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VIA www.regulations.gov

Mr. Greg Johnson, Director
Financial Assistance Programs Division
United States Department of Agriculture
Natural Resources Conservation Service
Room 5237S
1400 Independence Avenue SW
Washington, DC 20250-28900

Dear Mr. Johnson:

Re: Comments on Interim Final Rule for Environmental Quality Incentives Program, 74 Fed. Reg. 2,293 (January 15, 2009) and amended at 74 Fed. Reg. 10,674 (March 12, 2009).

The Farm and Food Policy Diversity Initiative, including the Rural Coalition and the undersigned partners and allies, submits these comments. They were prepared with the assistance of the Farmers' Legal Action Group, Inc. (FLAG) on our behalf, and concern the interim final rule for the Environmental Quality Incentives Program as published at 74 Fed. Reg. 2,293 (January 15, 2009) and amended at 74 Fed. Reg. 10,674 (March 12, 2009).

The **Farm and Food Policy Diversity Initiative (FFPDI)** includes diverse partner organizations with deep roots in the civil rights, rural and urban movements to secure land and justice. They work to ensure that organizations serving people of color in the food system have the opportunity to develop and support their own initiatives to improve equity in food and farm policy. The Diversity Initiative has successfully advocated for policies to increase transparency and accountability at USDA, halt land and farm loss by eliminating the factors that cause it, and increase prosperity in the food system by expanding opportunities and access to agriculture programs for the nation's diverse farmers and farmworkers.

The Rural Coalition is an alliance of more than 80 regionally and culturally diverse organizations that works to build a more just and sustainable food system. Its programs include advocating for national policies which support these goals, economic development efforts such as bridging the digital divide, and helping our diverse members market their farm products.

The Farmers' Legal Action Group (FLAG) is a nonprofit, public interest law center dedicated to the preservation of family farms. For two decades, 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 issues.

The preface to the interim final rule states that, among other things, revisions to the EQIP regulations focused upon expanding participation among historically underserved populations. According to the preface, the three chief methods to do this include: (1) a national target to set aside five percent of EQIP funds for socially disadvantaged farmers or ranchers, and an additional five percent of EQIP funds for beginning farmers or ranchers, (2) providing an increased payment rate to historically underserved producers, and (3) providing advance payments of up to 30 percent of the anticipated costs to be incurred. Our comments on these and related issues are as follows.

In Order to Achieve the Five Percent Set Aside Target for Socially Disadvantaged Farmers and Ranchers, States Should Have Flexibility to Set Targets of Up to Ten Percent, While All States Should Strive to Achieve Expanded Participation by Socially Disadvantaged Farmers and Ranchers.

Section 1466.8(e) of the interim final rule states that NRCS will establish a national target to set aside five percent of EQIP funds for socially disadvantaged farmers or ranchers, and an additional five percent of EQIP funds for beginning farmers or ranchers. The prefatory comments further discuss the means by which NRCS will implement the allocation required under the Farm Bill.

In general, the Diversity Initiative and the undersigned organizations support allocation at the national level, as discussed in the prefatory comments on page 2302. We acknowledge that the potential demand for EQIP funds among socially disadvantaged farmers may be greater in some states than others, and we agree that those states with a higher proportion of socially disadvantaged farmers may be in the best position to maximize the use of targeted funds. We believe that a ten percent set aside is justified for each state at the outset. Some states may have more vigorous demand from socially disadvantaged farmers, while other states may have a smaller proportion of socially disadvantaged producers, and may under perform in demand and contract approval. Having additional funds available in high demand states will help ensure that the nationwide target of five percent is met.

While accounting for differences in demand and population distribution from state to state, the EQIP final regulation should specifically encourage each state to strive for expanded participation by socially disadvantaged farmers and ranchers in general, as well as through the use of set aside funds. NRCS should provide for annual reviews, and development of plans, to improve the adequacy of outreach efforts and technical assistance in states that do not achieve EQIP participation by socially disadvantaged farmers and ranchers that is at least proportional with the representation of socially disadvantaged farmers and ranchers in that state.

The interim final rule is silent on whether funds set aside for socially disadvantaged farmers and ranchers might be re-pooled, and under what circumstances this might occur. Section 2704 of the 2008 Farm Bill granted discretion to the Secretary with respect to re-pooling. The undersigned organizations encourage NRCS to ensure that the target is treated as a minimum rather than maximum level of allocation to socially disadvantaged producers. NRCS should also

shift funds set aside for socially disadvantaged farmers from states with low utilization of the funds to high demand states as needed, until the entire national allocation has been used each year. However, states that do not achieve participation that is proportional to the representation of socially disadvantaged producers in the state should not be eligible for additional allocations of any other sources of reallocated or regional equity funds.

The agency should also clarify the process by which EQIP applications will be considered and ranked. It is unclear, under section 1466.20 of the interim final rule, whether applications from socially disadvantaged farmers and ranchers will initially be considered for funding in comparison with similar farming operations, or whether applications for socially disadvantaged farmers and ranchers will be considered for funding in a pool with all other socially disadvantaged farmers and ranchers. It is also unclear whether applications from socially disadvantaged farmers and ranchers that would qualify for funding in the absence of the set aside will be counted toward the five percent target.

