National Sustainable Agriculture Coalition

April 25, 2011

Branch Chief
Regulations and Paperwork Management Branch
United States Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-0742

Submitted online via: http://www.regulations.gov

Re: NSAC Comments on VAPG Interim Rule, 76 Federal Register 36, pages 10090-10134 (February 23, 2011)

Dear Branch Chief:

We are submitting these comments on the Value-Added Producer Grant (VAPG) program interim final rule (IFR) on behalf of the National Sustainable Agriculture Coalition (NSAC).

NSAC is an alliance of grassroots organizations that advocates for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. Our vision of agriculture is one where a safe, nutritious, ample, and affordable food supply is produced by family farmers who make a decent living pursuing their trade, while protecting the environment, and contributing to the strength and stability of their communities. Many NSAC organizations include agricultural producers that add value to their products, boosting farm income and enhancing food choices for consumers.

Summary of NSAC's Comments

NSAC applauds many of the Agency's decisions in the interim rule. We support the commitment to prioritize statutorily-designated priority groups when applicants' proposals are equally ranked. NSAC welcomes the acknowledgement that producer networks and cooperatives are rarely comprised entirely of beginning farmers and ranchers but urge the Agency to clarify the very confusing language provided in the IFR definition and to further reduce the minimum percentage of beginning producers required in an applicant's group to qualify for this priority category.

Additionally, we commend the expanded annual gross sales-based threshold to qualify as a medium-sized farm. NSAC also supports the decision to allow producers to count their time as an in-kind contribution up to 25 percent of total project costs, but urge that it be monitored and increased as may prove necessary. Finally, we eagerly await the simplified application for projects requesting less than $50,000 in the new NOFA for FY 2010 and 2011 funding.

We strongly disagree with four decisive changes in the interim rule. First, we adamantly oppose the IFR provision to make non-actively engaged landlords and passive investors eligible for grants. This radical change violates the letter and spirit of the law and reverses the Proposed Rule and the guidelines for the program over the past decade. It should be reversed in a second IFR or the Final Rule.

Second, NSAC objects to the complete removal of limitations on branding activities as a percentage of total projects costs. We are concerned that such a move could result in a large portion of VAPG funds being used for advertising budgets for large firms. A modified version of the Proposed Rule provision should be crafted for inclusion in a second IFR or the Final Rule.

Third, NSAC believes that project proposals in support of the statutory priority groups must be awarded more than the 10 points to which the Agency reduced the scoring designation, a point value that makes a mockery of the statute and congressional goals for the program. We believe this needs urgent attention and should be corrected in a second IFR or the Final Rule.

Finally, we disagree with the removal of priority points for rural projects and want to see these reinstated in a second IFR or the Final Rule. While we do not believe the program should be limited to rural areas, we do believe priority points are in keeping with the goals of the program.

Detailed Comments in Section-by-Section Order

§ 4284.901 Purpose.

The purpose section of the rule speaks to the major activities of the program – *"to develop businesses that produce and market value-added agricultural products"* – but does not actually address the underlying purpose of the program. In a second IFR or the Final Rule, we urge you to add language that speaks to the purpose of the program, namely to *"create expanded marketing opportunities, increase producer income, and enhance community economic development."*

§ 4284.902 Definitions.

Agricultural Producer.

The IFR adds a completely new eligibility category to VAPG not previously a part of any NOFA nor in the Proposed Rule. The definition of agricultural producer has been expanded from individuals and entities actively engaged in production to also include those who maintain ownership and financial control of an operation without being actively engaged in labor and management.

We vehemently protest this change. It could open the floodgates to non-farm passive investors and landlords to reap the benefits of a program clearly intended to raise incomes for producers. Too often and for too long USDA farm programs have been ripe with abuse that got started by rule changes to expand programs intended for working farmers to others nudging their way into the program's benefits. Rural Development would be making a huge mistake to go down this road historically littered with fraud and abuse.

