, para. 49.A (March 23, 2023).

179 ERP Phase 2 Handbook, page 3-28, para. 50.A (March 23, 2023).

180 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Benchmark year"); ERP Phase 2 Handbook, page 3-1, para. 45.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

181 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks (Jan. 11, 2023); ERP Phase 2 Handbook, page 3-26, para. 49.B (March 23, 2023).

2. Adjusted Benchmark Year Revenue for New Farmers

If actual allowable gross revenue is not available for tax year 2018 or 2019, the farmer may certify to an adjusted benchmark year revenue.[182] This could happen if a farmer began farming in 2020 or 2021 and thus did not have any allowable gross revenue in either tax year 2018 or 2019. In that case, the adjusted benchmark year revenue is allowable gross revenue the farmer would have reasonably expected for the disaster year, if the disaster event had not occurred.[183]

3. Adjusted Benchmark Year Revenue for Changes to Operation Capacity

Under some circumstances, there can be a change in a farm's operation capacity during a disaster year. In this case, the benchmark year revenue would not accurately reflect the farm's expected allowable gross revenue. In such situations, the adjusted benchmark year revenue is the allowable gross revenue the farmer would have reasonably expected for the disaster year, if the disaster event had not occurred.[184]

According to FSA, a farm's operation capacity is defined as "the potential scope that a farming operation has to produce crops or commodities with available physical resources, such as land and facilities."[185] To qualify as a change in operation capacity for purposes of ERP Phase 2, something tangible must have been taken away or added to the operation during the disaster year.[186] Changes to less tangible things, such as management practices, are not qualifying operation changes.[187] In addition, crop rotations, increases in the use of fertilizers or chemicals, and changes to farming practices, such as moving from conventional tillage to no-till farming, do not count as changes to operation capacity.[188]

a. FSA May Ask for More Information

For the changes that are descried below, at the time of the application, FSA can ask for additional documentation to verify the changes to the farmer's operation

182 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Benchmark revenue"); ERP Phase 2 Handbook, page 3-28, para. 50.B (March 23, 2023).

183 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Benchmark revenue"); ERP Phase 2 Handbook, Exhibit 2, page 1, Benchmark year revenue (March 23, 2023).

184 ERP Phase 2 Handbook, pages 3-29 and 3-30, para. 50.D-D (March 23, 2023).

185 ERP Phase 2 Handbook, Exhibit 2, page 6, "Operation capacity" (March 23, 2023).

186 ERP Phase 2 Handbook, page 3-31, para. 50.E (March 23, 2023). Although not defined by FSA, tangible usually means something that has a physical form. It can also mean something that is real, or substantial, or that can easily be understood. See Black's Law Dictionary (6th edition 1990). If FSA requires supporting documentation to support the farmer's adjusted benchmark year revenue, that documentation must show that physical alterations were made to the operation. The examples help show what FSA seems to have in mind.

187 See ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1864, prefatory remarks (Jan. 11, 2023).

188 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(e)); ERP Phase 2 Handbook, page 3-31, para. 50.E (March 23, 2023).

capacity.[189] Various ways a farmer might document the reason for decreased production are listed by FSA.[190]

b. Required Adjusted Benchmark Year Revenue

A farmer must provide an adjusted benchmark year revenue if the farmer had a decrease in their farm's operation capacity during a disaster year, when compared to the benchmark year.[191] A farmer's operation capacity could decrease, for example, if a farmer lost land, if orchard trees aged out, or if a farmer decommissioned an old greenhouse. The adjusted benchmark year revenue for a farmer that experienced a decrease in their farm's operation capacity would amount to the farmer's expected revenue for the disaster year.[192]

c. Optional Adjusted Benchmark Year Revenue

If a farmer experience an increased operation capacity in their disaster year the farmer may choose to use an adjusted benchmark year revenue on the Phase 2 application, but it is not required.

Examples of increases to an operation's capacity include situations in which the farmer acquired more farmland, added irrigation to the land, or gained a certified organic status and began producing certified organic crops.[193] The adjusted benchmark year revenue for a farmer that experienced an increase in their farm's operation capacity would amount to the farmer's expected revenue for the disaster year.[194]

F. ERP Factor

ERP payments are calculated by applying a percentage reduction—known as an ERP factor, or more generally, a payment factor. Applying an ERP factor has the effect of reducing the farmer's payment. Part of the logic of using an ERP factor is to make sure that FSA does not commit to payments that are more than the available funding for the program.[195] The inevitable result of the use of a payment factor is that ERP Phase 2 payments will always be less than the farmer's losses as calculated by the ERP Phase 2 rules.

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189 ERP Phase 2 Handbook, pages 3-28 through 3-31, para. 50.B-E (March 23, 2023).

190 The following are examples: (1) documentation for lost or added land could a be a copy of the lease; (2) adding irrigation might be documented with receipts for equipment; (3) organic premium could be documented with organic certification; aging out of orchard tress could be documented by a bill for tree removal; and (4) decreased or increased greenhouse space could be documented with bills related to a greenhouse. ERP Phase 2 Handbook, pages 3-29 through 3-30, para. 50.C-D (March 23, 2023).

191 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(c)); ERP Phase 2 Handbook, page 3-29, para. 50.C (March 23, 2023).

192 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1863, prefatory remarks, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1903(d)); Phase 2 Handbook, page 3-29, para. 50.C, Example (March 23, 2023).

193 ERP Phase 2 Handbook, page 3-30, para. 50.D (March 23, 2023).

194 ERP Phase 2 Handbook, page 3-30, para. 50.D, Example (March 23, 2023).

195 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d)); ERP Phase 2 Handbook, page 3-29, para. 50.C, Example (March 23, 2023).

1. Maximum ERP Factor—70 Percent

By statute, the ERP factor cannot be greater than 70 percent for either disaster year 2020 or 2021.[196] If a payment factor of 70 percent is applied, it would mean that only farmers who experienced a revenue loss of at least 30 percent would receive a payment from ERP Phase 2.

2. ERP Factor if Program Funds are Not Enough

If the total Phase 2 payments for ERP exceed the available funding for the program, FSA may reduce the ERP factor. [197] A reduced payment factor would result in reduced, or prorated, final Phase 2 payments for farmers.

Any reduction (and prorated payment) would not affect a farmer's initial Phase 2 payment. In other words, a farmer would be able to keep their initial Phase 2 payment that the farmer has already received.[198] This would be true even if the farmer's later-calculated total Phase 2 payment—after the ERP factor is applied—would amount to less than the farmer's initial payment.

3. Higher ERP Factor for Underserved Farmers

If FSA must reduce the ERP factor because there is not enough money to pay all eligible farmers in full, a higher ERP factor will be applied to the payment calculation for underserved producers and will be applied to other farmers.[199]

In general, there will be a 15 percent difference in the two ERP factors. For example, if the general ERP factor is reduced to 50 percent, then the ERP factor for underserved farmers will be 65 percent.[200] However, the ERP factor for underserved farmers cannot ever be more than 70 percent. This means that if FSA reduces the ERP factor to 60 percent, for example, the factor for underserved farmers would be 70 percent and not 75 percent.

For purposes of this rule, FSA defines underserved producers to mean: (1) beginning farmers and ranchers; (2) limited resource farmers and ranchers; (3) socially

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[196] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d); Form FSA-521-A, Emergency Relief Program (ERP) Phase 2 Allowable Gross Revenue Worksheet (Jan. 23, 2023), and instructions for form FSA-521-A, are available for download at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

[197] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(b)(1)); ERP Phase 2 Handbook, page 3-201, para. 85.B-C (March 23, 2023).

[198] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks (Jan. 11, 2023).

[199] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d)); ERP Phase 2 Handbook, page 1-21, para. 13.A (March 23, 2023). As FSA explains:

> This approach supports the equitable administration of FSA programs, as underserved farmers and ranchers are more likely to lack financial reserves and access to capital that would allow them to cope with losses due to unexpected events outside their control.

ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865 n.11, prefatory remarks (Jan. 11, 2023).

[200] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1865, prefatory remarks, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1905(d)); ERP Phase 2 Handbook, page 1-21, para. 13.A, page 3-201, para. 85.B (March 23, 2023).

disadvantaged farmers and ranchers (including women); and (4) veteran farmers and ranchers.[201] The FSA definition of these various groups is discussed later in this Guide.

To qualify for this increased payment factor, a farmer must have certified their status on Form CCC-860, the Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification form.[202] This form must be submitted within 60 days from the date of the ERP Phase 2 deadline. [203] If a farmer submits Form CCC-860 after they receive their ERP Phase 2 payment, but before the 60-day deadline, FSA will process the form and issue the farmer the additional payment.[204] In some cases, FSA will already have a CCC-86 form for the farmer. If the farmer is to be counted as a limited resources farmer or rancher the form must be updated each year.