Section 2504 of the Farm Bill states that, *“To the greatest extent practicable, the Secretary shall group applications of similar crop or livestock operations for evaluation purposes or otherwise evaluate applications relative to other applications for similar farming operations.”* We suggest that NRCS consider the process that has previously been used in Montana, whereby all applications are considered first in the general pool, and if not funded, are considered again within the targeted pool of funds.

The Diversity Initiative further recommends that, given the emphasis Congress has provided related to equity, that Sec. 1466.4, National Priorities, be amended to include an additional priority of, “Achieving equitable access to EQIP benefits by Indian Tribes and historically underserved populations.”

Applying Set-Aside Language to Allocation of Resources for Technical Service Providers.

In comments provided earlier related to Technical Service Providers, the Diversity Initiative has stated its support, reiterated here, to apply set aside policies to the allocation of funds to Technical Service Providers. This is necessary in order to ensure that socially disadvantaged, limited resource, and beginning producers have access to the technical assistance needed to understand and meet program criteria.

Clarify that the Increased Payment Rate for Historically Underserved Producers is Mandatory, and Clarify that the 90 Percent Cap Does Not Affect Any Payment Based Upon Foregone Income.

Section 1466.23(c)(2) of the interim final rule is confusing and in need of revision in order to bring it into compliance with section 2503 of the Farm Bill. The intent under the Farm Bill is to *increase* the amount that would otherwise be provided to the producer. In order to achieve this intent, the language in the Farm Bill provision is mandatory—the Secretary *shall* increase the amount that would otherwise be provided under this subsection. The use of the word *may* in the interim final rule implies discretion where none is allowed under the Farm Bill.

We propose the following revision for section 1466.23(c)(2):

Notwithstanding paragraph (c)(1)(i) of this section, a producer who is a historically underserved farmer or rancher shall receive a payment rate that is the result of adding not less than 25 percent to the otherwise applicable payment rate, up to 90 percent of the estimated costs incurred by implementing the conservation practice.

Under the interim final rule, the language “*notwithstanding paragraph (c)(1)(ii)*” refers to the provision allowing payment based on the estimated income foregone, but the Farm Bill reference is to the paragraph describing both payments—cost share and income foregone. NRCS could interpret this to mean that the reference in the regulation should be “notwithstanding paragraph (c)(1) of this section.” We believe the better reading is to state in the regulation “notwithstanding paragraph (c)(1)(i).” The intent of Farm Bill section 2503 is to increase the amount of the payment to historically underserved producers. The increase is achieved by increasing the rate of the cost share payment, which is established in paragraph (c)(1)(i). To reference paragraph (c)(1)(ii) or (c)(1) as a whole in order to limit historically underserved producers who receive the benefit of an increased cost share percentage to 90 percent of the costs incurred, whether or not they had also foregone income, would defeat the purpose of the Farm Bill provision.

Advance Payments are Critical to Making EQIP More Accessible to Historically Underserved Producers, and Outreach and Technical Assistance are Essential in Order to Maximize Their Impact.

The undersigned organizations strongly support interim final rule section 1466.24(d)(11), which states that the state conservationist may issue advance payments to historically underserved producers up to 30 percent of the anticipated cost incurred for purchasing materials or services to implement a conservation practice. Lack of access to capital can be a barrier for many historically underserved producers seeking to participate in conservation programs. Cost share programs can be beneficial, but the fact that they require farmers to pay for materials and labor upfront and then receive a reimbursement, has been a barrier to participation. Some underserved farmers may have been able to participate in conservation programs in past years by obtaining a loan, and providing an assignment of the cost share payment. For these farmers, providing an advance payment will save the administrative burden of obtaining the loan, the financial costs of paying interest and closing costs, and also addresses the possibility that loans may be less available during this recessionary period. Providing a portion of funds through an advance payment should significantly decrease many types of barriers to participation, at little or no additional cost to the agency.

However, the regulation does not set forth conditions under which an advance payment will be made available, nor does it specify the steps that NRCS will take to advise historically underserved producers of the availability of advance payments. Affirmative outreach to individual farmers and farm organizations, whose membership includes historically underserved producers, will be imperative. Without that outreach, many producers may be unaware of the possibility of advance payments. Farmers who continue to believe that upfront payments are required will be unlikely to apply to the program.

While strongly supporting the availability of advance payments, the undersigned groups believe that caution must also be exercised. The regulation should clarify that advance payments will be issued only after all the elements of the EQIP contract have been approved and agreed to by both NRCS and the farmer. The farmer should receive technical assistance in order to ensure that the technical requirements for the project are understood and agreed to before an advance payment is issued. An advance payment issued before such an understanding is reached could actually harm the farmer, if the farmer spends the funds in a way that does not meet agency specifications.

Civil Rights Impact Analysis was Incomplete, and Appeared to Overstate Conclusions.