It is particularly ironic that contract producers who actually provide the labor, management, and field operations on a farm are (correctly) not allowed to benefit from VAPG due to its sole emphasis on "independent" producers, yet the IFR allows investors who do none of the labor or field operations and little or none of the management to participate as if they were agricultural producers. There is nothing in the legislative history to suggest this result was ever intended by Congress. To the contrary, that history is full of references to assisting working entrepreneurial farm families improve their income by capturing a larger share of the consumer food dollar.

For these reasons, we therefore urge you to amend the definition of "agricultural producer" in a second IFR or the Final Rule to read as follows:

> *Agricultural producer.* An individual or entity directly engaged in the production of an agricultural commodity, or that has the legal right to harvest an agricultural commodity, that is the subject of the value-added project. Agricultural producers may "directly engage" ~~either~~ through substantially participating in the labor, management, and field operations ~~themselves or by maintaining ownership and financial control of the agricultural operation~~.

Beginning farmer or rancher.

Recognizing that producer groups and farm cooperatives are rarely comprised entirely of beginning farmers and ranchers, NSAC recommended in its Proposed Rule comments that entities with at least 25 percent beginning farmers and ranchers be permitted to apply for the funds reserved for this VAPG priority group. The interim rule moves in this direction by reducing the requirement from 100 percent to 51 percent beginning farmer-based membership, which we believe will begin to make the reserve fund more practical and useful.

1. The beginning farmer or rancher definition, as well as the related language in §4284.922(c)(1)(i), must be fixed to make its meaning clear and precise.

The IFR definition, however, is extremely convoluted and is in desperate need of revision. We fear it will be difficult for users, administrators, and review panels to interpret in its current form. It behooves the agency to write a clearer, cleaner definition in a second IFR or the Final Rule.

The definition in the IFR contains three contradictory statements with respect to beginning farmers and ranchers:

1. "…an entity in which none of the individual owners have operated a farm or a ranch for more than 10 years."
2. "...an Independent Producer that…has an applicant ownership or membership of 51 percent or more beginning farmers and ranchers."
3. " Except as provided…to compete for reserved funds, for applicant entities with multiple owners, all owners must be eligible beginning farmers or ranchers."

Excerpt number one and number two above are directly contradictory. Assuming that "Independent Producer" in excerpt two is intended to refer to an entity made up of independent producers, excerpt two has a 51 percent standard while excerpt one has a 100 percent standard. We assume excerpt two is intended somehow to override excerpt one, but there is no except clause to so indicate.

Excerpt number two and number three are also contradictory, unless the phrase "Except as provided" is intended to mean "except as provided by the preceding clause in the definition." The meaning is unclear since "Except as provided" does not have any reference point. Normally a rule making or legislative "except" clause is followed by a "by…" clause so that the reader knows what the exception is to the general rule that is about to be stated.

We suspect that excerpt number one above is intended to mean that any particular farm, in order to count as a farm operated by a beginning farmer, must be entirely owned by one or more beginning farmers. It does not say that however and should be corrected.

We suspect that excerpt number two above is intended to mean that an entity made up of independent producers has an ownership or membership of greater than 50 percent beginning farmers. It does not say that however. Rather, it refers to a singular independent producer farm as being made up of multiple farmers/farms. This is a tortured use of the English language and an example of unnecessarily complicated and misleading rule writing of the type that sometimes gives federal rules a bad name.

We suspect that the third excerpt is intended to mean that if there is more than one applicant, all applicants must either be a farm that is owned by a beginning farmer or an entity that includes at least 51 percent beginning farmer members or owners. It does not say that however. It refers to applicant entities with multiple owners rather than multiple entities.

The compound problems in this definition are, we believe, fairly easy to unpack and put into clear language. The outline of such a solution would be as follows:

1. An individual farm applicant, to qualify for the reserve, must be a beginning farmer. In an individual farm applicant with multiple farmers, all the farmers must be beginning farmers.
2. An applicant that is a larger-than-single farm entity must have ownership or membership of at least 51 percent beginning farmers.
3. For an application submitted by multiple entities, all entities must qualify as either individual farm applicants who are beginning farmers or entities that have 51 percent or greater ownership or membership.

