

FLAG



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October 5, 2004

Mr. Craig Derickson  
Conservation Security Program Manager  
Financial Assistance Programs Division  
Natural Resources Conservation Service  
P.O. Box 2890  
Washington, DC 20013-2890

Dear Mr. Derickson:

Re: Comments on Interim Final Rule for Conservation Security Program,  
69 Fed. Reg. 34,501 (June 21, 2004).

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the National Family Farm Coalition (NFFC) concerning the interim final rule for the Conservation Security Program, published at 69 Federal Register 34,501 (June 21, 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 federal farm program issues.

**These Comments Are Intended to Add to, Rather Than Reiterate, the Comments Submitted in Response to the Proposed Rule**

NFFC submitted comments in March, 2004 in response to the proposed rule. These comments are not intended primarily to repeat those earlier comments, but to add comment on new issues raised by the interim final rule. However, these comments do highlight portions of the earlier comments that were not addressed by NRCS in the preamble to the interim final rule.

**NRCS Has No Authority to Cap CSP Payments Based Upon the Rental Rate or Number of Acres Enrolled in the Program**

Under § 1469.23(e)(5) of the interim final rule, the total of the stewardship, existing, and enhancement payment cannot exceed a percentage of the unadjusted stewardship payment rate. The percentage varies based upon the tier of the contract. Essentially, this means that total CSP payments are capped based upon the rental rates and number of acres covered by the contract. This subsection should be repealed.

Subsections 1469.23(e)(1)-(3) reflect the statutory payment limits for Tier I, Tier II, and Tier III contracts. The statute has addressed in clear and unambiguous terms the specific question of how payments for CSP should be limited. 16 U.S.C. § 3838c(b)(2)(A). Since Congress has spoken, that is the end of the matter, and NRCS may not impose additional limits based upon numbers of acres, rental rates of those acres, or any further criteria other than the Tier level of the contract. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

In addition to opposing this provision of the regulations as a matter of law, NFFC opposes it as a matter of policy. In the preamble to the interim final rule, NRCS stated that its research related to CRP payments indicated that producers were concerned about the potential effects of CSP payment levels on land prices and rental values. 69 Fed. Reg. 34,501, 34,509 (2004). NFFC agrees that distorted and volatile land ownership and land rental rates can present a problem for farm owners, farm tenants, and beginning farmers. However, it is not clear that payments for CRP, a land retirement program, will have “similar” effects to CSP payments, a program for working lands.

The provision unfairly limits CSP payments to farmers, not based upon the extent to which they address conservation challenges, but based upon the size of their farms and upon the rental rates for land in their area. The provision would limit the incentive for farmers with small acreages, or farmers with large acreages in sparsely populated rural areas with correspondingly low land rental rates, to provide conservation benefits to the public. As a matter of policy, Congress correctly limited payments based upon the level of commitment to conservation.

**Conservation Security Contracts Are Binding**

Under § 1469.23(h) of the interim final rule, NRCS provides that, “In the event that annual funding is insufficient to fund existing contract commitments, the existing contracts will be pro-rated in that contract year.” This section of the regulations should be repealed. Conservation Security contracts are no less binding upon the government than upon the farmers and ranchers. Farmers and ranchers will be initiating and maintaining conservation practices on their farms in reliance upon CSP payments to which they are entitled by contract. As long as they perform in full, the government must perform in full as well.

While NRCS's apprehension about future funding designated specifically for CSP may be understandable in light of its short but already complicated history, there is simply no authority in the authorizing statute to pro-rate contractual payments. As with any other government agency, NRCS may not lawfully avoid its contractual payment obligations via regulation.

### **Sign-Up Period Must Be Long Enough to Accommodate Outreach and Assistance to Limited Resource and Socially Disadvantaged Farmers and Ranchers**

In its comments on the proposed rule, NFFC urged NRCS to undertake outreach efforts targeted toward limited resource and socially disadvantaged applicants in order to maximize participation in CSP. NFFC also urged NRCS to facilitate outreach by existing technical assistance providers, such as those designated through the Minority Outreach and Technical Assistance Program. 7 U.S.C. § 2279 et seq. (referred to as § 2501). In these comments, NFFC renews this call, with particular emphasis upon the need for a sign-up period long enough to allow outreach to take place.

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 before many limited resource and socially disadvantaged farmers learned of the opportunity and received the technical assistance needed in order to apply.

If CSP funds may be limited in the future, one way to obviate certain problems associated with limited funds is to have a longer sign-up period. At a minimum, the sign-up period should be 60 days. A minimum of 60 days is needed to allow for adequate outreach to socially disadvantaged and limited resource farmers. Otherwise, CSP contracts may be awarded at disproportionate rates to large-scale farmers with greater technological resources. Something as simple as having or not having a home Internet connection is a significant advantage or disadvantage if there is a sign-up period of less than one month, as was the case in 2004.

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

In its comments on the proposed rule, NFFC urged NRCS to provide an exemption from an administrative offset for new and existing practice payments. NFFC renews that call here. Administrative offset of these payments would substantially interfere with the purposes of the CSP and an exemption is within the Secretary's discretion. 31 U.S.C. § 3716(c)(3)(B). 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

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the benefits of those practices, and improve his or her bottom line enough to catch up on the missed payments, thereby enhancing the agency's collection efforts while serving other program goals, too.

Thank you for your consideration of these comments.

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

s/Jill E. Krueger

Jill E. Krueger

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