National Sustainable Agriculture Coalition

February 17, 2009

Branch Chief,
USDA Regulations and Paperwork Management Branch
300 7th Street SW, 7th Floor
Washington DC, 20024
Submitted through http://www.regulations.gov

RE: Comments on Rural Development Guaranteed Loans Interim Rule, 73 Fed. Reg. at 76698-76791 (Dec. 17, 2008)(RIN 0570-AA65).

Dear Sir or Madam:

I am submitting these comments, on behalf of the National Sustainable Agriculture Coalition (NSAC), on USDA's Interim Rule for Rural Development Guaranteed Loans, published in the Federal Register on Dec. 17, 2008. NSAC represents family farm, rural, and conservation organizations from around the U.S. that share a commitment to federal policy that promotes sustainable agriculture production systems, family-based farms and ranches, and healthy, vibrant rural communities.

Our comments focus on (a) the common platform, (b) the Business and Industry loan program, (c) the Rural Energy for America Program, and (d) the "rural in character" provision.

NATIONAL SUSTAINABLE AGRICULTURE COALITION COMMENTS

(A) NSAC opposes this interim rule (IR) with respect to the common platform for guaranteed loans with consolidated program regulations for four of Rural Development's thirty-nine programs -- the Community Facility, Water and Waste Disposal, Business and Industry Loan Program, and the Rural Energy for America Program (REAP).

1. Rural Development's proposal for implementing the IR's guaranteed loan common platform violates the Administrative Procedures Act.

NSAC is concerned about Rural Development's oft-repeated response to comments on its 2007 Proposed Rule that it will provide guidance to the differences among the programs in a handbook for the rule. For example, Rural Development agreed with one comment that procedures for pre-application review could vary among the programs and responded that it will provide guidance for each program's pre-application review in the, as yet unprepared, handbook for the consolidated platform and regulation. *[IR at pp. 76735-76736]*

NSAC is supportive of pre-application review to help give guidance to both lenders and borrowers. But we disagree that such an important component of each program should be left to

a sub-regulatory handbook. These agency handbooks and manuals are not subject to the notice and public comments of the Administrative Procedures Act and deferring significant program components to these sub-regulatory actions will likely be in violation of the Act. The pre-application procedures for each program should be clearly provided in a comprehensive, separate regulation for each program, subject to public comment from the farmers, ranchers, business enterprises and lenders who will be using these programs.

The same issue arises with Rural Development's response that it will determine whether loans under each program should be subject to mandatory review by State Loan Committees. Again, Rural Development acknowledges the importance of the issue but defers its resolution to a handbook for the regulation. *[IR at pp. 76736-76737]* This indicates to NSAC that Rural Development has spent too much time trying to fashion the common loan guarantee platform, with too little attention to fashioning comprehensive, workable programs. Rural Development has left significant criteria for important program elements to a sub-regulatory handbook that is not subject to the notice and comment required under the Administrative Procedures Act.

2. The proposed common guaranteed loan application platform and consolidated regulation is confusing and does not provide clear measures for implementing the four loan programs selected for inclusion in the common platform.

The four programs included in the IR for the common guaranteed loan platform have widely varying goals, eligibility criteria, ranking systems, funding mechanisms, statutorily mandated set asides and other disparate features. The preamble to the IR states that a major rationale for consolidation is to lessen "agency operational risk" in ". . . administering multiple programs using a variety of regulations that require unique sets of processes and procedures." *[IR at p. 76700]* The statutory requirements for these four programs, however, call for unique sets of processes and procedures intended to best meet the needs of those entities eligible for each program. Trying to shoehorn these programs into a "common platform" regulation, with numerous general definitions and other features invented out of whole cloth by Rural Development, will not serve the potential program recipients.

In addition, NSAC is not reassured that Rural Development's proposed guidance manual for the regulation will provide the clarity which should be provided within the regulations for each program. This process is even more complicated for programs like the Rural Energy for America Program, whose statutory authorization provides for grants and loan guarantees that Rural Development has separated into two piecemeal, disjointed regulatory frameworks – one for grants and one for guaranteed loans.

Rural Development offers another rationale for its common loan platform – that lenders and borrowers will no longer have to learn multiple programs. But rather than providing straight forward, comprehensive regulations for each of the four programs, the IR requires lenders and borrowers to parse their way through a complicated two-part process. First trying to understand the requirements of Subpart A – General Provisions and then trying to determine what in Subpart A has or has not been superseded by more specific requirements for the individual programs provided in Subpart B – Program Specific Provisions. So, essentially, USDA is requiring that

lenders and – more importantly – the farm and non-farm business borrowers who may well wish to deal with only one program must go through a complicated maze of regulatory language.

Another major issue is that Subpart A § 5001.2 contains general definitions that are not statutorily required by all four programs consolidated under the proposed rule. In many cases, it is not clear how the definitions in Subpart A – General Provisions and Subpart B – Program Specific Provisions interact. For example, in Subpart A, the definition of "agricultural producer" requires that the individual or entity derive 50 percent or greater of their gross income from operations producing specified agricultural products, a standard which we strongly oppose unless specifically required by law. But, for example, the Rural Energy for America Program (REAP) has no such restrictive statutory definition. Rural Development provides no explanation or analysis of how these general definitions will affect the specific statutory purposes and provisions of each loan program.

