



National Sustainable Agriculture Coalition

March 16, 2009

Robin Heard, Director
Easement Programs Division
USDA NRCS, Room 6819-S
P.O. Box 2890
Washington D.C. 20013

Submitted via www.regulations.gov

RE: Docket No. NRCS-IFR-08013: Wetlands Reserve Program Interim Final Rule, 74 Fed. Reg. 2317-2337 (Jan. 15, 2009).

Dear Ms. Heard:

I am submitting these comments on behalf of the National Sustainable Agriculture Coalition (NSAC) on the Wetlands Reserve Program (WRP) Interim Final Rule (IFR). 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. Many of our member organizations have representatives on NRCS State Technical Committees. A complete list of our represented members is appended to these comments.

NATIONAL SUSTAINABLE AGRICULTURE COALITION COMMENTS

1. NSAC recommends that the NRCS Chief immediately issue a directive to State Conservationists with additional circumstances that provide adequate assurance under WRP IFR § 1467.4(c)(2) that land acquired within the 7 preceding years was not acquired for the purposes of enrollment in the WRP.

The Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) amended a provision that generally restricts the creation of WRP easements on land that has changed ownership during the preceding 12 months to limits on land that has changed hands in the preceding 7-year period. NSAC supports the purpose of this provision to prevent land speculation which can keep farmland out of the hands of farmers. The increase of the interval from 12-months to 7 years, however, will dramatically increase the amount of acreage subject to the restriction on WRP enrollment. Therefore, we are making these recommendations to ensure that land which is eligible for enrollment in WRP and was not acquired solely for enrollment in the WRP is not barred from enrollment by a rigid application of the 7-year interval provision.

The 2008 Farm Bill provides two specific statutory exceptions to the 7-year restriction, one for land which changes ownership by will or succession and one for land which changes hands in foreclosure with a right of redemption. In addition, the USDA Secretary is given the discretion to allow WRP easements on land acquired within the preceding 7 years when the Secretary determines that the circumstances give adequate assurance that the land was not acquired for the purposes of placing it in the WRP.

The IFR § 1467.4(c)(2)(iii) delegates to NRCS State Conservationists the discretion to determine other circumstances with adequate assurance. The subsection also provides that the demonstration of the status of the new landowner as a beginning farmer or rancher is an example of a circumstance with adequate assurance. NSAC appreciates the inclusion of this beginning farmer and rancher provision. But we are concerned that in the absence of guidance from NRCS with other examples, NRCS State Conservationists will be reluctant to establish other “circumstances with adequate assurance” that allow for enrollment in the WRP of land transferred in the preceding 7 years.

Therefore, we recommend that the NRCS Chief make clear in outreach to state and local offices and to landowners that land transferred within the previous 7 years *may be but is not necessarily* ineligible for enrollment and that there are many circumstances indicating that a land transfer is not for the purpose of enrolling the land in the WRP.

We encourage guidance issued by headquarters to include a list of examples of circumstances which provide adequate assurance that land otherwise eligible for WRP enrollment was not acquired for the purpose of enrolling it in the WRP. For instance, this guidance list should include:

- the land is acquired by a socially disadvantaged, limited resource, or beginning farmer or rancher who are provided a designated funding pool in the WRP IFR § 1467.2(g) as authorized by Section 2708 of the 2008 Farm Bill;
- a working farmer or rancher who owns or operates other land within the county or a contiguous county acquires the land;
- a signed affidavit from the farmer or rancher that less than one-half of a purchased parcel will be enrolled in the WRP and that the farmer or rancher will make a good faith effort to keep the other portion of the parcel in agricultural production;
- the landowner can demonstrate with planting records that the land within a parcel purchased within the last 7 years is frequently inundated or has some other quality which results in significantly lower production levels than other acreage in the parcel;
- the landowner has offered the land for rent for agricultural production for the previous two years without success; and
- other similar considerations.

NSAC encourages the NRCS Chief to consider these and other circumstances in the directive to State Conservationists and in the WRP final rule.