IV. Payment Limitations

Payment limitations represent the maximum payment that a farmer, rancher, or legal entity can receive in a single year from a program—in this case, ERP Phase 2. In general, Congress sets the payment limitations for various programs when it passes the authorizing legislation.[205]

The payment limitations for ERP Phase 2 are different from the payment limitations that apply to other FSA programs, and also different from those that applied to ERP Phase 1.[206] For ERP Phase 2, the payment limitations are different depending on the type of eligible crop loss—either to specialty/high value crops or to other crops—that a farmer suffered.

Payment limitations for ERP Phase 2 do not apply to payments made to an Indian Tribe or Tribal Organization.[207]

A. Payment Limitations for Specialty Crops and High Value Crops

One set of payment limitations for ERP Phase 2 applies only to specialty crops and high value crops. The following rules apply.

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201 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Beginning farmer or rancher," "Limited resource farmer or rancher," Socially disadvantaged farm or rancher," "Underserved farmer or rancher," and "Veteran farmer and rancher"); ERP Phase 2 Handbook, page 1-21, para. 13.A, Exhibit 2, pages 1, 5, 7, 8 (March 23, 2023).

202 ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023); ERP Phase 2 Fact Sheet, at 2 (Jan. 2023).

203 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(2)); ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023).

204 ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023).

205 For ERP Phase 2, the payment limitations found in 7 C.F.R. § 1507(a)(2) apply. See The Extending Government Funding and Delivering Emergency Assistance Act (Pub. L. 117-43), Division B, Title I, Department of Agriculture, Agricultural Programs, 135 Stat. 344 (Sept. 30, 2021).

206 For example, the payment limitations found in FSA Handbook 6-PL, Payment Limitation, Payment Eligibility, and Average Adjusted Gross Income, Part 8 (April 29, 2022) do not apply to ERP Phase 2. See ERP Phase 2 Handbook, page 2-3, para. 26.D (March 23, 2023).

207 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(j)). For purposes if this rule, Indian Tribe and Tribal organization are defined in section 4(b) of the Indian Self-Determination and Education Assistance Act, at 25 U.S.C. § 5304.

1. General Rule—$125,000 Payment Limitation

In general, eligible farmers or entities for ERP Phase 2, excluding joint ventures or general partnerships, may not receive more than $125,000 in total in any one program year—2020 and 2021—for specialty crops and high value crops combined.[208]

2. If More than 75% of AGI Comes from Farming or Ranching— $900,000 Optional Payment Limitation

The payment limitation for specialty and high value crops may be increased to $900,000 per program year if at least 75 percent of the farmer's (or legal entity's) average adjusted gross income (AGI) comes from farming, ranching, or forestry.[209]

To determine whether a farmer meets the AGI requirements for an increased payment limitation, ERP looks at the average AGIs for the farmer's three taxable years prior to the immediately preceding complete tax year. For example, if a farmer applies for ERP Phase 2 based on program year 2020, the average AGIs from 2016, 2017, and 2018 would be used.[210] If a farmer applies for ERP Phase 2 based on program year 2021, the average AGIs from 2017, 2018, and 2019 would be used.[211]

To request this higher payment limitation, a farmer must complete and submit form FSA-510, Request for an Exception to the $125,000 Payment Limitation for Certain Programs.[212] Completing this form requires that the farmer provide a certification of their AGI from a licensed CPA or attorney.[213] It does not need to be the CPA or attorney who completed the farmer's taxes. However, any farmer who does not submit a completed form FSA-510 will not be eligible for the higher payment limitation.[214]

B. Payment Limitation for All Other Crops

One set of payment limitations for ERP Phase 2 applies only to what FSA calls all "other" crops.[215] The following rules apply.

1. General Rule—$125,000 Payment Limitation

In general, eligible farmers or entities for ERP Phase 2, excluding a joint venture or general partnership, may not receive more than $125,000 in total in any one year—

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[208] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(a)).

[209] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(b)(2)); ERP Phase 2 Handbook, page 2-1, para. 26.A (March 23, 2023). For a more complete definition of AGI that comes from farming, ranching, or forestry operations, see ERP Phase 2 Handbook, pages 2-4 through 2-6, para. 26.E (March 23, 2023).

[210] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(c)(1)).

[211] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(c)(2)).

[212] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(d)); ERP Phase 2 Handbook, page 2-2, para. 26.C, Exhibit 7 (March 23, 2023). An example of form FSA-510 can be found at Exhibit 7 of the ERP Phase 2 Handbook.

[213] If a legal entity wishes to apply for the payment increase, all members of the entity must and submit complete form FSA-510. ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(d)); ERP Phase 2 Handbook, page 2-2, para. 26.C (March 23, 2023).

[214] ERP Phase 2 Handbook, page 2-2, para. 26.C (March 23, 2023).

[215] See ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, "Other crop").

2020 and 2021—for all "other" crops.[216] For payment limit purposes this means all crops that are not specialty crops or high-value crops.

2. If More than 75% of AGI Comes from Farming or Ranching— $250,000 Payment Limitation

The payment limitation for all "other" crops may be increased to $250,000 per program year if at least 75 percent of the farmer's (or legal entity's) average adjusted gross income (AGI) comes from farming, ranching, or forestry.[217]

To determine whether a farmer meets the AGI requirements for an increased payment limitation, ERP looks at the average AGIs for the farmer's three taxable years prior to the immediately preceding complete tax year.[218] For example, if a farmer applies for ERP Phase 2 based on program year 2020, the average AGIs from 2016, 2017, and 2018 would be used.[219] If a farmer applies for ERP Phase 2 based on program year 2021, the average AGIs from 2017, 2018, and 2019 would be used.[220]

To request this higher payment limitation, a farmer must complete and submit Form FSA-510, Request for an Exception to the $125,000 Payment Limitation for Certain Programs.[221] Completing this form requires that the farmer provide a certification of their AGI from a licensed CPA or attorney.[222] According to FSA, it does not need to be the CPA or attorney who completed the farmer's taxes. However, any farmer who does not submit a completed form FSA-510 will not be eligible for the higher payment limitation.[223]

If a farmer has already submitted their ERP Phase 2 application and received an initial payment, the farmer may still submit Form FSA-510 so long as it is before the ERP Phase 2 signup deadline.[224] FSA will process the form and send an additional payment if the farmer qualifies.

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216 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(a)); ERP Phase 2 Handbook, page 2-1, para. 26.A (March 23, 2023).

217 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(b)(2)); ERP Phase 2 Handbook, page 2-1, para. 26.A (March 23, 2023). For a more complete definition of AGI that comes from farming, ranching, or forestry, see ERP Phase 2 Handbook, pages 2-4 through 2-6, para. 26.E (March 23, 2023).

218 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(a)); ERP Phase 2 Handbook, page 2-4, para. 26.E (March 23, 2023).

219 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(c)(1)).

220 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(c)(2)).

221 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(d)); ERP Phase 2 Handbook, page 2-2, para. 26.C (March 23, 2023). An example of form FSA-510 can be found at Exhibit 7 of the ERP Phase 2 Handbook.

222 If a legal entity wishes to apply for the payment increase, all members of the entity must and submit complete form FSA-510. ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(d)); ERP Phase 2 Handbook, page 2-2, para. 26.C (March 23, 2023).

223 ERP Phase 2 Handbook, page 2-2, para. 26.C (March 23, 2023).

224 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1906(e)); ERP Phase 2 Handbook, page 2-2, para. 26.C (March 23, 2023).

Chapter Six: Applying for ERP—Enrollment Period, Application, and Documentation

The application process for ERP Phase 2 is largely based on the farmer's certification that they suffered a reduction in revenue due to a qualifying disaster event that caused a loss to the farmer's eligible crops. Farmers make this certification by completing the Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, and submitting it to an FSA county office.[225]

The following sections outline the key aspects of the ERP Phase 2 application process.

