

# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1466

RIN 0578-AA45

#### Environmental Quality Incentives Program

**AGENCY:** Natural Resources Conservation Service and Commodity Credit Corporation, United States Department of Agriculture.

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** This interim final rule with request for comment amends the existing Environmental Quality Incentives Program (EQIP) regulations to incorporate programmatic changes as authorized by amendments in the Food, Conservation, and Energy Act of 2008 (2008 Act).

**DATES:** *Effective Date:* This rule is effective January 15, 2009.

*Comment date:* Submit comments on or before March 16, 2009.

**ADDRESSES:** You may send comments (identified by Docket Number NRCS-IFR-08005), which will be available to the public in their entirety, using any of the following methods:

*Government-wide rulemaking Web site:* Go to <http://regulations.gov> and follow the instructions for sending comments electronically.

*Mail:* Financial Assistance Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237S, Washington, DC 20250-2890.

*Fax:* (202) 720-4265.

*Hand Delivery Room:* Room 5237S of the USDA South Office Building, 1400 Independence Avenue, SW., Room 5237, Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

This interim final rule may be accessed via Internet. Users can access the NRCS homepage at <http://www.nrcs.usda.gov/>; select the *Farm Bill* link from the menu; select the *Interim final* link from beneath the *Final and Interim Final Rules Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (voice and TDD).

To view public comments, please ask the guard at the entrance to the South Office Building to call 202-720-4527 in order to be escorted into the building. **FOR FURTHER INFORMATION CONTACT:** Greg Johnson, Director, Financial Assistance Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Room 5237, P.O. Box 2890, Washington, DC 20013-2890. Phone: (202) 720-1845. Fax: (202) 720-4265.

#### SUPPLEMENTARY INFORMATION:

##### Regulatory Certifications

###### *Executive Order 12866*

Pursuant to Executive Order 12866 (FR Doc. 93-24523, September 30, 1993), this interim final rule with request for comment is an economically significant regulatory action, since it results in an annual effect on the economy of \$100 million or more. The administrative record is available for public inspection in Room 5831 South Building, USDA, 14th and Independence Avenue, SW., Washington, DC. Pursuant to Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of this preamble and a copy of the analysis is available upon request from the Director, Financial Assistance Programs Division, Natural Resources Conservation Service, Room 5237S, Washington, DC 20250-2890 or electronically at: <http://www.nrcs.usda.gov/programs/eqip/> under the *EQIP Rules and Notices with Supporting Documents* title.

###### *Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*

Section 2904(c) of the Food, Conservation, and Energy Act of 2008 requires that the Secretary use the authority in section 808(2) of title 5,

United States Code, which allows an agency to forego SBREFA's usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the Congressional intent to have the conservation programs, authorized or amended by Title II, in effect as soon as possible. Accordingly, this rule is effective upon filing for public inspection by the Office of the Federal Register.

###### *Executive Order 13175*

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.

###### *Regulatory Flexibility Act*

The interim final rule will not have a significant environmental impact on small entities. NRCS has determined that the Regulatory Flexibility Act does not apply.

###### *Environmental Analysis*

Availability of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI). A programmatic environmental assessment has been prepared in association with this rulemaking. The analysis has determined that there will not be a significant impact to the human environment and as a result an Environmental Impact Statement is not required to be prepared (40 CFR part 1508.13). The EA and FONSI are available for review and comment for 30 days from the date of publication of this interim final rule in the **Federal Register**. A copy of the EA and FONSI may be obtained from the following Web site: [http://www.nrcs.usda.gov/programs/Env\\_Assess/](http://www.nrcs.usda.gov/programs/Env_Assess/). A hard copy may also be requested from the following address and contact: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington, DC 20250. Comments from the public

should be specific and reference that comments provided are on the EA and FONSI. Public comment may be submitted by any of the following means: (1) E-mail comments to [NEPA2008@wdc.usda.gov](mailto:NEPA2008@wdc.usda.gov), (2) e-mail to egov Web site—<http://www.regulations.gov>, or (3) written comments to: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington, DC 20250.

#### *Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that the interim final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. Increased payment rates and advance payment for historically underserved producers, coupled with the national target of setting aside five percent of EQIP funds for socially disadvantaged farmers and ranchers and an additional five percent of EQIP funds for beginning farmers and ranchers is expected to increase participation among these groups. The data presented indicates producers who are members of the protected groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs, including EQIP, will continue to be administered in a non-discriminatory manner. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in USDA programs. EQIP applies to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, the EQIP rule portends no adverse civil rights implications for women, minorities and persons with disabilities.

#### *Paperwork Reduction Act*

Section 2904 of the 2008 Act provides that the promulgation of regulations and the administration of Title II of this Act shall be made without regard to chapter 35 of Title 44 of the United States Code, also known as the Paperwork Reduction Act. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim final rule.

#### *Government Paperwork Elimination Act*

NRCS is committed to compliance with the Government Paperwork

Elimination Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

#### *Executive Order 12988*

This interim final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this interim final rule are not retroactive. The provisions of this interim final rule preempt State and local laws to the extent that such laws are inconsistent with this interim final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at parts 614, 780, and 11 of this title must be exhausted.

#### *Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994*

The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Title III, section 304, requires that for each proposed major regulation with a primary purpose to regulate issues of human health, human safety, or the environment, USDA is to publish an analysis of the risks addressed by the regulation and the costs and benefits of the regulation. NRCS has determined that such a risk assessment does not apply to this interim final rule. NRCS recognizes that although such assessments can be quite helpful, the Act pertains only to a rule that has been designated as a “proposed major regulation.” NRCS does not consider “interim final” or “final” rules as falling into the category of proposed major regulations.

#### *Unfunded Mandates Reform Act of 1995*

NRCS assessed the effects of this rulemaking action on State, local, and Tribal governments, and the public. This action does not compel the expenditure of \$100 million or more in any one year (adjusted for inflation) by any State, local, or Tribal governments, or anyone in the private sector; therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

#### *Economic Analysis—Executive Summary*

Pursuant to Executive Order 12866, Regulatory Planning and Review, the Natural Resources Conservation Service (NRCS) has conducted a benefit-cost

analysis (BCA) of the Environmental Quality Incentives Program (EQIP) as formulated for the Interim Final Rule. This requirement provides decision makers with the opportunity to develop and implement a program that is beneficial, cost effective, and that minimizes negative impacts to health, human safety, and the environment. Congress passed amendments to the program that requires the Secretary of Agriculture, within 90 days after the enactment of the EQIP amendments, to promulgate regulations necessary to carry out the program.

In considering alternatives for implementing EQIP, the United States Department of Agriculture (USDA) followed the legislative intent to optimize environmental benefits, address natural resource concerns and problems, establish an open participatory process, and provide flexible assistance to producers who apply appropriate conservation measures that enable the satisfaction of Federal and State environmental requirements. Because EQIP is a voluntary program, the program will not impose any obligation or burden upon agricultural producers who choose not to participate. The program has been authorized by the Congress at \$7.325 billion over the five-year period beginning in fiscal year (FY) 2008 through FY 2012, with annual amounts of \$1.2 billion for FY 2008, \$1.337 billion in FY 2009, \$1.45 billion in FY 2010, \$1.588 billion in FY 2011, and \$1.75 billion in FY 2012.

The EQIP technical and financial assistance facilitates the adoption of conservation practices that, when installed or applied to technical standards, can mitigate degradation of the environment. These actions are not limited to their beneficial impacts on resource conditions on-site, but produce significant off-site environmental benefits for the public-at-large, such as the reduction of non-point source water pollution, leading to enhancements to freshwater and marine water quality and fish habitat, improved aquatic recreation opportunities, and reduced sedimentation of reservoirs, streams, and drainage channels; more efficient irrigation water usage; improved air quality by reducing wind erosion; an increase in carbon stored in the soil, leading to reduced atmospheric amounts of carbon; reduced pollution of surface and ground water, leading to enhanced drinking water supplies; reduced flood damages; conserved energy; and enhancements to wildlife habitat. Most of these factors are taken into consideration in the transfer benefit values used in this analysis.

Other significant environmental impacts have an appearance of being solely a private benefit, such as: The maintenance of the long-term productivity of the resource base, improved grazing productivity, more efficient crop use of animal waste and fertilizer and the fostering of energy conservation. However for this analysis, these impacts are considered as public benefits in that they have also have impacts in input and output markets, i.e. increasing the availability of those inputs at lower prices and/or for use in other sectors of the economy. This analysis did not utilize a social welfare impact model or general equilibrium model that would show these final producer and consumer welfare changes (brought about by changes in inputs used and output levels of EQIP participants). Thus, the economic impacts estimated in this analysis by these changes should be considered as first approximations of possible social welfare gains in input and output markets. In this analysis, the benefit categories which could be construed as having a high component of private benefit are clearly identified.

There is another group of benefits derived from EQIP which can not be empirically estimated at this time. As explained in the body of the report, there are also many conservation practices for which economic benefit estimates are not available. For example, the benefits derived from the remaining five percent of the EQIP funds used for 23 practices for which monetary benefits are important but could not easily be estimated (over half of these remaining funds were for the Pest Management Practice—595). As a result, they are not included in the quantitative estimates of benefits. In addition, many other environmental impacts were not included in this economic analysis because no clear conversion methods of the environmental impacts to economic terms were available. For additional information on these environmental impacts, see the NEPA environmental assessment for this regulation. In the future, nationally consistent estimates of beneficial environmental outcomes resulting from conservation practices and systems will be possible through the use of the results from the interagency Conservation Effects Assessment Project (CEAP). CEAP was established to develop a scientific understanding and methodology for estimating the environmental benefits and effects of conservation practices on agricultural landscapes at national, regional, and watershed scales. CEAP will become a science-based plan

designed to help meet the conservation and technology challenges of the future through a coordinated multi-agency assessment, research, and outreach-extension program to translate science into practice. CEAP has been underway since 2003, and is composed of multiple components focusing on cropland, grazing land, wetlands, and wildlife, and watersheds. Initial CEAP results will be available for the cropland component in FY2009. Some results from the wetlands, wildlife, and watershed assessment components are already available at: <http://www.nrcs.usda.gov/technical/nri/ceap/>. These results are expected to improve the Agency's ability to report on long-term conservation benefits being delivered by programs, such as EQIP.

Despite these limitations in our ability to estimate environmental benefits, the new EQIP is expected to have a substantial effect on the environment due to expanded funding compared with a baseline of continuing EQIP at an annual funding level of roughly \$1 billion. Resource treatments are estimated to increase protection for an additional 3.9 million acres for sheet and rill water erosion reduction, 3.9 million acres for wind erosion reduction improving air quality, 5.6 million acres for improved fertilizer management, 2.0 million acres for net irrigation water reduction, 17.5 million acres for grazing land productivity, and 2.8 million acres of improved wildlife habitat. Also, the waste from an additional 1.3 million animal units will be treated under the new program directly improving water quality. Using these quantity changes plus benefit transfer values derived from the literature, total benefits are estimated at \$10.4 billion for EQIP with the 2008 Act expanded funding allocation. Throughout the analysis, benefit estimates are compared to \$10.4 billion total costs which include both the EQIP funds and costs borne by participants, producing a net benefit of approximately \$57 million above total costs.

#### Methodology

In developing the BCA for EQIP, it is necessary to identify a baseline for comparison. The baseline for this analysis is EQIP as reauthorized in the 2002 Act with FY 2007 funding levels. In the 2002 Act, EQIP funding for FY 2005 through FY 2008 was capped at roughly \$1 billion until the 2008 Act was passed when additional funding was provided. The actual FY 2007 funding level of \$978 million is used as the baseline.

Public costs quantified in this analysis are the total TA and FA

assistance funds outlined in the Congressional Budget Office's (CBO) scoring of the 2008 Act. Private costs are out-of-pocket costs paid voluntarily by participants. As stated above, the quantifiable benefits are a subset of the environmental benefits that accrue to the types of practices implemented through EQIP. Available data and literature support benefits in the following benefit categories:

- Animal waste management (leading to improved water quality through better management) 1/<sup>1</sup>;
- Sheet and rill water erosion (reducing soil erosion);
- Grazing land productivity (increasing yields) 1/;
- Irrigation water use (reducing quantity used);
- Air quality (through reduced wind erosion);
- Fertilizer use (reduced fertilizer expense through nutrient management not associated with animal waste) 1/;
- Wildlife habitat (enhanced wildlife viewing and hunting);
- Energy use (reduced energy consumption associated with conservation tillage practices); and,
- Carbon sequestration (higher soil carbon levels associated with conservation tillage and grassland practices).

In order to conduct the analysis, certain assumptions were made based on the available data.

- The practice mix for the current (2007-base) and the new EQIP is the same. The new rule places additional emphasis on energy, organic practices, and forest management; however, due to the lack of benefit data for these types of practices, their associated benefits are not included in this analysis.<sup>2</sup>
- Quantifiable and per-unit benefits are constant and based on national average estimates.
- Technical assistance costs incurred by NRCS are based on the full workload associated with implementing EQIP and take into consideration projected average contract sizes.
- Average annual and net present value calculations use discount factors of seven and three percent, which are recommended by the Office of Management and Budget (OMB). All tables are presented using the seven percent discount rate. The analysis is also calculated using the three percent discount rate (see table 9).

<sup>1</sup> The "1/" above signifies that this benefit category could be construed as having elements of both environmental and private benefit impacts. More information on these distinctions is provided in the document.

<sup>2</sup> Additional time and resources would be necessary to modify the present model to incorporate such shifts in program emphasis.

- Environmental benefits generated in the animal waste management benefit category were adjusted downward by 42 percent to account for mandatory regulatory requirements associated with large concentrated animal feeding operations (CAFOs). This reduction is necessary to avoid any double counting of benefits attributed to EPA's CAFO regulations. The total CAFO-related costs associated with conservation practices were reduced by 23 percent
- Other than large CAFOs meeting EPA regulatory requirements, the adoption of conservation practices by EQIP participants is assumed to be solely attributed to their participation in EQIP.

**Conclusions**

The EQIP benefit-cost analysis assumes that the basic program features of EQIP created in 2002 (the "current program") remains the same, but is funded at higher funding allocations as a result of the 2008 Act.

The summary table below shows the estimated values of each benefit category and the estimated costs associated with EQIP for the "current" (2007-base) and "new" (with increased funding) scenario. Under the assumption that the current program continues at level funding, the expected present value of benefits over the period of FY 2007 to FY 2012 is estimated at \$7.1 billion, with \$0.5 billion coming from improved animal waste

management and \$6.6 billion from improved land treatment. Expected net benefits are estimated at \$39 million above total costs, including producer costs, other non-federal costs, and federal (EQIP) costs.

With expanded funding, the estimated present value of benefits over the period of FY 2007 to FY 2012 was \$10.4 billion with \$0.8 billion coming from improved animal waste management and \$9.6 billion from land treatment. Estimated net benefits were \$57 million above total costs. This provides \$18 million in additional net benefits due to the expansion of EQIP funds in the 2008 Farm Bill over the roughly \$1.0 billion annual baseline funding.

