

## **Final Agency Determination: FAD-316**

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**Subject:** Request dated December 15, 2023, submitted to the Risk Management Agency (RMA) for a Final Agency Determination (FAD) of section 14(b) of the Common Crop Insurance Policy (CCIP), Basic Provisions for the 2021 crop year, published at 7 C.F.R. §457.8, as it relates to the Sweet Cherry Crop Provisions.

### **References:**

The CCIP Basic Provisions state in relevant part:

#### **1. Definitions**

\* \* \* \* \*

**Abandon** - Failure to continue to care for the crop, providing care so insignificant as to provide no benefit to the crop, or failure to harvest in a timely manner, unless an insured cause of loss prevents you from properly caring for or harvesting the crop or causes damage to it to the extent that most producers of the crop on acreage with similar characteristics in the area would not normally further care for or harvest it.

\* \* \* \* \*

#### **14. Duties in the Event of Damage, Loss, Abandonment, Destruction, or Alternative Use of Crop or Acreage**

Your Duties -

\* \* \* \* \*

(b) You must provide a notice of loss in accordance with this section. Notice provisions:

(1) For a planted crop, when there is damage or loss of production, you must give us notice, by unit, within 72 hours of your initial discovery of damage or loss of production (but not later than 15 days after the end of the insurance period, even if you have not harvested the crop).

\* \* \* \* \*

(4) All notices required in this section that must be received by us within 72 hours may be made by telephone or in person to your crop insurance agent but must be confirmed in writing within 15 days.

\* \* \* \* \*

The Sweet Cherry Crop Provisions state in relevant part:

## **10. Causes of Loss**

(a) In accordance with the provisions of section 12 of the Basic Provisions, insurance is provided only against the following causes of loss that occur within the insurance period:

(1) Adverse weather conditions;

\* \* \* \* \*

(b) In addition to the causes of loss excluded in section 12 of the Basic Provisions, we will not insure against damage or loss due to:

\* \* \* \* \*

(2) Failure to harvest in a timely manner for any reason, including inability to obtain harvest labor, unless the failure to harvest is due to any of the perils specified in section 10(a); and

\* \* \* \* \*

## **11. Duties in the Event of Damage or Loss**

In addition to the requirements of section 14 of the Basic Provisions, the following will apply:

(a) You must notify us at least 3 days before the date harvest should start if the crop will not be harvested.

(b) If damage occurs when the cherries are mature or at any time during harvest, you must notify us within 3 days after you discover the damage so we can inspect your acreage.

\* \* \* \* \*

(d) You must notify us at least 15 days prior to the beginning of harvest or as specified elsewhere in this section if you expect the production to be harvested per acre will be less than your approved yield multiplied by the coverage level you selected.

\* \* \* \* \*

(f) You must not destroy the damaged crop until we have given you written consent to do so. If you do not meet the requirements of this section and we are unable to inspect the damaged production as a result, an appraisal of not less than the value per acre will apply to each affected acre.

(g) You may be required to harvest a representative sample selected by us so we can perform our appraisals.

\* \* \* \* \*

The Actual Revenue Sweet Cherry Pilot Loss Adjustment Standards Handbook state in relevant part:

## **11. Insurability**

\* \* \* \* \*

### **D. Duties in the Event of Damage or Loss**

Within the [Crop Provisions] is a requirement that insureds file a “notice of damage or loss”:

\* \* \* \* \*

(2) Within 3 days of the occurrence of damage if damage occurs when the cherries are mature and ready for harvest. This provision does not

mandate an appraisal or even an inspection, but only a notice of damage from the insured. The AIP [Approved Insurance Provider] has the option of whether or not to inspect the orchard.

## **Interpretation Submitted**

### First requestor's interpretation:

The first requestor's interpretation is that the written notice of loss related to an insurable cause of loss, submitted at the time of harvest satisfies the duties of the insured under the Basic Provisions and the related Sweet Cherry Crop Provisions found in paragraph 11(b), where the harvest commences but is later stopped due to an insured cause of loss that prevents an insured from properly caring for or harvesting the crop or causes damage to it to the extent that most producers of the crop on acreage with similar characteristics in the area would not normally further care for or harvest it. The cessation of a harvest due to an insured cause of loss that prevents further harvest is, by definition, not an abandonment of the crop.

The first requestor believes the determination of whether facts and evidence support the contention that most growers in the area would stop harvesting is not a question of policy interpretation, but a factual determination vested with the arbitrator.

### Second requestor's interpretation:

The second requestor's interpretation is that section 11 of the ARH Sweet Cherry Pilot Crop Provisions states that it is in addition to the Notice of Loss requirements under the Basic Provisions. It also states that within 3 days of the discovery of damage to mature cherries during harvest by the insured, "you," meaning the insured, must notify "us," meaning the AIP, so the AIP can inspect the acreage. Section 11(f) then indicates that "if you [the insured] do not meet the requirements of this section and we are unable to inspect the damaged production as a result[,], an appraisal of not less than the value per acre will apply to each affected acre." The second requestor does not feel there is any ambiguity in the requirement or the consequences for failing to meet it.

The second requestor believes that even in circumstances where a notice of an insurable event was presented to the AIP or the AIP's agent, and the insured indicated on such notice the intention to harvest the insured acreage, such notice does not waive or relieve the insured of the additional requirement of section 11(b)

to notify the AIP of actual damage to the insured crop if later discovered during harvest.

The second requestor's interpretation is that failure to provide the additional notice of damage and cessation of harvest wholly prevents the AIP from appraising the unharvested acreage to enable an accurate determination of undamaged production and determination of total production to count which is the essential purpose underlying the additional requirement in section 11(b) due to the perishable nature of mature sweet cherries.

### **Final Agency Determination**

The Federal Crop Insurance Corporation (FCIC) agrees with the first requestor's interpretation that a written notice of loss (NOL) within three days of discovery of an insurable cause of loss, submitted at the time of harvest satisfies the insured's obligations under section 14(b)(1) of the CCIP Basic Provisions and 11(a) of the ARH Sweet Cherry Pilot Crop Provisions (CP). However, FCIC disagrees that the initial NOL serves as a blanket NOL that spans the entire crop year when additional damage is discovered. Per section 11(b) of the ARH Sweet Cherry Pilot CP the insured is required to give an additional NOL within three days of discovery of additional damage during harvest.

FCIC agrees with the second requestor's interpretation that under section 11(b) of the ARH Sweet Cherry Pilot CP the insured is required to give an additional NOL within three days of discovery of additional damage during harvest.

FCIC disagrees with the first requestor's interpretation on the AIP's responsibility to make a factual determination as to what "most producers" of the crop on acreage with similar characteristics in the area would or would not do under similar circumstances. The AIP must make such a determination in order to properly adjust a claim. That does not affect any appeal rights of the insured, which may include an arbitrator if appropriate.

In accordance with 7 C.F.R. § 400.766(b)(2), this FAD 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. § 400.766(b)(5).

**Date of Issue:** February 1, 2024