2. NSAC approves of IFR § 1467.2(g) which includes allocation of funds specifically targeted to encouraging enrollment of historically underserved producers, including

socially disadvantaged farmers and ranchers, limited resource farmers and ranches, and beginning farmers and ranchers.

Many NSAC member organizations work closely with underserved producers, including work on conservation projects. We look forward to working with NRCS to increase and improve the agency's outreach to these farmers and ranchers.

3. The 2008 Farm Bill retains a provision allowing riparian areas that link wetlands protected by easement or some other means to be enrolled in the WRP. NSAC recommends that the rule be amended (and that the NRCS Chief issue a corresponding directive to State Conservationists) that provides a more expansive definition of "link" than the provided in the IFR to include riparian areas that are part of a hydrological system supporting wetlands.

Riparian areas help protect water quality throughout a watershed and provide important corridors for species to migrate among wetlands. Riparian areas also serve important functions in recharging water systems that include wetlands that may not have a direct surface connection to the riparian area. The 2008 Farm Bill retains a provision in the WRP which recognizes the link between wetlands and riparian areas by providing for enrollment in the WRP of riparian areas that link wetlands that are protected by easements or some other device or circumstance that achieves the same purpose as an easement. In addition, the Managers Statement for the 2008 Farm Bill recognizes that riparian habitat is extremely important habitat for wildlife. Riparian habitat was also recognized as important for improving water quality, controlling sediment pollution and managing floodwaters.

WRP IFR § 1467.4(e)(6) provides for the enrollment of a riparian area "along streams or other waterways that links or, after restoring the riparian area, will link wetlands . . ." This definition is narrower than the statutory definition. It focuses solely on the direct surface connection between two protected wetlands via a stream corridor. NSAC recommends that WRP IFR § 1467.4(e)(6) be amended in the final rule to provide a more expansive definition of the term "link" that will allow the enrollment of riparian areas that are linked to protected wetlands by direct surface connections or through subsurface connections as part of an overall hydrologic system that supports the wetland function.

In addition, in some regions of the U.S., particularly the arid Southwest, there are few permanent wetlands. In those regions, riparian areas provide many of the biological functions of wetlands. NSAC recommends that NRCS consider extending the protection of the WRP to riparian areas in arid regions where the riparian areas may not meet the strict definition of "wetland" but serve many of the important biological functions of wetlands.

4. NSAC recommends that the IFR with respect to the Wetlands Reserve Enhancement Program be amended to include the addition of a high priority for the development of projects that establish permanent easements on riparian areas linking multiple wetlands protected within a WREP project area.

5. NSAC recommends that IFR § 1467.8(a)(4) be amended to provide that the NRCS Chief will not approve a geographic rate cap set below 75% of the average value of the land in the area.

IFR § 1467.8 provides a new easement valuation process for WRP easements which requires that NRCS pay the lower of the fair market value of the land using the Uniform Standards for Professional Appraisal Practices or based on an area-wide market analysis or survey; geographic rate caps set by the State Conservationist in consultation with the State Technical Committee; or a landowner offer.

The use of a geographic rate cap may provide some fine tuning to WRP payments which can allow the WRP funding to go further in restoring and protecting wetlands. But if these payments are set too low, they may discourage landowners who would enroll in the WRP for more reasonable payment rates that better reflect the average value of land in the area.

NSAC is recommending that as a general guide rate caps not be lower than 75% of the land value in the area. We further recommend that the NRCS Chief review enrollment rates among the states and that geographic rate caps be raised in states with significant eligible wetlands and few offers for enrollment.

6. NSAC recommends removal from the WRP final rule of the provision in the IFR § 1467.2(g) which authorizes NRCS to designate conservation areas in which land may be enrolled in WRP to assist landowners in meeting nonpoint source pollution requirements and other conservation needs of the landowner. This provision is not authorized by statute as a purpose of the WRP and the sequestration of pollutants in a WRP wetland could interfere with the restoration of ecological values of the wetland.

The statutory purposes of the WRP are to restore, protect and enhance wetlands. 16 U.S.C. 3837(a). The WRP IFR at §1467.2(g) adds another purpose not authorized by the statute -- that is to allow NRCS to designate conservation priority areas "to assist landowners in meeting nonpoint source pollution needs" and other conservation needs of the landowner not necessarily related to enrolling wetlands to achieve high ecological values upon restoration.