I. Timeline to Enroll: January 23, 2023, through July 14, 2023

Enrollment for ERP Phase 2 opened on January 23, 2023.[226] It runs through July 14, 2023.[227] In general, an application submitted or postmarked after the end of the signup period will not be approved.[228]

II. ERP Phase 2 Application Forms

An ERP Phase 2 application is not considered complete until the farmer signs and submits two completed forms—the primary ERP Phase 2 application, Form FSA-521, and the linkage agreement to purchase crop insurance, NAP coverage or WFRP, Form FSA-522.[229]

A. Form FSA-521—ERP Phase 2 Application

Farmers must submit a completed and signed ERP Phase 2 application—Form FSA-521—to the farmer's county FSA office by the enrollment deadline of July 14, 2023.[230] The ERP Phase 2 application can be downloaded from FSA's website.[231] Only one application is needed, even if a farmer is applying for Phase 2 for both disaster year 2020 and 2021.[232]

The application, Form FSA-521, is a certification of the revenue loss experienced by farmers due to disaster events that caused crop losses. The application, however, does not require that farmers identify either the type of qualifying disaster event they endured, or the specific crops that suffered losses. Instead, farmers simply certify that they suffered a loss to eligible crops that was caused by a qualifying disaster event.

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[225] ERP Phase 2 Fact Sheet, at 1 (Jan. 2023).

[226] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(a)); ERP Phase 2 Handbook, page 1-4, para. 3.E (March 23, 2023); FSA, Emergency Relief, at https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

[227] FSA Notice ERP-10, "Emergency Relief Program (ERP) Phase 2 Program Signup Deadline Extended and Filing Deadline for Eligibility Forms for Phases 1 and 2" (May 26, 2023); USDA, Emergency Relief (May 30, 2023), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

[228] ERP Phase 2 Handbook, page 3-107, para. 66.D (March 23, 2023).

[229] ERP Phase 2 Handbook, page 3-101, para. 65.B (March 23, 2023).

[230] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(a)); ERP Phase 2 Handbook, page 1-4, para. 3.E (March 23, 2023); FSA, Emergency Relief, at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index

[231] The ERP Phase 2 Application, form FSA-521 (Jan. 23, 2023), as well as instructions for completing the application, are available at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

[232] ERP Phase 2 Handbook, page 3-101, para. 65.A (March 23, 2023).

B. Form FSA-522—Crop Insurance and/or NAP Coverage Agreement

As described earlier in this Guide, to receive assistance under ERP Phase 2, a farmer must agree to the linkage requirement of obtaining crop insurance, NAP coverage, or WFRP coverage if available.[233] This requires that farmers complete and submit Form FSA-522, Crop Insurance and/or NAP Coverage Agreement, when applying for Phase 2.[234] Form FSA-522 is the only form that requires the farmer to indicate which crops, specifically, suffered a loss due to a qualifying disaster event.

III. Farmer Self-Certification

Eligibility for ERP Phase 2 is primarily based on the farmer's certification that the farmer suffered an eligible crop loss due to a qualifying disaster event.[235]

When signing the ERP Phase 2 application, farmers are saying, under penalty of perjury, that the information they are providing on the application form is true and correct.[236] The failure of a farmer to provide complete and accurate information could result in the farmer being determined ineligible for FSA program, or possibly subject to criminal and civil fraud and perjury statutes.[237] If FSA determines that a farmer intentionally misrepresented information on an application, FSA will disapprove the application and the farmer will be required to refund the full payment, with interest.[238]

Although the application is a certification, farmers should be prepared to produce documentation to support their eligibility if requested by FSA.[239] The documentation requirements for Phase 2 are described later in this chapter.

IV. Ways to Apply—Mail, Online, Faxed, Through Local FSA Office

ERP Phase 2 Applications can be submitted by mail, email, fax, or dropped off in person at the farmer's local county office.[240]

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233 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1910(b)); ERP Phase 2 Handbook, page 3-6, para. 46.A (March 23, 2023); ERP Phase 2 Fact Sheet, at 3 (Jan. 2023).

234 See Form FSA-522, Crop Insurance and/or NAP Coverage Agreement, (Jan. 23, 2023), available for download at https://www.fsa.usda.gov/programs-and-services/emergency-relief/index. An example of form FSA-522 can also be found in the ERP Phase 2 Handbook at pages 3-12 and 3-13, para. 46.H (March 23, 2023).

235 ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023); FSA, Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, Part A, para. 3 (Jan. 23, 2023).

236 FSA, Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, Part E (Jan. 23, 2023).

237 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1890 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1909); ERP Phase 2 Handbook, page 4-11, para. 4.G (March 23, 2023). The regulations for ERP Phase 2 note that farmers are subject to perjury laws, and any resulting penalties and prosecution, under 18 U.S.C. § 1621, among other laws.

238 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1908(b)).

239 ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023);

240 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(a)); Emergency Relief FAQs, Additional ERP FAQs, "Do I have to submit my ERP application to an FSA County Office?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

Regardless of the method for applying, farmers must electronically sign the application, Form FSA-521.[241] FSA says that farmers should work with their local FSA office to ensure they are able to sign the application electronically.

V. Optional Tools to Assist with Applying

FSA has developed a couple of tools that are intended to help farmers apply for ERP Phase. One is an excel spreadsheet that walks farmers through each step of the Phase 2 application. The other is a form that walks farmers through calculating their allowable gross revenue. These tools are described immediately below.

A. ERP Application Tool

FSA has created what it calls an "Emergency Relief Program Application Tool," an Excel workbook intended to help farmers determine their allowable gross revenue for benchmark and disaster years.[242] The workbook allows farmers to input the required information for the farm's benchmark and disaster years, and—if desired—the farmer can print the ERP Phase 2 Application directly from the workbook.[243]

The ERP Application Tool can be found on FSA's website.[244] Instructions for using the Tool can be found in the ERP Phase 2 Handbook.[245]

B. Form FSA-521-A—ERP Phase 2 Allowable Gross Revenue Worksheet

Depending on the farmer's operation, determining the allowable gross revenue for Phase 2 could be complicated. To help farmers, FSA has created a worksheet that details the types of revenue that can be included for purposes of the Phase 2 application. This worksheet is called Form FSA-521-A, Emergency Relief Program (ERP) Phase 2 Allowable Gross Revenue Worksheet.[246] A farmer can use this form to help calculate their benchmark year revenue as well as their disaster year revenue. Form FSA-521-A is not a required form, and it does not need to be submitted to FSA.

VI. Documentation for ERP Phase 2

In addition to filing an ERP Phase 2 application (Form FSA-521) and the crop insurance agreement (Form FSA-522), farmers must submit several eligibility documents. Additional documents may also be required if FSA specifically requests so from the farmer. The following rules apply.

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241 See FSA, Emergency Relief, Emergency Relief Program (ERP) Phase 2, at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

242 ERP Phase 2 Handbook, page 3-116, para. 69.A (March 23, 2023); FSA, Emergency Relief, ERP Phase 2 Tool (Feb. 20, 2023); Emergency Relief FAQs, ERP Phase 2 FAQs, "Is there a tool to assist producers or accountants in determining Allowable Gross Revenue?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

243 ERP Phase 2 Handbook, page 3-116, para. 69.B (March 23, 2023); FSA, Emergency Relief, ERP Phase 2 Tool (Feb. 20, 2023).

244 FSA, Emergency Relief, ERP Phase 2 Tool (Feb. 20, 2023), at: https://www.fsa.usda.gov/programs-and-services/emergency-relief/index.

245 ERP Phase 2 Handbook, Exhibit 9 (March 23, 2023).

246 ERP Phase 2 Handbook, pages 3-28 through 3-31, para. 50.B-E (March 23, 2023).

A. Deadline to Submit Eligibility Documentation

Farmers have 60 days from the ERP Phase 2 enrollment deadline of July 14, 2023, to submit any required or requested documentation to FSA.[247] This means farmers will have until September 12, 2023 to submit eligibility documentation.[248]

B. Required Eligibility Documents for all ERP Phase 2 Applicants

To apply for ERP Phase 2, FSA requires that farmers submit certain documents.[249] The failure to submit these documents could result in no ERP Phase 2 payment, or a reduced payment.[250]

For some farmers, these documents will already be on file with FSA. FSA encourages farmers to call their local FSA service center if they want to verify whether FSA already has on file any of the required documents.[251]

Each of the forms below is available on USDA's website.[252]

1. Form AD-2047: Customer Data Sheet (if applicable)

For farmers who are new to working with FSA, or those who need to update their customer profile with FSA, a Customer Data Worksheet must submitted.[253] This is Form AD-2047. Form AD-2047 collects identifying information such as the farmer's name, birthdate, contact information, tax identification number (such as a social security number or EIN), and citizenship status.[254] It also asks for demographic information, though a farmer is not required to provide that information.

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247 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)); ERP Phase 2 Handbook, page 3-103, para. 65.C (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

248 FSA Notice ERP-10, "Emergency Relief Program (ERP) Phase 2 Program Signup Deadline Extended and Filing Deadline for Eligibility Forms for Phases 1 and 2" (May 26, 2023).

