



46 East Fourth Street Suite 1301  
Saint Paul, Minnesota 55101

Phone: 651.223.5400  
Fax: 651.223.5335

Internet:  
[lawyers@flaginc.org](mailto:lawyers@flaginc.org)

Web site:  
[www.flaginc.org](http://www.flaginc.org)

March 2, 2004

Mr. David McKay  
Conservation Planning Team Leader  
Conservation Operations Division  
Natural Resources Conservation Service  
P.O. Box 2890  
Washington, DC 20013-2890

Dear Mr. McKay:

Re: Comments on Proposed Rule for Conservation Security Program,  
69 Fed. Reg. 194 (January 2, 2004).

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the proposed rule to implement the Conservation Security Program, published at 69 Federal Register 194 (January 2, 2004).

NFFC represents 30 grassroots farm and rural advocacy organizations in more than 30 states. The coalition was formed in 1986 to coordinate the efforts of a growing network of grassroots organizations concerned with maintaining a family farm system of food production. NFFC's work includes education, outreach, and advocacy for stable rural communities, safe food, and the preservation of natural resources through family farming. NFFC has long been interested in federal farm policy.

FLAG is a nonprofit, public interest law center dedicated to the preservation of family farms. For over fifteen years, FLAG has provided legal services to thousands of small and mid-sized family farmers throughout the nation in class action lawsuits, administrative proceedings, public education initiatives, and legislative technical assistance involving agricultural credit issues.

**With the Restoration of Full Funding to CSP Beginning in Fiscal Year 2005, the Rule Must Be Revised and Opened to Further Public Comment**

NFFC appreciates the opportunity to comment on this proposed rule to implement this innovative conservation program. In the prefatory comments to the proposed rule, NRCS discussed the difficult balancing act it felt constrained to perform between the entitlement program mandated by the Farm Security and Rural Investment Act ("2002 Farm Bill") and the funding cap imposed on the program in the 2003 agricultural appropriations process. The 2004 omnibus appropriations bill has now lifted the funding cap for the future, beginning with fiscal year 2005, which commences on October 1, 2004. As a consequence, NRCS should issue a revised rule, as promised in the preamble, in order to allow an opportunity for meaningful public comment. 69 Fed. Reg. 194, 197. Farmers and ranchers should have the opportunity to comment on a proposed rule that is consistent with current funding realities.

**All Substantive Requirements Must Be Subject to Notice-and-Comment Rule-making**

Provisions of the Title II of the 2002 Farm Bill (the Conservation Title) must be subject to notice-and-comment rule-making under section 2702 of the Bill. Section 2702 gives NRCS some flexibility with respect to how it carries out the notice-and-comment, as long as NRCS carries out proper notice-and-comment rule-making consistent with the requirements of the Administrative Procedure Act, especially 5 U.S.C. sec. 553.

In the proposed rule, NRCS seems to signal that it anticipates a separate round of notice-and-comment rule-making prior to every CSP sign-up period. For example, in proposed section 1469.5(e)(3), NRCS indicates its intention to request public comment on the process used to select priority watersheds. With the removal of the funding caps, CSP should be offered as a continuous sign-up program, rather than as the limited program contemplated in the proposed rule. In order to make the most efficient use of agency resources, NFFC urges NRCS to publish a rule for public comment that addresses all open substantive questions for the CSP program in order to establish a permanent CSP program, without the need for endless rounds of public comment that neither the agency nor the interested public wants.

All substantive matters must be addressed in detail in the next rule published and offered for comment. Sufficient detail must be contained to enable meaningful opportunity for comment, as well as to provide meaningful standards. The final regulation or interim final regulation must include sufficient detail on criteria for conservation practices, payments and payment limitations, and minimum eligibility so that any policy statements or handbooks NRCS issues to guide employees only interpret the regulations, rather than in fact creating new laws. The use of such policy notices and handbooks as official and binding are controversial. See, for example, Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?, 41 Duke Law Journal 1311 (1992); Robert A. Anthony,

"Interpretive" Rules, Rules and "Spurious" Rules: Lifting the Smog, 8 Administrative Law Journal 1 (1994); and Christopher R. Kelley, Notes on the USDA National Appeals Division Appeal Process, 1999, Arkansas Law Notes 61 (1999). Legislative policy statements promulgated without an opportunity for notice and comment are unlikely to withstand judicial review. See *Christensen v. Harris County*, 120 S. Ct. 1655(2000); *Hector v. U.S. Dep't of Agriculture*, 82 F.3d 165 (7<sup>th</sup> Cir. 1996).