The confusion engendered by shoehorning these four programs into a single set of common platform definitions and requirements is clearly seen in the 57 pages of comments and responses in the IR's preamble. The agency responded to many of these comments with significant modifications to meet the statutory requirements and differences among the programs, a clear sign of the failure of this common guaranteed loan platform. NSAC predicts that the need for many more such modifications will be revealed should Rural Development try to implement this common platform approach.

(B) Specific Comments on Business and Industry (B&I) Loan Program, Subpart B § 5001.103.

1. The program specific regulations for the B&I Loan Program are legally deficient for failing to provide for the statutory requirement that not less than 5% of the annual appropriation for the Program be targeted to the new local and regional food enterprises defined in § 5001.103(a).

As a result of a Section 6015 of the 2008 Farm Bill, a provision championed by NSAC, not less than five percent of the annual appropriation for the B&I Loan Program is to be targeted to a new provision for local and regional food enterprises that process, distribute, aggregate, store, and market foods produced either in-state or transported less than 400 miles from the origin of the product. The recently enacted economic stimulus bill, the American Recovery and Reinvestment Act of 2009, includes nearly $3 billion in Rural Business and Industry loan guarantees. Combined with what we would expect for regular funding for FY 2009 and 2010, this additional money will bring the program up to approximately $2.5 billion a year in loan guarantees for each of the next two years. Thus, about $125 million of this amount will be targeted to local and regional food enterprises.

Given this clear signal of congressional support for the local and regional food enterprises in the 2008 Farm Bill, NSAC is surprised to see that the specific program regulation for the B&I Loan Program contains no provision for this funding set-aside. The regulation at § 5001.103(f)(2) does establish a priority for local and regional food enterprises that benefit underserved communities. But no provision for the set-aside is made in § 5001.103(f)(1) concerning the

obligation of funds for the set-aside. This section provides that if funds are insufficient to cover all applications pending approval, the agency will allocate funds to completed applications, in order of their receipt. There is no provision to ensure that completed applications for local and regional food enterprises will be assured of receiving at least 5 percent of the annual appropriations.

NSAC urges Rural Development to revise the regulations to provide clear provisions for ensuring that the agency meets the 5 percent or greater set aside requirement. In addition, the agency should provide directives to Rural Development state offices to encourage that their staff engage in outreach and education efforts to engage and help develop local and regional food enterprises. Many of the member organizations of NSAC stand ready to help assist the agency in this education and outreach effort.

2. NSAC disapproves of the imposition of Subpart A general definitions and provisions not required by the B&I Loan Program.

Subpart A of the IR contains general definitions and other provisions that are not statutorily required by all four programs consolidated under the proposed rule. A prime example is the § 5001.2 definition of "agricultural producer" as an individual or entity deriving 50 percent or greater of their gross income from operations producing specified agricultural products. The B&I authorizing statute has no such definition or program requirement. This general regulatory definition of "agricultural producer" could be especially detrimental to agricultural producers involved with new enterprises in developing markets for local and regional food enterprises – even though the 2008 Farm Bill targeted significant funding to such food enterprises, many of which might directly involved farmers and ranchers.

This is an inappropriate standard for many reasons. Off-farm income is a fact of life for most farm operations today. Young and beginning farmers may be phasing into agriculture but also relying on other jobs and incomes while they get established. Farmers with on-farm processing facilities or shares in farmer-owned cooperatives for processing have farm-related income that is different from farm production income. These examples serve to demonstrate the great variety and diversity that is US agriculture that in our view make a 50 percent of gross income standard a misguided regulatory attempt at "one size fits all" that simply will not work.

This is yet another example why Rural Development should void this IR and immediately begin preparation on comprehensive, coherent and unified interim final regulations for each program that take into account the purposes of the authorizing statutes and the needs of the agricultural producers, small rural businesses and other enterprises who are the intended beneficiaries of these programs.

(C) Comments on Rural Energy for America Program (REAP), Subpart B § 5001.104.

1. The combined REAP grant and loan regulations are legally deficient because they fail to implement Section 9007(b) of the REAP program, which provides grants for technical assistance.

The 2008 Farm Bill added a new component to REAP. Section 9007(b) establishes a competitive grants program for entities including state, local, and tribal government, rural electric cooperatives, colleges and universities, non-profits, and others to provide technical assistance to agricultural producers and rural small businesses to become more energy efficient and to use renewable energy technologies and resources. Section 9007(g)(2) of the 2008 Farm Bill mandates that 4 percent of the funds made available each fiscal year for REAP be available to carry out Section 9007(b).

This REAP component can assist agricultural producers and rural small businesses to identify specific energy efficiency improvements and renewable energy technologies suitable for their circumstances. Armed with this information, these agricultural producers and small businesses can then apply for financial assistance from REAP grants and/or loan guarantees.