249 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)); ERP Phase 2 Handbook, page 3-103, para. 65.D (March 23, 2023); FSA, Emergency Relief Program (ERP) Phase 2 Application, form FSA-521, Part A, para. 4 (Jan. 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022), at https://www.fsa.usda.gov/programs-and-services/emergency-relief/emergency-relief-faqs/index.

250 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)).

251 Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). Contact information for your local FSA Service Center can be found at: https://www.farmers.gov/working-with-us/service-center-locator.

252 To search for specific forms, visit https://forms.sc.egov.usda.gov/eForms/searchAction.do?pageAction=Browse%20Forms.

253 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(1)); ERP Phase 2 Handbook, page 3-103, para. 65.D (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing this requirement can be found at 7 C.F.R. pt. 1400 (2023).

254 A copy of form AD-2047 can be downloaded at: https://www.fsa.usda.gov/Internet/FSA_File/ad2047.pdf.

2. Form CCC-902: Farm Operating Plan for Payment Eligibility, and Farm Numbers

Anyone applying for ERP Phase 2 must have a farm operating plan on file with FSA.[255] This is known as Form CCC-902.

The farm operating plan is a commonly used USDA form, so most farmers that work with USDA will already have this form on file. Many farmers who have not worked with USDA will need to fill out the form for the first time.[256]

Farmers who have previously filed farm operating plans with FSA will not need to file a new one, so long as the previous plan was filed prior to the year for which the farmer is seeking ERP benefits (2020 or 2021), and so long as the farmer's operation has not undergone any changes that might affect eligibility under the ERP Phase 2 program.

It is likely that a farmer who needs to submit a farm operating plan will also need to have a farm number. In general, a farm number is a number that can be assigned by FSA when the land is part of a single farming operation, although it is possible for land with different owners to be combined into a single farm.[257]

3. Form AD-1026: Highly Erodible Land Conservation and Wetland Conservation Certification

To take part in most USDA farm programs farmers must meet what are commonly called conservation compliance requirements.[258] This is true for Phase 2 of ERP. This means that farmers must be in compliance with general restrictions against the conversion of highly erodible lands and wetlands.[259] To demonstrate this compliance, the farmer must submit to FSA form AD-1026, Highly Erodible Land Conservation and Wetland Conservation Certification.[260]

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255 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1887 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1902(b)(4)); ERP Phase 2 Handbook, page 3-103, para. 65.D (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing this requirement can be found at 7 C.F.R. pt. 1400 (2023).

256 Form CCC-902 asks for tax identification number and citizenship status. Tax identification numbers do not require a certain immigration status. See IRS, Understanding Individual Identification Number (ITIN), at 5 (2019), at https://www.irs.gov/pub/irs-pdf/p1915.pdf

257 For a short discussion, see FSA, What is the Definition of a Farm Number and a Farm? at: https://askfsa.custhelp.com/app/answers/detail/a_id/1870/~/what-is-the-definition-of%3A-a-farm-number-and-a-farm%3F. For the official rules for creating or changing a farm number, see FSA Handbook, 10-CM, Farm Records and Reconstitutions for 2013 and Subsequent Years (September 11, 2019), at https://www.fsa.usda.gov/Internet/FSA_File/10-cm_r00_a05.pdf.

258 ERP Phase 2 Handbook, page 1-20, para. 11.A (March 23, 2023).

259 ERP Phase 2 Handbook, page 1-20, para. 11.A (March 23, 2023); Additional conservation compliance requirements can be found in FSA Handbook, 6-CP, Highly Erodible Land Conservation and Wetland Conservation Provisions (Rev. 4) (Sept. 24, 2021).

260 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(6)); ERP Phase 2 Handbook, page 3-103, para. 65.C (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing highly erodible land and wetland conservation can be found at 7 C.F.R. pt. 12 (2023).

Form AD-1026 is what FSA calls a continuous certification, meaning that if a farmer has previously submitted form AD-1026 to FSA, and there have been no changes to the land which impact the certification, the farmer does not need to submit a new form.[261]

The ERP Handbook notes that FSA should not delay making an ERP Phase 2 payment to a farmer even if NRCS has not finished making a final determination on the farmer's conservation compliance.[262] Instead, the Handbook states that *if* a farmer is later determined not to be in compliance, the farmer will have to refund the Phase 2 payment.

4. Form CCC-901: Member Information for Legal Entities (if applicable)

For farmers that apply for ERP Phase 2 benefits as a legal entity, a Member Information for Legal Entities form must be submitted.[263] This is Form CCC-901.

C. Required Documents for Historically Underserved Farmers Seeking Increased Payments Under ERP Phase 2—From CCC-860

As described earlier in this Guide, some farmers—including socially disadvantaged, limited resource, beginning, and veteran farmers and ranchers—are eligible for an increased payment factor for ERP Phase 2. An increased payment factor means an increased payment from FSA. Farmers who fall into any of these categories, and who want to apply for an increased payment factor under Phase 2, must self-certify as such by filling out and submitting form CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification.[264] This form is not required if a farmer does not want to apply for an increased ERP Phase 2 payment factor, or if a farmer does not want to inform FSA that they fall into one of those categories.

Any farmers who choose to submit Form CCC-860 must do so within sixty days of the close of the ERP Phase 2 application period on July 14, 2023.[265]

1. Socially Disadvantaged Farmer or Rancher

A socially disadvantaged farmer or rancher is defined by FSA as someone who is a member of a group that has been subjected to racial, ethnic, or gender prejudice because of their identity as members of that group—and without regard to their

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261 See FSA, Form AD-1026, Highly Erodible Land Conservation (HELC), and Wetland Conservation (WC) Certification, Part D (Oct. 30, 2014).

262 ERP Phase 2 Handbook, page 1-20, para. 11.A (March 23, 2023).

263 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(3)); ERP Phase 2 Handbook, page 3-103, para. 65.C (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing this requirement can be found at 7 C.F.R. pt. 1400 (2023).

264 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(2)); ERP Phase 2 Handbook, page 1-21, para. 13.A-B, page 3-103, para. 65.C (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022).

265 FSA Notice ERP-10, "Emergency Relief Program (ERP) Phase 2 Program Signup Deadline Extended and Filing Deadline for Eligibility Forms for Phases 1 and 2" (May 26, 2023); ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(2)); ERP Phase 2 Handbook, page 1-21, para. 13.B, page 3-103, para. 65.D (March 23, 2023); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022).

individual qualities.[266] For ERP Phase 2, the following are the only eligible socially disadvantaged groups: (1) American Indians or Alaskan Natives; (2) Asians or Asian-Americans; (3) Blacks or African Americans; (4) Hispanics or Hispanic Americans; (5) Native Hawaiians or other Pacific Islanders; and (6) Women.

If the farmer is a socially disadvantaged farmer who has previously submitted form CCC-860 to FSA for other reasons, there is no need to resubmit form CCC-860 when applying for ERP Phase 2.[267]

2. Limited Resource Farmer or Rancher

To qualify as a limited resource farmer or rancher, two requirements must be met. The requirements differ slightly depending on the program year for which the farmer is applying for ERP Phase 2. It could be either 2020 or 2021.

To qualify as a limited resource farmer or rancher for program year 2020 (disaster year 2020), the farmer or rancher must be a person whose direct or indirect gross farm sales did not exceed $180,300 in calendar years 2017 and 2018.[268] In addition, the farmer or rancher's total household income must have been at or below the national poverty level for a family of four in both calendar years 2017 and 2018.

To qualify as a limited resource farmer or rancher for program year 2021 (disaster year 2021), the farmer or rancher must be a person whose direct or indirect gross farm sales did not exceed $179,000 in calendar years 2018 and 2019.[269] In addition, the farmer or rancher's total household income must have been at or below the national poverty level for a family of four in both calendar years 2018 and 2019.

For an entity to qualify as a limited resource farmer or rancher, all members who have an ownership interest in the entity must independently meet the limited resource farmer or rancher criteria.[270]

If the farmer is a limited resource farmer or rancher, form CCC-860 must be submitted to support the ERP Phase 2 application, even if the farmer has one on file with FSA already.[271] FSA explains that this is because a farmer's status as a limited resource farmer or rancher can change from year to year depending on the farmer's direct and indirect gross farm sales.

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[266] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Socially disadvantaged farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 7, Socially Disadvantaged Farmer or Rancher (March 23, 2023).

[267] ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023).

[268] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Limited resource farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 5, Limited Resource Farmer or Rancher (March 23, 2023).