Wetlands may serve to help control nutrient runoff from a farm fields, but WRP funding should not be diverted from the program's purposes of restoring, protecting and enhancing wetlands to an agricultural pollution control program to acquire wetlands whose primary purpose is a sink for agricultural pollutants. High levels of nutrients, pesticides, heavy metals, antibiotic and pharmaceutical residues, animal hormones and other substances are commonly found in agricultural runoff. The accumulation of these substances in a wetland can harm plants and wildlife directly or result in eutrophication and other processes that prevent full restoration or enhancement of wetland values.

The 2008 Farm Bill only authorizes a little over 3 million acres as the total enrollment in the WRP. NRCS should focus on the enrollment in WRP of high value wetlands or riparian areas that will provide significant overall ecological enhancement of the nation's wetlands.

There are several other funding streams for the use of wetlands for pollution control and other purposes. These include Section 319 of the Clean Water Act, the Conservation Reserve Program, the Conservation Stewardship Program, and the Environmental Quality Incentives Program, particularly the new Agricultural Water Enhancement Program. The CRP, CREP and the CCRP also provide funding for practices to deal with targeted pollution problems. These programs provide funds for the establishment of constructed wetland areas, the establishment of riparian buffers and other practices that can serve to control pollution control and remediate other environmental harms in order to protect aquatic habitat.

7. NSAC recommends that NRCS review and revise the restrictions in IFR § 1467.4(c) and (e) that govern transfer of land enrolled in WRP to units of federal, state and local governments and establish harsh penalties and measures that will lead to the unnecessary waste of WRP funding.

Prior to enactment of the 2008 Farm Bill, NSAC organizations had noted that NRCS was adding addenda to WRP contracts that stipulated harsh repercussions to WRP contract holders in situations involving transfer of land enrolled in the WRP. The addenda required that a landowner must repay, with interest, all easement and restoration payments received and, further, that the easement will remain in force and be held in the name of the United States. The criteria applied to landowners transferring the land in a WRP easement to a new owner, if that new owner does not fully restore the land in accordance to the contract “within a reasonable amount of time,” or if the new owner is a federal, state, or local unit of government.

These measures could have a chilling effect on efforts to gain new WRP enrollments and appear to abandon common and effective procedures that have been used in the past. NSAC is, therefore, dismayed to see these harsh provisions now appear in the WRP IFR § 1474.10(e).

We agree with NRCS that the 2008 Farm Bill does limit land eligible for enrollment in the WRP in the first instance to private and tribal land and excludes from enrollment federal, state and locally owned land. As the preamble to NRCS notes, Title I of the 2008 Farm Bill amended Section 1603(f)(6) of the Food Security Act of 1985 to prohibit state or local governments from receiving payment, benefits or loans under the Farm Bill’s Conservation Title.

We strongly disagree, however, with the IFR’s harsh remedies if private or tribal land enrolled in the WRP under the 2008 Farm Bill is subsequently transferred to a state or local government. IFR § 1467.10(e)(2) provides that if WRP land is transferred to a party ineligible for WRP enrollment, the WRP participant will be responsible for implementation of remaining items in the Wetlands Reserve Plan of Operation (WRPO), unless the new owner agrees to implement the WRPO “without NRCS assistance.” In addition, if the WRPO is not undertaken by the new owner, the easement will remain in full force and effect and NRCS may seek a refund of easement payments or 30-contract payments and restoration payments from the former owner.

With regard to the permanent easements, there appears to be no need for such harsh measures. The WRP participant could simply enter into a contract with the state or local government that transfers the land with the easement on the deed and leaves enforcement of the easement in the hands of the WRP participant, with USDA’s right of enforcement also intact. The easement

payments would continue to go to the private seller, who would not be getting a windfall because the price paid for the land would reflect the value of the easement.