On page 2294 of the Federal Register entry, the prefatory comments to the interim final rule discuss the Civil Rights Impact Analysis that was performed. It states, *“The data presented indicates producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers.”* The conclusion of the Civil Rights Impact Analysis for the Interim Final Rule: Environmental Quality Incentives Program, dated September 16, 2008, makes this assertion, yet nothing in the impact analysis itself supports it. In its discussion of historical participation data, the Civil Rights Impact Analysis states:

Due to the non-availability of sufficient historical compatible data, a barrier analysis on participation was not conducted. Historical data has been maintained, however, it has been deemed unreliable due to the fact that it does not include information on the number of program participants with disabilities, nor does it differentiate between whether small business entities are male or female owned.

Based upon this section of the Civil Rights Impact Analysis, it is unclear whether the data presented supports the conclusion of the Civil Rights Impact Analysis (which was repeated in the prefatory comments of the interim final rule). In addition, it is not clear whether the asserted parity of participation was achieved only at the national level or at the state and local levels as well. It is also unclear what baseline data level of producers is used for this calculation.

The Diversity Initiative recommends that all deficiencies in data collection be corrected from now on, and that the Farm Bill Requirements under sections 14006 and 14003 (receipt for service) be fully implemented, including new authority to collect and publish data by race and ethnicity to the county level. The Diversity Initiative further recommends that, in cases where there are gaps in the historical data, the agency complete as much of the analysis as possible. For example, where the historical data is unreliable as to disability and gender, the agency could still complete an analysis of participation barriers related to race and ethnicity. The agency should also consider whether further analysis might also be appropriate. For example, does the statutory priority for conservation practices involving livestock have a disparate impact upon socially disadvantaged producers? The Civil Rights Impact Analysis can be a powerful tool for monitoring and preventing discrimination, but only if the analysis is complete and conclusions are supported by the data.

The Diversity Initiative also supports the position of the Intertribal Agriculture Council that the language on page 2293 which states: *“Executive Order 13175 requires agencies to consult and collaborate with tribes, if policies or actions have substantial direct effects on tribes. NRCS*

has determined that this regulation does not have a substantial direct effect on tribes, since these regulatory provisions are required by statute, and these provisions do not impose unreimbursed compliance costs or preempt Tribal law. As a result, consultation is not required." be stricken, as section 1466.20 (b)(2) (i) and (ii) prohibit Tribes with ratified water agreements (ratified by both state and federal legislation) that call for new irrigation development from utilizing EQIP as a source of funding.

Ensure Equal Treatment of Farmer Cooperatives and Producer Associations.

Section 1466.24(d)(5) of the interim final rule states that any cooperative association of producers that markets commodities for producers will not be considered to be a person eligible for payment. The Diversity Initiative recommends that this provision be stricken from the final rule.

Farmer cooperatives and producer associations are important organizational forms in agriculture, particularly for socially disadvantaged farmers and ranchers and limited resource farmers and ranchers. Farmer cooperatives can assist producers in pooling resources and knowledge in entering markets, and in negotiating contract terms, which they could not access individually. To the extent that a cooperative or association is engaged solely in marketing commodities on behalf of its producer members, it is unlikely that it would meet the other conditions for EQIP eligibility if it applied for an EQIP contract on its own behalf. Thus, the provision is superfluous as to these farmer cooperatives and producer associations. It is also unclear whether the provision is intended as an absolute prohibition on eligibility for farmer cooperatives and producer associations, or if it is intended to indicate that producer associations and farmer cooperatives are not eligible as "persons," while leaving open the possibility that they may be eligible as joint operations or legal entities. To the extent that a farmer cooperative or producer association is itself actively engaged in farming, the farmer cooperative or producer association should be eligible to participate in EQIP to the extent allowed by the rules of general applicability for all other legal entities and joint operations.

The Farm Bill does not provide the authority for NRCS to single out farmer cooperatives and producer associations as a class for different and unfavorable treatment, and it contradicts the language in the manager's amendment, discussed in the next section, which expressly includes these entities.

Enable Producer Associations and Farmer Cooperatives to Act on Behalf of their Members in Submitting Applications, Plans of Operations, and Other Program Materials to Assist their Members in Applying for, and Participating in, EQIP.

The prefatory comments to the interim rule (page 2301 of the Federal Register entry) state that

"Producer associations and farmer cooperatives may submit applications, plans, and other necessary program materials on behalf of producers. However, eligibility and contract requirements still apply to any participant as set forth in § 1466.8."

This issue is not addressed specifically in the interim final rule, despite the expectation on the part of the Managers of the Farm Bill that the agency would do so.

The Conference Report on the 2008 Farm Bill, (Report 110-627) states in paragraph 12(f) of the discussion of the Conservation Title (Title II):

The Conference substitute strikes the Senate amendment provision on producer organizations. The Managers intend for the Secretary to allow producer associations and farmer cooperatives to act on behalf of their members in submitting applications, plans, or other program materials for their members to participate in this program. *The Managers expect the Secretary to clarify this option in any rule or procedure related to this program.* (Emphasis added.)

The conference report language expressly includes eligibility rules for producer associations and farmer cooperatives under Section 1240E. Here, Congress clearly lays out three ways that a farmer cooperative or producer association may act on behalf of its members: (1) submit applications; (2) submit plans; (3) or submit other program materials for their members to participate in the Environmental Quality Incentives Program. By spelling out the tasks that producer associations and farmer cooperatives could perform for the benefit of members, Congress intends these entities to play more than just a technical assistance role by allowing them to file an application as an eligible entity.