### **All Comments Submitted Regarding the Conservation Security Program Should be Posted on the NRCS Website as They Are Submitted**

The Conservation Security Program has been a topic of intense interest among farmers and ranchers even before passage of the 2002 Farm Bill. This intense interest extends for many farmers, ranchers, and farm organizations to a strong desire to review and analyze comments submitted on this and all subsequent rules published for public comment.

Federal agencies, including USDA, are increasingly making documents relating to the rule-making process available on their websites. Indeed, NRCS made many supporting documents to the proposed rule available on its website. Publication on the website helps improve public access to and participation in the rule-making process.

NFFC would like to urge NRCS to post all comments received on the Conservation Security Program on its website. Under the E-Government Act of 2002, agencies "shall make publicly available online. . . all submissions under 553(c) of Title 5, United States Code. 107 Pub. L. No. 347, Section 206(d)(2)(A); 116 Stat. 2899 (2002). The statutory provision of the Administrative Procedure Act referred to concerns notice-and-comment rulemaking. The Act allows for some agency discretion in determining whether online publication is "practicable." NFFC believes that many comments on CSP are being submitted by e-mail and fax, which would make online posting relatively convenient. Several other agencies within USDA, for example, the Agricultural Marketing Service, have concluded it is practicable to post comments received during the rule-making process upon their websites, and have in fact posted public comments. NFFC believes that it would be both practicable and beneficial to post all CSP comments on the NRCS website, and urges NRCS to do so for this and all subsequent comment periods.

### **The Proposed Rule Does Not Abide By the Statutory Prohibition on the Use of Competitive Bidding or Similar Procedures in the Enrollment Process**

In the proposed rule, the agency sought to maximize then-limited dollars, by targeting CSP funds to applications that would optimize environmental performance. While this may seem like a prudent decision, it does not appear to be one permitted under the statute. The statute states that in entering into conservation security contracts with producers, "the Secretary, shall not use competitive bidding or any similar procedure." 16 U.S.C. § 3838c.

Under the proposed rule, farmers and ranchers would, in effect, be forced to "bid" against other applicants for most environmentally distressed location, most pressing

resource concerns, and greatest potential environmental benefit. This is precisely what the statute seeks to prevent by prohibiting the use of "competitive bidding and similar procedures" in the enrollment process. When Congress uses terms like "competitive bidding," and "competitive procedure" it does not refer only to competition based on price, but to competition based on many factors. See, e.g., 10 U.S.C. § 2304(a)(2) (providing in part that sealed bids are permitted if award will be based on price and price-related factors, but competitive proposals must be requested if the award will not be based only on price and price-related factors, or if the government may need to discuss bids with their proponents). The CSP statute does not bar the Secretary from considering price during the enrollment process; it actually directs the Secretary to "require, to the maximum extent practicable, that the lowest cost alternatives be used." 16 U.S.C. § 3838a(d)(1)(B)(ii).

The use of the broad phrase, "or other similar procedure" also indicates that the statutory prohibition must be applied broadly to bar ranking applicants in any manner akin to competitive bidding, not just with respect to price. The prohibition on the use of "competitive bidding and other similar procedures" is meant to bar precisely the non-price-related competition contemplated by the proposed rule. This interpretation is supported by the conference committee report to the 2002 Farm Bill, which notes that the managers intend to bar "environmental bidding and ranking."