We strongly urge you to use this outline in rewriting the definition in a second IFR or the Final Rule. We also strongly discourage you from either keeping the definition as it appears in the IFR or revising it but retaining language that is awkward, confusing, and contradictory. The final product should be clear and concise and obvious in its meaning to farmers and review panels.

A similar problem in the IFR occurs in §4284.922(c)(1)(i) in the last sentence of that paragraph. It appears that the sentence is intended to mean that any independent farm, in order to qualify for the beginning farmer set-aside or priority, must be a farm in which all owners are beginning farmers. The way the sentence is stated, however, it could also mean that any applicant entity, made up of multiple farms, must be entirely made up of beginning farmers.

Please note that (c)(1)(i) says *"For applicant entities with multiple owners, all owners must be eligible beginning farmers or ranchers."* Yet, (d)(1) says *"For entities with multiple owners or members, 51 percent of owners or members must be eligible beginning farmers or ranchers."* This is contradictory and requires a simple clarification of terms in a second IFR or the Final Rule to distinguish between eligible farms and eligible entities under the beginning farmer priority and set-aside.

2. A careful review should be made of the implementation of the 51 percent standard to assess whether it is practical.

We believe that farm coops and multi-farm businesses in which more than half of the members or owners are beginning farmers will be a rare exception. The 51 percent standard is certainly far better than the 100 percent standard presented in the Proposed Rule, and we are grateful for the improvement. In our view, however, it remains an impractical standard for the purpose of ensuring the beginning farmer reserve fund created by Congress is used to the fullest extent possible. We urge you to monitor applications and awards very closely in the upcoming FY 2010/2011 round of grants. If the evidence suggests the 51 percent standard is still too high, we urge you to revise it downward in a second IFR or the Final Rule to a standard with greater utility in promoting the goal of the priority and set-aside.

Conflict of Interest.

We support the inclusion in the "conflict of interest" definition of the exception clause sentence at the end. We also support the deletion of the language from the Proposed Rule that forbade farmers and farm families from participation in developing feasibility studies.

Feasibility study. (Also, Marketing plan. Also, Planning grant.)

In each of these three definitions, we urge you to add in a second IFR or the Final Rule a sentence cross-referencing the up to 25 percent in-kind match option in §4284.92 (a) and (b), as you have already done for the "conflict of interest" definition and the "matching grant" definition. The addition of the cross reference will remove confusion that is otherwise created as to whether the definitions override the exception.

We do not need to make that same recommendation with respect to the definition for "business plan" since the IFR definition of business plan is a definition of what a business plan is rather than a definition of who performs it. We note, however, that this would be another viable option with respect to the feasibility study, marketing plan, and planning grant definitions. We would support either option – adding a cross reference to §4284.92 (a) and (b) or changing the form of the definition to simply describe the study, plan or grant, as has been done in the case of "business plan."

Matching funds.

We support the modifications made in this definition relative to the Proposed Rule that clearly tie it to the in-kind farmer and farm family contributions names in §4284.923(a) and (b) and that eliminate the language restricting in-kind contributions to third parties only.

Medium-sized farm.

NSAC's comments on the Proposed Rule recommended that the annual gross sales-based definition of medium-sized farm or ranch be increased from $700,000 to $1,000,000. We commend the Agency for adopting this change in the IFR. We believe this will more adequately reflect commodity, enterprise, and regional differences, while ensuring program funds are targeted to the "disappearing middle" of agriculture.

Mid-tier value chain.

NSAC applauds the Agency for modifying the definition of "local or regional supply network" to include aggregators and facilitation services.

§ 4284.922 Project eligibility.

Branding.

