



To: Amy Shambach, Illinois Indiana Sea Grant

From: Catherine Janasie, Research Counsel II, National Sea Grant Law Center

Re: Fish Covered by the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish (ELAP) Program (NSGLC-21-04-03)<sup>1</sup>

Date: March 17, 2021

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### **Advisory Summary**

You reached out to the National Sea Grant Law Center with a question regarding the type of fish covered by the U.S. Department of Agriculture (USDA) Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish (ELAP) Program. Illinois fish farmers growing Largemouth Bass have suffered massive fish loss due to this year's severe winter weather and applied for USDA ELAP funds to try and save their farms. The farmers are getting pushback from county Farm Service Agency (FSA) directors who feel that Bass raised as food fish are not covered under the program. According to the farmers, the county FSA directors claim the ELAP only covers losses to bait fish and game fish, and not fish raised as food.

You have asked us to research what fish are covered by the ELAP program. The 2014 ELAP regulations allow for the death loss provisions to apply to more than bait or game fish. Additional aquatic species can be added at the Deputy Administrator's discretion, though the FSA Handbook for the ELAP program does not reflect that any additional species have been added. Interested farmers could inquire with FSA whether additional species have been added in the last year, or ask if there is a process to petition for additional species to be added.

### **ELAP**

USDA's ELAP program is administered by the FSA. The program is meant to cover losses not covered by other USDA disaster assistance programs that were caused by adverse weather or other conditions causing a loss. For purposes of ELAP, farm-raised fish are defined as any aquatic species that is propagated and reared in a controlled environment.

For farm-raised fish, ELAP covers two specific types of losses. All other losses are considered to be covered by Noninsured Crop Disaster Assistance Program (NAP),<sup>2</sup> and thus, not eligible for ELAP. First, ELAP provides compensation for the loss of feed purchased or harvested for the

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<sup>1</sup> This product was prepared by the National Sea Grant Law Center under award number NA18OAR4170079 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the authors and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

<sup>2</sup> NAP coverage is prospective. The farmer needs to apply for coverage ahead of when the disaster strikes his or her farm. Therefore, for losses incurred this year, the farmer must have previously enrolled in the NAP program.

producer's farm-raised fish. Second, ELAP provides compensation for the death of certain farm-raised fish.<sup>3</sup>

The ELAP program requires that the aquaculture species be intentionally put in, and not simply be indigenous to, a facility in order to be eligible for ELAP. In addition, the producer must plant or seed the species in a way that protects and contains the species, such as in a container, wire basket, net pen, on a rope, or any other similar device. For farm-raised fish, eligible adverse weather and loss conditions include, but are not limited to: earthquakes, floods, hurricanes, tidal surges, tornados, and volcanic eruptions; for feed losses, excessive wind; and for death losses, excessive heat, and certain freezes.

In addition, to be eligible for ELAP, the farm-raised fish must be an aquatic species, which includes:

- 1) aquatic organisms grown as food for humans;
- 2) fish feed eaten by humans; and
- 3) ornamental fish.<sup>4</sup>

In regards to death losses, ELAP was traditionally applied only to bait and game fish, which are defined as:

- Bait Fish: small fish caught for use as bait to attract large predatory fish. For ELAP, it also must meet the definition of aquatic species and not be raised as food for fish; provided, however, that only bait fish produced in a controlled environment are eligible for payment under ELAP.
- Game or sport fish: fish pursued for sport by recreational anglers; provided, however, that only game or sport fish produced in a controlled environment can generate claims under ELAP.<sup>5</sup>

However, the ELAP regulations finalized in 2014 allowed for the possibility for additional types of farm-raised fish to be covered by the program. The preamble to the rule states:

Under the previous ELAP provisions, only bait and game fish were considered eligible farm-raised fish for death losses. However, this rule provides the Deputy Administrator discretion to include other aquatic species as eligible for death losses.<sup>6</sup>

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<sup>3</sup> 7 CFR § 1416.102(h).

<sup>4</sup> *Id.* § 1416.102.

<sup>5</sup> *Id.*

<sup>6</sup> Supplemental Agricultural Disaster Assistance Programs, Payment Limitations, and Payment Eligibility, 79 Fed. Reg. 21,086, 21,088 (Apr. 14, 2014).

The actual rule states:

(h) For fish to be eligible to generate payments under ELAP, the fish must be produced in a controlled environment and the farm-raised fish must: ... (2) For death losses: (i) Be bait fish, game fish, *or another aquatic species deemed eligible by the Deputy Administrator* that are propagated and reared in a controlled environment.<sup>7</sup>

Therefore, there is the possibility for additional fish species to be covered by the ELAP program. However, as of this time, it is not clear whether the Deputy Administrator has exercised this discretion. The FSA Handbook from 2019 for FSA state and county offices administering the ELAP still only references game and bait fish.<sup>8</sup> The 2020 amendments listed in the beginning of the document do not include amendments to add additional aquatic species to the ELAP program.<sup>9</sup> This seems consistent with the position that the FSA office is taking with the Illinois farmers this year.

Some steps the farmers could take when talking with FSA include:

- Asking if any additional aquatic species have been added to the EPAP program in the last year.
- If not, ask the FSA if there is a process by which farmers can request inclusion of other aquatic species in the ELAP program.

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<sup>7</sup> 7 CFR § 1416.102 (emphasis added). A controlled environment is an “environment in which everything that can practicably be controlled by the participant with structures, facilities, and growing media (including, but not limited to, water and nutrients) was in fact controlled by the participant at the time of the eligible adverse weather or eligible loss condition.” *Id.* Additional requirements for death losses include that the fish have “(ii) Been maintained for commercial use as part of a farming operation; and (iii) Been physically located in the county where the eligible loss adverse weather or eligible loss condition occurred on the beginning date of the eligible adverse weather or eligible loss condition.” *Id.*

<sup>8</sup> FARM SERV. AGENCY, FSA HANDBOOK- EMERGENCY ASSISTANCE FOR LIVESTOCK, HONEYBEES, AND FARM-RAISED FISH PROGRAM 116 (2019, updated 2020) (info found on page 116 of the PDF), [https://www.fsa.usda.gov/Internet/FSA\\_File/1-elap\\_r00\\_a03.pdf](https://www.fsa.usda.gov/Internet/FSA_File/1-elap_r00_a03.pdf).

<sup>9</sup> *Id.* at 1-4.