Farmer cooperatives are a critical resource for socially disadvantaged producers, and should have the options of both direct participation in the EQIP program, and of making applications for its members. Examples of direct cooperative participation might include the installation of a plasticulture project or other production methods needed to conserve resources, and to fulfill marketing agreements entered into by the cooperative for production of a certain product by certain methods. Upgrading practices to meet organic standards is another example of work that may be done by a cooperative.

This manager's report language referencing "*producer associations*," was added to the 2008 Farm Bill with the express intent of including acequias, which are traditional associations of producers who manage and maintain streams, rivers and irrigation systems for irrigation and other agricultural purposes. The acequias play an important role in the management of shared resources, and should be considered producer associations for the purposes of access to the EQIP program. The final rule should specifically mention acequias, and the practices they use, as eligible for EQIP program benefits.

For example, an acequia, considered under state law in New Mexico and other states as a legal entity, may engage in activities such as the design and placement of headgates along rivers and streams, and the improved design and implementation of the water distribution system to increase water conservation and enhance riparian habitat. For more information see the website of the New Mexico Acequia Association at <http://www.lasacequias.org/programs/acequia-governance/>.

The agency may want to add additional clarification to the provisions related to farmer cooperatives or producer associations. For example, the agency may want to suggest circumstances when a farmer cooperative or producer association, including an acequia, should apply to participate in EQIP on its own behalf, and when it should assist its members in applying to participate on their individual behalf. The agency may also want to set forth simple procedures to ensure that the farmer cooperatives or producer associations are acting with the knowledge and consent of the affected members.

In particular, the Diversity Initiative suggests that NRCS establish reasonable procedures that are not unduly burdensome to either the legal entity or joint operations, or to NRCS, with respect to the requirement in 1466.8 b (6) that applicants ***“Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.”*** Acequia associations, for example, may have up to 5000 members. Any procedure should ensure that payment limits are not violated, but in fact, many applications may seek levels of funding that are far below payment limit levels for the number of producers involved.

In order to further clarify the eligibility of these entities, the Diversity Initiative supports including these entities expressly in the definition section as follows:

Sec. 1466.3 Definitions.

*Agricultural land means cropland, grassland, rangeland, pasture, and other agricultural land, on which agricultural and forest-related products, or livestock are produced and resource concerns may be addressed. Other agricultural lands include cropped woodland, marshes, **acequias**, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.*

Applicant means a person, legal entity, joint operation, or tribe that has an interest in an agricultural operation, as defined in part 1400 of this chapter, who has requested in writing to participate in EQIP.

*Conservation practice means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management practices, and other improvements that achieve the program purposes, including such items as CNMPs, agricultural energy management plans, dryland transition plans, forest management plans, irrigation system and **water management plans and upgrades**, integrated pest management, and other plans determined acceptable by the Chief.*

*Joint operation means, as defined in part 1400 of this chapter, a general partnership, joint venture, **including producer cooperatives**, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization.*

The Diversity Initiative further recommends that NRCS add a definition to clarify the eligibility of acequias to say that: *“an acequia is a legal entity in which the members jointly control and manage a shared water resource.”*

Applying Set-asides and Other Provisions Related to Socially Disadvantaged Producers and Landowners to Farmer Cooperatives and Producer Associations.

At page 2300 of the Interim Final Rule, the agency restates the Section 1240E congressional intent, but stops short of harmonizing other rules designed to enhance conservation program participation by socially disadvantaged and beginning farmers and ranchers.

The interim final rule must be modified to acknowledge that applications may be submitted by eligible producer associations or farmer cooperatives that are at least 51 percent owned and controlled by socially disadvantaged and beginning producers. In the case of an application from such an entity, the final rule must acknowledge that (a) 90 percent cost share and (b) the 30 percent up front payment must be paid to the minority controlled cooperative or association as required under the “EQIP Cost Share and Advance Payment” rules laid out in Section 2503 of the 2008 Farm Bill.

Support for Farm Bill Language That Was Included With Respect to Applying the Payment Limit to Indian Tribes.

The Diversity Initiative supports the language in Sec. 1466.24 d (4) with regard to contracts with Indian tribes, or Indians represented by BIA, that allows payments exceeding the payment limitation to be made to the Tribal participant if a BIA or Tribal official certifies in writing that no one individual, directly or indirectly, will receive more than the payment limitation. We suggest that before issuing the final rule, NRCS consider the impact of the additional requirements in 1466.24 d (3) and d (4) that also require complete lists of all producers and members.

The Diversity Initiative also raises a concern about the requirement in Section 1466 d (9) that requires the participant to use the same identification number for all EQIP contracts and counts any violation as fraud. NRCS should take special steps to ensure that participants who are members of Indian Tribes, acequias or other producer associations, and joint operations including cooperatives, are properly informed of this provision and establish a process to correct inadvertent violations in cases where an individual may apply individually for funds, and also receive assistance through an Indian Tribe, or any legal entity or joint operation.

Success in Entering EQIP Contracts with Historically Underserved Producers is an Appropriate Factor in Determining Whether a State has Demonstrated a High Level of Program Accomplishment in Implementing EQIP.