**TABLE 1—SUMMARY OF CUMULATIVE 5-YEAR EQIP BENEFITS AND COSTS OVER FY 2008–FY 2012, USING A SEVEN PERCENT DISCOUNT RATE**  
[\$ million of 2007 dollars]

Benefit Category	To not implement EQIP	2007 EQIP with \$1 billion/year FY 2008–FY 2012	2008 Act benefits & costs	Increases with the 2008 Act	2007 EQIP with \$1 billion/year (acres or animal units)	2008 Act (acres or animal units)	Unit
Animal waste management *	\$0	\$554	\$816	\$262	2,724,000	4,061,000	Animal Units.
Sheet and rill water erosion.	0	1,948	2,869	920	8,019,000	11,955,000	Acres.
Grazing land productivity.	0	3,111	4,580	1,470	35,586,000	53,057,000	Acres.
Irrigation water use.	0	231	341	109	4,014,000	5,985,000	Acres.
Air quality .....	0	181	266	85	8,039,000	11,985,000	Acres.
Fertilizer use .....	0	601	885	284	11,370,000	16,953,000	Acres.
Wildlife habitat ...	0	172	254	81	5,660,000	8,439,000	Acres.
Energy use .....	0	210	309	99	7,446,000	11,102,000	Acres.
Carbon sequestration.	0	82	121	39	41,525,000	61,911,000	Acres.
<b>Grand Total Benefits.</b>	0	7,091	10,441	3,350			
<b>Costs:</b>							
Total costs** .....	0	7,053	10,384	3,332			
<b>Net Benefits:</b>							
Net benefits .....	0	39	57	18			

\* Environmental benefits from improved animal waste management attributed to EQIP are 42 percent below the total CAFO-related benefits to account for environmental benefits captured by EPA regulatory requirements on large CAFOs. Likewise, costs associated with large CAFOs represent about 23 percent of NRCS costs related to CAFOs of all sizes. These costs were deducted from the analysis as well.

\*\* Total costs include all federal costs plus private and other non-federal costs which have historically matched federal EQIP FA funding at an overall 50 percent cost-share rate discounted at seven percent. Costs associated with large CAFOs (roughly 23 percent) were deducted from the analysis.

**Section 2904 of the Food, Conservation, and Energy Act of 2008**

The Commodity Credit Corporation (CCC) is not required by 5 U.S.C. 553 or by any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule. Section 2904 of the 2008 Act requires regulations to be published within 90 days after the date of enactment and authorizes the CCC to promulgate an interim final rule effective upon publication with an

opportunity for notice and comment. CCC has determined that an interim final rule is necessary to expedite the effective date of rulemaking in order to meet the intent of section 2904.

**Discussion of Program**

The 2008 Act has reauthorized and amended the Environmental Quality Incentives Program, which had been added to the Food Security Act of 1985 (1985 Act) (16 U.S.C. 3801 *et seq.*) by the Federal Agriculture Improvement and Reform Act of 1996 (1996 Act) (16

U.S.C. 3839aa). The program is implemented under the general supervision and direction of the Chief of NRCS, who is a Vice President of the Commodity Credit Corporation (CCC).

Through EQIP, NRCS provides assistance to farmers and ranchers to conserve and enhance soil, water, air, and related natural resources on their land. Eligible lands include cropland, grassland, rangeland, pasture, wetlands, nonindustrial private forest land, and other agricultural land on which agricultural or forest-related products,

or livestock are produced and natural resource concerns may be addressed. Participation in the program is voluntary.

Under EQIP, NRCS will provide assistance in a manner that will promote agricultural production, forest management, and environmental quality as compatible goals; optimize environmental benefits; and help farmers and ranchers meet Federal, State, and local environmental requirements. NRCS will offer a consolidated and simplified program throughout the Nation using the technical services of NRCS and technical service providers. NRCS first allocated \$130 million in EQIP funds in 1996. Since the program began, NRCS has entered into 314,000 contracts with farmers and ranchers to apply conservation practices on approximately 143 million acres. The Agency has evaluated twelve years of program implementation and has assessed opportunities to improve program administration. The changes in this interim final rule are the result of this evaluation and the statutory changes authorized by the 2008 Act.

In summary, these changes include, but are not limited to:

- Extending EQIP's implementation through fiscal year 2012.
- Adding or revising the following terms and associated definitions: "agricultural land," "estimated income foregone," "forest management plan," "integrated pest management," "legal entity," "local working group," "National Organic Program," "nonindustrial private forest land," "operation and maintenance agreement," "organic system plan," "payment," "person," "socially disadvantaged farmer or rancher," and "technical assistance."
- Reaffirming EQIP's eligible lands to include nonindustrial private forest lands.
- Providing payments for conservation practices related to organic production and for conservation practices related to the transition to organic production.
- Providing payments up to 75 percent of the estimated costs associated with planning, design, materials, equipment, installation, labor, management, maintenance, or training, or up to 100 percent of the estimated income foregone by a producer to implement particular conservation practices.
- Giving the State Conservationist, as delegated by the Chief, discretion to accord great significance to a conservation practice that the Secretary determines promotes residue

management, nutrient management, air quality management, invasive species management, pollinator habitat, animal carcass management technology, or pest management.

- Limiting payments to \$20,000 per year or \$80,000 during any six-year period for persons or legal entities who receive payments for conservation practices related to organic production or the transition to organic production.
- Authorizing NRCS to cancel or otherwise nullify a contract if a producer who is receiving payments for conservation measures related to organic production is not pursuing organic certification or is not in compliance with the Organic Foods Production Act of 1990 (7 U.S.C. 6501 *et seq.*).
- Requiring NRCS to prioritize applications: (1) Based on overall cost-effectiveness, (2) based on how effectively and comprehensively the project addresses the designated resource concern or resource concerns, (3) that best fulfill the purposes of EQIP, and (4) that improve conservation practices or systems in place at the time the contract offer is accepted or that will complete a conservation system. (Note: Items 2 and 3 are included in the existing EQIP regulations.)
- Requiring applications of similar crop or livestock operations to be grouped together for evaluation purposes.
- Requiring NRCS to consider a plan developed in order to acquire a permit under a water or air quality regulatory program as equivalent to a plan of operations, if the plan contains elements equivalent to those required in a plan of operations. Section 2506 of the 2008 Act amends § 1240E(b) of the 1985 Act to require the Secretary, to the maximum extent practicable to eliminate duplication of planning activities.
- Requiring a forest management plan when the EQIP plan of operations addresses forestland.
- Lowering the payment limitation for participants from \$450,000 to \$300,000 during any six-year period, except for projects having special environmental significance, in such cases the payments will be limited to \$450,000.
- Providing payments, through the Conservation Innovation Grants Program (CIG), to producers to implement practices to address air quality concerns from agricultural operations and to meet Federal, State, and local regulatory requirements.
- Creating criteria to evaluate an acceptable watershed-wide project for the purpose of implementing water

conservation or irrigation practices on newly irrigated lands.

- Providing an increased payment rate to historically underserved producers that include limited resource, beginning, and socially disadvantaged farmers or ranchers.
- Providing advance payments, of up to 30 percent of the anticipated costs to be incurred for the purpose of purchasing materials or services to implement a conservation practice, to historically underserved producers.
- Establishing 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 fundamental purpose of the program, assisting farmers and ranchers to implement conservation practices to provide environmental benefits, has not changed. Revisions to the program have focused primarily on expanding participation among traditionally underserved populations, including organic growers; limiting payments to \$300,000 per legal entity or person, except for environmentally significant projects; streamlining the application and ranking process; and expanding practices and activities that are eligible for payment under EQIP. The interim final rule also includes changes to streamline program implementation and make the participant's contract responsibilities clearer and more transparent.

#### *Conservation Innovation Grants*

The 2008 Act added a provision to EQIP which dedicates funding under the Conservation Innovation Grants program (CIG) to address air quality specifically. Section 1240H of the 1985 Act, as amended by section 2509 of the 2008 Act, authorizes the Secretary to provide payments to producers to implement practices, including innovative practices, to address air quality concerns from agricultural operations. NRCS will use these dedicated funds to assist producers in adopting and implementing existing and innovative practices to address air quality concerns. Eligible practices will meet NRCS Field Office Technical Guide (FOTG) standards or interim practice standards, approved by the State Conservationist, in consultation with the State Technical Committee. Section 1240B(b) of the 1985 Act specifies that payments are limited to "implementing practices." Payments for stand-alone equipment that have beneficial impacts on air quality are not authorized; however, payments for conservation practices may include

consideration of the costs authorized for equipment that is deemed an essential component of a conservation practice included in the FOTG. *NRCS welcomes comments and suggestions on new innovative practices that may be approved for payment, such as but not limited to, improvements in mobile or stationary equipment, including engines, and the use of slow and controlled release fertilizers. NRCS also welcomes comment about how the CIG air quality provisions should be implemented.*

### Summary of Provisions

The regulation is organized into three subparts: Subpart A—General Provisions; Subpart B—Contracts and Payments; Subpart C—General Administration. The basic structure of the regulation has not changed. However, NRCS proposes amending several sections in Subparts A and B to make the regulation consistent with the requirements of the 2008 Act amendments, streamline processes and procedures, and increase transparency of the program, particularly as it relates to a participant's contract responsibilities. Below is a summary of each section. The summary of Subpart C is limited, since a majority of the changes in Subpart C are minor.

#### Subpart A—General Provisions

Section 1466.1, "Applicability," is revised as follows:

Section 1466.1 sets forth the purpose, scope, and objectives of EQIP. In paragraph (a), NRCS clarifies the program's purposes to include forest management. Paragraph (a) also reaffirms the original statutory intent, ensuring EQIP continues to provide assistance to farmers and ranchers to address soil, water and air quality; wildlife habitat; surface and groundwater conservation; and related natural resource concerns. This interim final rule reiterates the statutory intent that EQIP purposes are to be achieved by implementing conservation practices, and includes a new reference to energy conservation on eligible land.

NRCS added paragraph (b) to clarify where EQIP assistance is available. EQIP continues to be available to eligible persons or legal entities in all 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Section 1466.2, "Administration," describes the roles of NRCS, State Technical Committees, and local working groups. Paragraph (b) of

§ 1466.2, which required consultations between the Farm Service Agency (FSA) and NRCS has been deleted, since a 2003 decision by the Secretary authorizes NRCS to administer EQIP in its entirety.

NRCS continues to administer EQIP at the State and local levels. Determinations related to eligible practices and payment rates are made at the State level, in consultation with the State Technical Committee. State Technical Committees and local working groups are bodies that provide advice to the State Conservationist and designated conservationist on technical and programmatic matters related to the implementation of the 1985 Act's conservation programs. State Technical Committees and local working groups consist of representatives from Federal, State, Tribal, and local governments, as well as nongovernmental organizations and individuals, who have conservation expertise.

Section 1466.3, "Definitions," sets forth definitions for terms used throughout this regulation. Several new definitions have been added, such as: "estimated income foregone," "forest management plan," "integrated pest management," "National Organic Program," "nonindustrial private forest land," "operation and maintenance agreement," "organic system plan," and "socially disadvantaged farmer and rancher." Other definitions have been revised to accommodate requirements of the 2008 Act including: "agricultural land," "animal waste management facility," "Conservation Innovation Grants," "conservation practice," "legal entity," "local working group," "participant," "payment," "person," "producer," and "technical assistance," while others have been revised in an effort to make them consistent with other NRCS-administered programs, such as "agricultural operation," "applicant," "cost-effectiveness," "EQIP plan of operations," "liquidated damages," "Natural Resources Conservation Service," "operation and maintenance," "priority resource concern," "resource concern," and "wildlife." The remaining definitions, "historically underserved producer," "livestock," "Regional Conservationist," "State Conservationist," and "technical service provider," have been revised in an effort to simplify and clarify definitions within the rule. Specifically, the following definitions have been amended:

The definition of "agricultural land" is revised to include those areas identified by EQIP's authorizing legislation as eligible land. The definition added the term "grassland" to

clarify that such lands are eligible for EQIP assistance. The definition also further defined agricultural lands to include lands on which agricultural and forest-related products, or livestock are produced. Agricultural lands may include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock. Incidental areas are areas, within the agricultural operation that is receiving conservation treatment, which may not be grazed or cropped. Such areas may include, but are not limited to, pivot corners, access roads, and streambanks.

NRCS revises the definition of "agricultural operation" to make it consistent with other conservation programs administered by NRCS. "Agricultural operation" is defined as a "parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the FSA record system, which is under the effective control of the producer at the time the producer applies for contract, and that is operated by the producer with equipment, labor, management, and production, forestry, or cultivation practices that are substantially separate from other operations."

The definition of "animal waste management facility" is clarified to state that such a facility will be implemented within the context of a Comprehensive Nutrient Management Plan and is consistent with the Field Office Technical Guide.

The definition of "applicant" is revised to include the 2008 Act's added terminology. Specifically, the term "individual," is replaced with the term "person," and the word "legal" is inserted prior to "entity" to reflect these changes. "Applicant" is defined as follows: "a person, legal entity, joint operation, or tribe that has an interest in an agricultural or forestry operation, as defined in part 1400 of this chapter, who has requested to participate in EQIP."

NRCS requests public comment on the current definition of "at-risk species." As currently defined, "at risk species means any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its population decline." *Specifically, NRCS seeks public comment on how to tailor the definition to better assist species in greatest need.*

The term, "beginning farmer and rancher," remains the same as the definition included in the final rule

published on May 30, 2003 (68 FR 32337), as defined by 7 U.S.C. 1991(a). Throughout the text, the term has become a subset of the “historically underserved producer” term to reduce the number of times it and other associated terms are cited in the regulation.

NRCS also revises the “*Conservation Innovation Grants*” definition to accommodate the 2008 Act’s clarification that forest management is considered agricultural production under EQIP. NRCS defines “*Conservation Innovation Grants*” as “competitive grants made under EQIP to individuals, and governmental and non-governmental organizations to stimulate and transfer innovative technologies and approaches, to leverage Federal funds, and to enhance and protect the environment, in conjunction with agricultural production and forest management.” The term “transfer” is added to show that one of the purposes of the *Conservation Innovation Grants* is to transfer innovation to the private sector.

The definition, “*conservation practice*,” is changed to reflect the 2008 Act’s expansion of the definition of “*conservation practice*” beyond structural and land management practices, to include forest management and vegetative practices, as well as other practices that achieve the program purposes and positive environmental outcomes, like comprehensive nutrient management plans, forest management plans, and other plans determined acceptable by the Chief. NRCS has built upon the statutory examples of planning activities that are comprehensive in nature, such as agricultural energy management plans, dryland transition plans, integrated pest management plans, and other planning activities that meet FOTG requirements, approved by the NRCS State Conservationist, in consultation with the State Technical Committee. *NRCS requests comments from the public on what type of comprehensive planning activities should be eligible for payment under EQIP.* Throughout this regulation, the term “conservation practice” replaces the terms “structural practices” and “land management practices,” except where “structural practices is specifically mentioned.”

Within the definition of “*contract*,” NRCS replaces the terms “individual” and “entity” with the term, “participant.” “Contract” means “a legal document that specifies the rights and obligations of any participant in the program.” An EQIP contract is a binding cooperative agreement for the transfer of assistance from USDA to the participant

to share in the costs in applying the conservation practices.

The term, “*cost-share payments*” is removed to reflect the amended statutory language. To comply with the statutory change, the terms, “*cost-share payments*” and “*incentive payments*” have been merged to form one definition, entitled “*payments*,” which means financial assistance provided to the participant for estimated costs incurred performing or implementing conservation practices, including costs for: Materials, equipment, labor, design and installation, maintenance, management, or training, as well as the estimated income foregone by the participant for designated conservation practices. The term “*payment*” replaces the terms “*cost-share payments*” and “*incentive payments*” throughout the regulation.