[269] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Limited resource farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 5, Limited Resource Farmer or Rancher (March 23, 2023).

[270] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1885 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Limited resource farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 5, Limited Resource Farmer or Rancher (March 23, 2023).

[271] ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023).

3. Beginning Farmer or Rancher

A beginning farmer or rancher is someone who has not operated a farm or ranch for more than ten years and who materially and substantially participates in the operation.[272] For an entity to be considered a beginning farmer or rancher, at least fifty percent of the entity's interest must be beginning farmers or ranchers.

If the farmer is a beginning farmer who has previously submitted form CCC-860 to FSA for other reasons, there is no need to resubmit form CCC-860 when applying for ERP Phase 2.[273]

4. Veteran Farmer or Rancher

A veteran farmer or rancher is someone who has served in the Armed Forces.[274] In addition, the farmer or rancher must not have operated a farm or ranch for more than ten years or must have obtained the status as a veteran during the previous ten years.[275]

For an entity to qualify as a veteran farmer or rancher, at least fifty percent of the ownership interest must be held by members who meet the definition of a veteran farmer or rancher.[276]

If the farmer qualifies as a veteran farmer who has previously submitted form CCC-860 to FSA for other reasons, there is no need to resubmit Form CCC-860 when applying for ERP Phase 2.[277]

D. Required Documents for Farmers Seeking an Increased Payment Limitation—From FSA-510

To apply for an increased payment limitation under ERP Phase 2, a farmer must submit Form FSA-510—Request for an Exception to the $125,000 Payment Limitation for Certain Programs.[278]

This form requires that the farmer certify that at least 75 percent of their average adjusted gross income (AGI) for the applicable taxable years came from farming, ranching, or

[272] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1884 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Beginning farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 1, Beginning Farmer or Rancher (March 23, 2023).
[273] ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023).
[274] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Veteran farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 8, Veteran Farmer or Rancher (March 23, 2023). For purposes of this definition, Armed Forces has the meaning found in 38 U.S.C. § 101(10).
[275] Veteran, for this definition, has the meaning found in 38 U.S.C. § 101(2).
[276] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1886 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1901, Veteran farmer or rancher); ERP Phase 2 Handbook, Exhibit 2, page 8, Veteran Farmer or Rancher (March 23, 2023). For purposes of this definition, Armed Forces has the meaning found in 38 U.S.C. § 101(10).
[277] ERP Phase 2 Handbook, page 1-21, para. 13.B (March 23, 2023).
[278] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(5)); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing this requirement can be found at 7 C.F.R. pt. 1400 (2023).

forestry operations.[279] The applicable taxable years are the three taxable years prior to the taxable year that immediately precedes the year for which the farmer is seeking ERP Phase 2 benefits.[280] For example, if a farmer applies for ERP Phase 2 for program year 2021, the three taxable years would be 2017, 2018, and 2019.[281]

In addition, Form FSA-510 requires a certification from a certified public accountant or attorney for each program year for which the farmer is requesting ERP Phase 2 benefits.[282] This certification serves as an acknowledgement by the accountant or attorney that the farmer has met the AGI requirements for an increased payment limitation. The accountant or attorney does not need to have been the person who prepared the farmer's tax return.

Exhibit 7 in the ERP Phase 2 Handbook provides an example of form FSA-510, as well as instructions—for farmers and certified public accountants or attorneys—on how to fill out the form.[283]

If a farmer submits FSA-510 after receiving an ERP Phase 2 payment, but before the application deadline for the program, FSA will issue an additional payment to reflect the increased payment rate.[284]

E. Additional Supporting Documentation

The ERP Phase 2 application largely relies on a farmer's certification of their allowable gross revenue.

FSA has the discretion to request additional documentation that supports the information the farmer submits on their Forms FSA-521 and FSA-522 and provides additional documentation that establishes the farmers eligibility for ERP Phase 2 and verifies information given by the farmer.[285] The request by FSA for additional information and supporting documentation can be made if FSA has reason to question the farmer's certification. The FSA Handbook does not describe what might count as "reason to question" the farmer certification.

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279 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(5)); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing this requirement can be found at 7 C.F.R. pt. 1400 (2023). Page two of Form FSA-510 provides instructions on how to determine income that comes from farming, ranching, and forestry operations.

280 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(5)); ERP Phase 2 Handbook, page 2-4, para. 26.E (March 23, 2023).

281 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1900, Average adjusted gross farm income).

282 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(b)(5)); Emergency Relief FAQs, Additional ERP FAQs, "What eligibility forms must be submitted to the FSA County Office prior to receiving an ERP payment?" (June 6, 2022). The regulations governing this requirement can be found at 7 C.F.R. pt. 1400 (2023).

283 ERP Phase 2 Handbook, Exhibit 7 (March 23, 2023).

284 ERP Phase 2 Handbook, page 3-103, para. 65.D (March 23, 2023).

285 ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(c)); Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023). For a sample letter that a farmer might receive if FSA requests additional documentation, see ERP Phase 2 Handbook, Exhibit 10, page 1 (March 23, 2023).

1. Deadline to Submit Supporting Documentation—30 Days

If FSA does request supporting documentation, the farmer must submit it to FSA within 30 calendar days from the date of the request.[286] If the farmer fails to meet this deadline, FSA says the farmer's application "will be disapproved."[287]

2. Examples of Supporting Documentation

FSA provides several examples of the types of information for which it might request that the farmer provide supporting. These examples, which are not exhaustive, are listed immediately below.

a. Allowable gross revenue

FSA may request that farmers provide documentation to support the allowable gross revenue that they report on their ERP Phase 2 applications.[288] Farmers self-certify to their allowable gross revenue for both a benchmark year and the applicable disaster years in Parts C and D of the ERP Phase 2 application.[289]

b. Percentages of the expected gross revenue from certain crops

FSA may request that farmers provide documentation to support the percentages of their expected gross revenue that they expect to come from specialty and high value crops, as well as other crops.[290] These percentages are self-certified in Parts C and D of the ERP Phase 2 application.[291]

c. Ownership share in eligible crops

FSA may request that farmers provide documentation to support their ownership share in ERP-eligible crops.[292]

F. Must Keep Documentation for 3 Years

Farmers who apply for, and receive, and ERP Phase 2 payment must retain any documents that support their application for three years after the date their ERP application was approved.[293]

VII. Withdrawing an ERP Phase 2 Application

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[286] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1864, 1888 prefatory remarks (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(c)); ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023).

[287] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1864, 1888 prefatory remarks (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(c)); ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023).

[288] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(c)(1)); ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023).

[289] See ERP Phase 2 Application, form FSA-521, at Parts C and D (Jan. 23, 2023).

[290] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(c)(2)); ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023).

[291] See ERP Phase 2 Application, form FSA-521, at Parts C and D (Jan. 23, 2023).

[292] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1888 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1904(c)(3)); ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023).

[293] ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1907(a)); ERP Phase 2 Handbook, page 1-11, para. 4.G (March 23, 2023); ERP Phase 2 Application, form FSA-521, at Part A, para. 3 (Jan. 23, 2023).

The rules for ERP Phase 2 allow a farmer to withdraw their application, form FSA-521, at any time after it has been submitted.[294] For example, if a farmer determines that their ERP Phase 2 payment will be less than what it would cost to purchase the required crop insurance for the subsequent two years, the farmer could withdraw their Phase 2 application. To do so, the farmer must make the request in writing and submit it to their local FSA office.

VIII. Spot Checks

ERP rules state that FSA may spot checks a famer's ERP Phase 2 application.[295] In the spot check, FSA will likely ask for documentation that supports the farmer's eligibility for ERP and what the farmer certified on their Phase 2 application.

IX. Accepting an ERP Phase 2 Payment Means Authorizing Inspections

Any farmer who receives an ERP Phase 2 payment must allow USDA, or the Government Accountability Office, to enter the farm during regular business hours to inspect, examine, and allow copies to be made of books, records, and other items. [296] The purpose of this inspection is to the farm. confirm the accuracy of the information the farmer provided.

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294 ERP Phase 2 Handbook, page 3-109, para. 67.D (March 23, 2023).

295 ERP Phase 2 Handbook, page 3-104, para. 65.A (March 23, 2023).

296 This includes authorized representatives of USDA and the Government Accountability Office (GAO). See ERP Phase 2 Rule, 88 Fed. Reg. 1862, 1889 (Jan. 11, 2023) (codified at 7 C.F.R. § 760.1907(b)).