#### **The Rule Must Abide By the Statutory Prohibition on the Use of Competitive Bidding or Similar Procedures in the Enrollment Process**

The statute places a duty upon the Secretary to enter into conservation security contracts without the use of competitive bidding or similar procedures. The regulations must comply with this duty. Applicants must not be forced to "bid" against one another. Rather, the Secretary must approve applications that meet the minimum requirements, and enter into conservation security contracts with those producers.

#### **The First-Come, First-Served Alternative Would Give Effect to the Statutory Prohibition on the Use of Competitive Bidding or Similar Procedures in the Enrollment Process**

The NRCS commented in the preamble to the proposed rule that it viewed an option in which CSP applications would be considered and funded in the order received as "inappropriate and unworkable." 69 Fed. Reg. 194, 200 (2004). However, the stated reasons for this conclusion are not persuasive in light of the removal of funding caps. Applicants will suffer no "unnecessary pressure" to be first in line, because the funds are not limited, and all persons who meet the minimum requirements will be entitled to participate. Even in contexts where funding is limited, such as Farm Service Agency loan programs, NFFC notes that USDA has utilized a "first come, first served" policy. If Congress were to impose a funding cap in a given year, NRCS could simply hold applications until further funding became available, and continue to consider the applications in the order received.

NRCS need not approve an application upon its receipt, as it seems to understand this alternative to require. This alternative would simply require the agency to consider applications in the order received. To the extent that the agency must know the cost of an application before approving it, the agency could delay approving a contract until those costs were determined, as long as each contract was considered and resolved in the order received. The agency's need for this information prior to approval should be diminished in light of the removal of the funding caps. The "first come, first served" alternative also would ensure that the Secretary complies with the statutory prohibition upon the use of competitive bidding or similar procedures.

**NRCS Should Employ Aggressive Outreach and Targeted Funds to Encourage Participation by Limited Resource and Socially Disadvantaged Farmers and Ranchers**

NRCS should undertake outreach efforts targeted toward limited resource and socially disadvantaged applicants in order to maximize participation in CSP. In addition to its own efforts, NRCS should facilitate outreach by existing technical assistance providers, such as those designated through the Minority Outreach and Technical Assistance Program. 7 U.S.C. sec. 2501.

If Congress were to impose a cap upon CSP funding in the future, it would be imperative to target a certain percentage or fixed amount of CSP funding to limited resource and socially disadvantaged applicants and participants. A mechanism to enable such targeting should be contained in the regulations. If no portion of funds were reserved, but funds were limited, it is possible that all of the funds would be obligated rapidly under any of the alternatives considered by NRCS, before many limited resource and socially disadvantaged farmers learned of the opportunity and received the technical assistance needed in order to apply.

NRCS Should Report on Participation in CSP by Socially Disadvantaged Farmers in order for farmers and farm organizations as well as NRCS itself to monitor the fairness of the administration of CSP, the agency should collect and report on data documenting participation in CSP by race, ethnicity, and gender. This is consistent with requirements in section 10708 of the 2002 Farm Bill.

**The Proposed Rule is Inconsistent with the Statutory Provisions for Special Projects**

Congress apparently concluded that there might be some cumulative benefit to coordinated conservation efforts in a given geographic area. It provided authority in the 2002 Farm Bill for the Secretary to enter into stewardship agreements and to approve special projects for CSP and other conservation programs. 16 U.S.C. § 3843(f). However, the very use of the word "special" in special projects indicates that these programs were to be just one aspect of the programs. The proposed rule fails to implement the national CSP intended by Congress, and allows the exception to swallow up the rule. The

conference committee report for the 2002 Farm Bill reflects the members' intention that CSP should be available to "all producers," but the proposed rule does not carry out this mandate.

Under the proposed rule, each sign-up will in effect be designed to implement one or more "special projects." The proposed rule also fails to implement special projects in the manner provided for in the statute. For example, the proposed rule does not require that a stewardship agreement between NRCS and another governmental, tribal, or nonprofit entity guide the special project in order to assure that conservation efforts are coordinated in order to achieve a cumulative benefit, as required by the statute.