NRCS revises the definition of “*cost-effectiveness*.” The term “*cost-effectiveness*” means the “least-costly option for achieving a given set of conservation objectives.”

The term, “*entity*,” is replaced by the term, “*legal entity*,” to reflect the definitions outlined in the amendments to Section 1201 of the 1985 Act by Section 2001 of the 2008 Act.

The definition of “*estimated income foregone*” is added to clarify how producers will be compensated in accordance with Section 1240B(d) of the 1985 Act. As defined, “*estimated income foregone*” means an estimate of the net income loss associated with the adoption of a conservation practice, including a change in land use or land taken out of production or the opportunity cost associated with the adoption of a conservation practice. This shall not include losses of income due to disasters or other events unrelated to the conservation practice.”

The definition, “*EQIP plan of operations*,” is revised to clarify for applicants, participants, and the public that an operation and maintenance agreement and EQIP plan of operations are components of the EQIP contract.

NRCS includes the acronym, “*FOTG*,” in the definition of “*field office technical guide*” and also removes the term, “*treatment*,” and replaces it with the inclusive term, “*conservation practices*,” which is defined in § 1466.3. NRCS defines “*Field Office Technical Guide (FOTG)*” as follows: “the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources

applicable to the local area for which it is prepared.”

NRCS adds a definition for the term, “*forest management plan*,” into § 1466.3 as a result of requirements included in the amendments to Section 1240E of the 1985 Act by Section 2506 of the 2008 Act. A *forest management plan* means a site-specific plan that is prepared by a professional resource manager and approved by the State Conservationist. The plan, which is compatible with the participant’s objectives, identifies and describes actions to be taken by the participant to enhance soil, water, air, fish, and wildlife resources on such land.

Section 1240E, as amended by Section 2506 of the 2008 Act, requires a *forest management plan*, when the EQIP plan of operations addresses nonindustrial private forest land. The amendment gives discretion to the Secretary to determine the types of forest management plans that are eligible for EQIP payment. Indian forest lands, administered by the Bureau of Indian Affairs (BIA), have requirements for the implementation of forest management activities and these standards will be utilized when developing a forest management plan on BIA-administered land. NRCS has included the guidelines for a forest management plan within the “*forest management plan*” definition, but has given further discretion to the appropriate State Conservationist. A forest management plan may be a forest stewardship plan, as defined in the Cooperative Forestry Assistance Act of 1978, or another site-specific plan that contains elements equivalent to those of a *forest management plan*, approved by State Conservationist, in consultation with the State Forester or the BIA, where Indian forest lands and the associated natural resources are administered by BIA. The plan will comply with Federal, State, Tribal, and local laws, regulations, and permit requirements. NRCS is requesting public comment on other types of forest management plans that may be considered to be eligible for EQIP payment.

The term “historically underserved producer” combines the terms “*beginning farmer or rancher*,” “*limited resource farmer or rancher*” and “*socially disadvantaged farmer or rancher*” and their respective definitions into one term to simplify terms within the interim final rule. Definitions for “*beginning farmer and rancher*” and “*limited resource farmer and rancher*” remain the same as those definitions outlined in EQIP’s final rule published on May 30, 2003. However, the definition for “*socially*



*disadvantaged farmer or rancher*” has been added in accordance with the 2008 Act which sought to expand EQIP participation to be more inclusive of farmers and ranchers who have been subjected to racial or ethnic prejudices because of their identity as a member of a group, without regard to their individual qualities. This definition originates from Section 2501(g) of the Food, Agricultural, Conservation, and Trade Act of 1990, which defines “socially disadvantaged.”

NRCS removes the term, “*incentive payments*.” To reflect the statutory language, NRCS merges the terms “*cost share payments*” and “*incentive payments*” into one single term, entitled “*payments*.” “*Payment*” means financial assistance provided to the participant for estimated costs incurred performing or implementing conservation practices, including costs for: Materials, equipment, labor, design and installation, maintenance, management, or training, as well as the estimated income forgone by the participant for designated practices.

NRCS inserts the term, “*integrated pest management*,” into § 1466.3 as result of changes made by Section 2001 of the 2008 Act to Section 1201(a)(16) of the 1985 Act. The definition is the same as the statutory definition which defines integrated pest management as “a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks.”

NRCS replaces the term, “*land management practice*,” with the more inclusive term, “*conservation practice*,” to reflect statutory changes. In accordance with the 2008 Act amendments, the term, “*conservation practice*,” is expanded beyond structural and land management practices, to include forest management and vegetative practices, as well as other practices that fulfill the program purposes, like comprehensive nutrient management plans, forest management plans, and other plans determined to be acceptable by the Chief. NRCS has expanded the definition of conservation practice to include planning activities that are comprehensive and holistic in nature, such as agricultural energy management plans, dryland transition plans, integrated pest management plans, and other assessment and planning activities that meet FOTG requirements, approved by the NRCS State Conservationist in consultation with the State Technical Committee.

The term, “*legal entity*,” replaces the term, “*entity*,” to reflect the definition

set out in amendments by Section 2001 of the 2008 Act.

The term, “*limited resource farmer and rancher*,” remains the same as the definition included in the former program regulation, with an accommodation made to increase the level of gross farm sales from \$100,000 to \$155,200. Throughout portions of the text, the term has become a subset of the “historically underserved producer,” in order to reduce the number of times it and other associated terms are recited in the regulation.

The term, “*liquidated damages*,” is revised to clarify when and under what circumstances liquidated damages are collected. Liquidated damages is defined as a “sum of money stipulated in the EQIP contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred by NRCS to service the contract, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.”

The term, “*livestock*,” is simplified and reflects the definition contained in the 2008 Act. It is the responsibility of the Chief to determine livestock operations that are eligible for EQIP assistance. The decisionmaking authority resides with the Chief in order to ensure consistency among States.

The term, “*local working group*,” has been revised. Local working groups are defined in 7 CFR part 610.

The term, “*National Organic Program*,” has been inserted to implement the 2008 Act’s amendments related to conservation practices associated with organic production or for conservation practices related to the transition to organic production. The National Organic Program is a national program which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to sell an agricultural product as organically produced. The National Organic Program is administered by the Agricultural Marketing Service.

The term, “*Natural Resources Conservation Service*,” has been inserted to define the USDA agency that has responsibility for administering EQIP.

The term, “*nonindustrial private forest land*” has been inserted based on the definition in the 2008 Act amendments. Nonindustrial private forest land is rural land, as determined by the Secretary, that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association,

corporation, Indian tribe, or other private legal entity that has definitive decision-making authority over the land.

NRCS revises the definition of “*operation and maintenance*” to clarify that participants are expected to maintain EQIP-funded conservation practices for the conservation practice’s lifespan, as set forth in the operation and maintenance agreement. By maintaining the conservation practice for its lifespan, the participant ensures that the conservation practice will function for its intended use and will not cause harm or damage to the environment.

NRCS adds the term, “*operation and maintenance agreement*,” to describe the document that, in conjunction with the EQIP plan of operations, specifies the Agency expectation that participants will operate and maintain conservation practices installed with EQIP assistance.

NRCS adds the term, “*organic system plan*,” which is defined as a management plan for organic production or for an organic handling operation that has been agreed to by the producer or handler and the certifying agent. The Organic System Plan includes written plans concerning all aspects of agricultural production or handling.

NRCS revises the definition, “*participant*,” to reflect the 2008 Act’s statutory definition of “person” and “legal entity.” A participant is a person, joint venture, legal entity, or tribe who is receiving payment or is responsible for implementing the terms and conditions of an EQIP contract.

The term, “*payment*,” has been added and replaces the terms “cost share payments” and “incentive payments.” The term, “*payment*,” means financial assistance provided to the participant for estimated costs incurred performing or implementing conservation practices, including costs for: Materials, equipment, labor, design and installation, maintenance, management, or training, as well as the estimated income foregone by the participant for designated conservation practices. The term “*payment*” replaces the terms, “cost share payments” and “incentive payments” throughout the text.

The definition for “*person*” is revised to reflect the requirements of part 1400 of this chapter, the regulation which details CCC’s payment limitation policies.

NRCS revises the term “*priority resource concern*” to align program terminology with other conservation programs administered by NRCS.

The term “*producer*” has been expanded to reflect the 2008 Act’s



amendments to EQIP so that “producer” now means a person or legal entity or joint operation who is engaged in agricultural production or forestry management. The term, “livestock,” is removed from this definition, because the term, “agricultural production,” is inclusive of livestock operations.

The term, “*Regional Assistant Chief*,” has replaced the term, “*Regional Conservationist*.” In 2004, the NRCS reorganized, eliminated six Regional Conservationist positions, and created three Regional Assistant Chief positions. This definition has been revised to reflect that change.

The term, “*resource concern*,” replaces the term, “*related resource concern*,” in an effort to streamline program terminology with other conservation programs administered by NRCS.

NRCS inserts the term, “*socially disadvantaged farmer or rancher*,” and its associated definition. A “*socially disadvantaged farmer or rancher*” is a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities. The definition for “*socially disadvantaged farmer or rancher*,” which includes members of Indian tribes, has been added in accordance with the 2008 Act which sought to expand EQIP participation to be more inclusive of farmers and ranchers who have been subjected to racial or ethnic prejudices. This definition originates from Section 2501(g) of the Food, Agricultural, Conservation, and Trade Act of 1990, which defines “socially disadvantaged.”

NRCS revises the definition of “*State Conservationist*” to clarify that the former State Conservationist of Hawaii position has become the director of the Pacific Islands.

NRCS revises the term, “*technical assistance*,” to mirror the definition provided in the amendments by Section 2001 of the 2008 Act.

NRCS revises the definition, “*technical service provider (TSP)*,” to clarify that TSPs are used to provide technical services to program participants, in lieu of or on behalf of NRCS. A TSP is “an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants in lieu of or on behalf of NRCS.”

NRCS revises the term, “*wildlife*,” to make the definition consistent with definitions used in the other cost-share programs administered by NRCS.

Section 1466.4, “National priorities,” has been amended to address comments made by the public. On March 23, 2005,

NRCS published a Request for Public Comments (70 FR 14578) soliciting comments from the public on which resource concerns should be given national priority. NRCS sought public feedback in order to ensure that the stated national priorities reflected the most pressing natural resource needs while providing emphasis to off-site environmental benefits. NRCS received written comments from 85 individuals, agencies, and non-governmental organizations. In addition, NRCS held numerous public listening forums in which the public was invited to comment on the priorities. After consideration of the public input, NRCS determined that the former program’s national priorities adequately address the natural resource issues that were foremost identified, as no emerging issues of significance surfaced as a result of the feedback. However, as a result of public feedback and the need for clarification in the program, the first priority has been separated into two concerns, one for water quality, to include concentrated animal feeding operation (CAFO) as well as non-point source pollution, and a separate priority for water conservation, to address the quantity of ground and surface water available.

Section 1466.5, “National allocation and management,” addresses national allocations and national program accountability. Overall, the changes in this section were changes in terminology, rather than changes in policies and procedures. NRCS replaces the terms, “beginning farmers and rancher” and “limited resource producer,” with the term, “historically underserved producer.” NRCS has revised its allocation process to integrate all performance-based funding with initial allocations each year. This change eliminates the need for a national reserve; therefore, the “national reserve” reference is removed.

Section 1466.6, “State allocation and management,” is an existing section that describes State Conservationists’ responsibilities in the allocation of funds and the implementation of the program. This section was revised in an effort to streamline terminology among NRCS-administered programs and make existing terminology consistent with the 2008 Act amendments.

Section 1466.7, “Outreach activities,” describes how NRCS will establish special program outreach activities at the national, State, and local levels. While NRCS has made efforts to extend its outreach to limited resource, beginning, and socially disadvantaged farmers and ranchers that include tribes, this section is revised to clarify the

Agency outreach activities, and to specifically emphasize the need to provide assistance to “socially disadvantaged farmers or ranchers” as defined in § 1466.3 and the 2008 Act amendments.

Section 1466.8, “Program requirements,” sets forth land and applicant eligibility and the amount of EQIP funding to be used for livestock production, beginning farmers and ranchers, and socially disadvantaged farmers and ranchers. 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. Specifically, § 1466.8 is revised as follows:

In paragraph (a) the term “nonindustrial private forest land” is included. Within this paragraph, NRCS eliminates the term, “land use adjustments,” leaving the more inclusive term, “conservation practices.” In paragraph (b)(2), NRCS replaces the term “farming operation” with the term “agricultural operation,” which is defined in § 1466.3. In paragraph (b)(4), a participant may substitute a plan developed for the purposes of acquiring an air or water quality permit for an EQIP plan of operations, provided the former plan contains elements equivalent to those elements required by an EQIP plan of operations.

NRCS moves provisions in § 1466.24 to § 1466.8 to better organize the participant’s requirements. As a result, paragraph (b)(6) is inserted in § 1466.8, which requires a person or legal entity to submit to NRCS its tax identification or unique identifier number when applying for EQIP assistance. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identifier for each individual eligible for payment.

NRCS revises paragraph (c) to further clarify EQIP’s working landscape to include non-industrial private forestland, and other land on which agricultural products, forest-related products, and livestock are produced. These areas are identified in the 2008 Act’s amendment of eligible lands and in the program’s purposes. Other agricultural lands include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock. Within paragraph (c), NRCS also clarifies that publicly owned land is eligible if it is an actively managed component of the agricultural and forestry operation and

the conservation practice contributes to an improvement in an identified resource concern that is located on private land. To demonstrate adequate control of the land, members of Indian tribes should provide valid Tribal documentation and or documentation from the BIA. The BIA may assist NRCS with acquiring the appropriate authorization from the "certified" owners.

Within paragraph (c), the term, "operating unit" is replaced with the term, "agricultural operation," and the term, "natural," was eliminated in an effort to create consistent terminology among the conservation programs administered by NRCS.

Paragraph (e) has been inserted to ensure that five percent of the funds will be allocated to assist socially disadvantaged farmers or ranchers and an additional five percent of the funds will be allocated to assist beginning farmers or ranchers. In implementing the statutory change, NRCS considered three ways to allocate funds to meet the 2008 Act's requirements: (1) Issuing the allocations at the National level to defined geographic areas, where such groups are prevalent; (2) issuing the allocations to each State; or (3) establishing a national target that conforms to the statutory language, but providing States flexibility to designate money to each specified group based on potential demand in a given State. Under Option 3, NRCS pools the money and establishes a ten percent target for each State, enabling State Conservationists to designate money to the specified groups based on potential demand. NRCS has selected Option 3 to ensure that nationwide these groups of producers will benefit from EQIP assistance. Similar to EQIP's national livestock target, overall State-level percentages will be tracked at the national level to ensure that the amended national goals are met.

The effect of allocating the funds at the State level, with the targets being monitored at the national level will be threefold: (1) Funds will be provided to applicants who may be in the greatest need for additional assistance; (2) priority resource concerns may be better addressed; and (3) NRCS will assure that the national targets for these groups are met.

