

program, and that those producers should not be denied indemnity for losses simply because they took part in an effective program. The commenters stated that not compensating Texas producers would serve as a disincentive to take part in ongoing surveillance programs in the future.

We recognize the proactive efforts of producers and animal health officials in Texas to contain and eradicate LPAI when it occurred in that State in 2002, and we recognize the effects on producers of the LPAI situation in Texas. In this final rule, we are amending the provisions in part 53 to allow the Administrator to pay claims for eligible losses incurred by owners and contract growers related to the 2002 disease situation in Texas associated with the H5 virus. We will apply those payment conditions that we are applying to the disease situation in Virginia to the disease situation in Texas.

Flock Owners in North Carolina

Several commenters requested similarly that compensation be paid to producers in North Carolina for losses due to LPAI.

Our interim rule provided that the Department would pay compensation for birds in States other than Virginia if those birds were depopulated because of being epidemiologically linked to the situation in Virginia. Compensation has been paid for flocks in North Carolina epidemiologically linked to the situation in Virginia.

Percentage of Value Used for Compensation

Several commenters requested that poultry owners be compensated at a rate higher than 50 percent of the value of poultry destroyed minus the amount paid to contract growers.

In this final rule, we are providing that, subject to available funding, the Department may pay up to 75 percent of eligible total losses with contract growers being compensated at 100 percent of their eligible losses and the remaining amount being paid to the owner of the flock.

Payment for Eggs and Semen

Several commenters requested that compensation be paid for destroyed eggs from affected premises, including destroyed hatching eggs that had been moved to a hatchery after the disease was detected on the premises but before the poultry from that premises were destroyed.

We agree with the commenters that such losses should be eligible for compensation. Additionally, semen

collected from or used in affected flocks poses a risk of transmitting the LPAI virus and should be destroyed as part of the eradication process. Therefore, we are providing in this final rule that compensation will be paid for eggs, as well as any poultry semen, destroyed because of LPAI associated with the disease situations in Virginia and Texas.

Miscellaneous Items

One commenter expressed concern that the interim rule did not provide for payment for certain items other than poultry on affected premises. The commenter requested indemnity for feed and containers destroyed on affected premises. Additionally, the commenter requested compensation for custom-printed supplies that would not be used again because the destruction of birds and eggs would make it impossible to resume business operations. Other commenters requested compensation for feed used to sustain poultry from the time the disease was diagnosed on a premises until the time of depopulation and for poultry litter that could not be sold and moved from a quarantined premises.

We are making no changes based on the comments. Under the interim rule, growers were compensated fully for production losses and owners were compensated in part for poultry destroyed because of LPAI. With regard to feed and other materials destroyed, it has historically not been the Department's policy to compensate for such materials that were not required to be destroyed by the Department, such as in the Virginia and Texas outbreaks, where actions to control and eradicate the disease were initiated by the States. Any decision to no longer use supplies that were not contaminated by the disease was a voluntary business decision by the entity involved. The issue of compensating for feed used to sustain poultry is further inapplicable because, for those poultry that were allowed to move to slaughtering establishments (controlled slaughter), owners recouped the cost of feed for the poultry. In cases where affected poultry did not go to controlled slaughter, the poultry were required to be destroyed within 24 hours of diagnosis. Litter in the affected area was permitted to be moved from the area after meeting requirements to ensure that it was not contaminated by the LPAI agent.

The LPAI Compensation Plan

The interim rule based payments on the age (in weeks) of birds destroyed. Several commenters requested that the indemnification value of breeder flocks be calculated as of the date that the

flock was diagnosed positive for LPAI, because, following that date, hatching eggs produced by the flock could not be moved from the premises. One commenter requested that, at the minimum, the value of a breeding bird be calculated as of the last full week of age of the bird before depopulation. For instance, it was requested that, if a flock was 44 weeks and 5 days old when depopulated, we consider the age of that flock to be only 44 weeks. One commenter recommended that the per-bird value in the LPAI compensation plan be prorated to the day of the bird's age.

We are making no changes based on the comments. We decided to be consistent with the method used to determine age, whether the birds were meat birds or breeding birds. We rounded up or down in standard fashion according to how old in days beyond a full week a bird was (e.g., a bird 1 week and 2 days old will be considered 1 week old; a bird 1 week and 5 days old will be considered 2 weeks old). Although meat birds and replacement breeders gain in value as they age, breeder birds lose value as they age. An attempt to consider birds in all cases to be only as old as the last full week would have provided overcompensation to some owners and undercompensation to others. Calculation of compensation of a large number of birds based on days of age would delay payments and increase taxpayer expense to process the claims, and, on the average, using daily values would not change the overall payment made.

Several commenters stated that, practically speaking, the LPAI compensation plan bases payments to contract growers of breeder poultry on production records from one flock, whereas payments to growers of meat birds are based on an average of three to seven flocks. The commenters requested that a three-flock average be used to determine compensation for losses of breeder poultry.

We would find it acceptable to use a three-flock average for breeder birds. If companies provide APHIS with breeder data for the past three flocks, then all three flocks can be used in estimating flock productivity.

One commenter recommended that, in calculating a broiler breeder producer's projected flock income for the purposes of compensation, the previous three-flock income average be divided by the capitalized number of hens, and that the resulting payment per unit be multiplied by the capitalized number of hens in the LPAI-affected flock.