In order to achieve the goals of the statute, the regulations should provide for stewardship agreements and special project area plans as authorized by the statute. In keeping with the statute, these special projects should be in addition to the national CSP. Proposed section 1429.23(d)(3)(ii) appears to be an effort to encourage special projects in the manner provided in the statute, though it does not use the statutory language of stewardship agreements and special project areas. Congress has spoken to the question of how to focus and prioritize conservation efforts in specific geographic regions. The statute is not ambiguous, and the agency is not free to implement either the national program or special projects in a way that is different from that required by the statute.

### **The Proposed Rule Sets the Base Component of CSP Payments at an Inappropriate Rate**

The statute provides at 16 U.S.C. § 3838c(b)(1)(A) that the base payment shall be:

- The average national per-acre rental rate for a specific land use during the 2001 crop year; or
- Another appropriate rate for the 2001 crop year that ensures regional equity

The statute further provides that producers shall receive 5, 10, or 15 percent of the base payment, depending upon whether they are participating at Tier I, II, or III.

The proposed rule defines the base payment as 10 percent of the average national per-acre rental rate for a specific land use during the 2001 crop year. While the statute allows the Secretary some leeway to designate an appropriate rate for the base payment that ensures regional equity, surely that does not extend to simply taking the definition advanced by Congress, adding some regional adjustments, and reducing it by 90 percent. The base component of the CSP payment under the proposed rule would thus be 0.5 percent to 1.5 percent of the average national per-acre rental rate for a specific land use during the 2001 crop year. This is far too low.

As to a base payment defined by the average national per acre rental rate for a specific land use during the 2001 crop year, Congress has spoken. The rate contained in the proposed rule is not an appropriate rate. Such a rate would result in the base component of the CSP payment being just a few dollars per acre, which is simply not enough to

motivate farmers and ranchers to fill out the necessary paperwork to enroll in a federal program, much less implement and maintain conservation practices.

The base component of the CSP payment is a key component of CSP, particularly for limited resource and beginning farmers and ranchers. If NRCS wants to encourage participation among these farmers, the base component should be set at a rate high enough to encourage and reward participation.

### **A Future Rule Published for Public Comment Must Address Cost-Share Rates**

Most of the information on NRCS' thoughts on cost-share payments are contained in the economic analysis, though the discussion of "redundancy" with EQIP provides a hint. Again, the proposed rule was overwhelmingly shaped by the funding cap imposed during the 2003 appropriations process. With the removal of the funding caps, NFFC urges NRCS to issue a rule for public comment that provides CSP cost-share assistance at levels at or near the statutory maximum, particularly for beginning farmers and ranchers. The Act reflects a vision in which CSP could provide a "one-stop shop." Rather than forcing one farmer to apply for two or more conservation programs, generating two or more applications to be serviced by multiple agency personnel, CSP could reduce the workload and paperwork for both farmers and USDA employees. In order to achieve this efficiency, cost-share rates must be offered at rates that are at least comparable to the rates for other conservation programs such as EQIP, as contemplated by the Congress in the statutory maximums, and reflected in the conference committee report.

### **The Proposed Rule's Provisions on Eligibility are Too Strict**

The proposed rule would restrict eligibility to those producers who have already met all requirements for the Tier. The statute requires producers to develop, submit, and enter a contract to carry out a conservation security plan. The regulations should be changed to allow for broader participation, consistent with the statute.

### **NRCS Should Not Limit Participation By Tenants With One-Year Leases or Penalize Participants Who Transfer Their Interest In Land Enrolled in CSP**

The statute provides for the transfer of a conservation security contract to a new tenant or new owner, so there is no need for NRCS to limit participation in CSP to tenants with a lease for the entire term of the conservation security contract, which would be a minimum of five years. This proposed limit is simply not consistent with the realities of landlord-tenant relationships in agriculture today. While the same landlord and producer may enter into a lease agreement for years or even decades, the lease is rarely for more than one year. Nor is it required by the statute--which directly provided for the free transfer of duties and rights under a CSP contract, for termination of CSP contracts where the new holder of an interest in land declined to assume the rights and duties, but did not indicate that a penalty should be imposed upon termination in such circumstances. 16 U.S.C. sec. 3838c(e).