Section 1466.9, "EQIP plan of operations," describes the requirements of the EQIP plan of operations, which is a component of the EQIP contract. Producers will be required to develop and apply a plan of operations that addresses identified priority resource concerns. The producer develops the plan of operations with the assistance of

NRCS or other public or private technical service providers. The majority of this section has remained the same, with the following exceptions:

Paragraph (a) is revised to accommodate for the expansion of the term, "conservation practice," which includes conservation planning activities. All conservation practices must be carried out in accordance with NRCS technical guidance. This technical guidance includes, but is not limited to, the NRCS FOTG, National Planning Procedures Handbook, General Manual 180, Part 409, Conservation Planning Policy, and other appropriate technical guidance as determined by the State Conservationist or designated conservationist.

Paragraph (c)(2) is revised by adding the term, "natural resource," when listing a participant's potential objectives. Specifically (c)(2) is revised as follows: "To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation, natural resource, and environmental objectives."

Paragraph (d) of the former program regulation is moved to paragraph (b) of this interim final rule to clarify the participant's responsibilities as they relate to the EQIP plan of operations. Paragraph (b) states that it is the participant's responsibility to implement the EQIP plan of operations.

Paragraph (c) details the elements required in an EQIP plan of operations. Paragraph (c)(3) is also revised to accommodate the expansion of the term "conservation practice" by the 2008 Act amendments, which now includes activities such as conservation planning, design, and installation. An EQIP plan of operations may be made up of one or more conservation practices such as those activities listed above, in addition to structural, land management, vegetative, and forestry practices. Paragraph (c)(4) is revised to clarify that the EQIP plan of operations must include operation and maintenance, as well as timing and sequence of conservation practices.

Paragraph (e) is added to ensure that producers who address forestland in their EQIP plan of operations develop and implement a forest management plan that is approved by the State Conservationist. As defined in § 1466.3, a forest management plan is a site-specific plan that is compatible with the participant's objectives and identifies and describes actions to be taken by the participant to conserve and enhance soil, water, air, fish, and wildlife resources on such land. The forest management plan should be developed to comply with Federal, State, Tribal,

and local laws, regulations, and permit requirements.

NRCS inserts paragraph (f) to specify criteria to evaluate acceptable watershed-wide projects for the purposes of implementing water conservation or irrigation practices on newly irrigated lands, in accordance with section 1240B(h) of the 1985 Act. In determining an acceptable watershed-wide project, the State Conservationist will ensure:

- The project area has a current, comprehensive water resource assessment;
- The project plan has demonstrated effective water conservation and management strategies; and
- The project sponsors have consulted with relevant State, Tribal, and local agencies.

NRCS proposes to use the watershed assessments and State, Tribal, and local agency consultation in order to ensure that conservation practices implemented under EQIP are not in conflict with Federal, State, Tribal, and local water laws. The additional criteria also help to ensure that conservation practices are not applied to the detriment of other resource concerns within that watershed. For example, additional criteria may include, but is not limited to: Concurrence by State and local water management agencies that the anticipated activities will not be a detriment to existing resources; concurrence from State fish and wildlife agencies that the land can be irrigated with no detriment to in-stream flow for aquatics; and verification that the appropriate water permits have been acquired. *NRCS is interested in comments on the criteria for determining acceptable watershed-wide projects, particularly with respect to what should be included in a comprehensive water resource assessment and what should be considered in determining effective water conservation and management strategies at the watershed scale.*

Section 1466.10, "Conservation practices," describes how NRCS determines eligible conservation practices. The State Conservationist determines which conservation practices are eligible for payment and the maximum payment rates in the State. The State Conservationist may limit practice eligibility in some localities depending on the resource concerns. Throughout this section, to reflect statutory changes, NRCS replaces terms, such as "structural and land management practices," and "cost-share and incentive payments," with more inclusive terms, like "conservation

practices” and “payments,” respectively.

NRCS deletes the former program regulation’s paragraph (b), which prohibits payments for practices applied before application for participation has been made and combines it with paragraph (c), since a practice applied prior to application is a practice applied prior to contract approval. Payments will not be made for a conservation practice that was applied prior to program application or contract approval, unless a waiver is granted by the State Conservationist or designated conservationist prior to implementation of the conservation practice.

In paragraph (c), NRCS adds the term, “water conservation,” to clarify EQIP’s purposes, as follows: “A participant will be eligible for payments for water conservation and irrigation related conservation practices only on land that has been irrigated for two of the last five years prior to application for assistance.”

To reflect the 2008 Act’s expansion of the term, “conservation practices,” NRCS includes the term, “management approaches,” in paragraph (d). NRCS revises paragraph (d) as follows: “Where new technologies or management approaches that provide a high potential for optimizing environmental benefits have been developed, NRCS may approve interim conservation practice standards that incorporate new technologies and provide financial assistance for pilot work to evaluate and assess the performance, efficacy, and effectiveness of the new technology or management approach.”

Section 1466.11, “Technical services provided by qualified personnel not affiliated with USDA,” was added in the 2003 final rule to address technical assistance provided by non-USDA personnel. NRCS is authorized to use Federal, State, or local agencies, or private entities to provide technical assistance. As determined by the State Conservationist, NRCS may contract with private vendors or enter cooperative agreements with other Federal, State, or local entities for services related to EQIP implementation.

Throughout this section, the term, “technical services,” replaces the phrase, “and other assistance,” to make this regulation consistent with the 2008 Act’s amendment that added the definition of “technical services.” Section 1201(a)(25) of the 1985 Act, as amended by Section 2001 of the 2008 Act, defines “technical services” as “conservation planning, technical consultation, and assistance with design and implementation of conservation

practices.” In light of this statutory change, § 1466.11(b) is revised as follows: “Participants may use technical services from qualified personnel of other Federal, State, and local agencies, Indian tribes, or individuals who are certified as TSPs by NRCS.”

Using the same rationale as applied to paragraph (b), paragraph (c) is revised as follows: “Technical services provided by qualified personnel not affiliated with USDA may include, but are not limited to: Conservation planning; conservation practice survey, layout, design, installation, and certification; information, education; and training for producers.”

#### *Subpart B—Contracts and Payments*

Section 1466.20, “Application for contracts and selecting offers from producers,” is revised to split into two separate paragraphs, (a) “application acceptance” and (b) “selecting offer,” to better clarify these policies. The revisions to this section are a result of both statutory and streamlining changes.

Paragraph (a) clarifies that EQIP applications will be accepted throughout the year, with the State Conservationist or designated conservationist ranking applications at selected times throughout the year. Paragraphs (a)(2) and (3) have been inserted to enable the State Conservationist to group and rank applications that share similar resource objectives, economic status, cultural, or sociological backgrounds. In the case of paragraph (a)(2), the 2008 Act amendment requires the State Conservationist or designated conservationist, where practicable, to group applications based on the type of agricultural operation and rank accordingly. NRCS may extend this idea beyond agricultural operations to encourage the State Conservationist or designated conservationist to establish Statewide, area-wide, or local ranking pools. Applications may be grouped within ranking pools, which may be created to address a specific resource concern, a specific geographic area, a specific type of agricultural operation, or a specific group of applications that complete conservation systems. Spatially, ranking pools may be centered around a wildlife migration corridor, watershed, airshed, or other area of special significance. In the case of ranking pools, applications that meet the criteria established by the State Conservationist or designated conservationist, with advice from the State Technical Committee and local working group, where appropriate, will be evaluated against other applications that meet the same criteria. Each

application will be ranked accordingly within that ranking pool or grouping of applications.

The ranking pools streamline conservation program delivery, enabling producers to receive conservation assistance in a more expedited manner. For example, the State Conservationist may announce an initiative to protect a specific at-risk species or a resource, such as a municipal water supply, and designate a specified funding amount available to producers within the State or a designated region. Applicants may apply by proposing specific conservation practices that would create habitat for this at-risk species or protect the drinking water source. Applications that address this specific resource concern within the State or region would be evaluated against other applications and funded accordingly.

Paragraph (b) details how applications will be prioritized. When selecting EQIP applications, the State Conservationist or designated conservationist, with advice from the State Technical Committee or local working group, respectively, will develop a ranking process to prioritize applications for funding that addresses national, State, Tribal, and local priority resource concerns. NRCS will select applications that fulfill the program purposes, address the priority resource concern and offer significant environmental benefit. In developing this ranking process, NRCS will expand its focus to include energy conservation, in addition to the traditional resource concerns that include: Soil, water and air quality; wildlife habitat; and surface and groundwater conservation. To reflect the statutory intent and ensure both timely and effective conservation improvements, NRCS has expanded the selection criteria to give priority to applications that:

- Indicate a willingness by the applicant to complete all conservation practices in an expedited manner;
- Effectively and comprehensively address the designated resource concern or resource concerns; and
- Improve existing conservation practices or improve and complete a conservation system. To be eligible for higher ranking for this criterion, these existing practices or systems shall be in place at the time the contract offer is accepted.

For applications that include water conservation or irrigation efficiency conservation practices, the 2008 Act amendment also requires NRCS to give priority to applications that demonstrate a reduction in water use by the agricultural operation. As a condition of receiving a higher ranking within the

grouping of water conservation applications, the producer agrees not to use any associated water savings to bring new land under irrigation production, excluding incidental land needed for efficient operations. A producer who brings new land under irrigation production may be excluded from this condition, if the producer is participating in a watershed-wide project that will effectively conserve water. In evaluating whether a watershed-wide project is acceptable, the State Conservationist will ensure that:

- The project area has a current, comprehensive water resource assessment;
- The project plan has demonstrated effective water management strategies; and
- The project sponsors have consulted relevant State, Tribal, and local agencies.

The ultimate fate of associated water savings from water conservation or irrigation efficiency conservation practices depend on State water laws. NRCS does not have authority over State water rights and laws. The saved water could remain in the stream, provide aquifer recharge, or be utilized by another agricultural producer with more junior water rights. In essence, once the water leaves the agricultural operation, overall in-stream flow or aquifer recharge may be impacted by other sources.

Section 1466.20 also addresses contract approval authority. NRCS is revising § 1466.20 to require the appropriate Regional Assistant Chief to approve all contracts that exceed \$150,000 and are up to \$300,000.

Section 1466.21, "Contract requirements," identifies elements contained within an EQIP contract and the responsibilities of the participant who is party to the EQIP contract. This section also addresses EQIP contract funding limitations. To receive payment, an applicant must enter into an EQIP contract. Generally, the EQIP contract identifies all conservation practices to be implemented, their timing and sequence, and the operation and maintenance needed to maintain the conservation practice for its lifespan. As a condition of receiving EQIP payments for forestry-related practices, the 2008 Act amendments require a participant to have a forest management plan. To address this requirement, NRCS revises paragraph (b) to state that the participant must implement a forest management plan when the EQIP plan of operations addresses nonindustrial private forest

land. The forest management plan will be developed in accordance with the NRCS FOTG requirements and will comply with Federal, State, Tribal, and local laws, regulations, and permits.

NRCS continues to use a contract funding limitation to manage the program. In the past, NRCS has limited the contract amount to reflect the person/legal entity payment limitation. Prior to the 2008 Act, the contract and payment limitations were each \$450,000. NRCS retains the practice of limiting the contract amount to the person/legal entity payment limitation for ease in recordkeeping and for facilitating situations where a waiver up to \$450,000 may be granted. As required by the 2008 Act, paragraph (d) is revised to reduce the contract funding limitation from \$450,000 to \$300,000. NRCS also specifies in paragraph (d) that this contract funding limitation may be waived for projects of special environmental significance. Projects of special environmental significance must meet the following criteria, as determined by the Chief:

- Site-specific evaluation documents have been completed, documenting that the project will have substantial positive impacts on critical resources in or near the project area (*e.g.*, impaired water bodies, at-risk species, drinking water supplies, or air quality attainment);
- The project clearly addresses a national priority and State, Tribal, or local priorities; and
- The project assists the participant in complying with Federal, State, Tribal, and local regulatory requirements.

NRCS is also extending the policy of establishing a contract funding limitation to organic contracts. Participants who wish to enter into "organic-only" contracts are subject to a statutory annual payment limitation of \$20,000 per year or \$80,000 during any six-year period. These contract limitations will be instituted for ease in recordkeeping. However, participants who operate both organic and non-organic operations will be encouraged to have separate contracts for their non-organic and organic operations. Producers wanting to implement practices outside of their organic operations may enter into another contract, but will be subject to the overall \$300,000 person or legal entity payment limitation for all EQIP contracts. Both certified organic producers and those transitioning to an organic production system will have equal access for priority assistance. NRCS will encourage applicants to consolidate those conservation practices most directly related to organic production into a single contract to

optimize the use of funding within both the annual and six-year payment limits.

Section 1466.22, "Conservation practice operation and maintenance," addresses the participant's responsibility for conservation practice operation and maintenance. Paragraphs (a) through (e) are revised to clarify that the O&M agreement is part of the EQIP contract. The O&M agreement specifies the terms and conditions under which the participant must operate and maintain the conservation practices installed with EQIP assistance. This section also clarifies that NRCS may periodically inspect conservation practices to ensure they are being maintained for the conservation practice lifespan as detailed in the O&M agreement. In the event that NRCS finds that a participant is not operating and maintaining practices for the specified lifespan during the contract duration, NRCS may request a refund of payments in accordance with the EQIP contract. If a conservation practice is continuing to function for the conservation purposes for which it was installed, NRCS may choose to not request a payment refund. NRCS has created an O&M agreement to articulate the Agency's expectation that the participant is responsible for maintaining each conservation practice. NRCS has developed this O&M agreement for two reasons: (1) To increase the transparency of a participant's contract responsibilities; (2) to ensure these conservation practices are maintained for the length of time for which they were designed and created.

Section 1466.23, "Payment rates and levels," formerly addressed cost-share rates, incentive payment levels, and payment eligibility. Incentive payments have been removed in accordance with the 2008 Act amendments. In the place of incentive payments, participants will receive payments for estimated costs incurred or income foregone in implementing a practice. The terms "cost-share payments" and "incentive payments" have been replaced throughout this section with the more inclusive term, "payments." Specifically, NRCS has revised the following paragraphs:

The original paragraph (c) becomes paragraph (a); as a result, paragraphs are realigned accordingly. NRCS revises paragraph (a) to clarify how eligible conservation practices will be selected. In developing a list of conservation practices eligible for payment, the State Conservationist, in consultation with the State Technical Committee, will examine the cost-effectiveness, implementation efficiency, and longevity of the conservation practice.

NRCS will select a conservation practice based on the number of resource concerns the conservation practice will address or how comprehensively the conservation practice will address the resource concern and its ability to assist producers in meeting regulatory requirements.

NRCS revises paragraph (b) to specify that payment rates will be established by the State Conservationist or designee, with advice from the State Technical Committee or local working group. In determining the payment rate, NRCS will use the guidance found in paragraph (c), in addition to examining the cost of implementing a practice.

Paragraphs (c)(1) and (2) are revised to allow participants to receive: (i) Up to 75 percent of the estimated costs incurred by implementing a conservation practice, (ii) up to 100 percent of the estimated income foregone by participant for implementing a practice, or both (i) and (iii) where a producer incurs both costs in implementing a conservation practice and foregoes income related to practice implementation. When determining estimated income foregone, the State Conservationist, as specified in section 1240B(d)(3) of the 1985 Act, may provide a higher payment rate, provided the rate does not exceed 100 percent, to the following conservation practices: residue management, nutrient management, air quality management, invasive species management, pollinator habitat, animal carcass management technology, or pest management. In accordance with this paragraph, a producer simultaneously may receive payments for performing a practice, as well as income foregone for implementing such a practice.