Chapter Seven: Appeals and Equitable Relief

I. Appeals of ERP Phase 2 Decisions

In general, when FSA issues a decision on an ERP Phase 2 application, a farmer has the right to appeal that decision.[297] Appeals of ERP Phase 2 decisions are allowed when there is an issue of fact or a dispute over whether FSA applied the ERP rules and regulations correctly to the farmer's situation. A lengthy set of rules governs the USDA appeals system.[298]

Appeals are not allowed, however, when there is no dispute over the facts.[299] Appeals are also not allowed for what FSA calls "generally applicable provisions"—meaning that a farmer cannot appeal a decision based on rules that apply to all applicants without regard to the individual farmer's situation.[300] For example, a farmer cannot appeal an ERP decision because the farmer disagrees with the ERP application deadlines, payment rates or calculations, or eligibility criteria.[301]

II. Equitable Relief

Equitable relief rules grant FSA the authority to allow farmers who are not in compliance with program rules to still receive benefits under a program.[302] Equitable relief rules apply to ERP Phase 2.[303]

A. Rules for Equitable Relief

Rules for equitable relief by USDA can be found in the Code of Federal Regulations and in a USDA Handbook.[304]

B. When Equitable Relief Can Apply

In general, there are two circumstances under which equitable relief can be granted.

First, equitable relief can apply when a farmer relies—to the farmer's detriment—on the action or advice of USDA.[305]

Second, equitable relief can apply when a farmer makes a good faith effort to comply with program rules, but nonetheless fails to do so.[306]

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297 ERP Phase 2 Handbook, page 1-19, para. 8.B-C (March 23, 2023).
298 ERP Appeals are governed by the FSA Handbook, 1-APP (Rev. 2), Program Appeals, Mediation, and Litigation (Sept. 12, 2016). See ERP Phase 2 Handbook, page 1-19, para. 8.C (March 23, 2023);
299 ERP Phase 2 Handbook, page 1-19, para. 8.B-C (March 23, 2023).
300 ERP Phase 2 Handbook, page 1-19, para. 8.B-C (March 23, 2023).
301 ERP Phase 2 Handbook, page 1-19, para. 8.C (March 23, 2023).
302 7 C.F.R. § 718.304-305(2023); FSA Handbook, 7-CP, Finality Rule and Equitable Relief, page 3-3 to 3-4, para. 42.A (December 2, 2019).
303 ERP Phase 2 Handbook, page 1-19, para. 8.A (March 23, 2023).
304 7 C.F.R. part 718, subpart D (2023). FSA Handbook, 7-CP (Revision 4), Finality Rule and Equitable Relief ("Equitable Relief Handbook") (December 2, 2019).
305 7 C.F.R. § 718.303(a) (2023); Equitable Relief Handbook, page 3-6, para. 44.A (December 2, 2019).
306 7 C.F.R. § 718.304(a) (2023); Equitable Relief Handbook, page 3-9, para. 45.A (December 2, 2019).

Equitable relief cannot be used if a farmer does not like a program's eligibility requirements and thinks they should not apply, or if the farmer simply does not meet the program's requirements.[307]

1. Rely on USDA Advice

Equitable relief can apply if the farmer relies on the action or advice of the USDA.[308] In the case of ERP Phase 2, that means the farmer must rely on the action or advice of an authorized representative of either the county or the state FSA.

The farmer must rely in good faith on the action or advice given by USDA.[309] For equitable relief to apply, the farmer's good-faith reliance must result in what USDA calls a "detriment" to the farmer.[310] For example, denial of an ERP Phase 2 payment would be a detriment to the farmer.

According to the Code of Federal Regulations, equitable relief does not apply if the farmer had "sufficient reason" to know that the action or information on which the farmer relied was "improper or erroneous."[311] The USDA Handbook says the farmer must have had "no reason to suspect or know that the information, advice, or action" was in error.[312]

Equitable relief also does not apply if the farmer acted in reliance on the farmer's own misunderstanding or misinterpretation of the rules of the program or other USDA information.[313]

2. Fail to Fully Comply with Program Rules

Equitable relief can also apply if the farmer—despite a good faith effort—fails to meet all of the rules for ERP Phase 2.[314] This means that the farmer must have made a good faith effort to fully comply with the program rules. The farmer must also have taken "substantial actions" towards meeting the requirements of the program.[315]

Equitable relief will not apply if a farmer fails to meet a program signup deadline, or files an application late.[316]

C. If Equitable Relief Applies

If USDA decides that equitable relief applies, the farmer is then ruled by USDA to have met the requirements of the program and may receive the benefits of the program.[317]

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307 Equitable Relief Handbook, page 1-3, para. 3.A (December 2, 2019).
308 7 C.F.R. § 718.303(a) (2023).
309 7 C.F.R. § 718.303 (2023).
310 7 C.F.R. § 718.303(a) (2023); Equitable Relief Handbook, page 3-6, para. 44.A (December 2, 2019).
311 7 C.F.R. § 718.303(c) (2023).
312 Equitable Relief Handbook, page 1-4, para. 3.A (December 2, 2019).
313 7 C.F.R. § 718.303(c) (2023); Equitable Relief Handbook, page 3-6, para. 44.A (December 2, 2019).
314 7 C.F.R. § 718.304(a) (2023); Equitable Relief Handbook, page 3-9, para. 45.A (December 2, 2019).
315 7 C.F.R. § 718.304(b) (2023); Equitable Relief Handbook, page 3-9, para. 45.B (December 2, 2019).
316 Equitable Relief Handbook, page 3-9, para. 45.A (December 2, 2019).
317 7 C.F.R. § 718.305 (2023).

USDA may also take other action to provide equitable relief if USDA thinks it is appropriate.

D. Conditions for Receiving Equitable Relief

As a condition for receiving equitable relief, the farmer may be required to remedy the failure to meet the program requirement or to mitigate the effects of the failure.[318] While not defined in USDA rules, to mitigate generally means to reduce or make less severe.

[318] 7 C.F.R. § 718.305 (2021); Equitable Relief Handbook, page 3-2, para. 41.B, page 3-9, para. 45.C (December 2, 2019).

Chapter Eight: Discrimination is Illegal

By law, USDA is prohibited from discriminating against the farmers is serves.[319] This is true for ERP Phase 2 as well as other USDA programs.[320] USDA allows farmers and others to file discrimination complaints. The Office of the Assistant Secretary for Civil Rights (OASCR) is responsible for investigating farmer discrimination complaints.

I. The Bases of Illegal Discrimination

USDA is prohibited from subjecting any person to discrimination. Discrimination is defined by USDA as the unlawful treatment or denial of benefits, services, rights or privileges.[321] Discrimination can mean being excluded from participation in programs or denial of benefits.

On the ERP Phase 2 application FSA says the following:

> In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its agencies, offices, and employees participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs).[322]

Discrimination is defined in USDA regulations as:

> Unlawful treatment or denial of benefits, services right, or privileges to a person or persons because of their race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, sexual orientation, familial status, parental status, income derived from a public assistance program political beliefs or gender identity. [323]

According to USDA regulations, no USDA agency (this would include FSA) shall:

> on the grounds of race, color, national origin, religion, sex, sexual orientation, disability, age, marital status, family status, parental status, income derived from a public assistance program, political beliefs, or gender identity exclude the participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by USDA.[324]

Some USDA materials add limited English proficiency and genetic information as prohibited bases.[325]

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319 7 C.F.R. §§ 15d.2, "Discrimination," 15d.3(a) (2023). As USDA puts it, "USDA prohibits discrimination against its customers." USDA, Filing a Program Discrimination Complaints As a USDA Customer, page 2 (May 15, 2023), at: https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer; USDA, Department Regulation DR 4330-003, Nondiscrimination in USDA-Conducted Programs and Activities, page 2 (October 3, 2022), at https://www.usda.gov/directives/dr-4330-003.

320 FSA, Emergency Relief Program (ERP) Phase 2 Application, Form FSA-521, 2 (Jan. 23, 2023).

321 7 C.F.R. § 15d.2, "Discrimination" (2023).

322 FSA, Emergency Relief Program (ERP) Phase 2 Application, Form FSA-521, 2 (Jan. 23, 2023).

323 7 C.F.R. §§ 15d.2, "Discrimination" (2023).

324 7 C.F.R. § 15d.3(a) (2023).

325 USDA, Departmental Regulation DR 4330-003, Nondiscrimination in USDA-Conducted Programs and Activities, page 2 (October 3, 2022), at https://www.usda.gov/directives/dr-4330-003.