Under proposed section 1469.24(d), a producer who transferred his or her interest in land may be harshly penalized for the transfer if the transferee did not assume the CSP contract. If farmers and ranchers were aware of this provision, many of them would be deterred from participating in CSP. What would actually happen is likely worse, if the lessons of other government programs are any predictor. Many farmers would participate in CSP, transfer their interest in land to a person who elected not to participate in CSP, and only then learn of the possibility of harsh penalties. If CSP is implemented with appropriate payments, at the levels authorized by Congress, the overwhelming majority of transferees of land enrolled in CSP would likely elect to assume the contract.

### **The Regulations Should Provide a Means for Producers and NRCS to Work Together in Developing the Conservation Security Plan**

The statute contemplates that the producer will take the initiative in developing and submitting a conservation security plan to NRCS. 16 U.S.C. sec. 3838a(b)(1)(A). But the proposed rule assigns most of the responsibility and authority for developing a conservation security plan to NRCS. Many producers will certainly be eager to take advantage of NRCS' technical assistance. However, many producers may wish to design their own conservation security plan, or to work with NRCS to develop or modify the conservation security plan. The regulations should provide such a process, and address the producer's appeal rights should the producer and NRCS be unable to agree on a conservation security plan.

### **New and Existing Practice Payments Should Be Exempted from Administrative Offset**

The proposed rule provides that CSP payments would be subject to administrative offset. However, an exemption from an administrative offset for new and existing practice payments would serve the purposes of the CSP, and is within the Secretary's discretion. The exemption should also apply to enhanced payments to the extent the enhanced payment is intended to reimburse producers for the cost of implementing a conservation practice. Most CSP contracts will require ongoing maintenance of conservation practices. Some new practices may take several years to fully implement. In the absence of an exemption, offset of practice payments midway through the contract term may undo all of the environmental benefits already achieved, or result in termination of the practices just before they bear fruit. Offset of these payments could have a devastating effect upon producers. In other conservation programs, offset of cost-share payments midway through implementation has caused farmers to fall out of compliance with the contract, resulting in a claim from the agency for all previous payments to be refunded, and dramatically worsening the farmer's financial position. In contrast, exempting these payments from offset may allow the farmer to continue the practices, reap the benefits of those practices, and improve his or her bottom line enough to catch up on the missed payments.

**The Regulations Should Note that Applicants and Participants May Obtain Review of the Appealability of Adverse Decisions from the National Appeals Division**

The proposed rule states that producers would have the right to appeal adverse decisions under CSP to the National Appeals Division. However, the proposed rule also states that producers would not have the right to appeal payment rates, payment limits, cost-share percentages, eligibility of conservation practices, and other matters of general applicability. The final determination of just which adverse decisions involve matters of general applicability is a matter under the jurisdiction of the National Appeals Division. 7 C.F.R. § 11.6.

NFFC recommends that the regulation be amended to add the following sentence as the end of proposed section 1469.31(b): "An applicant or participant may obtain review of nonappealability decisions according to 7 C.F.R. § 11.6." This amendment will make it clear to program applicants and participants who may have had little involvement with USDA programs, or who have little familiarity with NAD, that NAD makes the final determination on the question of appealability. This amendment will alert participants and applicants to their appeal rights. This is important because determinations regarding appealability may be difficult, and because local NRCS employees may not be called upon to make these decisions often, and so may be unfamiliar with the nuances of these decisions.

In the administration of other USDA programs, NFFC has occasionally seen local agency staff erroneously conclude that a matter was not appealable, when in fact the dispute centered upon the proper application of a rule of general applicability to individual circumstances, and was appealable under NAD rules. Farmers and ranchers should be advised of their right to appeal when they believe the local NRCS employee has made an error regarding appealability. In order to obviate the occasion for such appeals, NFFC urges NRCS to develop training for employees to guide them in the nuances of the issue of appealability.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/Jill E. Krueger

Jill E. Krueger  
Attorney at Law  
Email: jkrueger@flaginc.org