Interim final rule section 1466.5(b) sets forth factors that the NRCS Chief will consider in determining whether to provide performance incentives to states with a high level of performance. One of the factors listed is the number of contracts with historically underserved producers. The Diversity Initiative strongly agrees that providing high quality service to historically underserved producers is one appropriate measure of program accomplishment in

state implementation of the EQIP program, as amended by the 2008 Farm Bill. The undersigned groups respectfully suggest that, in addition to considering the number of contracts with historically underserved producers, the quality of service to historically underserved producers may also be measured in terms of whether there has been an increase in the number or percentage of contracts with historically underserved producers in a state, and whether a state has implemented innovative outreach and technical assistance strategies to better serve historically underserved producers.

The Presence of Specialty Crop Producers, Organic Producers, and Small-scale Producers is an Appropriate Factor for State Conservationists to Consider When Determining How to Manage EQIP and How to Allocate Funds Within a State. Representation of these Types of Producers on State Technical Committees Will Aid State Conservationists in Making these Determinations.

Under interim final rule section 1466.6(c)(6), State Conservationists are to consider the presence of specialty crop producers, organic producers, and small-scale producers in determining how to manage EQIP, and how to allocate funds within a state. These types of producers are present in every state; thus, this regulation essentially directs all State Conservationists to consider the particular needs of these producers. State Conservationists should seek assistance in making these determinations by recruiting farmers who are specialty crop producers, organic producers, and small-scale producers to serve on their state technical committees. In addition, section 2706 of the Farm Bill directed NRCS to ensure that adequate technical assistance is available for the implementation of conservation practices by producers involved with organic and specialty crop production through federal conservation programs, including EQIP.

The EQIP Regulations Should Go Further to Carry Out the Congressional Intent of Utilizing EQIP to Support the Conservation Practices of Farmers Who are transitioning to Organic Production and who are Certified Organic.

Section 1466.4(a) lists the national priorities of the EQIP program. Adoption of organic farming practices should be added to this list, as should grazing management (including rotational grazing and management intensive grazing), protection of pollinators and pollinator habitat, and energy conservation.

Several provisions of the interim final rule require the agency to recognize applications for permits as potentially being the functional equivalent of an EQIP plan of operations. For example, section 1466.8(b)(4) recognizes that an application for an air or water quality permit may substitute for an EQIP plan of operations, provided these plans contain all elements required for an EQIP plan of operations. The Diversity Initiative recognizes that section 2506 of the Farm Bill specifically addressed plans developed in order to acquire a permit under a water or air quality regulatory program. However, the Diversity Initiative notes that section 2708 of the Farm Bill also included more general requirements that the Secretary streamline application forms and processes so that conservation program applicants are not required to provide information that is readily available to USDA. The Diversity Initiative recommends that the agency recognize an organic system plan which has been completed in accordance with the requirements of the National Organic Plan under 7 C.F.R. pt. 205, and has been approved by an

accredited certifying agent as equivalent to an EQIP plan of operations, provided the organic system plan contains all elements required for an EQIP plan of operations.

Section 1466.24(c) states that payments for conservation practices related to organic production to a person, joint operation, or legal entity, may not exceed in aggregate \$20,000 per year or \$80,000 during any 6-year period. In general, the interpretation set forth in the prefatory comments to the interim final rule on page 2305 of the Federal Register entry appears to be acceptable. It may be helpful to further define what constitutes a *“conservation practice related to organic production,”* in order to ensure that organic farmers are not penalized, and that they receive assistance comparable to that received by conventional farmers who implement comparable practices.

The Final Rule Should Clarify That EQIP Funds May be Used for Comprehensive Whole Farm Conservation Planning.

The final rule should clarify that EQIP funds may be used for comprehensive whole farm planning, as this is one of the greatest needs for socially disadvantaged populations. NRCS should look at the results achieved in its Small Farms Program in states such as Mississippi and South Carolina. In Mississippi, for example, the program which includes whole farm conservation planning has increased the use of conservation practices in the Mississippi delta region, identified needs for irrigation systems and other improvements, and helped to develop a whole sector of small operations that are geared towards providing vegetables, fruits, eggs and poultry to a network of farmers markets that are reaching low-income populations. This localized planning and production also conserves resources by reducing the distance fresh foods travel, and enhances the social structure of small communities.

NRCS should consider expanding staff and TSP resources to ensure access to whole farm planning, on a district and regional basis, for all historically underserved populations. This would be a first step towards building equity in access to services and strengthening trust. NRCS should work with the community-based and tribal organizations that represent and serve these populations, in order to build the relationships necessary to extend services to all producers and landowners.

Clarify that Determinations Relating to Organic Certification Shall Be Made by Accredited Certifying Agents Under the National Organic Program. Consider Contract Modification, Rather than Contract Termination, When There is a Change in Organic Certification Status.

Section 1466.26(f) of the interim final rule states that the State Conservationist, in consultation with the State Technical Committee, may terminate a contract, whereby a producer is receiving payments for conservation practices related to organic production, if the NRCS determines that the producer is not pursuing organic certification or has been decertified. Contract termination is a severe step, with serious financial consequences for producers, and should not be taken lightly.