For participants who are identified as historically underserved producers, in accordance with § 1466.3, NRCS may award the applicable payment rate and an additional payment rate that is not less than 25 percent above the applicable payment rate, provided this increase does not exceed 90 percent of the estimated incurred costs associated with the conservation practice.

NRCS also revises paragraph (c)(3) to clarify that payments made to a participant will be reduced proportionately below the rate established by the State Conservationist or designated conservationist to the extent that the total financial contributions for a conservation practice from other sources exceed 100 percent of the estimated costs incurred for implementing or performing the conservation practice.

Paragraph (c)(4) is inserted to reflect Congress's intent to provide payments

for conservation practices that assist producers in organic production or transition to organic production. Paragraph (c)(4) also clarifies that payments may not be made to cover the costs associated with acquiring the actual organic certification.

NRCS removes the former program regulations' reference to NRCS providing incentive payments, in accordance with the 2008 Act, which also removed references to incentive payments. NRCS will reimburse participants for estimated costs incurred and income foregone in accordance with § 1466.23(c).

NRCS adds paragraph (e) to enable NRCS to adjust payment for conservation practices scheduled after the year of contract obligation. Inflation, higher fuel costs, and increased labor impact the cost of implementing a conservation practice. This provision provides the Agency flexibility to compensate participants based on the increased costs.

Section 1466.24, "EQIP payments," provides direction on payment eligibility and payment limitations. Section 1240G of the 1985 Act, as amended by Section 2508 of the 2008 Act limits payments to persons, joint operations, or legal entities to \$300,000 during any six-year period, except for projects having special environmental significance. For projects of special environmental significance, payments will be limited to \$450,000 (during any six-year period). In order to ensure that no individual will receive more than \$300,000 (unless a waiver up to \$450,000 is granted), NRCS will track all EQIP funds paid and attributable to any individual by the social security identification number or unique identification number. To participate in EQIP, the person or legal entity's application must contain all members or beneficiaries, their tax identification numbers, and the percentage interest of each member or beneficiary. The BIA, as a fiduciary, may assist NRCS in distributing funds to individual Indians or Indian tribes. With regard to contracts on Indian land, payments exceeding the payment limitation may be made to the Tribal participant if an official of BIA or a Tribal official certifies in writing that no one individual, directly or indirectly, will receive more than the limitation.

For the purposes of applying the payment limitation and in accordance with the 2008 Act, the six-year period will include those payments made in fiscal years 2009 through 2014. NRCS will honor payment and contract limits that exceed \$300,000 for those persons, joint operations, and legal entities that entered into a contract with NRCS prior

to October 1, 2008. Contracts entered into prior to October 1, 2008, are governed by the payment limitations contained within the 2002 Act. The 2002 Act limited payments and contracts to \$450,000. The 2008 Act reduced the payment limit to \$300,000. NRCS will apply these new statutory and regulatory limitations, beginning with fiscal year 2009 contracts and will ensure that no new participants exceed the \$300,000 limit during the effectiveness of the 2008 Act. Contracts entered into prior to October 1, 2008 are not affected by the revision in payment limitation. Specifically, the following provisions have been changed in this section.

Paragraph (a) is revised to reduce the person, joint operation, or legal entity payment limitation from \$450,000 to \$300,000. This payment limitation applies to the six-year period, following a participant entering into a contract with NRCS, starting the year the contract is signed. Payments received for technical assistance shall be excluded from this limitation. The person, joint operation, or legal entity payment limitation may be waived for projects of special environmental significance. Projects of special environmental significance must meet the following criteria, as determined by the Chief:

- The project will have substantial positive impacts on critical resources in or near the project area (e.g., impaired water bodies, at-risk species, or air quality attainment);
- The project clearly addresses a national and State, Tribal, or local priorities; and
- The project assists the participant in complying with Federal, State, or local regulatory requirements.

Paragraph (c) is inserted to reflect the 2008 Act's limitation on payments to a person or legal entity, directly or indirectly, for conservation practices related to organic production. Payments for practices related to organic production shall not exceed \$20,000 per year or \$80,000 during any six-year period. This limitation excludes payments related to technical assistance and pertains only to conservation practices applied related to organic production. A producer may receive additional payments and is not subject to the organic payment limitation for conservation practices performed outside of those related to organic production, provided the sum total of all payments received does not exceed \$300,000 (unless a waiver is granted for an environmentally significant project).

NRCS revises paragraph (d) to reflect the statutory requirement that

participants who wish to receive payments for conservation practices related to organic production or the transition to organic production must carry out an organic system plan, as defined in section 1466.3, or develop and implement conservation practices for certified organic production that are consistent with an organic system plan and with EQIP's purposes. NRCS will offer conservation planning assistance to producers with an interest in organic production as authorized in section 1240B(i) of the 1985 Act, as amended by section 2503 of the 2008 Act.

Paragraph (d) is further revised to enable the Agency to provide advance payments to historically underserved producers, as provided in the 2008 Act amendments. Prior to this revision, EQIP policy required a participant to certify that a conservation practice had been completed before NRCS approved or issued payments. However, due to financial hardship by some applicants, the 1985 Act has been amended to enable "historically underserved producers" to receive advance payments up to 30 percent of the amount needed to implement a conservation practice for the purpose of purchasing needed materials or services. The advance payments will assist participants who lack financial resources to participate in the program.

Paragraph (d)(6) addresses the provisions related to the Adjusted Gross Income Limitation as it applies to conservation programs. Section 1001D of the Food Security Act of 1985, as amended by section 1604 of the 2008 Act, provides that a person, joint operation, or legal entity shall not be eligible to receive any payments from conservation programs under Title XII of the 1985 Act and section 524(b) of the Federal Crop Insurance Act (7 U.S.C. 1524(b)), which includes EQIP, during a crop, fiscal, or program year, if the average adjusted gross income of the individual, joint operation, or legal entity exceeds \$1,000,000, unless not less than 66.66 percent of the average adjusted gross income of the person, joint operation, or legal entity is average adjusted gross farm income. This provision of the 1985 Act will be implemented in accordance with part 1400 of this chapter. Since NRCS will be making a commitment for payments under an EQIP contract for a period of time into the future, NRCS will make a one-time eligibility determination in accordance with part 1400 of this chapter. These limitations do not extend to federally recognized Indian tribes.

Paragraph (d)(12) is revised to reflect the expansion of the term "conservation practice." NRCS or other Technical

Service Providers must certify that the conservation practice has been carried out in accordance with NRCS technical guidance. This technical guidance includes, but is not limited to, the NRCS FOTG, National Planning Procedures Handbook, General Manual 180, Part 409, "Conservation Planning Policy," and other technical guidance as determined by the State Conservationist or designated conservationist.

Section 1466.24(d)'s provisions related to depriving tenants and sharecroppers of EQIP payments is moved to § 1466.35, since the provision pertains directly to misrepresentation, scheme, and device, which is addressed in § 1466.35.

Section 1466.25, "Contract modifications and transfers of land," is revised to clarify the participant's contract responsibilities as they relate to loss of control of the land and the obligations incurred by the transferee. In detailing these obligations, NRCS also states that the participant and transferee assume the obligations not only of the contract, but also the O&M agreement. This section also promulgates NRCS's pre-existing policy by adding paragraph (e), which specifies that if a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the practice.

Section 1466.26, "Contract violations and termination," addresses the procedures that NRCS should take when a violation has occurred or a contract termination is needed. Specifically, § 1466.26 is revised as follows:

Paragraph (a) has been inserted to promulgate existing contract requirements and specify that the State Conservationist may terminate a contract when it is in the public interest, when the participant fails or refuses to correct a contract violation, or when a termination is needed as a result of conditions beyond the participant's control. The State Conservationist may unilaterally terminate an agreement when a termination is in the public interest, the participant refuses to correct a violation, or the participant is unable to comply with the contract terms. In the event a contract is terminated, the State Conservationist has the ability to retrieve all or a proportion of the payments. When a participant claims that the reason for the violation is a form of hardship, the claim must be documented and have existed after the participant entered into the contract. When a participant makes a hardship claim, the participant will provide documentation that details the hardship and for how long the hardship has existed and why the hardship has

prevented fulfilling requirements of the contract. Examples of hardship include: Natural disasters, major illness, farm or ranch building destruction, bankruptcy, and public interest (e.g., military service, public utilities' easement or condemnation of land, or environmental and archeological concerns).

Paragraph (e) notifies potential EQIP participants that NRCS has the ability to collect liquidated damages. Paragraph (e) also gives notice to the public that participants who violate EQIP contracts may be determined ineligible for future NRCS-administered conservation program funding. For clarity, the following provisions are moved to paragraph (e), "If NRCS terminates a contract, the participant will forfeit all rights for future payments under the contract and may be required to pay liquidated damages as prescribed in the contract, and refund all or part of the payments received, plus interest." NRCS also revises paragraph (e)(2) to provide flexibility to either reduce or waive the amount of liquidated damages.

NRCS adds paragraph (e)(2)(i) to clarify that proof of hardship must be documented, and such hardship must have occurred after the contract was signed by both parties.

NRCS adds paragraph (f) to provide that a contract, under which a producer is receiving payments for conservation practices related to organic production, may be terminated, if the State Conservationist, in consultation with the State Technical Committee, determines that the producer is not pursuing organic certification or is decertified.

Section 1466.27, "Conservation Innovation Grants," is amended to stipulate that NRCS will not reimburse the grantee for indirect costs. The bulk of CIG's policies and procedures were revised on January 3, 2005, and promulgated in § 1466.27. To locate information about this program, consult the NRCS Web site at: <http://www.nrcs.usda.gov/programs/cig/>.

#### *Subpart C—General Administration*

Section 1466.31, "Compliance with regulatory measures," is revised by adding the term, "permits," to clarify that it is the participant's responsibility to obtain necessary permits before commencing or carrying out conservation practices.

Section 1466.32, "Access to operating unit," is revised to notify potential EQIP applicants that an authorized NRCS representative may enter an operating unit or tract for the purpose of confirming compliance with program requirements during the term of the

contract. NRCS will continue to provide the participant with notice, prior to entering the property.

Section 1466.33, "Equitable relief," remains unchanged.

Section 1466.34 is revised to add the term, "legal entity," to clarify that legal entities shall be subject to the same provisions as persons.

Section, 1466.35, "Misrepresentation and scheme or device," is revised to insert the following clause from § 1466.24, "Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program."

Section 1466.36, "Environmental Credits for Conservation Improvements," is added to clarify NRCS's interest in environmental credits. NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through EQIP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of an EQIP contract. NRCS asserts no direct or indirect interest in these credits. However, NRCS retains the authority to ensure that operation and maintenance requirements for EQIP-funded improvements are met, consistent with § 1466.21 and § 1466.22. Where activities may impact the land under an EQIP contract, participants are highly encouraged to request an O&M compatibility determination from NRCS prior to entering into any credit agreements.

Section 2708, "Compliance and Performance", of the 2008 Act added a paragraph to section 1244(g) of the 1985 Act entitled, "Administrative Requirements for Conservation Programs," which states the following:

"(g) Compliance and performance.— For each conservation program under Subtitle D, the Secretary shall develop procedures—

"(1) To monitor compliance with program requirements;

"(2) To measure program performance;

"(3) To demonstrate whether long-term conservation benefits of the program are being achieved;

"(4) To track participation by crop and livestock type; and

"(5) To coordinate activities described in this subsection with the national conservation program authorized under section 5 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2004)."

This new provision presents in one place the accountability requirements placed on the Agency as it implements

conservation programs and reports on program results. The requirements apply to all programs under Subtitle D, including the Wetlands Reserve program, the Conservation Security Program, the Conservation Stewardship Program, The Farm and Ranch Lands Protection Program, the Grassland Reserve Program, the Environmental Quality Incentives Program (including the Agricultural Water Enhancement Program), the Wildlife Habitat Incentive Program, and the Chesapeake Bay Watershed initiative. These requirements are not directly incorporated into these regulations, which set out requirements for program participants. However, certain provisions within these regulations relate to elements of section 1244(g) of the 1985 Act and the Agency's accountability responsibilities regarding program performance. NRCS is taking this opportunity to describe existing procedures that relate to meeting the requirements of section 1244(g) of the 1985 Act, and Agency expectations for improving its ability to report on each program's performance and achievement of long-term conservation benefits. Also included is reference to the sections of these regulations that apply to program participants and that relate to the Agency accountability requirements as outlined in section 1244(g) of the 1985 Act.

*Monitor compliance with program requirements.* NRCS has established application procedures to ensure that participants meet eligibility requirements, and follow-up procedures to ensure that participants are complying with the terms and conditions of their contractual arrangement with the government and that the installed conservation measures are operating as intended. These and related program compliance evaluation policies are set forth in Agency guidance (M\_440\_512 and M\_440\_515 (<http://directives.sc.egov.usda.gov/>)).

The program requirements applicable to participants that relate to compliance are set forth in these regulations in § 1466.8, "Program Requirements," § 1466.9, "EQIP Plan of Operations," § 1466.21, "Contract requirements," and § 1466.22, "Conservation practice operation and maintenance." These sections make clear the general program eligibility requirements, participant obligations for implementing an EQIP plan of operations, participant contractual obligations, and requirements for operating and maintaining EQIP-funded conservation improvements.

*Measure program performance.* Pursuant to the requirements of the

Government Performance and Results Act of 1993 (Pub. L. 103–62, Sec. 1116) and guidance provided by OMB Circular A–11, NRCS has established performance measures for its conservation programs. Program-funded conservation activity is captured through automated field-level business tools and the information is made publicly available at: <http://ias.sc.egov.usda.gov/PRSHOME/>. Program performance also is reported annually to Congress and the public through the annual performance budget, annual accomplishments report, and the USDA Performance Accountability Report. Related performance measurement and reporting policies are set forth in Agency guidance (GM\_340\_401 and GM\_340\_403 (<http://directives.sc.egov.usda.gov/>)).

The conservation actions undertaken by participants are the basis for measuring program performance—specific actions are tracked and reported annually, while the effects of those actions relate to whether the long-term benefits of the program are being achieved. The program requirements applicable to participants that relate to undertaking conservation actions are set forth in these regulations in § 1466.9, "EQIP Plan of Operations," § 1466.21, "Contract requirements," and § 1466.22, "Conservation practice operation and maintenance." These sections make clear participant obligations for implementing, operating, and maintaining EQIP-funded conservation improvements, which in aggregate result in the program performance that is reflected in Agency performance reports.

*Demonstrate whether long-term conservation benefits of the program are being achieved.* Demonstrating the long-term natural resource benefits achieved through conservation programs is subject to the availability of needed data, the capacity and capability of modeling approaches, and the external influences that affect actual natural resource condition. While NRCS captures many measures of "output" data, such as acres of conservation practices, it is still in the process of developing methods to quantify the contribution of those outputs to environmental outcomes.