The harsh remedies in the IFR also ignore possible private arrangements, allowed by the IFR, for government or third party assistance to WRP participants in carrying out WRPOs. State or local governments can provide services to carry out WRPOs for land that is privately owned. As with the easement issue, the contract to transfer the land to the state or local government could leave the obligation for implementing the WRPO with the seller but also allow the state or local government to provide conservation services to the private seller with the seller getting cost-share payments from WRP to complete the obligation to implement the WRPO.

These arrangements do not provide a windfall to state and local governments nor do they put state and local governments in direct competition with willing private landowners who want to enroll in the WRP. The benefits of the WRP go to the private or Tribal participants.

These more flexible recommended arrangements recognize the reality that over the life of a permanent easement or long-term WRPO for wetland restoration and maintenance, landowners may face many contingencies. The landowner may die, run into economic problems, and have other circumstances that may necessitate the sale of the land. In these cases, state and local governments may be among the most appropriate parties to ultimately acquire wetland preserved by enrollment in the WRP, especially if the land serves important public purposes such as flood control, recreational opportunities, etc.

NSAC urges NRCS to revise the harsh remedies in IFR § 1467 and provide reasonable remedies that do not discourage private landowners from enrolling in the WRP. While protections against abuses in transferring easements are justified, the remedies established by the IFR exceed reasonable response and may disallow beneficial methods that have been used to cooperatively obtain and expand resource benefits to landowners, local communities, and government agencies.

8. NSAC recommends that NRCS amend IFR § 1467.11(a)(2) by eliminating subpart (ii) which grants to NRCS itself a right to permit compatible uses of the easement area, including such activities as hunting and fishing, managed timber harvest, or periodic haying and grazing, even if the use is consistent with the long-term protection and enhancement of the wetland resources for which the easement was established.

NSAC strongly supports a more flexible WRP that allows the landowner to allow approved compatible economic uses of the easement area. The breathtakingly broad provision at 1467.11(a)(2), however, grants to NRCS itself rights that appear to be more appropriate for land that NRCS buys outright. Most of the activities would require that numerous private parties be given access to the land or that the landowner be forced to undertake economic activities on the property against the landowner's will. Generally, the right to conduct such activities is reserved to the landowner, not to the holder of the easement. Indeed, the WRP statute provides that WRP lands *may be used* for compatible economic uses only if the use is specifically permitted by the WRPO. 16 U.S.C. 3837a(d).

Prudent landowners will be reluctant to enter into WRP easements and agreements that grant such extraordinary vague and open-ended powers to the NRCS. If the NRCS wishes to encourage recreational activities on land enrolled in WRP it seems more appropriate that NRCS negotiate with individual landowners to be granted limited, specific rights to allow others to use easement land.

9. NSAC recommends that NRCS clarify the priorities and ranking criteria for the Wetlands Reserve Enhancement Program (WREP) and the WREP Reserved Grazing Rights Pilot Program, and to do so in a revised IFR that will allow for public comment.

In the WRP IFR § 1467.9(a), NRCS announces that it will leave the details of the WREP, including key issues such as funding levels and ranking criteria to Federal Register notices, a process which precludes meaningful public comment on WREP. NSAC recommends that for this new program component of the WRP, NRCS provide more regulatory detail on administration of the WREP in a revised IFR that will allow for public comment. NRCS could then proceed to use the Federal Register announcements for geographically focused WREP projects and allow public comment on requests for proposals that can be used to improve subsequent RFPs.

NSAC also recommends that the WREP pilot program for reserved grazing rights also be included in a revised IFR with additional detail and public comment before the WRP is finalized. As provided in the IFR §1467.9(b), the WREP grazing option is not really a pilot program but rather a grazing option open to almost any and all WRP participants who want to graze the WRP acreage. The “pilot” terminology used in the IFR is therefore not an honest description of the actual intent of the provision.

NSAC recommends that NRCS go back to the drawing board and fashion a more limited grazing pilot program that targets it to wetland where the wetland values will be significantly enhanced by managed and seasonal grazing, not merely where grazing is compatible. An example is the Eastern Bog Turtle’s (*Clemmys muhlenbergii*) preferred habitat, which is open and marshy meadowlands, bogs and fens. Grazing on such land can improve wetland habitat for this species by controlling shrubs and trees from taking over the habitat.