The Diversity Initiative has two comments on this issue. The first is that the final rule should clarify that NRCS will not substitute its judgment for that of accredited certifying agents and the National Organic Program staff. Rather than NRCS determining whether the producer is

pursuing organic certification or has been decertified, it should request that information from the accredited certifying agent or the National Organic Program if the agency has reason to believe there has been a change in the farmer's status vis-à-vis organic certification. The accredited certifying agent could send a notice of denial of certification, or confirm that the farmer has withdrawn his or her application for certification. In the case of a denial of certification or a proposed suspension or revocation of certification, the NRCS should take no action until all appeals have been exhausted.

The second comment of the Diversity Initiative with respect to this provision is that NRCS should consider a less severe consequence than termination of the EQIP contract. While the farmer may have initially qualified for an EQIP contract based upon conservation practices needed to qualify for organic certification, the farmer may have lost organic certification or decided not to pursue organic certification for reasons unrelated to failure to carry out the conservation practices. To the extent that the farmer has continued to carry out the underlying conservation practices, and plans to continue to carry out those conservation practices, the agency should consider a modification of the contract rather than a termination of the contract. This approach would be consistent with section 2503 of the Farm Bill (as codified at 16 U.S.C. sec. 3839aa-2(i)(5)), which states that the Secretary *may* cancel or otherwise nullify a contract if the Secretary determines that the producer is not pursuing organic certification or is not in compliance with the Organic Foods Production Act. The Secretary has the discretion to pursue a less severe remedy.

Outreach and Technical Assistance Will Be Critical to Ensure Utilization of EQIP to Improve Conservation on Non-Industrial Private Forest Land.

Sections 1466.9(e) and 1466.21(b)(3)(v) of the interim final rule address forest management plans for use on non-industrial private forest land. Non-industrial private forest land is an important resource base for many socially disadvantaged farmers and ranchers. As such, the possibility of using EQIP funds to implement conservation practices on these lands will be of great interest. Outreach and technical assistance will be critical to ensure utilization of EQIP to develop forest management plans and improve conservation on non-industrial private forest land.

Greater Specificity Needed in Describing Outreach Activities Directed Towards Historically Underserved Producers.

Section 1466.7 states that “special outreach” will be made to historically underserved producers. Greater specificity is needed with respect to these outreach activities. Aggressive and innovative outreach strategies will be needed in order for socially disadvantaged farmers and other historically underserved producers to capitalize upon the targeted assistance contained in the 2008 Farm Bill. The outreach methods should include partnering with the community-based organizations and technical service providers that have established relationships and credibility with historically underserved producers. The content of the outreach should address both the technical aspects of conservation, and the procedural aspects of the program—such as the producer's obligations under an EQIP plan of operations and operation and maintenance agreement, the availability of a higher rate of cost share assistance, and producer obligations after accepting an advance payment. “Special outreach” should include expansion, and cover the

costs of NRCS offices on Indian reservations, the previous restriction on such expenditures having been removed in the Miscellaneous Title of the Farm Bill. It should also include the deployment of additional staff resources in areas with a high representation of socially disadvantaged producers and Indian Tribes, and an increase in training of TSP's with both the resources and cultural backgrounds necessary to reach historically underserved producers.

Include Incentives to Foster the Participation of Beginning, Socially Disadvantaged, and Limited Resource Farmers and Ranchers and Indian Tribes to Participate in EQIP and Other Conservation Programs.

Section 2708 of the Farm Bill authorizes the Secretary to provide incentives directly to beginning farmers and ranchers, socially disadvantaged farmers and ranchers, limited resource farmers and ranchers, and Indian tribes. Any outreach plan should include clear provisions on incentives that NRCS can supply. These should include wide scale access to conservation planning services on a community scale.

The Agency Should Grant a Waiver of the \$300,000 Contract Limit Only in Extremely Rare Circumstances.

Section 1466.21(d) of the interim final rule sets forth the general rule from the Farm Bill that payments under an EQIP contract shall be limited to \$300,000. The undersigned organizations believe this limit should be strictly enforced, in order to ensure that funds are available to the greatest number of producers. The Diversity Initiative recognizes that the Farm Bill granted some discretion to the Agency to exceed this limit, up to \$450,000 per contract, in order to allow NRCS the opportunity to provide additional funding support for truly extraordinary projects. However, the criteria set forth in the interim final rule appear to be much too lenient to describe projects of "special environmental significance." For example, the fact that EQIP funds beyond the \$300,000 maximum would further assist a participant in complying with federal, state, and local regulatory requirements is not uniquely compelling. The argument for a waiver to allow extraordinary assistance for producers who plan to build new concentrated animal feeding operations or expand existing concentrated animal feeding operations to comply with the existing law is particularly weak. Indeed, the agency's own calculation of costs and benefits of EQIP (discussed in the prefatory comments on page 2296 of the Federal Register entry) included a substantial downward revision of the estimated benefit in the animal waste management category to account for mandatory regulatory requirements associated with large concentrated animal feeding operations.