The Proposed Rule included a limitation of 25 percent of a project's costs that could be used for branding activities. The IFR omits these restrictions, allowing applicants to devote *all* grant funds to branding activities if they so choose. NSAC disagrees with this complete removal of restrictions on VAPG funding for branding activities. By eliminating this section, the Agency gives the impression that it is endorsing projects that are 100 percent for branding. This is in direct contradiction to the requirement under section 4284.22 (a) (1) that the project must focus on adding value to a product in one of five defined ways:

> *(i)* *Has undergone a change in physical state;*
> (ii) *Was produced in a manner that enhances the value of the agricultural commodity;*
> (iii) *Is physically segregated in a manner that results in the enhancement of the value of the agricultural commodity;*
> (iv) *Is a source of farm- or ranch-based renewable energy, including E-85 fuel; or*
> (v) *Is aggregated and marketed as a locally-produced agricultural food product.*

By permitting all grant funds to be used for branding, the Agency would be opening the floodgates to becoming a program to support the advertising and branding budgets as if it were a domestic equivalent of the Market Access Program. In the current economic climate and with the need to support small- and medium-sized farms in trying to remain afloat, we cannot afford such a move. VAPG has never before permitted projects devoted entirely to fund branding, and now is not the time to start.

Branding and advertising can be an important component of a more comprehensive value-added project. NSAC therefore supports a tiered approach to branding limitations. Small- and medium-sized farms face special challenges in diversifying and branding their products to remain competitive when compared to larger producers. We suggest a limitation of 50 percent for individual farmer grants, locally-produced food product grants, and mid-tier value chain grants, and a limitation of 30 percent for all other projects. NSAC proposes the following language regarding branding activities, which we have adapted from the note in the 2009 NOFA under the section titled "Other Eligibility Requirements" and from the Proposed Rule, under § 4284.922 (c):

> *Applications that propose only branding, packaging, or other similar means of product differentiation are not eligible in any category. However, applications may propose branding, packaging, or other product differentiation activities as a component of a value-added strategy for products otherwise eligible in one of the above categories. Individual farm and ranch projects, locally-produced food product projects, and mid-tier value chain projects that propose branding, packaging, or other product differentiation activities that are no more than 50 percent of total project costs of a value-added project for products otherwise eligible in one of the five value-added methodologies specified in paragraphs (1)(i) through (v) of the definition of value-added agricultural product are eligible. All other project types that propose branding, packaging, or other product differentiation activities that are no more*

> *than 30 percent of total project costs of a value-added project for products otherwise eligible in one of the five value-added methodologies specified in paragraphs (1)(i) through (v) of the definition of value-added agricultural product are eligible. Eligible activities must be directly related to the processing and marketing of the value-added agricultural commodity or product, and cannot include evaluation or analysis of related agricultural production activities for the agricultural commodity.*

Existing projects.

In § 4284.922 (b) (6) (i) of the Interim Final Rule, a new provision exempts Independent Producers with existing products and applying for working capital grants of $50,000 or more from feasibility studies. NSAC recognizes that in theory this modification to the rule could serve individual farmers in need of marketing assistance for their value-added products. However, we worry that without limitations, VAPG could easily become a program for marketing rather than predominantly for developing value-added products. We encourage the Agency to comprehensively track applications and awards for this subset of the program and to monitor the extent to which it modifies the current success of VAPG.

§ 4284.923 Eligible uses of grant and matching funds.

In order to keep business and enterprise planning of VAPG projects farmer-centered, NSAC recommended that farmers and ranchers directly participate in the development of VAPG projects and be allowed to count their time as an in-kind contribution toward the program's matching requirements. The interim rule responds to this suggestion by allowing time to count as an in-kind contribution up to 25 percent of the total project costs.

NSAC applauds the Agency for this decision. We believe it is a step in the right direction. We urge the Agency to do a detailed assessment of the 25 percent cap, including a survey of applicants after the next grant round to get detailed reactions to the 25 percent cap. If the assessment, including the survey, reveals the 25 percent cap is a barrier to the program meeting its objectives, including participation by the statutory priority groups, we would then urge you to raise the cap.