Rural Development, however, has failed to implement this REAP component. Neither the Rural Development Grants Common Platform IFR, 73 Fed. Reg. at pp. 61198-61254 (Oct. 15, 2008) nor this Rural Development Guaranteed Loans IR make any provision for the Section 9007(b) technical assistance grant program. Rural Development may have chosen to ignore this congressionally mandated REAP component. But it is just as likely that in separating a single, comprehensive program such as REAP into two separate and confusing sets of regulations, those drafting the REAP regulations lost track of the statutory provision for technical assistance grants, which did not fit in the narrow, preconceived "formulas" for the common platforms..

This is yet another example of why NSAC urges Rural Development to totally revise the regulations for REAP and other Rural Development programs caught up in the confusing common platform regulations. Separate interim final regulations should be issued for each program that take into account the specific purposes, priorities and intended recipients of the program grants and/or guaranteed loans, as well other program components.

2. NSAC opposes the imposition of Subpart A general definitions on REAP.

Subpart A § 5001.2 of the IR contains general definitions that are not statutorily required by all four programs consolidated under the proposed rule. A prime example is the § 5001.2 definition of "agricultural producer" as an individual or entity deriving 50 percent or greater of their gross income from operations producing specified agricultural products. The REAP authorizing statute has no such definition or program requirement.

This general regulatory definition of "agricultural producer" could be detrimental to many beginning farmers and ranchers, who are in the process of developing and expanding new operations. It is critical that these new agricultural producers receive technical and financial assistance for energy efficiency and renewable energy systems as they undertake economic, energy and conservation planning for new operations that may not yet provide 50 percent of greater of their gross income. With this general definition of agricultural producer, Rural Development may well be cutting off beginning farmers and ranchers access to REAP, at the very time when the nation needs to engage our next generation of farmers and ranchers in implementing energy conservation measures and renewable energy systems.

3. Leveraging of funds is a legitimate criterion for REAP project selection, particularly if the leveraged funding involves increasing the conservation performance of a farm or ranch. For instance, a REAP proposal to provide assistance to establish renewable energy technologies could be targeted to farmers in a state who are enrolled in CSP and have included renewable energy production in their CSP plans.

The first priority of any energy policy is to manage current energy usage through conservation and energy efficiency. Reducing unnecessary use of energy is common sense, saves money, and helps the environment. Likewise, numerous studies have shown that improving the efficiency with which energy is used is the cheapest and quickest energy "source."

With biomass energy production increasing the pressure on the nation's agricultural and natural resources, it is well worth the time, effort and forethought to develop energy systems in the nation's rural areas - including a mix of biomass, wind, and solar - that improve the environmental performance of agriculture and increase the health and economic vibrancy of rural communities. Energy production from agricultural systems will only be truly "renewable" if it does not erode and degrade the nation's agricultural and natural resource base.

The 2008 Farm Bill includes three programs -- REAP, CSP and EQIP -- which can be used together to achieve the goals of energy conservation and efficiency and renewable energy production in a manner that protects the nation's environment and natural resources. NSAC recommends that Rural Development work with the Natural Resources Conservation Service to leverage the conservation funds to make the REAP funding more effect in conserving both energy and natural resources.

(D) Comments on "Rural in Character" Designation

In many regions of the U.S., significant agricultural operations are located in the urban fringe or within urban areas. These include agricultural operations such as greenhouses, tree farms, landscaping centers, and many small farms producing organic produce and other high value agricultural products on relatively small land areas. NSAC believes many of these operations and related local and regional food enterprises should without question be eligible for both B&I food enterprise loans and for REAP loans and grants.

We are aware of the Administrative Notice issued on December 1, 2008 that applies the "rural in character" provisions of Section 6018 of the 2008 Farm Bill to both of these programs as well as others. We support this decision but question why is has not also been included in the rulemaking. We urge the agency to include the "rural in character" provision in the rule.

In addition, we recommend that the agency undertake an assessment of the impacts of the combined "rural area" and "rural in character" designations on agricultural operations that would still be left out of the REAP program and agricultural operations and related food enterprises that would still be left out of the B&I food enterprise loan program and report the findings to Congress.

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In summary, NSAC finds that this consolidated Rural Development Guaranteed Loan Interim Rule, with its common guaranteed loan platform, will do nothing to streamline the application process and will add unnecessary confusion and complexity to the delivery of Rural Development programs to farmers, ranchers, rural businesses and rural communities served by these programs. We recommend that Rural Development scrap this consolidated regulation – common platform approach and immediately prepare separate IRs for each program.

We further recommend that the agency pay greater attention to ensuring that each program meets its statutory mandates and that agency resources be used for outreach and education for farmers, ranchers, rural businesses and rural communities – the intended beneficiaries of these programs. Many of our NSAC member organizations hold yearly conferences, maintain websites, issue periodic newsletters which include information about rural development programs, and/or have staff members who provide advice on a wide array of USDA programs. We encourage Rural Development to reach out to non-profit organizations, academic institutions, and others who can assist with program delivery.

Sincerely,

Martha L. Noble

Martha L. Noble
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