10. NSAC recommends additional limitations on Ecosystem Services Credits for WRP-funded conservation improvements provided in IFR § 1467.20. We urge NRCS to clearly and explicitly prohibit WRP credits to be used to offset federal or state wetland mitigation requirements such as requirements in Army Corps of Engineers Clean Water Act Section 404 permits.

Given the urgency of the wetland conservation challenges facing the U.S., NSAC disapproves of the use of WRP environmental credits as the offset for degradation of other wetland. WRP participants are provided public compensation for the restrictions on the use of the land imposed by WRP and may eligible for up to 100% cost share for conservation activities on 30-year easements. NSAC strongly opposes any environmental credit trading or wetland mitigation which allows the destruction or degradation of other wetlands to be offset by wetlands enrolled in the WRP.

The WRP may also provide a publicly funded market for other ecosystem services such as water quality credits. Although NSAC does not categorically oppose the use of environmental credits for WRP in water quality trading, we recommend that NRCS place strict limitations on such credit so that buyers in private markets for environmental credits are encouraged to use their funds to seek out landowners who are not enrolled in WRP. This will help maximize the amount of protected wetland acreage.

Thank you for considering the comments and recommendations of the National Sustainable Agriculture Coalition as you prepare the final rule.

Sincerely,

Martha L. Noble

Martha L. Noble
Senior Policy Associate

NATIONAL SUSTAINABLE AGRICULTURE COALITION

Represented Member Organizations

Agriculture and Land-Based Training Association (ALBA) - *Salinas, CA*

Alternative Energy Resources Organization (AERO) - *Helena, MT*

California Certified Organic Farmers (CCOF) - *Santa Cruz, CA*

California FarmLink - *Sebastopol, CA*

CASA del Llano (Communities Assuring a Sustainable Agriculture) - *Hereford, TX*

Center for Rural Affairs - *Lyons, NE*

Community Alliance with Family Farmers - *Davis, CA*

Dakota Rural Action - *Brookings, SD*

Delta Land and Community, Inc. - *Almyra, AR*

Ecological Farming Association - *Watsonville, CA*

Flats Mentor Farm - *Lancaster, MA*

Georgia Organics - *Atlanta, GA*

Grassworks - *Wausau, WI*

Heifer USA - *Little Rock, AR*

Illinois Stewardship Alliance - *Rochester, IL*

Institute for Agriculture & Trade Policy - *Minneapolis, MN*

Iowa Environmental Council - *Des Moines, IA*

Iowa Natural Heritage Foundation - *Des Moines, IA*

Izaak Walton League - *St. Paul, MN*

Just Food - *New York, NY*

Kansas Rural Center - *Whiting, KS*

Kerr Center for Sustainable Agriculture - *Poteau, OK*

Land Stewardship Project - *White Bear Lake, MN*

Land for Good - *Belchertown, MA*

Michael Fields Agricultural Institute - *East Troy, WI*

Michigan Integrated Food and Farming Systems - *East Lansing, MI*

Midwest Organic & Sustainable Education Service - *Spring Valley, WI*

National Catholic Rural Life Conference - *Des Moines, IA*

National Center for Appropriate Technology - *Butte, MT; Fayetteville, AR; Davis, CA*

New Mexico Acequia Association - *Santa Fe, NM*

Northeast Organic Dairy Producers Alliance (NODPA) - *Deerfield, MA*

Northern Plains Sustainable Agriculture Society - *Fullerton, ND*

Ohio Ecological Food & Farm Association - *Columbus, OH*

Organic Farming Research Foundation - *Santa Cruz, CA*

Pennsylvania Association for Sustainable Agriculture - *Millheim, PA*

Practical Farmers of Iowa - *Ames, IA*

Rural Advancement Foundation International, USA - *Pittsboro, NC*

Sierra Club Agriculture Committee - *Nationwide*

Virginia Association for Biological Farming - *Lexington, VA*

Washington Sustainable Food and Farming Network - *Mount Vernon, WA*

Wild Farm Alliance - *Watsonville, CA*

Union of Concerned Scientists (Food and Environment Program) - *Cambridge, MA/Was*