§ 4284.932 Simplified application.

As required by statute, the program must include a simplified application form for proposals requesting less than $50,000. NSAC commends the Agency's commitment to developing this simplified application form in the annual Notice of Solicitation of Applications (NOSA) for the program. We trust it will appear in the NOSA for FY 2010/11 funding and thereafter. We will comment on the simplified application when it appears in the NOSA.

§ 4284.942 Proposal evaluation criteria and scoring applications.

Priority points for Priority Classes.

NSAC proposed increasing the percentage of total proposal evaluation ranking points for projects that foster the program's statutory priority for small and medium-sized family farms and beginning and socially disadvantaged farmers, from 15 to 25 out of a total of 100 points. However, the interim rule moves in the exactly the opposite direction, decreasing those ranking points from 15 to 10 points.

It strains the meaning of the word "priority" to assign it a ten percent factor. Ten percent might be appropriate in a "bonus" situation in which the factor might be considered a minor distinguishing item, but it certainly does not come close to being a priority factor.

It appears the Agency is attempting to flaunt the law and instead insert its own vision of how the program should work. In fact, the preamble to the IFR makes the decision to oppose the law blatantly clear. Explaining its decision to reduce rather than increase the points given to the priority classes, the Agency states: "reducing priority points from 15 to 10 will result in a better balance among applicants in priority categories and other applicants who do not qualify for priority points who also submit worthy applications."

It is rare to see such an explicit statement of an agency's intent to disregard the law. The Agency indicates it will substitute its own judgment by giving non-priority applicants a stronger leg up, in the name of "better balance." Congress did not direct the Agency to achieve balance; it directed the Agency to give priority to small and mid-sized family farms and beginning and socially disadvantaged farmers and ranchers. The Agency indicates in its own words its unilateral decision to substitute its own priority for "balance" for the legal requirement to favor priority classes.

NSAC is deeply concerned that if this decision is not reversed, non-priority applicants will push aside priority applicants and one of the intended goals of the program will not be realized. We strongly urge the Agency to issue a Final Rule that provides a real priority to the statutory priority classes. We recommend that 25 percent of the total point value be assigned to statutory priorities, with review panels then assessing which projects best foster the priority for small and mid-sized family farms and beginning and socially disadvantaged farmers and ranchers and providing evaluative ranking points accordingly.

Priority points for Rural Areas.

In addition to reducing points for priority groups, the interim rule eliminates the potential for applicants to receive 10 points for being located in a rural area. While we agree that VAPG projects cannot be strictly limited to rural areas, we disagree that the program should not prioritize rural projects.

While most farms are in rural areas, some are in more urban areas. Moreover, by necessity the marketing component of many projects will include more populated areas. Farmer-owned companies and coops are also sometimes headquartered in areas with greater than 50,000 residents or establish aggregation centers or processing plants there. For these reasons, VAPG awards should clearly not be limited to rural areas.

On the other hand, there are be good reasons to assign ranking points to projects that are located in rural areas, even if the markets they serve are both rural and urban. A key purpose of the program is to raise farm income and improve the economy in farming communities. This purpose can be legitimately advanced by providing some amount of ranking points to projects located in rural areas. These are very challenging times for the economies of much of rural America, including disproportional unemployment and poverty rates. Furthermore, when compared to urban agricultural producers, rural farmers and ranches face heightened challenges in accessing markets for their products. We therefore recommend reinstating 10 points for rural projects, thus demonstrating a continued commitment to rural economic development.