The Diversity Initiative would favor adding a criterion to this section that would allow a waiver for projects on Tribal or Indian Land, or related to joint operations, producer cooperatives, or producer associations such as acequias. The sheer number of farmers participating in these voluntary projects contributes to their environmental significance.

Provision Relating to Access to the Operating Unit Should Be Revised to Ensure Equal Treatment.

Section 1466.32 of the interim final rule describes the Agency's right to enter upon an agricultural operation or tract for purposes of program implementation. It states that the NRCS

representative shall *“make an effort”* to contact the participant prior to exercising this provision. The Diversity Initiative recommends that the final rule clarify this language to ensure that NRCS representatives have clear guidance on what it means to *“make an effort”* to contact the participant, so that the effort made to reach each participant is consistent in light of the relevant circumstances.

1466.8(b)(5) Proving Eligibility as Socially Disadvantaged Farmers and Ranchers,

In Section 1466.8 (b)(5), the Diversity Initiative favors adding a clarification that, with respect to socially disadvantaged farmers and ranchers, NRCS should use the authority to collect data related to race, gender and ethnicity as provided in Section 14006 of the 2008 Farm Bill, and that this data should be collected by self-identification.

The Diversity Initiative also favors changing the NRCS policy to remove the requirement of providing Schedule F of the tax return in order to be eligible for programs.

Include Agricultural and Forestry Operations as Eligible Land if the Operation Includes All Private Land, or Both Public and Private Land.

Section 1466.8(c) of the interim final rule says publicly owned land may be included where (1) the land is a working component of the participant’s agricultural and forestry operation, (2) the participant has control of the land for the term of the contract, and (3) the conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern that is on private land. Indian land is specifically included as eligible land.

The Diversity Initiative does not oppose extending EQIP benefits to agricultural and forestry operations that include public land, but only if the operation on public land also includes or is attached to private land that is part of the same farming operation. The DI does oppose extending EQIP to those with a permit to operate on public land with no private property involved.

Clarify the Elements of the EQIP Contract Ensure that Participants Understand and Agree to All of Their Rights and Obligations.

Section 2708 of the Farm Bill directed USDA to streamline the application process for conservation programs. Under the previous version of EQIP, the EQIP contract consisted of three documents: the Conservation Program Application, the Appendix to the Conservation Program Contract, and the Conservation Plan. The use of three separate documents for the EQIP contract caused confusion for farmers, and caused disputes, particularly when the farmer signed the application before the details of the conservation plan had been agreed to.

Under the interim final rule, it appears that the EQIP contract will be composed of two documents: the EQIP plan of operations and the operation and maintenance agreement. That is, the definitions contained in section 1466.3 of the interim final rule for “contract,” “EQIP plan of operations,” and “operation and maintenance agreement” indicate that the EQIP plan of operations is “part” of the EQIP contract, and that the operation and maintenance agreement is a separate document that binds participants in conjunction with the EQIP plan of operations. Yet

the interim final rule does not use the term “operation and maintenance agreement” once it has been defined; all other references (in sections 1466.22, 1466.25, 1466.26, and 1466.33) are to the “O & M agreement.” It is worth noting that when an electronic search of the interim final rule for “operation and maintenance agreement” is made, references to an “O & M agreement” will not appear. The interim final rule contains references to operation and maintenance that are difficult to harmonize. Section 1466.9(c)(4) and 1466.25(c)(1) imply that the operation and maintenance agreement will be included in the EQIP contract or EQIP plan of operations, but sections 1466.26(c) and 1466.33(b) contain a reference to the “O & M agreement” as a document distinct from the EQIP contract.

The Diversity Initiative believes that including all elements of the EQIP contract in one document would reduce confusion among participants, and recommends this approach to the agency. Alternatively, the Diversity Initiative recommends that in the final rule, section 1466.21 be revised to clarify the components of the EQIP contract, and to clarify that participants are not legally bound under the EQIP contract until all components of the contract have been approved by the agency, and signed by the participant. In addition, if more than one document is used to make up the EQIP contract, program participants should receive clear written notice describing the components of the contract. Incorporation by reference is not a concept that is familiar to very many farmers—a simple notice and explanation could be very helpful and effective. The agency should ensure that persons searching for references to the “operation and maintenance agreement” would be able to find them.

Clarify Provision Related to Transfers of Lands; Seek to Increase Farmer Awareness of This Provision.

Section 1466.25 of the interim final rule addresses contract modifications and transfers of land. Section 1466.25(c)(2) and 1466.25(d) appear to be redundant. The wording of subsection (d) is clearer and easier to understand. Subsection (c)(2) should be stricken.

Section 1466.25(b) states that it is the participant’s responsibility to notify NRCS when he/she anticipates the voluntary or involuntary loss of control of the land covered by an EQIP contract. The Diversity Initiative recommends omitting this provision from the final rule. The undersigned organizations agree that farmers need education about their responsibilities related to transfers of land. Adequate regulation is already in place, but more outreach would more effectively prevent disruptions of EQIP contracts caused by transfers of land.