II. Right to File a Complaint

If someone feels they have been discriminated against by USDA for any of the above reasons, the person may file a discrimination complaint with the USDA Office of the Assistant Secretary for Civil Rights (OASCR).[326]

A complaint needs to describe the discriminatory action in enough detail for USDA to understand the nature of the civil rights violation.[327]

III. Discrimination Complaint Form

USDA has a discrimination complaint form. [328] The complaint form is available online. [329] Farmers may also get a copy of the form by sending an email to USDA.[330] Otherwise, farmers may write USDA to get a copy of the form.[331]

Farmers can write a letter instead of using the official USDA complaint form.[332] The letter needs to have all of the information that is requested on the complaint form. This includes information on when the discrimination took place, who discriminated against the farmer and how, and the basis of the discrimination (race, color, religion, sex, age, etc.).[333] Regardless of whether a farmer uses the official form or writes a letter, the complaint needs to describe the discrimination in enough detail for investigators to understand the nature and date of the discrimination.[334] Either the farmer or an authorized representative must sign the form or letter.

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[326] 7 C.F.R. §§ 15d.2, "Complaint," 15d.5 (2023); USDA, How to File a Program Discrimination Complaint (May 31, 2021), at: https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint; USDA, Filing a Program Discrimination Complaint as a USDA Customer, at https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer# (May 15, 2023); USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 2 (October 3, 2022),

[327] USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at B1 (October 3, 2022)

[328] USDA, Program Discrimination Complaint Form, AD-3027 (May 15, 2023), at https://www.usda.gov/sites/default/files/documents/ad-3027.pdf.

[329] USDA, Program Discrimination Complaint Form, AD-3027 (May 15, 2023), at https://www.usda.gov/sites/default/files/documents/ad-3027.pdf.

[330] A complaint form may be received by sending an email to CR-Info@USDA.gov. Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).

[331] Written requests for the USDA Program Discrimination Complaint Form can be mailed to:
U.S. Department of Agriculture
Director, Center for Civil Rights Enforcement
1400 Independence Avenue, SW
Washington, DC 20250-9410

[332] 7 C.F.R. § 15d.2, "Complaint" (2023); USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023); USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 2 (October 3, 2022); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions (May 15, 2023), at: https://www.usda.gov/oascr/program-discrimination-complaint-filing.

[333] For specific details on what to include in the letter, see USDA, How to File a Program Discrimination Complaint (May 15, 2023). See also USDA Complaint Form, AD-3027 (January 19, 2012).

[334] 7 C.F.R. § 15d.2, "Complaint" (2023); For specific details on what to include in the letter, see USDA OASCR, How to File a Program Discrimination Complaint (May 15, 2023).

IV. Filing a Complaint

To file a complaint, a person can use one of several methods.[335] If the complaint goes to the wrong agency within USDA, the agency should forward it to OASCR within five calendar days of the date on which it was received.[336]

A. Mail

A farmer can mail the complaint to USDA at this address: [337]

U.S. Department of Agriculture
Director, Center for Civil Rights Enforcement
1400 Independence Avenue, SW
Washington, DC 20250-9410

B. Fax

The complaint can be faxed to USDA at: (202) 690-7442.[338]

C. Email—With Signed Complaint Attached

The USDA website says farmers may use email to send in a complaint.[339] Complaints should be emailed to the following email address: program.intake@usda.gov. Farmers should make sure to attach a signed copy of the complaint to the email as well.[340]

V. Help with the Discrimination Complaint Form

USDA says that for help filling out the discrimination complaint form, and for further information on filing a discrimination complaint, farmers can contact the Office of the Assistant Secretary for Civil Rights (OASCR) at USDA.[341] Calls can be made to the following numbers:

Local: (202) 260-1026

Toll Free: (866) 632-9992

Local or Federal Relay: (800) 877-8339

Relay Voice User: (866) 377-8642

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335 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).
336 USDA, Department Regulation No. 4330-003, Nondiscrimination in USDA-Conducted Programs and Activities, page 3 (October 3, 2022), at https://www.usda.gov/sites/default/files/documents/dr-4330-003.pdf.
337 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023); USDA, OASCR, How to File a Program Discrimination Complaint; USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "Where do I mail my program discrimination complaint?" (May 15, 2023).
338 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).
339 USDA Complaint Form, AD-3027 (May 15, 2023).
340 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023); USDA Complaint Form, AD-3027 (May 15, 2023).
341 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "Who may I contact for further information on filing a program discrimination complaint?" (May 15, 2023).

People who are deaf, hard of hearing, or have speech disabilities, may contact USDA through the Federal Relay Service at (800) 877-8338 or (800) 845-6136 (Spanish).[342]

USDA says that persons with disabilities who require alternative means of communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600.[343]

Farmers also can email USDA for help at CR-INFO@ascr.usda.gov.

VI. Deadline to File a Discrimination Claim: 180 Days

Any discrimination complaint against USDA must be filed within 180 calendar days of when the person complaining knew or should have known of the discrimination.[344] It is possible to receive a waiver of this 180-day requirement if: (1) the discriminatory act could not reasonably have been expected to be known within 180 days; (2) illness or incapacitation prevented the filing of the complaint within 180 days; (3) the same complaint was filed with another Federal, state, or local agency; or (4) any other reason allowed by the Director of the Center for Civil Rights Enforcement.[345]

VII. Reprisals

USDA is not allowed to subject a person to reprisal for filing a complaint or opposing a discriminatory practice.[346] That means USDA may not intimidate, threaten, harass, coerce, discriminate against, or otherwise retaliate against that person.

VIII. Checking the Status of a Complaint

Farmers may check the status of a complaint by either calling or emailing USDA.[347]

Calls should be made to the Information Research Service of OASCR at either (202) 260-1026 (local), or (866) 632-9992 (toll free). [348] Individuals who are deaf, hard of hearing, or have speech disabilities, may contact OASCR using the Federal Relay Service, at (800) 877-8339 or (800) 845-6136 (Spanish).

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342 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).

343 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).

344 7 C.F.R. § 15d.5(a) (2023); USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022); USDA, Filing a Discrimination Complaint as a USDA Customer (May 15, 2023); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "How long do I have to file a USDA program discrimination complaint?" (May 15, 2023); USDA Complaint Form, AD-3027 (May 15, 2023); USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).

345 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022); USDA, How to File a Program Discrimination Complaint (May 15, 2023); USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "How do I request a waiver of the 180-day filing deadline?" (May 15, 2023). To request a waiver, contact USDA at (202) 260-1026 (local) or (866) 632-9992 (toll free), or email CR-INFO@usda.gov.

346 7 C.F.R. § 15d.3(b) (2023); USDA DR 4330-003, Nondiscrimination in USDA-Conducted Programs, at 2-3 (October 3, 2022); USDA Complaint Form, AD-3027 (May 15, 2023)

347 USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "How do I check the status of my program discrimination complaint?" (May 31, 2021).

348 USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "How do I check the status of my program discrimination complaint?" (May 31, 2021).

Emails should be sent to the Information Research Service of OASCR, at CR-INFO@usda.gov.[349]

IX. USDA Responses to Discrimination Complaints

A set process should be used by OASCAR to respond to a discrimination complaint. It is described below.

A. Acknowledge Complaint

USDA must acknowledge in writing that it has received the complaint.[350]

B. Accepting—or Not Accepting—the Complaint

After receiving the complaint, USDA says it will first decide if the complaint meets what it thinks are the legal requirements for processing the complaint.[351] It is possible USDA will ask the farmer for more information as it is deciding whether it is timely, complete, within the jurisdiction of USDA, and whether it must be resolved with an investigation or might be resolved with an early resolution or pre-investigation settlement process.[352] If USDA asks for that additional information, the farmer has fifteen calendar days to respond.[353] If the farmer does not respond USDA may close the complaint.

If USDA decides the complaint is not to be accepted, USDA must send a letter to the farmer explaining why.[354]

C. If Complaint Accepted: Investigation

If USDA accepts the complaint, USDA will send a letter letting the farmer know this has happened.[355] The complaint will then be investigated.[356]

By investigation USDA means:

> an impartial process designed to obtain facts and evidence relevant to a factual determination of whether the complainant was subjected to the

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349 USDA, Program Discrimination Complaint Filing: Frequently Asked Questions, "How do I check the status of my program discrimination complaint?" (May 31, 2021).

350 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022)

351 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022); USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023),

352 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023); USDA DR 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022).

353 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022).

354 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 3 (October 3, 2022); USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 15, 2023).

355 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021); 7 C.F.R. § 15d.5(b) (2023); USDA DR 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022).

356 USDA, Filing a Program Discrimination Complaint as a USDA Customer (May 31, 2021); 7 C.F.R. § 15d.5(b) (2023); USDA DR 4330-003, Nondiscrimination in USDA-Conducted Programs, at 4 (October 3, 2022).