§4284.942 Proposal evaluation criteria and scoring applications
and
§4284.950 Award process

NSAC recommended that when proposals are equally ranked, those targeting the VAPG priority groups – small and medium-sized family farms, beginning farmers and ranchers, and socially disadvantaged farmers and ranchers – receive priority. We commend the Agency's decision to include this specification in the preamble to the IFR. Without it also appearing in the rule itself, however, we fear it will be overlooked by review panels in the future. We therefore urge you to incorporate the language as a new subsection (b) in §4284.942 and as a revision to subsection (a) in §4284.950, as follows:

> §4284.942 (b) *Tie-Breaker*. The program includes priorities for projects that best contribute to opportunities for beginning farmers or ranchers, socially disadvantaged farmers or ranchers, and operators of small- and medium-sized family farms and ranches that are structured as Family Farms. Applications from these priority groups receive additional points in the scoring of applications. In the case of equally ranked proposals, preference will be given to applications that more significantly contribute to opportunities for beginning farmers and ranchers, socially disadvantaged farmers and ranchers, and operators of small- and medium-sized farms and ranches that are structured as Family Farms.

> §4284.950 (a) *Selection of applications for funding and for potential funding*. The Agency will select and rank applications for funding based on the score an application has received in response to the proposal evaluation criteria, compared to the scores of other value-added applications received in the same fiscal year. Higher scoring applications will receive first consideration for funding. The Agency will notify applicants, in writing, whether or not they have been selected for funding. In the case of equally ranked proposals, preference will be given to applications that more significantly contribute to opportunities for beginning farmers and ranchers, socially disadvantaged farmers and ranchers, and operators of small- and medium-sized farms and ranches that are structured as Family Farms. For those applicants not selected for funding, the Agency will provide a brief explanation for why they were not selected.

Review Panels

We understand the Agency chose not to put information in the IFR about who will do the review and evaluation of project proposals. This information has instead appeared in the annual NOSA. For instance, in 2009, the NOSA said:

> *…All eligible and complete proposals will be evaluated by three reviewers based on criteria i through v described in Section V.A.1. or 2. One of these reviewers will be a Rural Development employee not from the servicing State Office and the other two reviewers will be non-Federal persons. All reviewers must either: (1) Possess at least five years of working experience in an agriculture-related field, or (2) have obtained at least a bachelors degree in one or more of the following fields: Agri-business, business, economics, finance, or marketing and have a*

> *minimum of three years of experience in an agriculture-related field (e.g. farming, marketing, consulting, university professor, research, officer for trade association, government employee for an agricultural program). Once the scores for criteria i through v have been completed by the three reviewers, they will be averaged to obtain the independent reviewer score. The application will also receive one score from the Rural Development servicing State Office based on criteria vi through x. This score will be added to the independent reviewer score. Finally, the Administrator of USDA Rural Development Business and Cooperative Programs will award any Administrator points based on Proposal Evaluation Criterion xi. These points will be added to the cumulative score for criteria i through x. A final ranking will be obtained based solely on the scores received for criteria i through xi. Applications will be funded in rank order until available funds are expended….*

We can appreciate the Agency's hesitancy in placing this type of information in the rule. The iterative NOSA process allows for the evolution of the program in a more flexible manner. Nonetheless, we believe the Agency should reflect on the experience of the program over time, especially with respect to the 2009 and 2010/11 process, and should include in a second IFR or the Final Rule the broad outlines of the review process which could then still be adjusted within those broad parameters on a year-by-year basis. As part of the review, we strongly encourage the Agency to explore the experiences of sister agencies at USDA that also operate review panels.

Now over a decade old, VAPG deserves greater consistency in the review panel process. The program would be improved by insertion of a section in the rule on review panels, provided that it is not as specific and rigid as to not allow positive program evolution over time.

Timing of Final Rule

In our view, some of the shortfalls in the IFR are quite serious and deserve to be addressed shortly after conclusion of the 2010-11 grant round. We urge you not to leave this IFR in place for more than this upcoming grant cycle. We recommend that you issue a second IFR or a Final Rule by the time the 2012 NOSA is issued.

Thank you for carefully considering our recommendations on the IFR.

Sincerely,

Ferd Hoefner helenjdombalis

Ferd Hoefner, Policy Director Helen J. Dombalis, Policy Associate