

## **Final Agency Determination: FAD-236**

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**Subject:** Request dated May 6, 2015, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2012 and succeeding crop years regarding the interpretation of section 9 of the Northern Potato Crop Insurance Processing Quality Endorsement, published at 7 C.F.R. § 457.144. This request is pursuant to 7 C.F.R. part 400, subpart X.

### **Background:**

Section 9 of the Northern Potato Crop Insurance Processing Quality Endorsement states:

9. For any production that qualifies for adjustment in accordance with section 7 and that is discarded:

(a) Within 21 days (60 days if the Northern Potato Storage Coverage Endorsement is applicable), after the end of the insurance period, the amount of production to count will be:

(1) Zero if we determine the production could not have been sold; or

(2) Determined in accordance with section 8(b)(2) if we determine the production could have been sold; or

(b) Later than 21 days (60 days if the Northern Potato Storage Coverage Endorsement is applicable), after the end of the insurance period, the amount of production to count will be adjusted in accordance with section 8(b)(2).

### **Interpretation Submitted**

Two interpretations were submitted in this FAD request.

### First Requestor's Interpretation:

The first requestor interprets section 9 to require the approved insurance provider (AIP) to determine the production to count in accordance with section 8(b)(2) when the potato crop is discarded after the applicable deadline (21 days, or 60 days if the storage coverage endorsement applies), with no exception. When the Federal Crop Insurance Corporation (FCIC) promulgated the proposed regulations that would become the current version of the Northern Potato Crop Provisions and Processing Quality Endorsement, it explained the reason for imposing a less-favorable adjustment method on claims where the producer had discarded production after the end of the insurance period. FCIC explained the following in its Federal Register commentary:

Reports prepared by [United States Department of Agriculture Office of the Inspector General] and RMA Compliance indicated there were some cases in which producers retained production beyond the time period specified and then were able to sell more production than the amount of production used to determine production to count. Therefore, FCIC is proposing changes to the quality adjustment procedures for situations in which damaged production is not sold within the applicable time period.

...

By using [the alternative adjustment method], the production will no longer be able to qualify for adjustment based on the percentage factors contained in the policy and then later sold in a greater amount.

In light of that commentary from FCIC, the first requestor states it is clear that the time limitation for discarding the crop is designed to counter an identified fraud risk, and it is clear how FCIC intended for section 9 of the Processing Quality Endorsement to operate. If the insured discards the production after the deadline for any reason whatsoever, the AIP must use the less-favorable adjustment method.

The first requestor states the policy terms cannot be waived, so there can be no hardship exception for the deadline established in section 9(b). If a policyholder does not discover damage to potatoes in storage until it is too late, as a practical matter, to discard the potatoes by the deadline, section 9(b) still applies. It is the policyholder's responsibility to familiarize himself with the terms of the policy and to ensure compliance with its provisions. To allow an exception would amount to a

waiver of the policy terms.

The first requestor states that, in FAD-211, which addressed the issue of whether equitable estoppel could serve as a ground for an arbitration award, FCIC agreed that an arbitrator cannot use equitable estoppel to override or render inapplicable policy provisions that would otherwise apply in a given circumstance, since to do so would automatically nullify the arbitrator's award. The same principle of non-waiver applies to other forms of equitable relief.

Therefore, the first requestor argues no arbitrator could grant a policyholder equitable relief in a situation where the policyholder argued that the deadline established under section 9 created a hardship. To do so would result in nullification of the award.

#### Second Requestor's Interpretation:

The second requestor interprets section 9 to require the AIP to determine the production to count in accordance with section 9(a)(1) when the potato crop is discarded after the applicable deadline (21 days, or 60 days if the storage coverage endorsement applies) in circumstances where the timing of discovery of the damage means it would be impossible to physically remove the damaged potatoes within the timeframe and it is determined that the crop could not have been sold.

The second requestor states that in such cases where the potatoes are damaged to the extent that they are not capable of being sold, and in fact are eventually removed and disposed of for no value, section 9(a)(1) should be used to calculate the value so that the amount of production to count will be zero.

The requestor argues that section 9 should not be read to require that potatoes be physically disposed of, or removed, within the specified time frame. Such a requirement effectively reduces the insurance period. At the very least, there must be a reasonable time period after the results of testing to remove or dispose of potatoes that cannot be sold. If the time limitation for discarding the crop is designed to counter an identified fraud risk, as the first requester maintains, it should not be the justification for interpreting the policy terms to use the less-favorable adjustment method in circumstances where the risk of fraud does not exist. Where the damaged potatoes were not sold but are removed with no money being received for the potatoes, there is no risk of fraud, and section 9 of the

Processing Quality Endorsement should not be interpreted to operate to impose a less-favorable adjustment method.

### **Final Agency Determination**

FCIC agrees with the first requestor's interpretation.

Section 9 of the Northern Potato Crop Insurance Processing Quality Endorsement specifies the adjustments that will be made to production discarded "Within 21 days" and production discarded "Later than 21 days" (or 60 days if the Northern Potato Storage Coverage Endorsement is applicable) after the end of the insurance period (Emphasis added). Production discarded "Later than 21 days" after the end of the insurance period will be subject to the reduction factors detailed in section 8(b)(2) (Emphasis added). The term "discarded" must be given in common meaning, which is "to throw away or get rid of." This means the date the potatoes are thrown away or gotten rid of is the date that determines whether section 9(a) or 9(b) is used. Section 9 does not provide any exceptions to this deadline. Further, the preamble to the Common Crop Insurance Policy Basic Provisions (7 C.F.R. § 457.8) expressly states that no one is permitted to waive or vary the terms of the policy. Allowing adjustment under section 9(a) for potatoes that were discarded after the applicable deadline would constitute a variance of the terms of the policy.

In accordance with 7 C.F.R. § 400.765(c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

**Date of Issue:** June 24, 2015