> alleged discrimination in violation of USDA civil rights regulations and applicable statutes.[357]

D. Agency Decision

After the investigation is complete, USDA will write a Final Agency Decision (FAD).[358] The decision can say one of three things.

First, if USDA decides that there is documentation of a civil rights violation that existed at the start of the investigation, but that USDA has corrected the violation, the decision will say so.[359]

Second, the decision may say that there is "no finding" of discrimination.[360] If so, there is no relief for the farmer.

Third, the decision may say that there is a "finding" of discrimination.[361]

In general, these agency decisions are final.[362]

E. Remedy if There is a Finding of Discrimination

If the decision says that there is a "finding" of discrimination, the decision will also set out "specific remedial actions" that USDA must take.[363] This can include the payment of damages and other relief as USD finds is appropriate and that USDA believes is authorized by law.

F. Settlements: Negotiation and Alternative Dispute Resolution

Along the way, USDA may offer alternative dispute resolution, including mediation, to the farmer.[364] This can include if discrimination is found. USDA may also seek to take corrective action.[365]

Settlements of discrimination complaints are possible. USDA defines a settlement agreement as:

> a voluntary written, and signed agreement in which parties to a dispute reflect the mutually agreed to terms to resolving a dispute and bring an end to the processing of an informal or formal complaint of discrimination.[366]

357 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at B-1 (October 3, 2022).
358 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022).
359 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022).
360 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022).
361 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022).
362 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022). There is an exception to this rule if a complaint alleged disability discrimination.
363 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5 (October 3, 2022).
364 7 C.F.R. § 15d.5(d) (2023); USDA DR 4330-003, Nondiscrimination in USDA-Conducted Programs, at 4 (October 3, 2022).
365 7 C.F.R. § 15d.5(b) (2023); USDA, Nondiscrimination Regulation §§ 5(l), "Settlement Agreement," 7(f) (October 5, 2015).
366 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, B-2 (October 3, 2022).

G. Enforcing Decisions and Settlements

USDA has a process whereby OASCAR must monitor and evaluate the corrective action that was in a Final Agency Decision or a settlement.[367] A farmer who believes that at decision or a settlement is not being carried out by USDA should contact OASCAR within thirty days of then the farmer know or should have known about the failure to comply with the decision or settlement.

H. USDA Can Close the Case Along the Way

At any stage in the process described above USDA can find "procedural grounds" exist to close the complaint.[368] Reasons can include: voluntary withdrawal of the complaint, filing in court of a similar claim, or a settlement or voluntary resolution. They can also include USDA's belief that there is a lack of further remedies or that the complaint is really the continuation of other complaints that have already been resolved. A number of other reasons may be used by USDA to close the complaint.

If USDA closes the complaint, it must tell the farmer in writing.[369]

I. Disability Claims Somewhat Different

Claims of discrimination based on disability operate under somewhat different rules.[370]

X. USDA Reporting on Discrimination Complaints

The 2008 Farm Bill required USDA to report on civil rights matters.[371] USDA rules give responsibility for those reporting requirements to OASCR.[372] USDA is required to report every year on discrimination complaints for each USDA agency. The report should describe, among other things: (1) the number of program complaints filed (this means farmer complaints, not employee complaints); (2) the time it took to process each complaint; and (3) the number of complaints that resulted in a finding of discrimination.[373] Congress directed USDA to send the report to Congress and to make it available to the public on the USDA website. USDA regulations say that the responsibility for making these reports goes to the OASCR.

The last report was for the fiscal year 2021 and was completed in December 2022.[374]

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367 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 6-7 (October 3, 2022).

368 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 5-6 (October 3, 2022).

369 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, at 6 (October 3, 2022).

370 7 C.F.R. § 15d.5(c) (2023); USDA, Nondiscrimination Regulation, § 7(f), (i) (October 5, 2015).

371 Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, section 14007 (codified at 7 U.S.C. § 2279-2).

372 7 C.F.R. §§ 2.25(a)(22), 15d.4(c) (2023).

373 7 C.F.R. § 15d.4(b) (2023); Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, section 14007 (codified at 7 U.S.C. § 2279-2). The number of personnel actions taken as a result should also be reported.

374 USDA, Report of Civil Rights Complaints, Resolutions, and Actions for Fiscal Year 2021 (2022), at: https://www.usda.gov/sites/default/files/documents/report-civil-rights-compliants-resolutions-actions-fy-2021.pdf.

A. Discrimination Complaints Filed

According to the December 2022 report, in fiscal year 2021, 220 program discrimination complaints were filed against USDA.[375] In fiscal year 2020, 243 program discrimination complaints were filed against USDA.

B. Outstanding Discrimination Complaints

At the end of fiscal year 2021, there were 293 outstanding program discrimination complaints at USDA agencies.[376] At the end of fiscal year 2020, there were 299outstanding program discrimination complaints at USDA. These include complaints of discrimination based on race as well as other bases, such as age and disability.

C. Processing Time for Discrimination Complaints

The average processing time for a program complaint at USDA in fiscal year 2021 was 412 days.[377] For the Farm Service Agency (FSA), the agency that implements ERP Phase 2, the average processing time for a discrimination complaint in 2021 was 644 days. For fiscal year 2020, the average processing time for a USDA program discrimination complaint was 369 days. For FSA, the average processing time for a discrimination complaint in fiscal year 2020 was 369 days.

D. Findings of Discrimination

In fiscal year 2021, USDA found discrimination in one case.[378] In fiscal year 2021, eighteen program complaints were resolved with a settlement agreement. In fiscal year 2020, USDA found discrimination in one case. In fiscal year 2020, thirty-eight program complaints were resolved with a settlement agreement.

XI. Proposed Realignment at USDA in 2018

In 2018, USDA announced in the Federal Register that it was proposing a "realignment" of the Office of the Assistant Secretary for Civil Rights (OASCR).[379] In this document, USDA announced its intention to strengthen civil rights at USDA. Included in the intended proposals was the implementation of a timely, fair, transparent, and consistent approach to addressing discrimination complaints filed by farmers.[380]

At about the same time, USDA issued a Memorandum from the Secretary of Agriculture that described USDA's intention to strengthen civil rights management functions at USDA.[381] The Memorandum describes some aspects of a bureaucratic realignment of USDA civil rights

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375 USDA, Report of Civil Rights Complaints, at 2 (2022).
376 USDA, Report of Civil Rights Complaints, at 3 (2022).
377 USDA, Report of Civil Rights Complaints, at 5 (2022).
378 USDA, Report of Civil Rights Complaints, at 6 (2022).
379 USDA, Strengthening Civil Rights Management, 85 Fed. Reg. 10,825 (March 13, 2018), at: https://www.federalregister.gov/documents/2018/03/13/2018-05051/strengthening-civil-rights-management.
380 Strengthening Civil Rights Management, 85 Fed. Reg. 10,825, 10,826 (March 13, 2018).
381 USDA, Secretary's Memorandum 1076-023, Strengthening Civil Rights Management Functions (March 9, 2018), at https://www.usda.gov/directives/sm-1076-023.

programs. It also says that OASCR plans to implement a timely, fair, transparent, and consistent approach to farmer discrimination complaints.[382]

There does not appear to be any public discussion from USDA of a follow-up to the Federal Register announcement or the Secretary's Memorandum.

XII. A Realistic View of the USDA Discrimination Complaint Process

On paper, and in theory, USDA has a discrimination complaint process that can work. OASCAR investigates discrimination complaints filed by farmers and decides if discrimination has taken place.

In the past USDA has had a great deal of difficulty conducting timely and effective civil rights investigations.[383] USDA tends to have a hard time keeping up with discrimination complaints—although that appears to be much improved in the last couple of years—and is not often finding discrimination when the investigations are completed. There are a number of settlements of complaints, but it is difficult to know the extent to which they provide relief for farmers. Previously, long delays and gaps in USDA reporting on discrimination complaints was also not encouraging. Reporting appears to be more timely of late.

XIII. Lawsuit Also Possible: Beware of Statue of Limitations

Filing a federal lawsuit is also possible. There can be strict deadlines based on what is called the statute of limitations for a discrimination lawsuit. In addition, once a federal lawsuit is filed, USDA will close the discrimination complaint claim that is about the same issue as the lawsuit.[384]

382 USDA, Secretary's Memorandum 1076-023, Strengthening Civil Rights Management Functions, para. 3 (March 9, 2018).

383 See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

384 USDA DR no. 4330-003, Nondiscrimination in USDA-Conducted Programs, 5 (October 3, 2022)