NRCS currently uses a mix of approaches to evaluate whether long-term conservation benefits are being achieved through its programs. Since 1982, NRCS has reported on certain natural resource status and trends through the National Resources Inventory (NRI), which provides statistically reliable, nationally consistent land cover/use and related



natural resource data. However, lacking has been a connection between these data and specific conservation programs.<sup>3</sup> In the future, the interagency Conservation Effects Assessment Project (CEAP), which has been underway since 2003, will provide nationally consistent estimates of environmental effects resulting from conservation practices and systems applied. CEAP results will be used in conjunction with performance data gathered through Agency field-level business tools to help produce estimates of environmental effects accomplished through Agency programs, such as EQIP. In 2006 a Blue Ribbon panel evaluation of CEAP<sup>4</sup> strongly endorsed the project's purpose but concluded "CEAP must change direction" to achieve its purposes. In response, CEAP has focused on priorities identified by the Panel and clarified that its purpose is to quantify the effects of conservation practices applied on the landscape. Information regarding CEAP, including reviews and current status, is available at <http://www.nrcs.usda.gov/technical/NRI/ceap/>. Since 2004 and the initial establishment of long-term performance measures by program, NRCS has been estimating and reporting progress toward long-term program goals. Natural resource inventory and assessment, and performance measurement and reporting policies set forth in Agency guidance (GM\_290\_400; GM\_340\_401; GM\_340\_403) (<http://directives.sc.egov.usda.gov/>).

Demonstrating the long-term conservation benefits of conservation programs is an Agency responsibility. Through CEAP, NRCS is in the process of evaluating how these long-term benefits can be achieved through the conservation practices and systems applied by participants under the program. The program requirements applicable to participants that relate to producing long-term conservation benefits are described previously under "measuring program performance," *i.e.*, § 1466.9, "EQIP Plan of Operations," § 1466.21, "Contract requirements," and § 1466.22, "Conservation practice operation and maintenance."

*Track participation by crop and livestock type.* NRCS's automated field-level business tools capture participant,

land, and operation information. This information is aggregated in the National Conservation Planning database and is used in a variety of program reports, for example in validating the program requirement for ensuring that 60 percent of funds are directed toward conservation practices related to livestock production. Additional reports will be developed to provide more detailed information on program participation to meet congressional needs. These and related program management procedures supporting program implementation are set forth in Agency guidance (M\_440\_512 and M\_440\_515).

The program requirements applicable to participants that relate to tracking participation by crop and livestock type are put forth in these regulations in § 1466.8, "Program Requirements," which makes clear program eligibility requirements, including eligible land and relationship to the production of agricultural, livestock, or forest-related products.

*Coordinate these actions with the national conservation program authorized under the Soil and Water Resources Conservation Act (RCA).* The 2008 Act reauthorized and expanded on a number of elements of the RCA related to evaluating program performance and conservation benefits. Specifically, the 2008 Farm Bill added a provision stating,

"Appraisal and inventory of resources, assessment and inventory of conservation needs, evaluation of the effects of conservation practices, and analyses of alternative approaches to existing conservation programs are basic to effective soil, water, and related natural resources conservation."

The program, performance, and natural resource and effects data described previously will serve as a foundation for the next RCA, which will also identify and fill, to the extent possible, data and information gaps. Policy and procedures related to the RCA are set forth in Agency guidance (GM\_290\_400; M\_440\_525; GM\_130\_402) (<http://directives.sc.egov.usda.gov/>).

The coordination of the previously described components with the RCA is an Agency responsibility and is not reflected in these regulations. However, it is likely that results from the RCA process will result in modifications to the program and performance data collected, to the systems used to acquire data and information, and potentially to the program itself. Thus, as the Secretary proceeds to implement the RCA in accordance with the statute, the approaches and processes developed

will improve existing program performance measurement and outcome reporting capability and provide the foundation for improved implementation of the program performance requirements of section 1244(g) of the 1985 Act.

#### List of Subjects in 7 CFR Part 1466

Agricultural operations, Conservation practices, Conservation payments, Natural resources, Payment rates, Contract, Animal feeding operations, Soil and water conservation, Soil quality, Water quality and water conservation, Wildlife, Forestry management.

■ For the reasons stated in the preamble, the Commodity Credit Corporation amends Part 1466 of Title 7 of the Code of Federal Regulations as follows:

#### PART 1466—ENVIRONMENTAL QUALITY INCENTIVES PROGRAM

■ 1. The authority citation for part 1466 continues to read as follows:

**Authority:** 15 U.S.C. 714b and 714c; 16 U.S.C. 3839aa–3839aa–8.

■ 2. Subpart A, consisting of §§ 1466.1 through 1466.9, is revised to read as follows:

##### Subpart A—General Provisions

Sec.	
1466.1	Applicability.
1466.2	Administration.
1466.3	Definitions.
1466.4	National priorities.
1466.5	National allocation and management.
1466.6	State allocation and management.
1466.7	Outreach activities.
1466.8	Program requirements.
1466.9	EQIP plan of operations.

##### Subpart A—General Provisions

###### § 1466.1 Applicability.

(a) The purposes of the Environmental Quality Incentives Program (EQIP) are to promote agricultural production, forest management, and environmental quality as compatible goals, and to optimize environmental benefits. Through EQIP, the Natural Resources Conservation Service (NRCS) provides assistance to eligible farmers and ranchers to address soil, water, and air quality, wildlife habitat, surface and groundwater conservation, energy conservation, and related natural resource concerns. EQIP's financial and technical assistance helps producers comply with environmental regulations and enhance agricultural and forested lands in a cost-effective and environmentally beneficial manner. The purposes of the program are achieved by planning and implementing conservation practices on eligible land.

<sup>3</sup> The exception to this is the Conservation Reserve Program; since 1987 the NRI has reported acreage enrolled in CRP.

<sup>4</sup> Soil and Water Conservation Society. 2006. Final Report from the Blue Ribbon Panel Conducting an External Review of the U.S. Department of Agriculture Conservation Effects Assessment Project. Ankeny, IA: Soil and Water Conservation Society. This review is available at <http://www.nrcs.usda.gov/technical/NRI/ceap/>.

(b) EQIP is available in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

#### § 1466.2 Administration.

(a) The funds, facilities, and authorities of the Commodity Credit Corporation (CCC) are available to NRCS for carrying out EQIP. Accordingly, where NRCS is mentioned in this Part, it also refers to the CCC's funds, facilities, and authorities where applicable.

(b) NRCS supports "locally led conservation" by using State Technical Committees at the State level and local working groups at the county or parish level to advise NRCS on issues relating to the EQIP implementation such as:

(1) Identification of priority resource concerns;

(2) Identification of which conservation practices should be eligible for financial assistance; and

(3) Establishment of payment rates.

(c) No delegation in this Part to lower organizational levels shall preclude the Chief from making any determinations under this Part, or from reversing or modifying any determination made under this Part.

(d) NRCS may enter into agreements with other Federal or State agencies, Indian tribes, conservation districts, units of local government, public or private organizations, and individuals to assist NRCS with implementation of the program in this Part.

#### § 1466.3 Definitions.

The following definitions will apply to this Part and all documents issued in accordance with this Part, unless specified otherwise:

*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, incidental areas included in the agricultural operation, and other types of agricultural land used for production of livestock.

*Agricultural operation* means a parcel or parcels of land whether contiguous or noncontiguous, which the producer is listed as the operator or owner/operator in the Farm Service Agency (FSA) record system, which is under the effective control of the producer at the time the producer applies for a contract, and which is operated by the producer with equipment, labor, management,

and production, forestry, or cultivation practices that are substantially separate from other operations.

*Animal waste management facility* means a structural conservation practice, implemented in the context of a Comprehensive Nutrient Management Plan and consistent with the Field Office Technical Guide, which is used for storing, treating, or handling animal waste or byproducts, such as animal carcasses.

*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.

*At-risk species* means any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its population decline.

*Beginning Farmer or Rancher* means a person or legal entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity, who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a contract with an individual, individually or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or State where the farm is located.

(3) In the case of a contract with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Chief* means the Chief of NRCS, United States Department of Agriculture (USDA), or designee.

*Comprehensive Nutrient Management Plan (CNMP)* means a conservation system that is unique to an animal feeding operation (AFO). A CNMP is a grouping of conservation practices and management activities which, when implemented as part of a conservation system, will help to ensure that both production and natural resource protection goals are achieved. A CNMP incorporates practices to use animal

manure and organic by-products as a beneficial resource. A CNMP addresses natural resource concerns dealing with soil erosion, manure, and organic byproducts and their potential impacts on all natural resources including water and air quality, which may derive from an AFO. A CNMP is developed to assist an AFO owner/operator in meeting all applicable local, Tribal, State, and Federal water quality goals or regulations. For nutrient impaired stream segments or water bodies, additional management activities or conservation practices may be required by local, Tribal, State, or Federal water quality goals or regulations.

*Conservation district* means any district or unit of State, Tribal, or local government formed under State, Tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a "conservation district," "soil conservation district," "soil and water conservation district," "resource conservation district," "land conservation committee," "natural resource district," or similar name.

*Conservation Innovation Grants* means competitive grants made under EQIP to individuals and governmental and non-governmental organizations to stimulate and transfer innovative technologies and approaches, to leverage Federal funds, and to enhance and protect the environment, in conjunction with agricultural production and forest management.

*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, integrated pest management, and other plans determined acceptable by the Chief.

*Contract* means a legal document that specifies the rights and obligations of any participant accepted into the program. An EQIP contract is a binding agreement for the transfer of assistance from USDA to the participant to share in the costs of applying conservation practices.

*Cost-effectiveness* means the least costly option for achieving a given set of conservation objectives.

*Designated conservationist* means an NRCS employee whom the State Conservationist has designated as responsible for EQIP administration in a specific area.

*EQIP plan of operations* means the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to address the priority resource concerns, optimize environmental benefits, and address program purposes as defined in § 1466.1. The EQIP plan of operations is part of the EQIP contract.

*Estimated income foregone* means an estimate of the net income loss associated with the adoption of a conservation practice, including from a change in land use or land taken out of production or the opportunity cost associated with the adoption of a conservation practice. This shall not include losses of income due to disaster or other events unrelated to the conservation practice.

*Field office technical guide (FOTG)* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

*Forest management plan* means a site-specific plan that is prepared by a professional resource manager, in consultation with the participant, and is approved by the State Conservationist. Forest management plans may include a forest stewardship plan, as specified in section 5 of the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2103a); another practice plan approved by the State Forester; or another plan determined appropriate by the State Conservationist. The plan is intended to comply with Federal, State, tribal, and local laws, regulations, and permit requirements.

*Historically underserved producer* means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, or limited resource farmer or rancher.

*Indian land* means:

- (1) Land held in trust by the United States for individual Indians or Indian tribes; or
- (2) Land, the title to which is held by individual Indians or Indian Tribes subject to Federal restrictions against alienation or encumbrance; or
- (3) Land which is subject to rights of use, occupancy and/or benefit of certain Indian Tribes; or
- (4) Land held in fee title by an Indian, Indian family or Indian Tribe.

*Indian Tribe* means any Indian Tribe, band, nation, or other organized group

or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Integrated Pest Management* means a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks.

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

*Legal entity* means, as defined in part 1400 of this chapter, an entity created under Federal or State law that:

- (1) Owns land or an agricultural commodity, product, or livestock; or
- (2) Produces an agricultural commodity, product, or livestock.

*Lifespan* means the period of time during which a conservation practice should be maintained and used for the intended purpose.

*Limited Resource Farmer or Rancher* means:

- (1) A person with direct or indirect gross farm sales not more than \$155,200 in each of the previous two years (adjusted for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service), and
- (2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years (to be determined annually using Commerce Department Data).

*Liquidated damages* means a sum of money stipulated in the EQIP contract that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the contract. The sum represents an estimate of the technical assistance expenses incurred to service the contract, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Livestock* means all animals produced on farms or ranches, as determined by the Chief.

*Livestock production* means farm or ranch operations involving the production, growing, raising, or reproduction of livestock or livestock products.

*Local Working Group* means the advisory body as defined in part 610 of this title.

*National measures* mean measurable criteria identified by the Chief, with the advice of other Federal agencies and State Conservationists, to help EQIP achieve the national priorities and statutory requirements.

*National Organic Program* means the national program, administered by the Agricultural Marketing Service, which regulates the standards for any farm, wild crop harvesting, or handling operation that wants to sell an agricultural product as organically produced.

*National priorities* means resource issues identified by the Chief, with advice from other Federal agencies and State Conservationists, which will be used to determine the distribution of EQIP funds and guide local EQIP implementation.

*Natural Resources Conservation Service* is an agency of the USDA, which has responsibility for administering EQIP using the funds, facilities, and authorities of the CCC.

*Nonindustrial private forest land* means rural land, as determined by the Secretary, that has existing tree cover or is suitable for growing trees; and is owned by any nonindustrial private individual, group, association, corporation, Indian Tribe, or other private legal entity that has definitive decision-making authority over the land.

*Operation and maintenance* means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Operation and maintenance (O&M) agreement* means the document that, in conjunction with the EQIP plan of operations, specifies the operation and maintenance responsibilities of the participant for conservation practices installed with EQIP assistance.

*Organic System Plan* means a management plan for organic production or for an organic handling operation that has been agreed to by the producer or handler and the certifying agent. The Organic System Plan includes all written plans that govern all

aspects of agricultural production or handling.

*Participant* means a person, legal entity, joint operation, or tribe that is receiving payment or is responsible for implementing the terms and conditions of an EQIP contract.

*Payment* means financial assistance provided to the participant based on the estimated costs incurred in performing or implementing conservation practices, including costs for: planning, design, materials, equipment, installation, labor, maintenance, management, or training, as well as the estimated income foregone by the producer for designated conservation practices.

*Person* means, as defined in part 1400 of this chapter, an individual, natural person, and does not include a legal entity.

*Priority resource concern(s)* means a resource concern that is identified by the State Conservationist, in consultation with the State Technical Committee, as a priority for a State, geographic area, or watershed level.

*Producer* means a person, legal entity, or joint operation who has an interest in the agricultural operation, according to part 1400 of this chapter, or who is engaged in agricultural production or forestry management.

*Regional Assistant Chief* means the NRCS employee authorized to direct and supervise NRCS activities in an NRCS region.

*Resource Concern* means a specific natural resource problem that represents a significant concern in a State or region, and is likely to be addressed successfully through the implementation of the conservation activities by producers.

*Secretary* means the Secretary of the USDA.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities.

*State Conservationist* means the NRCS employee authorized to implement EQIP and direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Island Area.

*State Technical Committee* means a committee established by the Secretary in a State pursuant to 16 U.S.C. 3861.

*Structural practice* means a conservation practice, including a vegetative practice, that involves establishing, constructing, or installing a site-specific measure to conserve and protect a resource from degradation, or improve soil, water, air, or related natural resources in the most cost-

effective manner. Examples include, but are not limited to, animal waste management facilities, terraces, grassed waterways, tailwater pits, livestock water developments, contour grass strips, filterstrips, critical area plantings, tree plantings, establishment or improvement of wildlife habitat, and capping of abandoned wells.

*Technical assistance* means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(2) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

*Technical Service Provider (TSP)* means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants, in lieu of or on behalf of NRCS.

*Wildlife* means non-domesticated birds, fishes, reptiles, amphibians, invertebrates, and mammals.