A review of the decisions of the National Appeals Division related to EQIP, conducted in 2007, revealed that transfers of land prompted a relatively high number of appeals.¹ To the extent that the agency can do so, the undersigned organizations recommend that NRCS emphasize this issue when initiating EQIP contracts, and also when conducting outreach, training technical service

¹ Jill Krueger, *Is Your Farm ‘EQIPed’ for Conservation? A Farmers’ Guide to Understanding the Environmental Quality Incentives Program* (Farmers’ Legal Action Group, 2007), available at www.flaginc.org. See also, Jill Krueger and Karen Krub, *Making the Most of the Environmental Quality Incentives Program (EQIP)*, Farmers’ Legal Action Report, (Farmers’ Legal Action Group, 2007, Issue 3).

providers, and providing technical assistance. Improving the understanding of program applicants and participants of this provision may deter farmers who are contemplating sale of their farms from entering into EQIP contracts, encourage farmers who enter into EQIP contracts to delay transfers of ownership, and encourage farmers planning to sell their farms to discuss the EQIP contract with potential buyers. This would maximize use of EQIP funds by farmers who are actively farming the land, while simultaneously reducing the number of appeals brought before the agency.

Revise Provisions Related to Contract Violations and Terminations.

Section 1466.26 of the interim final rule addresses contract violations and termination. Section 1466.26 also governed these issues under the previous rule published in 2003.

The Diversity Initiative is aware that section 1466.26 has been the subject of confusion and appeals, and appreciates the agency's apparent desire to add clarity. The Diversity Initiative believes that because a contract termination profoundly impacts the farm's economics, there should be clear appeal rights.

However, the interim final rule may, in fact, be no clearer than the previous regulation, despite being considerably longer. The requirement that farmers refund payments and pay liquidated damages can present a substantial and unexpected burden for farmers. In general, the Diversity Initiative believes that because socially disadvantaged and beginning producers have had less access to training and technical assistance to meet program requirements, it is especially important that any appeals system take into account any lack of access to technical assistance that may impact the ability of a producer to understand and meet all requirements. As such, we urge NRCS to provide more outreach and education (such as an entry in a "frequently asked questions" page on the NRCS website) could help farmers better understand their options when circumstances beyond their control prevent them from fulfilling an EQIP contract.

The former section 1466.26 made a distinction between voluntary and involuntary contract terminations. Not requiring repayment of funds already received in cases of voluntary contract termination [compare former section 1466.26(b)(2) with former section 1466(b)(1)] created an incentive for farmers to come forward—creating an opportunity for them to try to work with the agency to modify the contract, possibly preserving conservation benefits that might otherwise be lost—or at least lessening the administrative burden of an involuntary termination. The Diversity Initiative recommends reinstating provisions similar to those in the former section 1466.26 to provide for voluntary termination of the contract, and preserve the ability of NRCS to waive part or all of the refund payments and liquidated damages based upon hardship and good faith efforts to comply with both voluntary and involuntary contract terminations. Section 1466.26(b) and 1466.26(e)(2)(i) of the interim final rule are partially redundant.

Omit References to Specific Sections Related to Equitable Relief.

Section 1466.33 of the interim final rule addresses equitable relief in the context of the EQIP program. The Diversity Initiative recommends that the agency refer generally to part 635, and strike all references to specific sections such as 635.3 and 635.4. General references will avoid needless restatements of regulations contained elsewhere in the Code of Federal Regulations, and

also help to avoid any unintended restrictions upon the equitable relief available to producers that might result if the specific references were not applicable in a particular case. The Diversity Initiative notes that the references to specific sections of part 635 have been added to the text contained in the previous rule, though the prefatory comments state on page 2307 of the Federal Register entry that section 1466.33 remains unchanged. The agency may indeed simply want to reinstate the previous section 1466.33.

Strive to Act Promptly Upon Comments to the Interim Final Regulation.

The Diversity Initiative urges NRCS to issue a final EQIP rule promptly, and to the extent it is practicable and lawful, to implement needed policy changes even before a new final rule is promulgated. The Diversity Initiative also encourages NRCS to take swift action on lingering regulatory actions, such as the issuance of a final rule for the agency's informal appeals procedures under part 614. These informal appeal procedures are referenced in section 1466.30 of the EQIP interim rule, and themselves have been in place under an interim final rule since 2006. 71 Fed. Reg. 28,239 (2006).

Thank you for your consideration of these comments.

Sincerely,

FARM AND FOOD POLICY DIVERSITY INITIATIVE

Farmworker Association of Florida, Apopka, FL
Federation of Southern Cooperatives/Land Assistance Fund: Atlanta, GA
Intertribal Agriculture Council, Billings, MT
Land Loss Prevention Project: Durham, NC
National Latino Farmers and Ranchers Trade Association: Washington, DC
Organización en California de Lideres Campesinas, Pomona, Ca
Rural Coalition/Coalición Rural: Washington, DC

National Hispanic Environmental Council: Alexandria, VA
National Family Farm Coalition, Washington, DC
National Immigrant Farming Initiative: Washington, DC
New Mexico Acequia Association: Santa Fe, NM
Oklahoma Black Historical Research Project: Oklahoma City, OK
Operation Spring Plant: Oxford, NC
Rural Advancement Fund: Orangeburg, SC
Texas-Mexico Border Coalition CBO, TX
United Farmers USA: Manning, SC