#### § 1466.4 National priorities.

(a) The following national priorities, consistent with statutory resource concerns that include soil, water, wildlife, air quality, and related resource concerns, will be used in EQIP implementation:

(1) Reductions of nonpoint source pollution, such as nutrients, sediment, pesticides, or excess salinity in impaired watersheds consistent with total maximum daily loads (TMDLs) where available; the reduction of surface and groundwater contamination; and the reduction of contamination from agricultural point sources, such as concentrated animal feeding operations;

(2) Conservation of ground and surface water resources;

(3) Reduction of emissions, such as particulate matter, nitrogen oxides, volatile organic compounds, and ozone precursors and depleters that contribute to air quality impairment violations of National Ambient Air Quality Standards;

(4) Reduction in soil erosion and sedimentation from unacceptable levels on agricultural land; and

(5) Promotion of at-risk species habitat conservation.

(b) In consultation with other Federal agencies, NRCS will undertake periodic reviews of the national priorities and the effects of program delivery at the State and local level to adapt the program to address emerging resource issues. NRCS will:

(1) Use the national priorities to guide the allocation of EQIP funds to the NRCS State offices,

(2) Use the national priorities in conjunction with State and local priorities to assist with prioritization and selection of EQIP applications, and

(3) Periodically review and update the national priorities utilizing input from the public and affected stakeholders to ensure that the program continues to address priority resource concerns.

#### § 1466.5 National allocation and management.

The Chief allocates EQIP funds to the State Conservationists to implement EQIP at the State and local level. In order to optimize the overall environmental benefits over the program duration, the Chief will:

(a) Use an EQIP fund allocation formula that reflects national priorities and that uses available natural resource and resource concerns data to distribute funds to the State level. This procedure will be updated periodically to reflect adjustments to national priorities and information about resource concerns and program performance. The data used in the allocation formula will be updated as they become available.

(b) Provide a performance incentive to NRCS in States that demonstrate a high level of program accomplishment in implementing EQIP. The Chief shall consider factors such as strategically planning EQIP implementation, effectively addressing national priorities and measures, State and local resource concerns, the program delivery effectiveness, the use of TSPs, and the number of contracts with historically underserved producers.

(c) Establish State level EQIP performance goals based on national, regional, and State priorities.

(d) Ensure that national, State and local level information regarding program implementation such as resource priorities, eligible practices, ranking processes, payment schedules, fund allocation, and program achievements are made available to the public.

(e) Consult with other Federal agencies with the appropriate expertise and information when evaluating the considerations described in this section.

(f) Authorize the State Conservationist, with advice from the State Technical Committee and local working groups, to determine how funds will be used and how the program will be administered to achieve national priorities in each State.

(g) Utilize assessment, evaluation, and accountability procedures based on actual natural resource and environmental outcomes and results.

#### § 1466.6 State allocation and management.

The State Conservationist will:

(a) Identify State priority resource concerns, with the advice of the State Technical Committee, which directly contribute toward meeting national priorities and measures, and will use NRCS's accountability system and other accountability tools to establish local level goals and treatment objectives;

(b) Identify, as appropriate and necessary, designated conservationists who are NRCS employees that are assigned the responsibility to administer EQIP in specific areas; and

(c) Use the following to determine how to manage EQIP and how to allocate funds within a State:

(1) The nature and extent of priority resource concerns at the State and local level;

(2) The availability of human resources, incentive programs, educational programs, and on-farm research programs from public, private, and Tribal sources, to assist with the activities related to the priority resource concerns;

(3) The existence of multi-county and/or multi-State collaborative efforts to address regional priority resource concerns;

(4) Program performance and results;

(5) The degree of difficulty that producers face in complying with environmental laws; and

(6) The presence of additional priority resource concerns and specialized farming operations, including but not limited to, specialty crop producers, organic producers, and small-scale farms.

#### § 1466.7 Outreach activities.

NRCS will establish program outreach activities at the national, State, and local levels in order to ensure that producers whose land has environmental problems and priority resource concerns are aware and informed that they may be eligible to apply for program assistance. Special outreach will be made to eligible producers with historically low participation rates, including but not restricted to, limited resource, socially disadvantaged, small-scale, or beginning farmers or ranchers, Indian Tribes, Alaska Natives, and Pacific Islanders.

#### § 1466.8 Program requirements.

(a) Program participation is voluntary. The applicant must develop an EQIP plan of operations for the agricultural or nonindustrial private forest land to be treated that serves as the basis for the EQIP contract. NRCS provides participants with technical assistance and payments to plan and apply needed conservation practices.

(b) To be eligible to participate in EQIP, an applicant must:

(1) Be in compliance with the highly erodible land and wetland conservation provisions found at part 12 of this title;

(2) Have an interest in the agricultural operation as defined in part 1400 of this chapter;

(3) Have control of the land for the term of the proposed contract period;

(i) The Chief may determine that land administered by the Bureau of Indian Affairs (BIA), Indian land, or other such circumstances provides sufficient assurance of control,

(ii) If the applicant is a tenant of the land involved in agricultural production or forestry management, the applicant shall provide the Chief with the written concurrence of the landowner in order to apply a structural conservation practice,

(4) Submit an EQIP plan of operations or plan developed for the purposes of acquiring an air or water quality permit, provided these plans contain elements equivalent to those elements required by an EQIP plan of operations and are acceptable to the State Conservationist as being consistent with the purposes of the program;

(5) Supply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information to verify the applicant's status as a limited resource, beginning farmer or rancher, and payment eligibility as established by part 1400 of this chapter; and

(6) 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.

(c) Eligible land includes agricultural land and nonindustrial private forest land, and other land on which agricultural products, livestock, or forest-related products are produced and resource concerns may be addressed. Other agricultural lands include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of agricultural land used for production

of livestock. However, land may be considered for enrollment in EQIP only if NRCS determines that the land is:

(1) Privately owned land;

(2) Publicly owned land where:

(i) The land is a working component of the participant's agricultural and forestry operation, and

(ii) The participant has control of the land for the term of the contract, and

(iii) 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; or

(3) Indian land.

(d) Sixty percent of available EQIP financial assistance will be targeted to conservation practices related to livestock production, including practices on grazing lands and other lands directly attributable to livestock production, as measured at the national level.

(e) 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.

#### § 1466.9 EQIP plan of operations.

(a) All conservation practices in the EQIP plan of operations must be approved by NRCS and developed and carried out in accordance with the applicable NRCS technical guidance.

(b) The participant is responsible for implementing the EQIP plan of operations.

(c) The EQIP plan of operations must include:

(1) A description of the participant's specific conservation and environmental objectives to be achieved;

(2) To the extent practicable, the quantitative or qualitative goals for achieving the participant's conservation, natural resource, and environmental objectives;

(3) A description of one or more conservation practices in the conservation management system, including conservation planning, design, or installation activities, to be implemented to achieve the conservation and environmental objectives;

(4) A description of the schedule for implementing the conservation practices, including timing, sequence, operation, and maintenance; and

(5) Information that will enable evaluation of the effectiveness of the plan in achieving the environmental objectives.

(d) If an EQIP plan of operations includes an animal waste storage or

treatment facility, the participant must agree to develop and implement a CNMP or demonstrate to the satisfaction of the designated conservationist that a CNMP has been implemented.

(e) If an EQIP plan of operations addresses forestland, the participant must develop and implement a forest management plan.

(f) A participant may receive assistance to implement an EQIP plan of operations for water conservation only if the assistance will facilitate a reduction in ground and surface water use on the agricultural operation, unless the producer is participating in a watershed-wide project, as approved by the State Conservationist, which will effectively conserve water in accordance with § 1466.20.

■ 3. In subpart B, §§ 1466.10 through 1466.26 are revised to read as follows.

#### Subpart B—Contracts and Payments

Sec.

1466.10 Conservation practices.

1466.11 Technical services provided by qualified personnel not affiliated with USDA.

1466.20 Application for contracts and selecting applications.

1466.21 Contracts requirements.

1466.22 Conservation practice operation and maintenance.

1466.23 Payment rates.

1466.24 EQIP payments.

1466.25 Contract modifications and transfers of land.

1466.26 Contract violations and terminations.

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#### § 1466.10 Conservation practices.

(a) NRCS will determine the conservation practices for which participants may receive program payments. A list of eligible practices will be available to the public.

(b) Payments will not be made to a participant for a conservation practice that either the applicant or another producer has applied prior to application for the program. Payments will not be made for a conservation practice that has been initiated or implemented prior to contract approval, unless a waiver was granted by the State Conservationist or designated conservationist prior to the practice implementation.

(c) A participant will be eligible for payments for water conservation and irrigation related conservation practices only on land that has been irrigated for two of the last five years prior to application for assistance.

(d) Where new technologies or management approaches that provide a high potential for optimizing environmental benefits have been

developed, NRCS may approve interim conservation practice standards that incorporate the new technologies and provide financial assistance for pilot work to evaluate and assess the performance, efficiency, and effectiveness of the new technology or management approach.

#### § 1466.11 Technical services provided by qualified personnel not affiliated with USDA.

(a) NRCS may use the services of qualified TSPs in performing its responsibilities for technical assistance.

(b) Participants may use technical services from qualified personnel of other Federal, State, and local agencies, Indian Tribes, or individuals who are certified as TSPs by NRCS.

(c) Technical services provided by qualified personnel not affiliated with USDA may include, but are not limited to: conservation planning; conservation practice survey, layout, design, installation, and certification; and information; education; and training for producers.

(d) NRCS retains approval authority of work done by non-NRCS personnel for the purpose of approving EQIP payments.

#### § 1466.20 Application for contracts and selecting applications.

(a) In evaluating EQIP applications, the State Conservationist or designated conservationist, with advice from the State Technical Committee or local working group, takes into account the following guidelines:

(1) Any producer who has eligible land may submit an application for participation in EQIP. Applications are accepted throughout the year. Producers who are members of a joint operation may file a single application for the joint operation.

(2) The State Conservationist, to the greatest extent practicable, will group applications of similar crop, forestry, and livestock operations for evaluation purposes.

(3) The State Conservationist will evaluate applications within each established grouping.

(b) In selecting EQIP applications, the State Conservationist or designated conservationist, with advice from the State Technical Committee or local working group, may establish ranking pools to address a specific resource concern, geographic area, or agricultural operation type or develop a ranking process to prioritize applications for funding that address national, State, and local priority resource concerns, taking into account the following guidelines:

(1) The State Conservationist or designated conservationist will

periodically select the highest ranked applications for funding based on applicant eligibility, fund availability, and the NRCS ranking process. The State Conservationist or designated conservationist will rank all applications according to the following factors:

(i) The degree of cost-effectiveness of the proposed conservation practices;

(ii) The magnitude of the expected environmental benefits resulting from the conservation treatment and the priority of the resource concerns that have been identified at the local, State, and national levels;

(iii) How effectively and comprehensively the project addresses the designated resource concern or resource concerns;

(iv) Use of conservation practices that provide long-term environmental enhancements;

(v) Compliance with Federal, State, Tribal, or local regulatory requirements concerning soil, water and air quality; wildlife habitat; and ground and surface water conservation;

(vi) Willingness of the applicant to complete all conservation practices in an expedited manner;

(vii) The ability to improve existing conservation practices or systems, which are in place at the time the application is accepted, or that complete a conservation system;

(viii) Other locally defined pertinent factors, such as the location of the conservation practice, the extent of natural resource degradation, and the degree of cooperation by local producers to achieve environmental improvements.

(2) For applications that include water conservation or irrigation efficiency practices, the State Conservationist will give priority to those applications where:

(i) Consistent with State law in which the producer's eligible land is located, there is a reduction in water use in the agricultural operation, or where the producer agrees not to use any associated water savings to bring new land under irrigation production, other than incidental land needed for efficient operations.

(ii) A producer who brings new land under irrigated production may be excluded from this latter condition if the producer is participating in a watershed-wide project that will effectively conserve water. The State Conservationist will designate eligible watershed-wide projects that effectively conserve water, using the following criteria:

(A) The project area has a current, comprehensive water resource assessment;

(B) The project plan has demonstrated effective water conservation management strategies; and

(C) The project sponsors have consulted relevant State and local agencies.

(3) If the State Conservationist determines that the environmental values of two or more applications for payments are comparable, the State Conservationist will not assign a higher priority to the application solely because it would present the least cost to the program.

(4) The ranking will not give preferential treatment to applications based on size of the operation.

(5) The ranking process will determine the order in which applications will be selected for funding. The approving authority for EQIP contracts will be the State Conservationist or designee, except that the approving authority for any EQIP contract greater than \$150,000 and up to \$300,000 will be the appropriate NRCS Regional Assistant Chief.

(6) The State Conservationist will make available to the public all information regarding priority resource concerns, the list of eligible practices, payment rates, and how the EQIP program is implemented in the State.

#### **§ 1466.21 Contract requirements.**

(a) In order for a participant to receive payments, the participant must enter into a contract agreeing to implement one or more conservation practices. Technical services may be included in the contract.

(b) An EQIP contract will:

(1) Identify all conservation practices to be implemented, the timing of practice installation, the operation and maintenance requirements for the practices, and applicable payments allocated to the practices under the contract;

(2) Be for a minimum duration of one year after completion of the last practice, but not more than 10 years;

(3) Incorporate all provisions as required by law or statute, including requirements that the participant will:

(i) Not implement any practices within the agricultural or forestry operation that would defeat the program's purposes;

(ii) Refund any program payments received with interest, and forfeit any future payments under the program, on the violation of a term or condition of the contract, consistent with the provisions of § 1466.26;

(iii) Refund all program payments received on the transfer of the right and

interest of the producer in land subject to the contract, unless the transferee of the right and interest agrees to assume all obligations, including operation and maintenance of the EQIP contract's conservation practices, consistent with the provisions of § 1466.25;

(iv) Implement a comprehensive nutrient management plan when the EQIP contract includes an animal waste management facility;

(v) Implement a forest management plan when the EQIP plan of operations addresses nonindustrial private forest land;

(vi) Supply information as may be required by NRCS to determine compliance with the contract and program requirements;

(vii) Specify the participant's responsibilities for operation and maintenance of the applied conservation practices, consistent with the provisions of § 1466.22; and

(4) Specify any other provision determined necessary or appropriate by NRCS.

(c) The participant must start at least one financially assisted practice within the first 12 months of signing a contract. If a participant, for reasons beyond their control, is unable to start conservation practice within the first year of the contract, the participant can request a waiver from the State Conservationist.

(d) Each contract will be limited to no more than \$300,000. The Chief may waive this contract limitation to allow up to \$450,000 for projects of special environmental significance that include methane digesters, other innovative technologies, and projects that will result in significant environmental improvements. Projects of special environmental significance must meet the following criteria, as determined by the Chief:

(1) Site-specific evaluation documents have been completed, documenting that the project will have substantial positive impacts on critical resources in or near the project area (e.g., impaired water bodies, at-risk species, drinking water supplies, or air quality attainment);

(2) The project clearly addresses a national priority and State, Tribal, or local priority resource concerns, as applicable; and

(3) The project assists the participant in complying with Federal, State, and local regulatory requirements.

#### **§ 1466.22 Conservation practice operation and maintenance.**

(a) The contract will incorporate the O&M agreement that addresses the operation and maintenance of conservation practices applied under the contract.

(b) NRCS expects the participant to operate and maintain each conservation practice installed under the contract for its intended purpose for the conservation practice lifespan as specified in the O&M agreement.

(c) Conservation practices installed before the contract execution, but included in the contract to obtain the environmental benefits agreed upon, must be operated and maintained as specified in the contract and O&M agreement.

(d) NRCS may periodically inspect the conservation practice during the contract duration as specified in the O&M agreement to ensure that operation and maintenance requirements are being carried out, and that the conservation practice is fulfilling its intended objectives.

(e) If NRCS finds during the contract that a participant is not operating and maintaining practices in an appropriate manner, NRCS may terminate and request a refund of payments made for that conservation practice under the contract.

#### **§ 1466.23 Payment rates.**

(a) The State Conservationist or designated conservationist will develop a list of conservation practices, eligible for payment under the program, which considers:

(1) The conservation practice cost-effectiveness, implementation efficiency, and innovation,

(2) The degree and effectiveness in treating priority resource concerns,

(3) The number of resource concerns the practice will address,

(4) The longevity of the practice's environmental benefits,

(5) The conservation practice's ability to assist producers in meeting regulatory requirements, and

(6) Other pertinent local considerations.

(b) Payment rates will be established by the State Conservationist or designated conservationist, with advice from the State Technical Committee and local working groups.

(c) Determining payment rates. (1) A payment to a producer for performing a practice may not exceed, as determined by the State or designated conservationist:

(i) 75 percent of the estimated costs incurred by implementing the conservation practice;

(ii) 100 percent of the estimated income foregone; or

(iii) Both conditions in paragraphs (c)(1)(i) and (ii) of this section, where a producer incurs costs in implementing a conservation practice and foregoes income related to that practice implementation.



(iv) When determining payments for income foregone, the State Conservationist may give higher priority to the following conservation practices:

- (A) Residue management;
- (B) Nutrient management;
- (C) Air quality management;
- (D) Invasive species management;
- (E) Pollinator habitat development or improvement;
- (F) Animal carcass management technology; or
- (G) Pest management.

(2) Notwithstanding paragraph (c)(1)(ii) of this section, a farmer or rancher meeting the historically underserved producer designation in § 1466.3 may be awarded the applicable payment rate and an additional rate that is not less than 25 percent above the applicable rate, provided this increase does not exceed 90 percent of the incurred costs estimated for the conservation practice.

(3) The payments to a participant will be reduced proportionately below the rate established by the State Conservationist or designated conservationist, to the extent that total financial contributions for a conservation practice from other sources exceed 100 percent of the estimated costs incurred for implementing or performing the conservation practice.

(4) The State Conservationist shall provide payments for conservation practices on some or all of the operations of a producer related to organic production and the transition to organic production. Payments may not be made to cover the costs associated with organic certification or for practices that are eligible for cost-share payments under the National Organic Program (7 U.S.C. 6523).

(d) Practice payment rates greater than 50 percent for estimated costs incurred, excluding those described in paragraph (c)(2) of this section, are to be approved by the Chief.

(e) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

#### **§ 1466.24 EQIP payments.**

(a) Except for contracts entered into prior to October 1, 2008, or as provided in paragraph (b) of this section, the total amount of payments paid to a person, joint operation, or legal entity under this part may not exceed an aggregate of \$300,000, directly or indirectly, for all contracts, including prior year contracts, entered into during any 6-year period. For purpose of applying this requirement, the 6-year period will include those payments made in fiscal

years 2009–2014. Payments received for technical assistance shall be excluded from this limitation.

(b) The Chief may waive the \$300,000 payment limitation, allowing up to \$450,000 per person, joint operation, or legal entity for projects of special environmental significance, as defined in § 1466.21(d).

(c) Payments for conservation practices related to organic production to a person, joint operation, or legal entity, directly or indirectly, may not exceed in aggregate \$20,000 per year or \$80,000 during any 6-year period. Payments received for technical assistance shall be excluded from this limitation.

(d) To determine eligibility for payments, NRCS will use the following criteria:

(1) The provisions in part 1400 of this chapter, Payment Limitation and Payment Eligibility, subparts A and G.

(2) States, political subdivisions, and entities thereof will not be considered to be persons or legal entities eligible for payment.

(3) To be eligible to receive an EQIP payment, all legal entities or persons applying, either alone or as part of a joint operation, must provide a tax identification number and percentage interest in the legal entity. In accordance with 7 CFR 1400, an applicant applying as a joint operation or legal entity must provide a list of all members of the legal entity and joint operation and associated embedded entities, along with the members' social security numbers and percentage interest in the joint operation or legal entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(4) With regard to contracts with Indian tribes or Indians represented by BIA, payments exceeding the payment limitation may 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. The Tribal entity must also provide, annually, a listing of individuals and payments made, by social security or tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The BIA or Tribal entity must also produce, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs or sacrificed income related to conservation practice implementation.

(5) Any cooperative association of producers that markets commodities for producers will not be considered to be a person eligible for payment.

(6) Eligibility for payments in accordance with part 1400, subpart G of this chapter, average adjusted gross income limitation, will be determined prior to contract approval.

(7) To be eligible for payments for conservation practices related to organic production or the transition to organic production, a participant will develop and implement an organic system plan as defined in § 1466.3.

(8) Eligibility for higher payments in accordance with paragraph (b) of this section will be determined at the time of contract approval.

(9) Any participant that utilizes a unique identification number as an alternative to a tax identification number will utilize only that identifier for any and all other EQIP contracts to which the participant is a party.

Violators will be considered to have provided fraudulent representation and be subject to full penalties of § 1466.35.

(10) A participant will not be eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice on the same land under any other conservation program administered by USDA.

(11) The State Conservationist may issue advance payments to historically underserved producers up to 30 percent of the anticipated amount of the costs incurred for the purpose of purchasing materials or services to implement a conservation practice.

(12) Before NRCS will approve and issue final payment, the participant must certify that the conservation practice has been completed in accordance with the contract, and NRCS, or an approved TSP, must certify that the practice has been carried out in accordance with the applicable NRCS technical guidance.

#### **§ 1466.25 Contract modifications and transfers of land.**

(a) The participant and NRCS may modify a contract if both parties agree to the contract modification, the EQIP plan of operations is revised in accordance with NRCS requirements, and the contract is approved by the designated conservationist.

(b) It is the participant's responsibility to notify NRCS when he/she either anticipates the voluntary or involuntary loss of control of the land covered by an EQIP contract.

(c) The participant and NRCS may agree to transfer a contract to another party.

(1) To receive an EQIP payment, the transferee must be determined by NRCS to be eligible to participate in EQIP and must assume full responsibility under the contract, including the O&M agreement for those conservation practices already installed and those conservation practices to be installed as a condition of the contract.

(2) If the transferee is ineligible or refuses to accept future payments, NRCS will terminate the contract and may require the transferor to refund and/or forfeit all payments received.

(d) NRCS may require a participant to refund all or a portion of any financial assistance earned under EQIP if the participant sells or loses control of the land covered by an EQIP contract and the new owner or controller is not eligible to participate in the program or refuses to assume responsibility under the contract.

(e) In the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the practice, at the rates established in accordance with § 1466.23, provided such payments do not exceed the payment limitation requirements as set forth § 1466.24.

#### § 1466.26 Contract violations and terminations.

(a) The State Conservationist may terminate, or by mutual consent with the parties, terminate the contract where:

(1) The parties to the contract are unable to comply with the terms of the contract as the result of conditions beyond their control;

(2) Termination of the contract would, as determined by the State Conservationist, be in the public interest; or

(3) A participant fails to correct a contract violation within the time period defined by NRCS.

(b) If a contract is terminated in accordance with the provisions of paragraphs (a)(1) and (a)(2) of this section, the State Conservationist may allow the participant to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract, or, in cases of hardship, where forces beyond the participant's control prevented compliance with the contract. If a participant claims hardship, such claims must be clearly documented and cannot have existed when the applicant applied for participation in the program.

(c) If NRCS determines that a participant is in violation of the terms of a contract, O&M agreement, or documents incorporated by reference

into the contract, NRCS shall give the participant a period of time, as determined by NRCS, to correct the violation and comply with the terms of the contract and attachments thereto. If a participant continues in violation, NRCS may terminate the EQIP contract in accordance with § 1466.26(e).

(d) Notwithstanding the provisions of paragraph (c) of this section, a contract termination shall be effective immediately upon a determination by NRCS that the participant has submitted false information or filed a false claim, or engaged in any act, scheme, or device for which a finding of ineligibility for payments is permitted under the provisions of § 1466.35, or in a case in which the actions of the party involved are deemed to be sufficiently purposeful or negligent to warrant a termination without delay.

(e) If NRCS terminates a contract due to breach of contract, the participant will forfeit all rights to future payments under the contract, pay liquidated damages, and refund all or part of the payments received, plus interest. Participants violating EQIP contracts may be determined ineligible for future NRCS-administered conservation program funding.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously installed conservation practice can function independently, is not adversely affected by the violation or the absence of other conservation practices that would have been installed under the contract.

(2) The State Conservationist will have the option to reduce or waive the liquidated damages, depending upon the circumstances of the case.

(i) When terminating a contract, NRCS may reduce the amount of money owed by the participant by a proportion that reflects the good faith effort of the participant to comply with the contract or the existence of hardships beyond the participant's control that have prevented compliance with the contract. If a participant claims hardship, that claim must be well documented and cannot have existed when the applicant applied for participation in the program.

(ii) In carrying out its role in this section, NRCS may consult with the local conservation district.

(f) 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 designated conservationist determines that the producer is not pursuing

organic certification, or has been decertified.

■ 4. In subpart B, § 1466.27 is amended by revising paragraph (c)(4) to read as follows:

#### § 1466.27 Conservation Innovation Grants (CIG).

\* \* \* \* \*

(c) \* \* \*

(4) There are some costs that grantees may not cover using CIG funds, such as costs incurred prior to the effective date of the grant, entertainment costs, any indirect cost exceeding fifteen percent, or renovation or refurbishment of facilities. A detailed list of costs not allowed will be published in the Request for Proposals.

\* \* \* \* \*

■ 5. Subpart C, consisting of §§ 1466.30 through 1466.36, is revised to read as follows:

#### Subpart C—General Administration

Sec.

1466.30 Appeals.

1466.31 Compliance with regulatory measures.

1466.32 Access to operating unit.

1466.33 Equitable relief.

1466.34 Offsets and assignments.

1466.35 Misrepresentation and scheme and device.

1466.36 Environmental credits for conservation improvements.

#### Subpart C—General Administration

##### § 1466.30 Appeals.

A participant may obtain administrative review of an adverse decision under EQIP in accordance with parts 11 and 614 of this title. Determination in matters of general applicability, such as payment rates, payment limits, the designation of identified priority resource concerns, and eligible conservation practices are not subject to appeal.

##### § 1466.31 Compliance with regulatory measures.

Participants who carry out conservation practices shall be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations. Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the participant's performance under the contract.

##### § 1466.32 Access to operating unit.

Any authorized NRCS representative shall have the right to enter an agricultural operation or tract for the

purposes of determining eligibility and for ascertaining the accuracy of any representations related to contract performance. Access shall include the right to provide technical assistance, determine eligibility, inspect any work undertaken under the contract, and collect information necessary to evaluate the conservation practice performance, specified in the contract. The NRCS representative shall make an effort to contact the participant prior to the exercising this provision.

#### § 1466.33 Equitable relief.

(a) If a participant relied upon the advice or action of any authorized NRCS representative and did not know, or have reason to know, that the action or advice was improper or erroneous, NRCS may accept the advice or action as meeting program requirements and may grant relief, to the extent it is deemed desirable by NRCS, to provide a fair and equitable treatment because of the good-faith reliance on the part of the participant. The financial or technical liability for any action by a participant that was taken based on the advice of a NRCS certified non-USDA TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment. Where a participant believes that detrimental reliance on the advice or action of a NRCS representative resulted in an ineligibility or program violation, but the participant believes that a good faith effort to comply was made, the participant may request equitable relief under § 635.3 in chapter VI of this title.

(b) If, during the term of an EQIP contract, a participant has been found in violation of a provision of the EQIP contract, the O&M agreement, or any document incorporated by reference through failure to fully comply with that provision, the participant may be eligible for equitable relief under § 635.4 in chapter VI of this title.

#### § 1466.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person, joint venture, legal entity or tribe shall be made without regard to questions of title under State law and without regard to any claim or lien against the crop, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at part 1403 of this chapter shall be applicable to contract payments.

(b) EQIP participants may assign any payments in accordance with part 1404 of this chapter.

#### § 1466.35 Misrepresentation and scheme or device.

(a) A person, joint venture, legal entity or tribe that is determined to have erroneously represented any fact affecting a program determination made in accordance with this Part shall not be entitled to contract payments and must refund to NRCS all payments, plus interest determined in accordance with part 1403 of this chapter.

(b) A producer who is determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation;

(3) Adopted any scheme or device for the purpose of depriving any tenant or sharecropper of the payments to which such person would otherwise be entitled under the program; or

(4) Misrepresented any fact affecting a program determination, shall refund to NRCS all payments, plus interest determined in accordance with 7 CFR 1403, received by such producer with respect to all contracts. The producer's interest in all contracts shall be terminated.

(c) In accordance with § 1466.26(e), NRCS may determine the producer ineligible for future conservation programs funding.

#### § 1466.36 Environmental credits for conservation improvements.

NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through EQIP, and environmental credits may be gained as a result of implementing activities compatible with the purposes of an EQIP contract. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that operation and maintenance (O&M) requirements for EQIP-funded improvements are met, consistent with §§ 1466.21 and 1466.22. Where activities may impact the land under an EQIP contract, participants are highly encouraged to request an O&M compatibility determination from NRCS prior to entering into any credit agreements.

Signed in Washington, DC, on January 8, 2009.

**Arlen L. Lancaster,**

*Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.*

[FR Doc. E9-530 Filed 1-14-09; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1467

RIN 0578-AA47

#### Wetlands Reserve Program

**AGENCY:** Natural Resources Conservation Service and Commodity Credit Corporation, United States Department of Agriculture.

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** The Wetlands Reserve Program (WRP) assists owners of eligible land in restoring and protecting wetlands. This interim final rule sets forth how the Natural Resources Conservation Service (NRCS), an agency of the U.S. Department of Agriculture (USDA), using the funds, facilities, and authorities of the Commodity Credit Corporation (CCC), will implement WRP in response to changes made to the program by the Food, Conservation, and Energy Act of 2008. In addition, this interim final rule incorporates other changes to the regulation for clarification or program administration improvement.

**DATES:** *Effective Date:* The rule is effective January 15, 2009.

*Comment Date:* Submit comments on or before March 16, 2009.

**ADDRESSES:** You may send comments (identified by Docket Number NRCS-IFR-08013) using any of the following methods:

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending comments electronically.

- *Mail:* Easements Programs Division, Natural Resources Conservation Service, Wetlands Reserve Program Comments, P.O. 2890, Room 6819-S, Washington, DC 20013.

- *Fax:* 1-202-720-9689.

- *Hand Delivery:* Room 6819-S of the USDA South Office Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays. Please ask the guard at the entrance to the South Office Building to call 202-720-4527 in order to be escorted into the building.

- This interim final rule may be accessed via Internet. Users can access the NRCS homepage at <http://www.nrcs.usda.gov/>; select the *Farm Bill* link from the menu; select the *Interim final* link from beneath the *Final and Interim Final Rules Index* title. Persons with disabilities who require